



VOLUME 10 ISSUE 3-4

The International Journal of

Sustainability Policy and Practice

Know Your Rights

Earth Jurisprudence and Environmental Politics

DAVID HUMPHREYS



ONSUSTAINABILITY.COM

THE INTERNATIONAL JOURNAL OF SUSTAINABILITY POLICY AND PRACTICE

www.onsustainability.com

First published in 2015 in Champaign, Illinois, USA by
Common Ground Publishing
University of Illinois Research Park
2001 South First St, Suite 202
Champaign, IL 61820 USA

www.CommonGroundPublishing.com

ISSN: 2325-1166

© 2015 (individual papers), the author(s)

© 2015 (selection and editorial matter) Common Ground

All rights reserved. Apart from fair dealing for the purposes of study, research, criticism, or review as permitted under the applicable copyright legislation, no part of this work may be reproduced by any process without written permission from the publisher. For permissions and other inquiries, please contact [<cg-support@commongroundpublishing.com>](mailto:cg-support@commongroundpublishing.com).

The International Journal of Sustainability Policy and Practice is a peer-reviewed scholarly journal.

Know Your Rights: Earth Jurisprudence and Environmental Politics

David Humphreys, The Open University, UK

Abstract: Two Andean countries – Ecuador and Bolivia – have politically recognized the rights of nature, an idea that is also gaining traction at the sub-federal in the United States. The origins of the concept can be traced to the cultures of indigenous peoples of the Americas as well as to the work of American legal scholar Christopher Stone. Recognition of nature's rights holds out the possibility of an alternative approach to environmental management and politics, as well as to a fundamentally redefined relationship between nature and society. However, upholding rights of nature in practice may conflict with four other sets of rights in environmental politics: the sovereign rights of the state, human rights, property rights (or, more accurately, claims by people and organizations to property), and the rights of business corporations. Even in Ecuador and Bolivia, the first two countries to recognize what is now known as Earth jurisprudence, the rights of nature do not necessarily prevail over these other rights. For example, the private property rights granted by the state may conflict with the idea that nature has rights that trump those of humans. The challenge for those who support rights of nature is how to promote both a wider uptake of the idea among political leaders and civil society, and a clearer long term vision of how upholding nature's rights may be operationalized in practice.

Keywords: Pacha Mama, Buen Vivir, Rights

Introduction

In October 2012 a group of environmental activists entered the West Burton gas-fired power station in England and occupied one of the site's chimneys for a week. The owners, EDF Energy (a subsidiary of Électricité de France), responded by suing the activists for £5 million in damages resulting from lost production and increased security costs.

From one normative perspective the lawsuit made sense: EDF had legally acquired private property rights to the site, and it operated the power station within British law. The company was therefore fully entitled to seek compensation given that the trespassers had prevented the company from operating the site leading to significant financial losses. However, the protesters took a very different view: EDF is a major greenhouse gas emitter and its activities contribute to anthropogenic climate change. They were, they believed, fully justified in protesting as they were operating in the service of a greater good, namely the rights of future generations to inherit a habitable planet.

Following a public backlash against EDF the company quietly dropped the lawsuit. However, the story is important in illustrating the contradictions between the different types of rights that inform environmental politics. This paper begins by examining four clusters of rights: the rights of states, human rights, property rights (or, more accurately, the legally sanctioned rights of actors to property, such as territory, products or patents) and corporate rights (namely the rights of business enterprises under national and international commercial law). This paper then examines the emerging jurisprudence of rights of nature with particular reference to Ecuador, Bolivia and the United States. Throughout the paper contradictions between these five clusters of rights are analysed.

Rights and Environmental Politics

The study of rights lies at the heart of academic disciplines such as the law and political philosophy and is central to the study and practice of environmental politics. Rights may be defined as legal or moral freedoms or entitlements that an actor is entitled to expect from other members of a moral community. This paper focuses primarily on the rights of nature. First,

however, it briefly examines the four sets of rights that have hitherto dominated the study and practice of environmental politics, starting with the rights of states.

Rights of States

The Charter of the United Nations of 1945 is based on the principle of sovereign equality between states.¹ Shortly after its creation the UN set out to negotiate a declaration on the rights and duties of states. A draft was concluded by the International Law Commission and presented to the General Assembly, which in 1949 passed resolution 375(IV) agreeing to circulate the draft for comments and suggestions from member states.² Two years later the General Assembly noted that the number of states that had responded was too small “to base thereon any definite decision” and passed resolution 596(VI) postponing consideration of the matter.³ The draft was not subsequently passed⁴ although some lawyers consider it a key text of the UN General Assembly.⁵ It provides an indication of the rights that states now enjoy under customary international law including “the right to independence ...including the choice of its own form of government” (article 1), “the right to exercise jurisdiction over its territory” (article 2), “the right to equality in law with every other State” (article 5) and “the right of individual or collective self-defence against armed attack” (article 14).⁶

Throughout the 1960s the General Assembly passed several resolutions codifying principles of international law leading in 1970 to resolution 2625(XXV) adopting the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. This amplifies some of the rights in the 1949 draft including “Each state enjoys the rights inherent in full sovereignty.”⁷ The declaration makes clear that states are equal, rights and duties are equal and that states have the duty to respect the rights of other states.

The principle of sovereignty has since been clarified for international environmental issues. The 1972 Stockholm Declaration of the Human Environment asserts that states have “the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”⁸ This principle was repeated in the Rio Declaration on Environment and Development of 1992 with one important difference: whereas the Stockholm Declaration mentioned “environmental policies” the Rio Declaration mentioned “environmental and developmental policies.”⁹ The principle marries the right of states to exploit natural resources with the duty to avoid transboundary environmental harm.

Human Rights

The second set of rights invoked in environmental politics is human rights. In the seventeenth and eighteenth centuries natural rights theorists such as John Locke, Thomas Hobbes and Thomas Jefferson argued for the existence of natural rights, which are universal, inalienable and cannot therefore be taken away, such as the rights to worship, to free speech and to own property.

¹ United Nations 1945, article 2.1.

² United Nations 1949.

³ United Nations 1952.

⁴ The draft was criticized from a legal point of view as it was unclear whether it was codifying existing international law on the rights and duties of states or providing a guide for its future development. See Kelsen 1950.

⁵ Rauschnig et al. 1997.

⁶ International Law Commission 1949.

⁷ United Nations, 1970.

⁸ United Nations 1972, principle 21.

⁹ United Nations 1992a, principle 2.

This work has influenced the development of liberal political thought and contributed to contemporary notions of human rights.

The cornerstone piece of international human rights law is the Universal Declaration of Human Rights adopted by General Assembly resolution 217(III) in 1948. The principle asserts that humans have the rights to “life, liberty and security of person” (article 3), “to own property alone or in association with others” (article 17), to “food, housing, clothing and medical care and necessary social services” and to education (article 26).¹⁰ These so-called first generation human rights focusing primarily on the individual have since been supplemented by “second generation,” or collective, rights. In 1986 the General Assembly affirmed the right to development as an “inalienable human right.”¹¹ The General Assembly recognized the right to water and sanitation in 2010.¹²

There has been no equivalent declaration on rights to the environment. Richard Hiskes presents a human rights argument that all citizens, both present and future, have environmental entitlements to clean air, water and soil. He argues that for these rights to be realized states that ascribe to them should promote a universal consensus on their applicability.¹³ Such a consensus is emerging: by 2005 some 50 countries had established a constitutional right to a clean environment with many recognizing that future generations have the right to inherit a clean environment.¹⁴ In 2007 the General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which recognizes the principle of free, prior and informed consent whereby indigenous peoples have the right to participate in and be fully informed about decisions that affect their traditional lands.¹⁵

Two regional legal instruments have endorsed a human right to a clean environment. In 1981 the Organisation of African Unity adopted the African Charter on Human and People’s Rights (Banjul Charter), which states “all peoples shall have the right to a general satisfactory environment favourable to their development.”¹⁶ In 1988 the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights recognized that “Everyone shall have the right to live in a healthy environment” and states “shall promote the protection, preservation, and improvement of the environment.”¹⁷

Property Rights

As noted above, the right to own property appears in the Universal Declaration of Human Rights. The right to property ownership applies not only to individuals but also to communities, businesses and organizations. A property right may be defined as an entitlement to own and use a prescribed area or piece of property under the law. The modern state plays a central role in establishing and upholding property rights through passing and enforcing laws. This notion of property rights owes much to political philosophers such as Hobbes and Locke who argued that there were no legal property rights prior to the modern state, which alone decides the rules of property ownership.¹⁸ The private property rights granted by the state often conflict with traditional and collective ideas of property. In particular, the idea that property did not exist before the creation of the modern state clashes with the notion of customary rights to land

¹⁰ United Nations 1949. Other key international declarations on human rights are the *United Nations International Covenant on Economic, Social and Cultural Rights* (opened for signature 16 December 1966; entered into force 3 January 1976) and the *United Nations International Covenant on Civil and Political Rights* (opened for signature 16 December 1966; entered into force 23 March 1976).

¹¹ United Nations 1986.

¹² United Nations 2010.

¹³ Hiskes 2009.

¹⁴ Hayward 2005, 22.

¹⁵ United Nations 2007, articles 10, 11.2, 19, 28.1, 29.2 and 32.2. See also Ward 2011.

¹⁶ Banjul Charter 1981, article 24. For an analysis of the Charter see Umozurike 1983.

¹⁷ Organization of American States 1988, article 11.

¹⁸ Hobbes, 2002 [1651]; Tuck 2002.

claimed by indigenous and traditional communities who have lived on and farmed land for generations, with communally-owned and managed land passed down from generation to generation within families and communities.

Corporate Rights

Some of the main beneficiaries of legal private property rights created by the state are agricultural business corporations which, often in alliance with host governments, control much of the world's most fertile agricultural land, often through "land grabs" resulting in the displacement of traditional communities.¹⁹ Business corporations and other investors have also been granted rights under international law, including the right to sue. The World Trade Organization (WTO) agreements have adopted the idea of the business corporation as an entity with a legal personality that was first introduced in the United States through the 1886 court case, *Santa Clara County v. Southern Pacific Railroad*, which ruled that business corporations have rights of protection that are equal to those of natural persons.²⁰ The decision, it can be argued, was instrumental in turning the US away from a society governing for the rights of people to one governed by business.²¹ Jurisprudence on corporate rights now finds expression in international law and the WTO agreements that promote trade and investment liberalization, such as the Agreement on Trade-Related Investment Measures (TRIMS) and the Agreement on Trade-Related Intellectual Property Rights (TRIPS).

The WTO has no agreement dealing specifically with the environment and has been criticized for promoting a rules-based economy that places the rights of businesses over and above those of people and environments.²² For proponents of corporate rights the WTO has the advantage of providing a relatively harmonized and predictable international business climate. The WTO has enforcement and compliance mechanisms that require states to implement international trade and trade-related law on pain of sanctions.

Both complementarities and tensions may exist between these four sets of right. One example of a complementarity concerns the rights of states and human rights: the 1970 *Declaration of Principles of International Law*, as well as codifying the rights of states, mentions the importance of maintaining human rights, noting that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right."²³ States have thus voluntarily adopted human rights, which all states then have a duty to respect.

However, tensions between these different rights may also exist. In particular, states may grant rights to corporations in international law that subsequently undermine government environmental protection policy. For example, when the Mexican government decided to close a waste disposal facility owned by Metalclad Corporation after a geological survey revealed that the site would contaminate water supplies Metalclad sued the Mexican government arguing that the closure of the site represented an expropriation of its assets. The decision from the International Centre for Settlement of Investment Disputes (ICSID) ruled in favour of Metalclad, awarding the business US\$15.6 million.²⁴ (The ICSID is an autonomous institution. However, the legal convention that brought it into existence was formulated by the World Bank. It entered into legal effect in 1966.) The government of Mexico appealed the decision, only to find that it had surrendered to corporations rights that undermined its own autonomy.

¹⁹ Pearce 2012; Linklater 2013.

²⁰ Horwitz 1985; Korten 1995, 59; Drutman and Cray 2004, 63.

²¹ Monks 2008.

²² Drutman and Cray 2004.

²³ United Nations 1970.

²⁴ Weiler 2001, 702,

The advent of the rights of nature movement has added a fifth ingredient to the mix of rights that inform environmental politics. The next section traces the origins of the rights of nature discourse and analyses the growing, albeit still tenuous, political acceptance of these rights.

Rights of Nature in South America

On April 22, 2009 the Bolivian president Evo Morales addressed the United Nations General Assembly and said that 60 years after the UN had adopted the Universal Declaration of Human Rights “Mother Earth is now, finally, having her rights recognised.”²⁵ The General Assembly subsequently passed a resolution designating 22 April as International Mother Earth Day.²⁶ The agreement of this resolution has its origins in traditional Andean beliefs that have been politically recognized in two countries: Ecuador and Bolivia. In 2008 Ecuador became the first country in the world to include rights of nature in its constitution, article 71 of which declares that

Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structures, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.²⁷

The constitution allows any individual or group to take action through the courts to uphold nature’s rights. Indigenous peoples played an important role in the drafting of the constitution and were represented in the drafting process by the Confederation of Indigenous Nationalities of Ecuador (CONAIE). Their involvement paved the way for the inclusion of rights of nature in the constitution. In 2011 the first court case to uphold the rights of nature was brought, namely *Wheeler v. Director de la Procuraduria General Del Estado de Loja*. The court ruled that the dumping of road debris into the Vilcamba River violated nature’s rights and found the local provincial council liable. The council was ordered to remove the debris in order to restore the right of the river to flow.²⁸

In 2009 Bolivia passed a new constitution stipulating that Bolivians have a duty to “protect and defend an adequate environment for the development of living beings.”²⁹ The following year the Bolivian legislature passed the Law of the Rights of Mother Earth which recognized seven rights of Mother Earth: the rights to life and to exist; not to have cellular structure modified or genetically altered; to pure water; to clear air; to balance; to continue vital cycles and processes free of human existence; and not to be polluted.

The idea of rights of nature expressed in the constitutions of Ecuador and Bolivia reflects a particular South American worldview. For example, Pacha Mama, or Mother Earth, is an Andean goddess, the giver of life, who to Andean indigenous peoples has rights irrespective of human desires and wants. The term Pacha Mama appears in article 71 of the 2008 constitution of Ecuador (above). It does not appear in the text of Bolivian constitution (although it is mentioned in the introduction to the published edition³⁰). The idea of Pacha Mama underlies Bolivia’s 2010 Law of the Rights of Mother Earth, although this law used the Spanish for Mother Earth (Madre Tierra).

The notion of *buen vivir* is central to the 2008 constitution of Ecuador. The term has no single translation into English but is usually translated as “living well” or “good living” and is not to be confused with a higher standard of living defined in economic terms. Good living includes a spiritual component, cultural identity, community (of which the natural world is part)

²⁵ United Nations 2009a.

²⁶ United Nations 2009b.

²⁷ Constitution of the Republic of Ecuador 2008, Article 71.

²⁸ Daly 2012, 64.

²⁹ Constitution of the Plurinational State of Bolivia 2009, Article 108.16.

³⁰ Constitution of the Plurinational State of Bolivia 2009, 1.

and harmony between people and nature. *Buen vivir* does not mean that humans should be prevented from using nature, but it does redefine human use of nature. Humans are not separate from nature but have an interdependent, complementary and indivisible relationship with it. The idea of *buen vivir* articulates a collective notion of community and citizenship that embraces all life, and not solely humans, with collective rights prevailing over individual rights. As Villalba argues, “Community does not imply a lack of individuality, since individuality is expressed through complementarity with other beings in the group.”³¹ Ecuadorians have a collective and inclusive notion of citizenship³² and this is reflected in the constitution with a chapter on the collective rights of “communities, peoples and nationalities.”³³ The Bolivian constitution mentions “collective well-being”³⁴ and grants indigenous peoples the right to the “collective titling of rights and resources.”³⁵

The emphasis on collective titling and collective ownership of land runs counter to the notion of individual ownership of property in Western societies derived from work of 17th political philosopher John Locke who viewed property as land with which man (sic) has mixed his labour.³⁶ This has been used to justify enclosure of land on the basis that if a person is prepared to till land then it may be claimed as private property. As recently as the 1980s deforestation was one route for an aspiring property owner in Brazil or Ecuador to stake a legal claim to land.³⁷

Those who recognize rights of nature seek to promote a world view whereby human rights are dependent on, and cannot be realized without, the recognition and defence of the rights of Mother Earth. The relationship between rights of nature and human rights is thus seen not as one of equivalence but one whereby rights of nature trump those of the humans with the latter proscribed by the former. As Morales has argued “our rights [the rights of humans] end where we begin to provoke the extermination or elimination of nature.”³⁸

Rights of Nature in the United States

The idea that nature has rights is recognized in many traditional cultures throughout the Americas.³⁹ It has also gained a tentative status in the US judiciary through Christopher Stone’s landmark paper of 1972, “Should trees have standing?”

Standing (*locus standi*) is the ability of a party to demonstrate harm from an action in order to support the party’s involvement in a court case. Stone argues that trees, and the whole natural environment in general, should be afforded legal rights. He insists that it is unfair for trees to be denied legal protection because they cannot speak and concludes that guardians, those who wished to defend the rights of trees, should be allowed to bring legal action against those whose actions would harm trees.⁴⁰ Stone’s paper led to a dissenting opinion in the US Supreme Court. In *Sierra Club v. Morton* the Sierra Club had opposed on ecological grounds the development of a valley in the Sequoia National Forest. The court ruled that the Sierra Club had no standing in the case as neither the club nor its members would suffer injury from the proposed development.⁴¹ However, Justice William Douglas dissented, citing Stone’s paper to argue that standing should be conferred upon natural objects so that guardians can sue for their

³¹ Villalba 2013, 1430.

³² See, for example, Stober 2010; Dellert 2010.

³³ Constitution of the Republic of Ecuador 2008, articles 56-60.

³⁴ Constitution of the Plurinational State of Bolivia 2009, article 35.I

³⁵ Constitution of the Plurinational State of Bolivia 2009, article 30.II.6.

³⁶ Locke 1997. Note, however, that Locke also stipulated the “sufficiency restriction”: one must take only what one needs, and should leave enough for others.

³⁷ Myers 1989.

³⁸ Morales 2011, 124.

³⁹ Gill 1987; Weaver 1996.

⁴⁰ Stone 1972.

⁴¹ Baude 1973.

preservation.⁴² The provision that any person may take action to defend the rights of nature in the constitution of Ecuador can be seen as consistent with Stone's arguments.⁴³

While the US federal government does not recognize rights of nature there has been some recognition at the sub-federal level. In Tamaqua Borough in 2006 an ordinance was issued that recognized natural ecosystems within the borough as "legal persons" for the purpose of preventing sewage sludge dumping on wild land. Significantly, the ordinance asserts not only that "the Borough must take affirmative steps to subordinate the powers of those corporations to the will of the majority within the Borough of Tamaqua" but declares that corporations that apply sludge to the land "shall not be 'persons' under the United States or Pennsylvania Constitutions, or under the laws of the United States, Pennsylvania, or Tamaqua Borough, and so shall not have the rights of persons under those constitutions and laws."⁴⁴ The ordinance represents the first time that a public body in the United States has granted personhood to nature and stipulated that corporations causing environmental degradation will lose the rights of personhood.

In November 2010 the city of Pittsburgh issued an ordinance that banned natural gas drilling and fracking, elevating community rights and the rights of nature over and above those of corporate personhood. The ordinance was passed after state lawmakers prevented Pittsburgh from taking action to protect the city. The language used in the ordinance, which remains extant at the time of writing (February 2015), appears to draw from Stone's 1972 paper and the Ecuadorian constitution:

Natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems, possess inalienable and fundamental rights to exist and flourish within the City of Pittsburgh. Residents of the City shall possess legal standing to enforce those rights on behalf of those natural communities and ecosystems.⁴⁵

The city of Pittsburgh thus establishes legal standing for any citizen to protect the local environment, including those that have no interest in the threatened ecosystem.

The cases of Tamaqua Borough and Pittsburgh illustrate that although the federal government has not recognized rights of nature the idea is being adopted in other political power centers in the United States. There is a similarity here with the Kyoto Protocol of 1997, signed by the Clinton administration but repudiated by the administration of Bush junior. Since then a number of cities and other local public authorities have committed themselves to meeting the greenhouse gas emissions reduction target that the United States agreed at Kyoto.⁴⁶

Having considered the adoption of rights of nature by the governments of two countries in South America and by certain sub-federal level actors in the United States, the next section will examine the tensions that may exist between the rights of nature and the four sets of rights introduced at the start of this paper.

When Rights Collide

Based primarily on the experiences of Bolivia and Ecuador this section will address the question of where rights of nature stand in relation to the rights of states, human rights, property rights, and corporate rights. It poses the question: when different rights collide, which rights tend to prevail?

Upholding one set of rights does not preclude the promotion or advocacy of others. For example, many of those who advocate the primacy of rights of nature argue that upholding the

⁴² Hogan 2007.

⁴³ Constitution of the Republic of Ecuador 2008, article 71.

⁴⁴ Tamaqua Borough Sewage Sludge Ordinance, cited in Community Environmental Legal Defense Fund 2006.

⁴⁵ Pittsburgh Pennsylvania Code of Ordinances 2013.

⁴⁶ Resnik, Civin and Frueh 2008.

rights of communities and indigenous peoples is necessary for upholding nature's rights. However, to many environmental and human rights activists, upholding the rights of nature and of indigenous communities necessarily challenges corporate rights. For example, to Atossa Soltani, the founder of the campaigning group Amazon Watch, "The Rights of Nature movement is the antidote to reigning in the unbridled power of corporations whose drive for short-term profits is pushing humanity and countless species to extinction."⁴⁷ Anuradha Mittal argues that corporations should be denied legal personhood and made "accountable to communities and ecosystems where they extract wealth."⁴⁸ Throughout the activist community there is a widespread view that people and communities have lost control of their lands to external actors such as business corporations and that meaningful implementation of both human rights and the rights of nature requires curtailing the rights of corporate to own land where this results in environmental degradation.

The view that corporate rights should be limited has found support in the political establishments of Ecuador and Bolivia. However, the reasons for this are less to do with upholding the rights of nature and more with a concern to assert the rights of the state to exercise sovereignty over its territory and natural resources. In 2007 Bolivia became the first country to withdraw from the International Centre for Settlement of Disputes (ICSID), the body that ruled against the government of Mexico in the *Metalclad* case.⁴⁹ Ecuador withdrew in 2010.

The governments of Ecuador and Bolivia have thus asserted their right to manage their own environments without submitting to external adjudication. Indeed the adoption of rights of nature in Ecuador and Bolivia has been accompanied by more strident assertions of state control over natural resources. The 2008 constitution of Ecuador claims food sovereignty and economic sovereignty and asserts that "The State shall exercise sovereignty over biodiversity, whose administration and management shall be conducted on the basis of responsibility between generations."⁵⁰ The 2009 constitution of Bolivia asserts that

natural assets are of public importance and of strategic character for the sustainable development of the country. Their conservation and use for the benefit of the population will be the responsibility and exclusive authority of the State, and the sovereignty over natural resources may not be compromised.⁵¹

But while asserting sovereignty, the constitutions of Ecuador and Bolivia also uphold the rights of citizens to participation.⁵² There is thus a tension between the state and the executive branch on the one hand, and people, citizens' groups and participatory democracy on the other.⁵³ In the case of Bolivia this dualism is exemplified in the phrase "natural resources are the property of the Bolivian people and will be managed by the State."⁵⁴

While promoting rights of nature the governments of both countries also promote economic development. The constitution of Bolivia makes clear the country defends its right to fossil fuel-driven development by asserting that its "hydrocarbons ...are the inalienable and unlimited property of the Bolivian people. The State, on behalf of and in representation of the Bolivian people, is the owner of the entire hydrocarbon production of the country and is the only one authorised to sell it."⁵⁵ In 2014 Ecuador, speaking also for Bolivia and Argentina, emphasized at

⁴⁷ Soltani 2011, 38.

⁴⁸ Mittal 2011, 41.

⁴⁹ Gaillard 2007.

⁵⁰ Constitution of the Republic of Ecuador 2008, article 400.

⁵¹ Constitution of the Plurinational State of Bolivia 2009, article 346.

⁵² For example, Constitution of the Republic of Ecuador 2008, articles 61 to 65.

⁵³ Schilling-Vacaflor 2011, 16.

⁵⁴ Constitution of the Plurinational State of Bolivia 2009, article 311.II.2

⁵⁵ Constitution of the Plurinational State of Bolivia 2009, article 359.

a session of the UN General Assembly Open Working Group on Sustainable Development Goals the “central role of the state” in coordinating environmental and social policies.⁵⁶

In both countries the practicalities of both upholding rights of nature and promoting a state-driven economic model of development that remains reliant on external investment has led the government into conflict with citizens seeking to protect local environments. In Bolivia there have been protests against hydrocarbon and mineral mining projects from indigenous peoples invoking the need to respect Pacha Mama. The government has ignored these protests.⁵⁷ Similarly, since the adoption of the 2008 constitution in Ecuador there have been indigenous protests against oil extraction and mineral mining leading to arrests.⁵⁸ President Correa has responded that mining will create new employment opportunities.⁵⁹

In a 2012 court case, *Kichwa Indigenous People of Sarayaku v. Ecuador*, the Inter-American Court of Human Rights ruled that the government of Ecuador should have consulted with the Kichwa people in line with the principle of free, prior and informed consent before commencing oil drilling on customary lands and called on the government to comply with the ruling in future.⁶⁰ It should be noted that the Ecuadorian constitution does not mention the principle of free, prior and informed consent,⁶¹ an omission which, it can be argued, undermines the ability of community groups to defend the rights of nature. Given Ecuador’s position as the first country to adopt rights of nature, the defeat of its government in the Inter-American Court of Human Rights on an environmental issue was an international embarrassment. According to one legal analyst the implementation of rights of nature and other environmental law in Ecuador has lagged behind the commitments due to a lack of political will and, despite government resistance, continued corporate control of environmental decision-making.⁶² In December 2013 the Global Alliance for the Rights of Nature, a global civil society network, announced that the Ecuadorian Ministry of the Environment had ordered the dissolution of Fundación Pachamama, one of the Ecuadorian groups that had campaigned for the inclusion of rights of nature in Ecuador’s constitution.⁶³ Fundación Pachamama has been a vocal critic of the Ecuadorian government’s decision to allow oil mining on Amazonian indigenous peoples’ land.

A further case illustrating the tension between rights of nature and the sovereign rights of states over their natural resources in Ecuador concerns the Yasuni-ITT scheme. In 2007 Ecuador offered to desist indefinitely from deforestation in order to exploit the Ishpingo-Tambococha-Tiputini (ITT) oilfield in the Yasuni national reserve if the international community was prepared to compensate it for so doing. A United Nations Development Program trust fund was established to receive donations for the protection of the Yasuni reserve. Ecuador’s proposal was consistent with the notion of common but differentiated responsibilities, a legal principle included in the UN Framework Convention on Climate Change which holds that responsibilities for addressing climate change should be shared among states, with those states that have polluted most bearing the greater responsibility.⁶⁴ As Correa commented in 2007 when making the proposal, “Ecuador doesn’t ask for charity but does ask that the international community share in the sacrifice and compensates us with at least half of what our country would receive, in

⁵⁶ *Earth Negotiations Bulletin* 2014, 7. (The words in quotation marks represent a quote from the *Earth Negotiations Bulletin* and not necessarily the actual words used by the Ecuadorian delegate.)

⁵⁷ Stevenson 2013, 22.

⁵⁸ For a history of these protests, which predate the election of Correa and the adoption of the 2008 constitution, see Anguelovski 2007.

⁵⁹ Becker 2011, 58.

⁶⁰ Inter-American Court of Human Rights 2012, 35, 49-50.

⁶¹ Although it does mention the softer formulation of “free prior informed consultation, within a reasonable period of time” on proposals for the prospecting of non-renewable resources on indigenous lands. Constitution of the Republic of Ecuador 2008, article 57.7.

⁶² Kimerling 2013, 62.

⁶³ Email from Global Alliance for the Rights of Nature, December 6, 2013.

⁶⁴ United Nations 1992b, preamble, articles 3.1 and 4.1.

recognition of the environmental benefits that would be generated by keeping this oil underground.”⁶⁵

In August 2013 Correa announced that Ecuador was abandoning the scheme after just \$13 m. of the \$3.6 bn. being sought was deposited.⁶⁶ It can be argued that Ecuador is fully entitled to exploit its oil if other countries are not prepared to share the costs of conservation. Against this it may be argued that Ecuador should desist from mining the oil if it is serious about respecting the rights of nature. The decision of the government to abandon the scheme suggests that while Ecuador is prepared to stand some economic costs to protect nature it is also prepared to use the country’s resources as a political bargaining chip with other countries and to assert its sovereign right to exploit these resources should such bargaining fail.

The fate of the Yasuni-ITT scheme illustrates the dominant approach to environmental conservation, namely payment for environmental services (PES). The underlying rationale of the PES approach is that property owners should be financially compensated for maintaining the environmental services of their property, as without such compensation owners are free to use their property for other, less environmentally friendly, uses. This approach underpins many policies to halt tropical deforestation. On this view, if forest owners are compensated for the environmental services that standing forests provide, such as carbon sequestration and biodiversity conservation, they are less likely to sell their forests for, say timber or conversion to cattle pasture. Payment for environmental services may take place through markets (for example, for carbon sink functions or watershed services) or may be negotiated bilaterally or multilaterally between buyers and sellers. Ecuador’s Yasuni-ITT proposal was consistent with the latter approach. However, the idea of rights of nature runs counter to the idea of nature as property that can be exploited, bought and sold. The PES approach is a logical and rational one in a world where private property rights prevail. However, in a world where the rights of nature were dominant, all other rights would be subsumed under nature’s rights and acceptable only if they did not undermine or erode nature’s rights. A fundamentally different type of law would prevail, human societies would be governed and regulated very differently and the human-nature relationship would be placed on a very different legal basis than today.

Conclusion

Through examining the tensions between the idea of rights of nature and four other sets of rights this paper has provided some indication of why upholding the rights of Pacha Mama has proved so difficult in practice in Ecuador and Bolivia. In neither country should the adoption of rights of nature be seen as absolute, unfettered or consistent. In both there are unresolved questions between conserving nature to benefit the present and future generations, and between resource use to promote national development or localized community-driven development. It seems likely that some of the political support that the idea of rights of nature has enjoyed in these two countries is less about respect for nature or for the rights of future generations per se but as a political tool for public authorities to assert rights of access to nature for favoured local or national actors, with foreign businesses admitted on terms set by the national government. That said, there is no doubt that many of those who support the idea do so out of firm moral conviction and principled belief. The challenge for those who support rights of nature is how to promote both a wider uptake of the idea among political leaders and civil society and a clearer long term vision of how upholding nature’s rights may be operationalized in practice.

⁶⁵ Environmental News Service 2007.

⁶⁶ Watts 2013, 13.

REFERENCES

- Anguelovski, Isabelle. 2007. Indigenous resistance to oil extraction in southern Ecuador: The need for state recognition of autonomy demands for cultural sustainability. *International Journal of Environmental, Cultural, Economic and Social Sustainability* 3(5): 95-105.
- Banjul Charter. 1981. *African (Banjul) Charter on Human and Peoples' Right*. Available at <http://www.africancourt.org/en/images/documents/Sources%20of%20Law/Banjul%20Charta/charteang.pdf>, accessed February 16, 2015.
- Baude, Patrick L. 1973. *Sierra Club v. Morton: Standing Trees in a Thicket of Justiciability*. *Indiana Law Journal* 48(2): 197-215.
- Becker, Marc. 2011. Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador. *Latin American Perspectives* 38(1): 47-62.
- Community Environmental Legal Defense Fund. 2006. Tamaqua Borough Corporate Waste and Local Control Ordinance. Available at <http://www.celdf.org/article.php?id=439>, accessed February 16, 2015.
- Constitution of the Plurinational State of Bolivia. 2009. Translated by Luis Francisco Valle V. Printed in San Bernadino, California. Spanish version available at <http://pdba.georgetown.edu/constitutions/bolivia/bolivia09.html>, accessed February 16, 2015.
- Constitution of the Republic of Ecuador. 2008. English translation from Political Database of the Americas, Georgetown University. Available at <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>, accessed February 16, 2015. Spanish version available at <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html>, accessed October 11, 2013.
- Daly, Erin. 2012. The Ecuadorian Exemplar: The first ever vindications of constitutional rights of nature. *Review of European Community and International Environmental law (RECIEL)* 21(1): 63-66.
- Dellert, Christine. 2010. Protecting the 'Other': Ecological Citizenship Under Ecuador's Constitution. *International Journal of Environmental, Cultural, Economic and Social Sustainability* 6(6): 117-128.
- Drutman, Lee, and Charlie Cray. 2004. *The People's Business: Controlling Corporations and Restoring Democracy*. San Francisco: Berrett-Koehler.
- Earth Negotiations Bulletin. 2014. Summary of the Seventh Session of the UN General Assembly Open Working Group on Sustainable Development Goals: 6-10 January 2014. *Earth Negotiations Bulletin* 32(7), 18pp.
- Environmental News Service. 2007. Ecuador seeks compensation to leave Amazon oil undisturbed. Available at <http://www.ens-newswire.com/ens/apr2007/2007-04-24-04.asp>, accessed February 16, 2015.
- Gaillard, Emmanuel. 2007. The denunciation of the ICSID Convention. *New York Law Journal* 237(122). Available at http://www.shearman.com/files/Publication/a4ce24f1-83de-445d-a50a-b82baf2f89fc/Presentation/PublicationAttachment/ce3cbe9a-ca49-4eaa-b3f5-d0a26ba0680c/IA_NYLJ%20Denunciation%20ICSID%20Convention_040308_17.pdf, accessed February 16, 2015.
- Gill, Sam D. 1987. *Mother Earth: An American Story*. Chicago: University of Chicago Press.
- Hayward, Tim. 2005. *Constitutional Environmental Rights*. Oxford: Oxford University Press.
- Heskes, Richard P. 2009. *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice*. Cambridge: Cambridge University Press.
- Hobbes, Thomas. 2002 [1651]. *Leviathan*. London: Penguin.

- Hogan, Marguerite. 2007. Standing for Nonhuman Animals: Developing a Guardianship Model from the Dissents in *Sierra Club v. Morton*. *California Law Review* 95(2): 513-534.
- Horwitz, Morton J. 1985. *Santa Clara Revisited: The development of corporate theory*. *West Virginia Law Review* 88: 173-224.
- Inter-American Court of Human Rights. 2012. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgement of June 27, 2012. Available at http://www.esrnet.org/sites/default/files/Court%20Decision%20_English_.pdf, accessed February 16, 2015.
- International Law Commission. 1949. Draft Declaration on Rights and Duties of States 1949. Available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/2_1_1949.pdf, accessed February 16, 2015.
- Kelsen, Hans. 1950. The Draft Declaration on Rights and Duties of States: Critical Remarks. *American Journal of International Law* 44(2): 259-76.
- Kimerling, Judith. 2013. Oil, Contact, and Conservation in the Amazon: Indigenous, Huaorani, Chevron, and Yasuni. *Colorado Journal of International Environmental Law and Policy* 24: 43-115.
- Korten, David C. 1995. *When Corporations Rule the World*. London: Earthscan.
- Linklater, Andro. 2013. *Owning the Earth: The Transforming History of Land Ownership*. London: Bloomsbury.
- Locke, John. 1997. *Political Essays*, edited by Mark Goldie. Cambridge: Cambridge University Press.
- Mittal, Anuradha. 2011. The nature of farming and farming with nature. In *The Rights of Nature: The Case for a Universal Declaration of the Rights of Mother Earth*, edited by Council of Canadians, Fundación Pachamama and Global Exchange, 40-1. San Francisco: Council of Canadians, Fundación Pachamama and Global Exchange.
- Monks, Robert L. 2008. *Corporocracy*, Hoboken NJ: John Wiley and Sons.
- Morales, Evo. 2011. The Century of the Rights of Mother Earth. In *The Rights of Nature: The Case for a Universal Declaration of the Rights of Mother Earth*, edited by Council of Canadians, Fundación Pachamama and Global Exchange, 122-125. San Francisco: Council of Canadians, Fundación Pachamama and Global Exchange.
- Myers, Norman. 1989. *Deforestation rates in tropical countries and their climatic implications*. London: Friends of the Earth.
- Organization of American States. 1988. *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*. Available at <http://www.cidh.oas.org/Basicos/English/basic5.Prot.Sn%20Salv.htm>, accessed February 16, 2015.
- Pearce, Fred. 2012. *The Landgrabbers: The new fight over who owns the Earth*. London: Transworld.
- Pittsburgh Pennsylvania Code of Ordinances. 2013. Code of Ordinances City of Pittsburgh Pennsylvania. Codified through Ordinance No. 12-2013, April 19, 2013. Available at <http://library.municode.com/index.aspx?clientID=13525&stateID=38&statename=Pennsylvania>, accessed February 16, 2015.
- Rauschnig, Dietrich, Katja Wiesbrock, and Martin Lailach (eds). 1997. *Key Resolutions of the United Nations General Assembly, 1946-1996*. Cambridge: Cambridge University Press.
- Resnik, Judith, Joshua Civin, and Joseph B. Frueh. 2008. Ratifying Kyoto at the Local Level: Sovereigntism, Federalism and Translocal Organizations of Government Actors (TOGAs). *Arizona Law Review* 50: 709-786.
- Schilling-Vacaflor, Almut. 2011. Bolivia's New Constitution: Towards Participatory Democracy and Political Pluralism. *European Review of Latin American and Caribbean Studies* 90: 3-22.

- Sheehan, Linda. 2012. Establishing Earth-based governance for the rights of the environment. In *Future Perfect: Rio +20 – United Nations Conference on Sustainable Development*, edited by Michele Witthaus, Cherie Rowlands and Jacqui Griffiths, 18-21. Available at <http://digital.tudor-rose.co.uk/future-perfect/#6>, accessed February 16, 2015.
- Soltani, Atossa. 2011. The Heart of the World: U'Wa perspectives on Mother Earth. In *The Rights of Nature: The Case for a Universal Declaration of the Rights of Mother Earth*, edited by Council of Canadians, Fundación Pachamama and Global Exchange. pp.36-8. San Francisco: Council of Canadians, Fundación Pachamama and Global Exchange.
- Stevenson, Hayley. 2013. Representing Green Radicalism: The limits of state-based representation in global climate governance. *Review of International Studies* August: 1-25.
- Stober, Spencer, 2010. Ecuador: Mother Nature's Utopia. *International Journal of Environmental, Cultural, Economic and Social Sustainability* 6(2): 229-239.
- Stone, Christopher D. 1972. Should Trees Have Standing? Towards Legal Rights for Natural Objects. *Southern California Law Review* 45: 450-501.
- Tuck, Richard. 2002. *Hobbes: A Very Short Introduction*. Oxford: Oxford University Press.
- Umzurike, U.O. 1983. The African Charter on Human and Peoples' Rights. *American Journal of International Law* 77(4): 902-912.
- United Nations. 1945. *Charter of the United Nations*, San Francisco: United Nations Available at <http://www.un.org/en/documents/charter/index.shtml>, accessed August 1, 2014.
- United Nations. 1949. UN General Assembly Resolution 375(IV). Available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/051/94/IMG/NR005194.pdf?OpenElement>, accessed August 1, 2014.
- United Nations. 1952. UN General Assembly Resolution 596(VI). Available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/068/51/IMG/NR006851.pdf?OpenElement>, accessed February 16, 2015.
- United Nations. 1970. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Available at <http://legal.un.org/avl/ha/dpilfrscun/dpilfrscun.html>, accessed February 16, 2015.
- United Nations. 1972. Stockholm Declaration on the Human Environment. Available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>, accessed February 16, 2015.
- United Nations. 1986. A/RES/41/128 Declaration on the Right to Development. Available at: <http://www.un.org/documents/ga/res/41/a41r128.htm>, October 9, 2013.
- United Nations. 1992a. Rio Declaration on Environment and Development. Available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>, accessed February 16, 2015.
- United Nations. 1992b. UN Framework Convention on Climate Change. Available at http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf, accessed February 16, 2015.
- United Nations. 2007. United Nations Declaration of the Rights of Indigenous Peoples. Available at http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf, accessed February 16, 2015.
- United Nations. 2009a. General Assembly GA/10823, Sixty-third General Assembly, General Assembly proclaims 22 April 'International Mother Earth Day', adopting by consensus Bolivian-led resolution, 22 April, press release.

- United Nations. 2009b. A/RES/63/278 Resolution adopted by the General Assembly on 22 April 2009, 63/278. International Mother Earth Day. Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/278&Lang=E, accessed February 16, 2015.
- United Nations. 2010. A/RES/64/292 Resolution adopted by the General Assembly on 28 July 2010, 64/292, The human right to water and sanitation. Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/292, accessed February 16, 2015.
- United Nations. 2011. A/66/302. Harmony with Nature: Report of the Secretary-General, 15 August. Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/66/302, accessed February 16, 2015.
- Villalba, Unai. 2013. *Buen Vivir vs Development: A paradigm shift in the Andes? Third World Quarterly* 34(8): 1427-1442.
- Ward, Tara. 2011. The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights within International Law. *Northwestern Journal of International Human Rights* 10(2): 54-84.
- Watts, Jonathan. 2013. Oil drilling to start in pristine Amazon as eco fund fails. *Guardian*, 17 August, 13.
- Weaver, Jace (ed.) 1996. *Defending Mother Earth: Native American Perspectives on Environmental Justice*. Maryknoll NY: Orbis Books.
- Weiler, T. 2001. *Metalclad v. Mexico: A Play in Three Parts. Journal of World Investment* 2(4): 685-711.

ABOUT THE AUTHOR

Dr. David Humphreys: Reader in Environmental Policy, Geography Discipline, Faculty of Social Sciences, The Open University, Milton Keynes, United Kingdom

The International Journal of Sustainability Policy and Practice is one of four thematically focused journals in the collection of journals that support the Sustainability knowledge community—its journals, book series, conference, and online community.

The International Journal of Sustainability Policy and Practice addresses sustainability agendas and the practices flowing from these in government, corporate, and community sectors.

In addition to traditional scholarly papers, this journal invites presentations of sustainability practices—including documentation of case studies and exegeses analyzing the effects of these practices.

The International Journal of Sustainability Policy and Practice is a peer-reviewed scholarly journal.

ISSN 2325-1166

