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Defending Rivers: Vilcabamba in the South of Ecuador

Is it possible to give “a legal voice” to a river? For several decades, different disciplines have been debating this possibility within a larger context: Could Nature have rights?

It was relatively easy to find a positive answer to this question in a number of environmental and animal ethics contributions, as well as from some legal scholarly perspectives.¹ But the idea of recognizing Nature as an entity holding legal rights or personality was not formally introduced to any legal system until the twenty-first century. In 2008, Ecuadorians amended their constitution and, in the Seventh Chapter, *Pachamama* (Mother Earth) was recognized as a legal entity. In a similar sense, the 2009 Constitution of Bolivia (as well as two national regulations in 2010 and in 2012) was amended to recognize the rights of Mother Earth.² In both cases, the idea of *buen vivir* or “good living”—living in harmony with Nature as its own entity (a simplified definition), epitomized by both the *quichua* expression *sumak kawsay*, and the *aymara* term *suma qamaña*³—was presented as a larger and alternative proposal to global capitalism. The environmental aspect of this proposal is connected with the understanding that Nature is itself a *subject*, concurrent with the heterogeneous indigenous worldviews present in the Andean region.

Translated into legal language: *Pachamama*, Mother Earth, has rights. Taken from the perspective of Jens Kersten’s contribution in the first part of this volume, these juridical experiences—which have since inspired several propositions in other countries, regions, and in the international legal arena—represent one of five possibilities of representing Nature within our contemporary juridical systems.

- 1 In the legal field, for example, the contributions from Christopher Stone (United States) and from Marie-Angèle Hermitte (France) are central. It is important to observe that, as early as the beginning of the twentieth century, jurists such as Rene Demogue (France) were also trying to argue that the idea of legal personhood is a technical concept not specifically related to humans beings, allowing one to consider the recognition of the rights of animals or enterprises, for example.
- 2 Universal Declaration of the Rights of Mother Earth, 2010, Bolivia; Framework Act on Mother Earth and Holistic Development to Live Well, 2012, Bolivia.
- 3 *Quichua* is the language of various indigenous populations in the Andean region of South America (Argentina, Bolivia, Chile, Colombia, Ecuador, and Peru). In Ecuador’s most recent constitutional reform, different expressions in *Quichua* can be observed as a manifestation of the recognition that Andean culture has played an active role in this reform. *Aymara* is the language of the Aymaras or Aimarás, an indigenous group that represents an important part of Bolivia’s population and that inhabits some regions in the north of Argentina and Chile, and in the south of Peru.

The River Has Rights to Its Natural Course

Nearly a decade after these initial transformations in Ecuador and Bolivia, scholars are starting to analyze case studies that show how the reforms can be implemented. From such case studies, newly available legal tools have been identified and described that can guide the process of recognizing and applying Rights of Nature. My focus is on the the judicial application of these newly available legal tools. In 2011, we observed the first case in which the Rights of Nature concept was applied: the right of a river to its natural course. In fact, the legal personhood attributed to *Pachamama* in Ecuadorian regulations gave rise to this particular event: it became possible to consider that a river has a “legal voice.”

In the Ecuadorian Loja Province, the natural course of a river situated in the southern region was stopped short and redirected by the expansion of a road providing access to the city of Vilcabamba. This special place is known throughout the world because it possesses a privileged climate, extraordinary biological diversity, and is also considered a sacred place: *Vilca* means sacred and *Bamba* means valley. The valley is situated 52 kilometers from Loja, the capital of Loja Province, at an altitude of 1,500 meters and is known as the “Valley of Longevity” because of its inhabitants’ long life spans. These special characteristics have encouraged people from other countries and other regions of Ecuador to retire there, resulting in important changes in the city’s way of life. Changing practices and use of the local landscape have already resulted in pollution and the divergence of cultural values between longer standing residents and newcomers. These rapid developments in Vilcabamba have made the issue of access routes to the valley increasingly relevant.

Within this context, the local state initiated a project to expand the Vilcabamba–Quinara road—surprisingly, without an environmental impact assessment. Since then, the natural course of the river has been diverted, excavation of materials begun, and stones have been deposited in the riverbed. It is possible to argue that the river is a natural resource that should be protected, or that its condition also affects our human right to a healthy environment. But, in this particular case, it became possible to affirm that the *river itself has the right* to its own natural course, according to the new Ecuadorian Constitution. This last point was central to the case put forward by the two inhabitants who decided to submit a judicial action to stop the road-building project. As a result, this—the first

case in the world to open jurisprudence on nature as a legal entity—was all about Rights of Nature. One of the main arguments in the judgment from the Penal Tribunal of Loja's Provincial Court, dated 30 March 2011, is the recognition of the constitutional Rights of Nature:

Our Constitution of the Republic, without precedent in the history of humanity, recognizes nature as a subject of rights. Article 71 affirms that: Nature, or *Pachamama*, 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, structure, functions, and evolutionary processes.⁴

These types of references within judicial arguments—along with others presented to the constitutional assembly in which Rights of Nature was debated and, finally, recognized—present innovative ways of applying the new constitutional guidelines about the rights of *Pachamama*. Moreover, the Vilcabamba River judgment illustrated the different perspectives that underline and inspire the environmental law, showing that it is possible for new applications of the law to complement traditional, established legal tools. The judgment referred specifically to the local state's failure to carry out an environmental impact assessment, which was one of the reasons the project was stopped. The state has since been forced to repair the damage generated by the initial stages of the road construction.

Interpreting Rights of Nature: Territories, Activities, and Knowledge Production

Since this judgement was passed, the Constitutional Court of Ecuador has made several other decisions that allow for a more comprehensive definition of Rights of Nature and what such recognition entails, particularly within a broader context. It has become apparent that other relevant issues still need to be addressed, such as how different communities and territories are distinguished and defined in the new constitution, as well as in existing environmental law. How should traditional settlements and cultures, protected places, be accounted for in comparison to more industrial human activities and places, when all are considered part of *Pachamama*? Identifying valuable spaces of

4 Criminal Division of the Provincial Court of Loja, Judgement no. 11121-2011-0010, 31 March 2011.

knowledge production (particularly those places in which scientific knowledge may not be prioritized) such as indigenous settlements, may prove an important focus. Assuming a basis for recognizing Rights of Nature can be established, a remaining challenge will revolve around how the juridical applications of the concept can be facilitated and implemented.

The definition of “territories” is a common conflict in—and an interesting aspect of—all cases of Rights of Nature recognition. If we examine environmental law, we can normally distinguish regulations for protected (“natural”) areas from those for urban and productive ones. But if *Pachamama* includes both humans and nonhuman beings, as the regulations in Ecuador and Bolivia suggest, is it possible that such distinctions between territories, as defined by existing environmental laws, can be upheld, and if so, how? A recent example from the Galápagos Islands demonstrates how the question of boundaries tentatively started to appear, albeit marginally, in judicial arguments. In this case study, an Ecuadorian resident who considered a law to be unconstitutional presented a judicial action to the courts.

This law, the Special Regime for Galápagos Islands, limits potential commercial, migratory, and tourism developments within the whole province of the Galápagos Islands and prevents non-residents from undertaking work in these areas. As one of the most popular tourist destinations in the Ecuadorian republic, the resident in question (and other Ecuadorians) considered this ruling to be a contradiction to his right to work and to migrate. The case is fundamentally complex because the territory defined under the Special Regime includes areas already used for commercial development, which continue to be developed to some extent by Galápagos residents. By designating a territory that includes both urban and protected spaces, with special laws for its environment as well as its inhabitants, the boundaries of “who can do what where” become blurred. According to the Ecuadorian resident, the Special Regime imposes restrictions upon certain people who, although governed by the same constitution, happen to live in or outside of a particular territory. It was up to the Constitutional Court to decide whether the regime was indeed unconstitutional and, in accordance with this, Rights of Nature appeared as a main argument in the 2012 decision. It was concluded that as long as there is a balance between Rights of Nature and human rights to work, migrate, and pursue livelihoods, then we can justify the formulation of special regimes like this one. In the official case report, there are many paragraphs explaining why this type of rec-

ognition is in fact crucial in deciding the constitutionality of special regimes that protect nature. Overriding the traditional definitions of boundaries with such regimes is a necessary way of advancing conservation actions. Indeed, among these paragraphs and in the final judgement, there is a particular reference: “Galápagos is not divided in[to] urban places and protected areas, the whole province is protected, not by parts.” “Galápagos is indivisible,” and so is *Pachamama*, according to Ecuador’s regulations.

This issue of territories highlights another critical concept regarding the interpretation of rights recognition: How do we prioritize human activities in the context of the rights of *Pachamama*, which itself includes humans? Especially when some of these activities are perceived to be in conflict with conservation practices or existing laws? This topic is highly relevant in most Latin American territories, in which the processing and management of natural resources constitutes a major part of their economies. (And, as debates about extractivism and other industrial activities assume a more prominent position in public discussions in these regions, related issues about who decides the costs of nature conservation and which groups of people should bear these costs, necessarily arise.) In those Latin American countries where enormous areas of land are used for agriculture (a practice that is unfortunately expanding with the use of genetically modified seeds), there are instances where the rules for protected areas restrict how indigenous people can use their land. It seems that one is entitled to live in an unrestricted way in unprotected, agricultural areas, yet there are limits on ancestral practices and ways of using nature—usually harmoniously—in protected areas. Considering that we (all humans), are a part of *Pachamama*, which debates do we still need to mobilize to recognize Rights of Nature effectively, and what are the juridical and institutional implications?

These two questions became startlingly prominent in two further cases brought to the Constitutional Court in Ecuador. The first case illustrated that the successful recognition of Rights of Nature depends on distinguishing spaces of knowledge production. The world of scientific research is largely considered to be the main stage for knowledge production, but it is not the only one, as the Bolivian and Ecuadorian constitutions, national plans, and regulations suggest. Given that living in harmony with nature (covered by the term “good living”) is one of the central features of the new constitution, it stands to reason that valuing and protecting the knowledge and cultural practices of indigenous peoples is of extreme importance, particularly where the

interests of different groups of humans come into conflict. In this first case, 70 families who worked collecting crabs in a mangrove swamp were displaced by the commercial prawn industry.⁵ An initial judicial verdict found that the industry was exercising their property rights and that the families living there could only continue working in 20 percent of the territory. The rest of the land would be designated for the prawn industry. The Constitutional Court later determined that it was necessary to review this decision, which had ignored several pertinent and necessary legal elements: namely, an anthropological report about how ancestral practices contributed to the preservation of the mangrove swamp, and the establishment of the relation between Rights of Nature recognition and ancestral rights and knowledge. The renewed consideration given to this case demonstrates how the recognition of Rights of Nature is slowly being integrated and applied in the existing legal framework, and how different groups of people, cultures, and knowledges, in different contexts, can be taken into consideration within *Pachamama*.

The second case indicates some of the legal implications of recognizing Rights of Nature, especially when they are poised against existing constitutional rights, such as those relating to work and commercial development. In this case, the courts initially found that a private industry exploiting prawns in a protected area was not committing an offence—a decision based on the constitutional rights to work and to develop industries. It was called up for revision because it was considered unconstitutional, owing to a failure to consider an argument for Rights of Nature. The Constitutional Court overturned the original decision. One important argument it raised in this judgement concerned Rights of Nature as a juridical innovation: it posited that we need to build a new conception about our activities that is in harmony with nature, and to strengthen those environmental laws that rely heavily on the standards of nature protection.⁶ By incorporating Rights of Nature arguments into the existing law, we allow for a better understanding of how activities can be carried out in harmony with Nature, and we give greater scope (and therefore force) to existing legal arguments.

5 Constitutional Court of Ecuador, Judgement no. 065-15-SEP-CC, 11 March 2011.

6 Constitutional Court of Ecuador, Judgement no. 166-15-SEP-CC, 20 May 2015.

Conclusion

Now that the protection of a river's rights, as the opening jurisprudence, is in dialogue with other decisions regarding Nature as a legal entity, we can start the process of evaluating and reconstructing the judicial interpretation and meaning of Rights of Nature recognition. We often hear that the legal field is like "another world," with its own language and sometimes seemingly abstract rules. And, in a sense, it is. But a different perspective is to consider that regulations are a translation of social demands and conflicts.

In the judicial actions and tribunal decisions described above, some aspects of positive law (human-made laws that deal with establishing specific rights for individuals or groups) have been taken into account, while others have been overshadowed. The concept and scope of Rights of Nature laws and discourse are being built by articulating Rights of Nature through the judicial decisions that uphold them and by issuing the arguments for Rights of Nature in the legal arena. Protecting and representing Nature in this way is not just about allowing Nature legal personhood, but putting Rights of Nature into action in the real world. Just like "sustainable development," "green economy," and other such phrases, the idea of Rights of Nature could easily become just another catchphrase wielded by politicians, activist, NGO's, and the like to justify all sorts of decisions. For that reason, it is important to pay attention to the slow construction of this legal framework, and remember that recognizing Rights of Nature always reflects and correlates with what is happening in the legal field and beyond it, in social, cultural, and environmental processes and transformations.

Further Reading:

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