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SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

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Joel Colón-Ríos
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Sir Geoffrey Palmer
Nicole Rogers
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Greg Severinsen
Linda Sheehan
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CONTENTS

SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

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NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

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COMMENT: THE RIGHTS OF NATURE AND THE NEW LATIN AMERICAN CONSTITUTIONALISM

Joel Colón-Ríos*

This comment was presented at the "New Thinking on Sustainability" conference held at Victoria University of Wellington in February 2014 in response to the keynote address from Linda Sheehan, "Implementing Rights of Nature Through Sustainability Bills of Rights".

I INTRODUCTION

Linda Sheehan identifies as the foundational flaw of modern environmental law its understanding of nature as separate from, and having the function of serving, human beings.[1] It is thus necessary, she argues, to transform environmental law in a way that promotes new relationships among communities and nature. That approach, she maintains, is already contained in the idea of rights. In the same way that human rights can serve to rebuild relationships between human beings, recognising nature's rights can help to rebuild a community's relationship with nature.

In this comment, I would like to explore some of the connections between the recognition of the rights of nature in some Latin American countries (namely Ecuador through the Constitution of 2008 and Bolivia through the *Law of Mother Earth* of 2010), and what has been identified by some authors as the New Latin American Constitutionalism (NLAC). I will argue that not only the legalisation of these rights mandates a fundamentally different relationship between human beings and their natural environment, but that it is strongly connected to more general developments in Latin American constitutional law.

II THE NEW LATIN AMERICAN CONSTITUTIONALISM

The NLAC is usually identified, and in a way defined, by the new wave of constitution-making that took place in Latin America at the end of the 20th century and at the beginning of the 21st. More

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1 Linda Sheehan "Implementing Rights of Nature Through Sustainability Bills of Rights" (2015) 13 NZJPIL 89.

specifically, it is exemplified by the constitutions of Venezuela, Ecuador and Bolivia, adopted in 1999, 2008 and 2009 respectively (the Colombian Constitution of 1991 could also be seen as the first manifestation of the NLAC). The NLAC can be said to have four main characteristics.[2] Firstly, it is based on the idea that constitutions should only be adopted through highly participatory procedures. Unlike most previous Latin American constitutions, these new constitutions were adopted by special constitution-making bodies elected for the specific purpose of adopting a constitution (which would come into force after being approved in a referendum). These processes were not perfect, but if one compares them with the ways in which constitutions used to be adopted in the region, they represent an important advance in terms of participatory democracy.[3] It is therefore not surprising that they contain mechanisms of constitutional change, like the sovereign constituent assembly convened by popular initiative, that do not exist in any other parts of the world.[4]

Secondly, the constitution-making bodies that drafted these constitutions (when compared to the previously prevailing approach, in which the activity of constitution-making was reserved to certain elites) were highly inclusive, allowing for the participation of groups that had been historically marginalised from the political process.[5] The most obvious example is the role played by indigenous groups in each of these processes, which was eventually reflected in the content of the constitutions that were adopted (the attribution of rights to nature in the Constitution of Ecuador being just one example).[6] Thirdly, the constitutions that emerged from these processes attempted to create a new set of economic relations. For example, they create new forms of property, attribute the state with a strong

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2 There is no unified view about the main elements of the NLAC. In this article, I identify a number of features that are similar (though not identical) to those identified by Rubén Martinez Dalmau as the "material elements common to the new Latin American constitutionalism"; Rubén Martínez Dalmau "El Nuevo Constitucionalismo Latinoamericano: Fundamentos para una Construcción Doctrinal" (2011) 9 Revista General de Derecho Público Comparado 1 at 20–24. See also Carlos Manuel Villabella Armengol "Constitución y Democracia el Nuevo Constitucionalismo Latinoamericano" (2010) 25 IUS: Revista del Instituto de Ciencias Jurídicas de Puebla 49; and Gerardo Pisarello, "El Nuevo Constitucionalismo Latinoamericano y la Constitución Venezolana de 1999: Balance de una Década" (2009) 6 Revista Sin Permiso 1.

3 For a discussion see Gabriel Negretto *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America* (Cambridge University Press, Cambridge, 2013); Gerardo Pisarello *Procesos Constituyentes: Caminos para la Ruptura Democrática* (Editorial Trotta, Madrid, 2014); Roberto Gargarella *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (Oxford University Press, Oxford, 2013).

4 I have considered these processes in some detail in Joel Colón-Ríos *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, London, 2012).

5 See for example David Landau "Constitution-Making Gone Wrong" (2013) 64 Ala L Rev 923; Renata Segura and Ana María Bejarano "*¡Ni una asamblea más sin nosotros!* Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes" (2004) 11 Constellations 217.

6 For a discussion see Eduardo Gudynas "Buen Vivir: Today's Tomorrow" (2011) 54 Development 441.

role in the economy and prohibit the privatisation of certain public services and industries.[7] Finally, they are characterised by extensive lists of rights, including collective rights (such as the right to development and the right to a healthy environment, which are also present in many other constitutions), as well as by mechanisms for their protection.[8]

III THE NATURE OF CONSTITUTIONS

In addition to these four features, there is something else that characterises the constitutions that are commonly associated with the NLAC. They all contain very strong statements in favour of nature and ecological diversity. For example, in its art 127, the Constitution of Venezuela attributes to the State the obligation of protecting "biological and genetic diversity", and in its very preamble, it establishes as one of the goals of the Venezuelan Republic the promotion of an "ecological balance".[9] This is a type of language that one can find in international declarations on the environment, but that is much less frequent in national constitutions.[10] The Bolivian Constitution contains similar statements, but also presents an interesting development. In fact, the Bolivian Constitution suggests that the very possibility of democratic political action and of participatory constitution-making, the very possibility of a *democratic constitutionalism*, depends on the community's relationship with nature. So in its preamble, the Constitution states that the people of Bolivia, thanks to the strength given to them by the *Pachamama*, came together to create a new constitutional order.[11]

That type of statement is interesting because it makes explicit the connections between the participatory conception of constitutional change in which the NLAC is based and the protection of nature; in other words, acts of democratic participation, including the popular exercise of the power to create or transform a constitution, can only take place if human beings are in a condition to engage in different forms of political action (and that presupposes the existence of a healthy environment, of

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7 For a discussion (focused on Ecuador), see Agustín Grijalva Jiménez *Constitucionalismo en Ecuador* (Centro de Estudios y Difusión del Derecho Constitucional, Quito, 2012) at 37–49.

8 See Jiménez, above n 7.

9 The full text in Spanish reads as follows: "Artículo 127. Es un derecho y un deber de cada generación proteger y mantener el ambiente en beneficio de sí misma y del mundo futuro. Toda persona tiene derecho individual y colectivamente a disfrutar de una vida y de un ambiente seguro, sano y ecológicamente equilibrado. El Estado protegerá el ambiente, la diversidad biológica, genética, los procesos ecológicos, los parques nacionales y monumentos naturales y demás áreas de especial importancia ecológica. El genoma de los seres vivos no podrá ser patentado, y la ley que se refiera a los principios bioéticos regulará la materia."

10 For a general discussion, see David Boyd *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, Vancouver, 2012).

11 The Spanish text reads as follows: "Cumpliendo el mandato de nuestros pueblos, con la fortaleza de nuestra Pachamama y gracias a Dios, refundamos Bolivia".

an ecological balance, of genetic diversity, and so on).[12] Of course, these constitutional developments reached their climax in 2008, with the Constitution of Ecuador's recognition of nature as a relevant constitutional category and the attribution to it of a number of rights.[13] As Sheehan explained, there are a number of provisions in that Constitution that are directly or indirectly related to the rights of nature; here I will only mention a few. The main substantive provision is art 71, which defines nature (or Pacha Mama), as the place "where life is reproduced and occurs", and attributes to it the "rights to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes".[14] It also states that "all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature".

If one looks at the Ecuadorian constitution more closely, it becomes clear that it does not merely affirm the rights of nature in an abstract way, but that it contains a systematic legal framework for the enforcement of those rights. For example, art 72 recognises nature's "right to be restored", specifying that this "restoration shall be independent from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems", and art 396 states: "In case of doubt about the environmental impact stemming from a deed or omission, even if there is no scientific evidence of the damage, the State shall adopt effective and timely measures of protection."[15] Giving additional force to art 71, art 83(6) establishes a duty on all Ecuadorian citizens to "respect the rights of nature, preserve a healthy environment and use natural resources rationally, sustainably, and durably". I will now briefly examine one of the cases in which the enforcement of the rights of nature has been at issue, which Sheehan mentioned in her article.

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12 I discuss this idea further in Joel I Colón-Ríos "Constituent Power, the Rights of Nature, and Universal Jurisdiction" (2014) 60 McGill LJ 127.

13 Similar to the Constitution of Bolivia, the Constitution of Ecuador states in its preamble that it was adopted by the people "celebrating nature, the Pacha Mama, of which we are a part of and which is vital to our existence". The Spanish text reads as follows: "Celebrando a la naturaleza, la Pacha Mama, de la que somos parte y que es vital para nuestra existencia".

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

15 I examine these provisions more closely in Joel Colón-Ríos "Notes on the Theory and Practice of the Rights of Nature: The Case of the Vilcabamba River" in Martin and others (eds) *In Search of Environmental Justice* (Edward Elgar, Cheltenham, 2015) 120.

IV THE RIGHTS OF NATURE IN ACTION: THE VILCABAMBA CASE

In 2008, the Provincial Government of Loja, as part of the works involved in the widening of a road, deposited large amounts of rocks and excavation materials in the Vilcabamba River. Not surprisingly, the river flow increased to unprecedented levels, and those living nearby were affected in different ways. Two US citizens residing in the area decided to file a protective action against the Provincial Government (*acción de protección*, a mechanism that has the purpose of remedying a violation of rights that has already occurred).[16] The claimants stated that they were presenting the action "in favour of nature, particularly in favour of the Vilcabamba River". The final judgment was rendered in 2011 by the Provincial Court of Loja.[17] Interestingly, the Court began by referring to what it called (following Alberto Acosta), a "democracy of the earth". The Court stated:[18]

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

The Court then stated that in this case, no one had questioned the basic fact that a road was being widened by the Provincial Government, and that as part of these works certain materials were being deposited in the Vilcabamba River. Applying the reverse burden of proof contained in art 397(1) of the Constitution,[19] the Court maintained that for an action in favour of the rights of nature to be successful it was not necessary for the plaintiffs to prove that the relevant environmental harm resulted from the actions of the defendant; on the contrary, it was the defendant, in this case the Provincial Government, which had the burden of proving that the activity of widening the road did not result in the alleged harm. The Court stated that, upon an inspection, a number of environmental harms were identified in the river and surrounding areas, and that the Provincial Government had not demonstrated

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16 The *acción de protección* is probably the most important mechanism provided by the Constitution of Ecuador for the protection of rights. Article 88 defines it as an action "aimed at ensuring the direct and efficient safeguard of the rights enshrined in the Constitution". The action is of a remedial character: its purpose is to remedy a violation of rights that has already occurred.

17 Juicio No: 11121-2011-0010.

18 These statements, originally published in the website of the National Constituent Assembly of Ecuador (29 February 2008) were then reproduced in *Peripecias* No 87 (5 March 2008).

19 Article 397(1) establishes that with respect to environmental harm "the burden of proof regarding the absence of potential or real danger shall lie with the operator of the activity or the defendant".

that those harms were not the result of its actions. Accordingly, it was determined that the actions of the Provincial Government resulted in a violation of nature's rights.

The Provincial Government was ordered to put in place a number of corrective actions directed at stopping the river's contamination. At the time of writing this comment, these orders have not been fully complied with. For example, although the Provincial Government partially cleaned the riverside it had not removed the excavation materials that were deposited in the river.[20] This partial and limited implementation of the judgment, however, does not necessarily mean that there is something fundamentally wrong with the constitutional recognition of the rights of nature. For example, partial non-implementation of judgments is a common theme in debates about social and economic rights, but that is not generally seen as a reason for rejecting the recognition of those rights.[21] Since the Vilcabamba Case, a number of actions based on the rights of nature have been filed, including an action against British Petroleum for the oil spill in the Gulf of Mexico (that case is particularly interesting since the Court is being asked to hear the case based on the principle of universal jurisdiction).[22]

V A NEW PARADIGM

Some people argue that attributing rights to nature makes little or no sense, and in a way they are undoubtedly correct. It is in a certain way nonsensical to say that something that lacks the ability to engage in rational action and moral deliberation (like a river, a mountain, a forest), or that is unable to project itself in the future and decide to act in certain ways, can have rights. But that would only be a reasonable assessment in the context of what we may call the traditional liberal constitutional paradigm. What we are seeing in countries like Ecuador is precisely a transition to a new paradigm which mandates a different way of conceiving the relationship between human beings and the natural environment. Now, constitutions are not to be seen merely as the result of an act of will of a group of human beings that has decided to create certain governmental structures and attribute each other with a number of rights, but as also creating duties toward non-human entities.

This emerging paradigm, even though it was partly made possible by the inclusive and participatory character of the New Latin American constitutionalism, goes beyond it; it sees the constitution not only as a means of realising social justice, economic redistribution or participatory democracy, but also, and perhaps principally, as a means of promoting a new type of relationship with

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20 As reported by the Pachamama Foundation upon a visit to the site in February 2012: Gabriela León Cobo "Vilcabamba River case law: 1 year after" (27 March 2012) Global Alliance for the Rights of Nature <www.therightsofnature.org>; and stated in Eleanor Wheeler "Acceso a la jurisdicción ambiental: el rol de la sociedad civil" (presentation to Universidad Andina Simón, Bolívar, 19 February 2013) published online by Centro Ecuatoriano de Derecho Ambiental.

21 For a discussion, see David Landau "The Reality of Social Rights Enforcement" (2012) 53(1) Harv Intl LJ 189.

22 I discuss the issues raised by this case in J Colón-Ríos, above n 12 at 11.

nature which would hopefully do away with what Sheehan called environmental law's foundational flaw. This relationship is heavily informed by Andean indigenous views under which rivers and mountains are conceived as living beings and attributed with interests of their own: interests in maintaining their own existence through time, interests in the existence of the life-systems that they help to sustain and interests in the protection of the conditions that allow for the reproduction and regeneration of those systems. The constitutionalisation of the rights of nature, of course, is a way of attempting to protect those interests.

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