

Rights of Nature: An Interview with Tom Ginsburg and Claudia Flores

Our editorial team met with two UChicago Law Professors, [Tom Ginsburg](#) and [Claudia Flores](#), to discuss the rights of nature—a developing area of law domestically and internationally. This interview is based off episode six of Professor Ginsburg and Flores’s podcast, [Entitled](#), which assesses legal rights in a variety of disciplines and settings.

This interview has been edited for length and clarity.

Kathy Luo (KL): To start off, I thought that I would ask generally about your podcast. Why did you decide to talk about rights? In particular, why did you choose rights of nature as one of your topics?

Claudia Flores (CF): I think there were a few things that motivated it. One was just this issue of whether or not the ideas that we share with each other in the law school context, or in the academic context, make their way into the public space. We’re in a moment where debates around rights are really contentious and complicated. So we wanted to have those conversations in a more public sphere. Podcasts have become a really popular way for people to learn about things that they don’t know very much about.

And Professor Ginsburg and I have always worked together in some format. We thought it would be really fun because we have different ideas, but are both interested in each other’s perspective. And then we could also talk to other academics and people in different fields, and have it be a learning process for us.

Tom Ginsburg (TG): I think the rights of nature—well, I think that one of the reasons we got focused on that was actually my spouse, Amber. Amber had asked Claudia to come talk about it in a class. My wife teaches in the art department, and it’s just very interesting, conceptual stuff—questions like, “does a tree have rights?”, and art projects involving what we would think of as inanimate objects, and the Anthropocene, and the long, long, time scale that we’re increasingly recognizing. She asked Claudia to talk about that, and we both knew independently about some of the developments in Latin America. So that became a pretty natural episode, and I think was one of the early ones we decided on.

KL: A point that you brought up during the podcast that really stood out to me was the fact that the “rights of nature” is almost a Western way to think about that right—it’s not exactly in conformity with some other cultures’ ideas of what nature is, or how we are to protect it. What your thoughts are on different conceptions of rights, culturally or geographically, especially in regards to nature and our relationship with it?

TG: Yeah, I guess the critique that you are referring to is that to think about nature having rights is to already adopt a liberal paradigm. It's to think that individuals, or rights-bearers, are the most important, and that's the best way to protect various interests. One critique of that is that it doesn't get into the ontology of the many, many groups in human history who have seen themselves as part of nature, not separate from it. These groups haven't seen the individual as the basic unit of society. That's fair; I think it's a good critique.

I guess where I come down on it, is that as a practical matter, given that we are in these modern systems, and we have systems of private property, and all this stuff that flows from liberal individualism—I would then treat rights instrumentally, as it were. If we can use this paradigm to actually have people in courtrooms speaking up for nature when they otherwise wouldn't be there—yeah, maybe it doesn't work at some high, conceptual level, but it's still probably worth trying.

CF: I agree. In that the podcast episode, there were these two stark positions that were represented by both of our guests. There was Frank's idea in Uganda, that we should just fit into the existing system. Then there was this other idea that we should question the entire system of rights, even our system of law a little bit.

Even though I think it's worth challenging ourselves in that way, that would really require a complete up-ending of how we think about these issues. I already think that the rights of nature is a stretch for a lot of people. You can say we give corporations rights, and there is precedent for moving outside of the individual human's sphere. But there are a lot of challenges to thinking about the right of nature. We have individuals representing nature—they're probably going to have different ideas about what nature needs. What is it based on? Is it going to be science? Is it going to be a certain area of science? I think there's going to be a lot of disputes about how we protect nature.

And then there's always the challenge in every conversation about rights: how do we balance them? Even if we acknowledge nature has rights, they are still going to be human rights, and there will be individual interests that are going to come up against it.

Tori Keller (TK): You mentioned having to work within the institutions we already find ourselves in. One of the things that struck me is this difficulty of defining what nature is, and what actual objects you attach that right to. For example, I could easily see the slippery slope of this definition being that Earth itself is a unit of nature, and then maybe you would have countries suing other countries for pollution or harming the earth. That might lead to sovereignty issues. How might we go about answering this question of defining what unit of nature you would attach this right to?

CF: I think it will have to be worked out, because it's part of what the rights of nature assumes—that there's the connection between the individual components and then the components themselves. So like you were saying, the Earth *is* a component of nature, and certainly is a unit that

you could be thinking about when you think about the rights of nature. But so is just an individual river, or even an individual ecosystem.

When disputes around the rights of nature are determined, we'll have to figure out what are the units that you're thinking about, and then how those units interact with the other units. Because you can certainly imagine a situation where what is good for a river is not great for the mountain next to it. These issues are complicated. But we have those issues in the rights context anyway, when we're weighing rights against each other. For example, we have to think about hate speech and freedom of speech; we need to think about equality and freedom. There are always these issues that are coming up against each other that we have to balance, so I think this is just a new world in which we have to do that.

KL: I thought it was interesting that you mentioned that Ecuador and Bolivia already had their own laws on the rights of nature. I also saw that the Colombian Constitutional Supreme Court recognized some nature rights for certain areas, such as the Amazon ecosystem in 2018. I was wondering if you thought any of these laws might have international influence. Do you think that it will become a trend for more nations to recognize the rights of nature? Or do you see these as more of one-off instances?

TG: In general, the way law works is that when you have some innovation in any field, in any legal area, things get copied. International law generally does reflect changes in society. For example, a non-discrimination clause traditionally wouldn't have included sexual orientation. That was not the category, even 20 or 30 years ago. But now we're starting to see them in constitutions, and of course courts all over the world are creating a category of sexual orientation for purposes of non-discrimination.

In this context, we definitely see that in these early constitutional changes in Latin America. In some countries, that works through constitutional reform, but sometimes courts are just borrowing the general principle, or local authorities are declaring this. It's an idea that is following this pattern of diffusion across jurisdictions. And that's exciting.

CF: I think that's right. We already see some changes. About three weeks ago, the General Assembly found there was a right to a healthy environment. So, although neither of us are experts in this field, it does seem to be a movement. There's a general recognition that this might be a way that addresses the problem of most of our efforts to address environmental harms being responsive, rather than preventative. This idea of the rights of nature is really aiming to make our actions preventative, rather than just waiting until something goes wrong.

KL: In terms of the movement building, then, do you think there is a reason why it seems like it started in Latin America? Do you think certain nations are just more able to accept that idea, either

within the legal system or culturally? Is there a country that you think would be more receptive to it, versus not?

TG: I think the reason that we saw it emerge when it did is because it was part of a democratizing political change that happened in those countries. Ecuador and Bolivia for the first time incorporated large populations of indigenous individuals into the political sphere. So constitutional change was happening, and it was reflecting indigenous thinking a little. I think that confluence of those two things led to this emerging.

By the way, this is kind of a general point for why it might be good to change the constitution every once in a while. We Americans, of course, live under this ancient document. And that means it's very badly out-of-date, and showing its age. Countries that are more politically unstable actually sometimes have opportunities to try out and introduce new ideas—sometimes quite innovative and good ideas.

CF: I think that's one of the things that's interesting. Because you're right: in most of the countries where a rights of nature movement has emerged, it's been connected to indigenous rights and indigenous communities mobilizing. I'm wondering how that movement will look in countries that neither have indigenous communities nor indigenous communities with that kind of voice. I will be curious to see how it manifests there, because right now, all the language around rights of nature is very connected to indigenous communities being custodians, and the way that indigenous communities engage with their environment, which is really different.

TG: In terms of an example of a country which might be resistant, I think we're living in one. In the United States, we can't even get an agreement to stop a pipeline running through traditional native lands. Actually giving nature rights is going to be quite a stretch in our current political environment. But you know there's lots of other wealthy, developed countries that are moving this direction: Australia, Canada, New Zealand.

TK: In terms of trying to think about how to get different countries and people to change their relationship to nature, how they think about it, or what rights it should have—I know that COP26 is happening right now. There's a lot of criticism about how they have a draft agreement, but it's extremely vague. They've talked about how maybe wealthier countries should help poor countries meet their climate change challenges, but it's also been criticized by activists as being exclusionary. For the nature rights movement, how helpful do you think international summits are? Or is something that you foresee happening at a more local level?

TG: I think it's bottom-up. It's what's happened so far, and I think that maybe the best way is to go bottom-up, and then horizontally. Across countries, as ideas get borrowed, so many good things happen that way.

Eventually, I feel like the big climate talks aren't really grounded in rights, and they can't be, because these are states coming together reflecting very diverse interests. They just have to negotiate. It's really a truly political way of solving it, as opposed to a rights-based way. Usually, we think of rights as being the things we take out of politics, and they're sort of trump cards for which politics are set aside.

CF: Yeah, and I think that rarely is it the case that the global cooperation element ends up bolstering rights. Usually rights conversations happen first, and then there's a demand, and then countries sort of pull it together to reflect that. That's not always the case, obviously, but I think here, most of the work will happen at the local level of communities demanding that from their own governments, and then the states hopefully will cooperate.

TG: By the way, that's also where the knowledge is. Indigenous knowledge tends to be very locally grounded—what does this tree mean, and what is this part of Earth saying to us, and such. The macro level of the globe is just a different way and a different level.

KL: I had a larger question about rights in general. In your podcast, you touched upon a kind of societal risk coming from people's strong insistence upon rights. We see it with political rights, with social rights, with economic rights. Do you think that the rights of nature pose a similar risk? Do you think it could cause divisiveness or conflict in society, whether within one nation or internationally?

CF: We tried to have a little bit of this conversation in the episode. Of course they will create conflict—rights always create conflict. But it's usually because there are conversations that we need to have about what our priorities are and how we're going to balance different rights and the interests that they advance. I think one area of conflict is urban versus rural. People in urban areas have a different set of concerns. They think of nature differently: it's a park that's been landscaped that you go to sometimes to, you know, escape an urban area. Or maybe you get away on a weekend. That's a really different relationship with nature than someone whose livelihood is based on the well-being of the nature around them. In the case of some of these indigenous communities, it's an even deeper relationship. I can imagine that being an area of conflict, but the urban versus rural divide is a source of conflict in a lot of different areas. I don't think that would surprise anyone.

And then of course, from country to country. There are some countries whose livelihoods are based on the environment. I do think that the rights of nature movement is trying to get away from this way of thinking and motivate everyone to realize how interdependent we are. Humans are interdependent with their environments, so hopefully over time that's the way we would start thinking about it.

TK: Are there any specific victories in the human rights movement that you think are instructive for advancing the nature rights campaign?

TG: I think there's a lot of them. In Canada, courts declared a river to have rights. There's a number of cases in Ecuador where individuals have stepped forward to say, "we represent nature, and nature wants 'x' or 'y.'" I think there's a lot of very small victories happening, and again, it's bottom-up.

I'm not one hundred percent sure on this, but I think so far, we haven't run into the problem of who speaks for nature and having multiple conflicting voices. For the most part, it's development versus nature, and anyone who's going to speak for nature is kind of on that side. But I predict we'll start to get into some conflicts as things become more developed and more sophisticated.

One thing you might imagine: suppose you're like Exxon Mobil, and you want to develop an oil field in Bolivia. You own it, and the rights of nature people come and see you. You, Exxon Mobil, might set up your own rights of nature organization which is very well-funded and comes to say, "no, nature actually really wants the oil well here, because of XYZ reasons."

That's an oversimplification, but you can imagine that kind of sophisticated strategy that we have observed in politics being used in this case as it becomes more prominent. So, I think we're going to get into that question of who speaks for nature and what the conflicts are. Legal texts can help, and courts can do a good faith job of sorting out, as we already do in certain kinds of collective rights situations. But I think we'll see more conflict as the area develops.

CF: I was thinking about this too: the fact that a lot of the rights of nature, like rights of nature legislation, and even constitutional provisions, are connected to indigenous governance. I think questions will arise at some point, because a community might have a certain idea about what the river needs that may be different from an ecologist. I think that at some point, we will have to find a way to really be able to figure out what it means to be acting on behalf of the interest of a piece of nature.

But one legal element that I think will be interesting here is communities that exist on the basis of customary law, that have their own practices. And so you have the national government at the top level, with their rules about what's okay and what's not okay. But then there are constitutions that will carve out an area for communities to actually have their own rules, and we call it customary law—it can be on divorce, marriage, parentage, the sort of things that are kind of in everyday functioning. There's been a lot of debates about where customary law should end and begin, and where the national constitution and federal law should end and begin.

I think those same conversations will also have to happen in the context of rights of nature, because you will have communities that have their own rules and thoughts about the environment around them. It's unclear whether or not those rules and understandings will have to be consistent with what happens at the national level, or whether or not they can be distinct.

TG: We kind of have a sometimes simplistic assumption that indigenous communities and the rights of nature always go together. At the deep and historical and ontological level that may be true, but tribal communities are governed by tribal self-governance, and there's a massive range of the way those institutions operate. Sometimes they're really drawing on communal norms and traditional ideas, and sometimes they are like mini dictatorships because of their structures. We're going to have to be sophisticated in terms of thinking about what nature might want. It's going to be an interesting sort of epistemological challenge.

And by the way, you might sometimes have intra-natural conflict right. If you think of a species, well, species are in Darwinian competition all the time. Is the Asian carp part of nature? Does it have a right to swim into Lake Michigan? What does that do for the other fisheries? There are intra, non-human, species conflicts that we will confront.

CF: To put that in context, the reason this conversation is necessary is because we have one species that is also very assertive: us. And so we're in conflict with the rest of nature.

KL: In terms of the end game, where do you think the movement might go, ideally? Do you think it is just different coalitions, organizations, groups, etc. codifying law and making it constitutional, black and white on paper? Or is it going to be a soft law development?

CF: My sense is that science exists, and once we start asking ourselves questions like, what does it mean for river to thrive, what conditions need to be present for a particular ecosystem to be balanced . . . Once these questions are answered, it's going to make litigation, conflict assessment, all those things a lot easier, because there are empirical things that we can say.

In terms of what the system will look like, if you look at constitutions around the world, they're all awfully similar. Not every single constitution—but a lot of constitutions are, and the rights of nature could become one of those provisions that you just expect to see. Like a non-discrimination clause, that's in most constitutions in the world. Once that exists, you have a way of taking these kinds of disputes to court, and then courts will interpret things in different ways. But then courts also converge on a lot of these issues, too, because they actually look at each other. So that's the domestic step of things. And then obviously at the international level, once those things converge, then you can start seeing countries cooperating with each other and having similar understandings.

TG: Just to add, law and culture are mutually informing. Laws are reflecting the idea that we should be thinking about nature in a very different way. But laws are also shaping that right, shaping ideas down the road, and maybe shaping people's thoughts about their relationships. So I think that it's not really either or—I imagine that legal change will go hand-in-hand with cultural change, and really ultimately political change. That's good. That's what has to happen for anything—any of this—to really stick. And in that sense, it kind of means that ultimately it has to move out of the rights area,

and back into the mainstream political discourse of what interests we consider in our democratic process.

CF: And I do think we are in a state of rapid cultural change- I mean, we're having this conversation. Tom's wife invited me to participate in a conference on the rights of nature, I think three years ago. It was mostly artists that were having this discussion. I had never even heard of this. So I do think we're in a moment of accountability around our impact on the environment, and the fact that this is even in the mainstream demonstrates how quickly things are evolving.

TG: And she [Tom's wife] is actually teaching a class that we were presenting at this morning. The class is an art class, but the art project is to take a little bit of land here at the University of Chicago, which they were not really going to do anything with and develop a kind of ecosystem. One of the things they were doing this morning is thinking about what a constitution for that ecosystem would be, how you would even go about writing that, what interests would be reflected. The students were really good at thinking about all these issues we've talked about—definitely committed to the idea that something like this has to happen, while wrestling with the extent to which legal language is helpful.

KL: Would you like to plug the class?

TG: Yes, the class is called “Untidy Objects,” taught in the Art department.

KL: Great, we can serve as a megaphone, put our foot in the ground in the rights of nature movement.

TG: Yeah, exactly. I will send it to them, and they'll be stoked and circulate the link.

KL: It's really interesting that it seems like a lot of the movement for rights of nature is coming from a grassroots level, from individuals who have cared about it. It's gotten to the level of where national governments actually care about it now, too. Do you think that's unique to this particular issue because it is so universal, or do you think that's what happens for a lot of rights that we see throughout history?

TG: Oh, I think this is the way it works. Change is always bottom-up, and very rarely top-down. Leaders are responsive.

CF: And when change tries to be top-down, often it goes wrong. Law is just a reflection of what we've decided as a community, right? I mean, that's simplistic, obviously. Sometimes there are power dynamics involved. But especially when you're talking about rights, it started with people objecting to the way things were.

Amber Stewart (AS): I did have one question about reparations. I wanted to know what we thought about reparations for past ills that have been done to the environment. When I think about like, the Gulf of Mexico, Exxon, typically what happens is that the company that's responsible has to pay damages or has to clean up. But if we start thinking about reparations to the land for, I don't know, forest fires, slash and burn, all the different ways in which we manipulate the land and work with it—where does that money go towards, and who collects? That's maybe a tertiary question, because we're still not at the point where everyone acknowledges that land has rights, but that's something that came to mind when I was listening to the podcast.

CF: I guess there are two things this is making me think about. One is damages. For example, Uganda has a national legislation on the rights of nature. And so, any litigation—and there I think eight or nine pending cases right now—any litigation that's brought, it's usually brought by the community, on behalf of a natural element that's been harmed, usually against the corporation (because it's usually corporations doing this). The damages that can result are supposed to go back to the preservation and the enhancement of the elements of nature that were harmed. So there is first that idea of making nature whole. Whatever the corporation has to pay—some of it goes to the government—but most of it is supposed to go back to kind of addressing the issue in the first place.

That's a different question the one that you're asking, which is so interesting: this idea of reparations to nature. I haven't seen it anywhere, but I really like the idea, because I think you would be talking about something beyond just undoing the damage that was done to that natural component. It's something that's enhanceive.

I don't know what that would look like, but I can imagine a reversal. For example, if you had some element of nature that was harmed by a corporation, having the corporation put enough resources that there would be a “going back in time” of the harm that was done. It's above and beyond just the dressing that particular problem. You could also have reparations go towards the community whose livelihood has been harmed. That gets a little trickier, but I think the idea is very interesting.

TG: Yeah, I think it raises interesting questions about what's the baseline. A famous historian, Simon Schama, wrote a wonderful book couple decades ago called *Landscape and Memory*, in which he points out that all landscapes have been manipulated by humans to begin with. Sometimes that's invisible to us. The park or the forest looks like it's natural, but of course people have been messing around with it, and human activity is just environmentally degrading, period, at every level. There's some level at which we would say, “Well this is just too much.” But that raises big, big social and political questions about exactly what that level is. So I think it's tough.

When you have an acute disaster like the Exxon spill, it's relatively easy, and that is certainly a starting point. What I guess would be nice to see would be that the damages that are paid by these companies would not necessarily just go into the general fund, but actually be deployed to restore the status quo ante. That would be the best application of it.

KL: To wrap up our time here, I did have one last question just about the podcast in general. Are there any future topics we can expect for next season's episodes?

TG: Yes, we're wrestling with equality. We want to do a whole season on equality and all of its different dimensions. And we're knee deep in thinking about it. It's just such a big, complicated issue. But it's been really fun to try to try to pin that one down.

CF: Yeah, that's the plan. The first season was major concepts and issues in in rights discussions. In future seasons, we're going to focus on one right. So the right to equality—that can be socioeconomic equality, it can be ethnic equality, it can be gender equality, it can be transnational equality—what would global equality actually look like outside of our borders? Is it okay that some countries are rich and some are poor? We're trying to look at all of those issues from a human rights perspective, and then see what we come up with.