

Case Note

THE ECUADORIAN EXEMPLAR: THE FIRST EVER VINDICATIONS OF CONSTITUTIONAL RIGHTS OF NATURE

The 'Sala de la Corte Provincial' – a provincial court in Ecuador – became the first court ever to vindicate the recently constitutionalized rights of nature. Recognizing the indisputable importance of the rights of nature for present and future generations, the court held the provincial government liable for flooding damages caused by dumping of construction debris. This judicial victory is arguably overshadowed by challenges facing the plaintiffs in seeing the court's order enforced, however. A subsequent case bears witness to the judiciary's vindication of rights of nature in Ecuador with ever increasing legal effect.

INTRODUCTION

Wheeler c. Director de la Procuraduría General Del Estado de Loja,¹ decided by a provincial court in Ecuador, was the first case in history to vindicate the constitutional rights of 'Pachamama' – often translated as 'Mother Nature'. The litigation resulted from the construction and expansion of a road in the mountains of southern Ecuador carried out by the provincial government. When the local authorities began works on the road, they had not carried out an environmental impact assessment, secured planning permits for the construction, or planned for the disposal of debris that would inevitably occur. The rocks, sand, gravel, trees and other debris from the excavation and construction were eventually dumped along the Rio Vilcabamba, narrowing its width and thereby quadrupling its flow. This caused significant erosion and flooding to the lands downriver when the spring rains came. When the provincial government began dumping anew, the landowners sued. Instead of pursuing the case on the basis of property rights, the plaintiffs invoked the recently constitutionalized rights of nature. Although the first petition was denied for failure to name the appropriate

parties, the provincial Court of Justice in Loja heard the case in March 2011.

This case represents the culmination of two recent constitutional changes in Ecuador. The most significant constitutional change occurred in 2010, when the Constitution was amended to recognize that nature has enforceable rights. In four extensive paragraphs, it spells out that: 'Nature, or Pachamama, where life is reproduced and created, has the right to integral respect for her existence, her maintenance and for the regeneration of her vital cycles, structure, functions and evolutionary processes.'² The section further confirms that this right is not merely hortatory in that it empowers each 'person, community, people or nationality'³ to exercise public authority to enforce the right, according to normal constitutional processes.⁴ Indeed, the constitutionalization of the rights of nature is part of a growing global movement recognizing the importance of the natural environment for its own sake and as a whole, rather than as an aggregation of resources to be harnessed by humans for various purposes.⁵ This idea has found resonance in Bolivia,⁶ in various municipalities in the United States,⁷ and in Turkey and Nepal, where discussions about constitutional reform are ongoing.⁸ Moreover, rights of nature have also been pursued at the international level.⁹

The other relevant constitutional change in Ecuador, which occurred in 2008, provided for an *acción de protección* – a form of action that aims to ensure 'the direct and efficient safeguard of the rights enshrined in the constitution'¹⁰ by removing procedural barriers, such as the traditional qualifications for standing and pleading formalities. In combination, these two recent constitutional amendments allow judicial protection of nature for the sake of nature itself and eliminate many of the procedural hurdles to enforcing such rights.

² Ecuador Constitution, Article 71 and Articles 72–74, found at <<http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>>.

³ *Ibid.*, Article 71.

⁴ *Ibid.*

⁵ See, e.g., 'Global Alliance for the Rights of Nature', found at <<http://www.rightsofnature.org>>, and 'Community Environmental Legal Defense Fund', found at <<http://www.celdf.org/rights-of-nature>>.

⁶ See <<http://www.guardian.co.uk/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>>.

⁷ See <<http://www.celdf.org/-1-27>>.

⁸ See <<http://therightsofnature.org/rights-of-nature-laws/turkey-ecological-constitution/>>.

⁹ See, e.g., 'The Universal Declaration of the Rights of Nature', found at <<http://www.celdf.org/-1-27>>.

¹⁰ *Wheeler*, n. 1 above.

¹ *Wheeler c. Director de la Procuraduría General Del Estado de Loja*, Juicio No. 11121-2011-0010 ('*Wheeler*'), found at <<http://blogs.law.widener.edu/envirolawblog/2011/07/12/ecuadorian-court-recognizes-constitutional-right-to-nature/>>. Translations from the original Spanish are the author's own.

WHEELER: SUBSTANTIVE PROTECTION FOR NATURE

The provincial court in *Wheeler* is the first court to give effect to the right of nature and in doing so, it acknowledged that this constitutional right, and implicitly also this action, is unprecedented 'in the history of humanity'.¹¹ The court explained: '[W]e cannot forget that injuries to Nature are "generational injuries" which are such that, in their magnitude have repercussions not only in the present generation but whose effects will also impact future generations.'¹² In support of this strong commitment to protecting the environment, the court quoted Alberto Acosta, President of the Constituent Assembly: 'The human being is a part of nature, and [we] must prohibit human beings from bringing about the extinction of other species or destroying the functioning of natural ecosystems.'¹³ The court recognized that if there were a conflict between the environment and other constitutional rights (which was not the case here), the rights of nature would prevail because, as the court stated, a 'healthy' environment is more important than any other right and affects more people.¹⁴ In other words, the court emphasized the need to protect the environment at all means necessary.

WHEELER: PROCEDURAL ASPECTS OF THE PROTECTION OF NATURE

In securing the constitutional rights of nature, *Wheeler* did not merely privilege environmental rights as a substantive matter but also found that procedural rules had to be adjusted to ensure the full vindication of these rights. In particular, the court concluded that the *acción de protección* is the 'only suitable and effective way' to end and remedy in an immediate way a specific harm to the environment, given the 'indisputable, elemental and irremediable importance of Nature and taking into account how notorious and evident is its process of degradation'.¹⁵ Finding that environmental damage may be based not on certitude but on possibilities and probabilities, the court also admitted probabilistic evidence to support the action.¹⁶ Moreover, the court confirmed that in cases involving the rights of nature, the burden of proof to show no damage is on the defendant. This, the court said, is in accordance with the practice in other Latin American countries, as well as in Europe, and is justified not only because the

defendant is usually in the best position to have information about the likelihood of damage, but also because it is the defendant who is asserting the inexistence of harm to the environment.¹⁷ Indeed, this is consistent with the explicit language of the Ecuadorian constitution, which states that 'the burden of proof on the inexistence of potential or actual damage rests with the person responsible for the activity (manager) or the defendant'.¹⁸ Here, the court invoked the precautionary principle, putting the responsibility, however, on the court itself: '[U]ntil it can be shown that there is no probability or danger to the environment of the kind of work that is being done in a specific place, it is the duty of constitutional judges to immediately guard and to give effect to the constitutional right of nature, doing what is necessary to avoid contamination or to remedy it.'¹⁹ Thus, the court invited all judges to follow its lead and take seriously the obligation of vigorously protecting the environment, pursuant to the recent constitutional innovations.

WHEELER: CHALLENGES OF ENFORCEMENT

Despite the unmitigated judicial victory in *Wheeler*, its enforcement has been disappointing. This is notwithstanding the court's sophisticated remedial model, which included a public apology of one-quarter page in a local daily newspaper and the presentation within thirty days of a Plan for Remediation and Rehabilitation for the affected areas in the Rio Vilcabamba and for the properties of the affected settlers. The court also ordered the defendants to adopt immediate actions to secure environmental permits, protect against oil spills or leakage into the river and the surrounding soils caused by machinery, clean up existing damage, implement a warning system to prevent future damage to the environment caused by the combustibility of the machinery, and find appropriate sites for the dumping of debris as the construction continues.²⁰ Moreover, the court ordered the Ecuadorian government to comply with the recommendations of the Sub-secretary of Environmental Quality of the Ministry of Environment and ordered the establishment of a committee composed of government officials to oversee the enforcement of the court's order. However, additional time, resources and continued persistence on the part of the plaintiffs is needed to ensure compliance with the court's order in this case. As of January 2012, the provincial government had not stopped the road construction, it had not complied with the court's order to clear the debris and it had not remedied the damage to the

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ecuador Constitution, n. 2 above, Article 397.1.

¹⁹ *Wheeler*, n. 1 above.

²⁰ Ibid.

riverbed. Even though the right has been judicially vindicated, supporters of the plaintiffs have been compelled to hire lawyers to pursue enforcement.²¹ Unfortunately, it seems that in many lawsuits seeking to vindicate environmental rights, it is as difficult to secure enforcement of remedial orders as it is to obtain the judicial victory in the first place.

RISE OF THE RIGHTS OF NATURE?

Immediately following the judgment in *Wheeler*, the rights of nature were again vindicated in another provincial courtroom in Ecuador in a dramatic case that pitted the rights of nature against property rights. This case, *República del Ecuador Asamblea Nacional, Comisión de la Biodiversidad y Recursos Naturales*,²² is unusual in several respects. First, it was the government that asserted the rights of nature against private property owners. Second, enforcement of the injunction on behalf of nature was swift and bold – presumably because the government supported the action. The proceedings of the case are as follows.

In March 2011, the Interior Minister of the national government of Ecuador sought an injunction against illegal gold mining operations in two remote districts in the north of the country: San Lorenzo and Eloy Alfaro. He argued that the illegal mining was polluting the Santiago, Bogotá, Ónzole and Cayapas rivers, thereby violating the rights of nature. Two months later, the Second Court of Criminal Guarantees of Pichincha issued the injunction ‘for the protection of the rights of nature and of the people’.²³ The court not only ordered the mining activities to cease, but further ordered that the ‘armed forces of Ecuador and the national police should collaborate to control the illegal mining [in the area] including by destroying all of the items, tools and other utensils [used in the mining activities] that constitute a grave danger to nature and that are found in the site where there is serious harm to the environment’.²⁴ Only two days later, a contingent of 580 military troops arrived at the mining areas in Los Ajos and San José de Cachaví, near San Lorenzo, and

destroyed, by the use of explosives, between 70 and 120 backhoes and other machinery belonging to the miners.²⁵ The government had argued that the destruction of the property was necessary because previous efforts to confiscate the mining materials had failed.²⁶

However, even some supporters of the enforcement of rights of nature questioned whether the judge should have proffered a fuller explanation to justify the complete subordination of the miners’ property rights to the rights of nature.²⁷ The national government ratified the action after a hearing in which all of the representatives from the region supported the military operation, describing ‘the dramatic and unhealthy situation that exists because of the mining contamination’.²⁸ Further illustrating the level of support for the rights of nature in all parts of the national government, the president of the national assembly also testified at the hearing about the importance of ‘prioritizing the rights of the people to life and to health above the economic interests of the owners of the destroyed machinery’.²⁹

The legal landscape for the protection of nature for its own sake looks very different elsewhere compared to Ecuador. Although many European countries have already constitutionalized environmental protection, none has constitutionalized the rights of nature. Under the European Convention on Human Rights, the European Court of Human Rights has indicated a strong commitment to environmental protection – for example, by stating that environmental concerns must prevail over other interests, including private property rights.³⁰ The European Union requires environmental protection to be ‘integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development’,³¹ also insisting that ‘Union policy on the environment shall aim at a high level of [environmental] protection’.³² Moreover, the Charter, which came into legal force with the Lisbon Treaty in 2009, requires that states integrate into their policies ‘[a] high level of environmental protection and the improvement of the quality of the environment . . . in accordance with the

²¹ Correspondence with Fundación Pachamama, on file with author.

²² *República del Ecuador Asamblea Nacional, Comisión de la Biodiversidad y Recursos Naturales*, Acta de Sesión No. 66 (15 June 2011) (*‘República del Ecuador Asamblea Nacional’*), found at <<http://asambleanacional.gov.ec/blogs/comision6/files/2011/07/acta-66.pdf>>. For an additional review of the judicial progressiveness in securing environmental rights in Ecuador, see P. Radden Keefe, ‘A Crusading Lawyer Helped Ecuadorians Secure a Huge Environmental Judgment against Chevron. But Did It Go Too Far?’, *The New Yorker* (9 January 2012).

²³ *Ibid.* I am very grateful to Professor John Bonine at the University of Oregon for information about this case.

²⁴ See, e.g., ‘Controversial Injunction for the Rights of Nature’, found at <http://pachamama.org.ec/2011/06/29/polemica-medida-cautelar-en-favor-de-los-derechos-de-la-naturaleza/#_ftn2,quoting>.

²⁵ *Ibid.* See also M. Melo and J. Auz, ‘Polémica Medida Cautelar en favor de los Derechos de la Naturaleza’, found at <<http://mariomelo.wordpress.com/2011/06/28/polemica-medida-cautelar-en-favor-de-los-derechos-de-la-naturaleza/>>.

²⁶ See ‘Operativo en áreas mineras ilegales, ayer en Esmeraldas’, *Hoy* (22 May 2011), found at <<http://www.hoy.com.ec/noticias-ecuador/operativo-en-areas-mineras-ilegales-ayer-en-esmeraldas-476589.html>>.

²⁷ See M. Melo and J. Auz, n. 25 above.

²⁸ See *República del Ecuador Asamblea Nacional*, n. 22 above.

²⁹ *Ibid.*

³⁰ See, e.g., ECHR 27 November 2007, *Hamer v. Belgium*, No. 21861/03.

³¹ Article 11, Consolidated Versions of the Treaty on the Functioning of the European Union (TFEU), [2008] OJ C115/49 (‘TFEU’).

³² Article 191.2, and more generally Articles 191–193 TFEU.

principle of sustainable development'.³³ It is not yet clear to what extent the Court of Justice of the European Union will enforce these environmental rights; however, nothing in Union law or the law of any Member State goes so far as to protect the rights of nature itself.

Courts in the United States have been even less committed to environmental protection for its own sake than Ecuador or even Europe, perhaps for reasons relating to the difficulty of enforcement and the fact that environmental protection often clashes with jobs-producing development projects.³⁴ In general, environmental protection has not been recognized at the national level as a constitutional or supra-constitutional value in any form, nor have United States courts accepted that the principle that environmental protection ought to prevail over other legal interests, such as property rights.³⁵

These Ecuadorian cases also go further procedurally in enabling vindication of environmental rights than most courts in Europe and in the United States. Without an explicit mandate for environmental protection in the European Convention on Human Rights, and given the wide margin of appreciation that is owed to national governments – particularly on matters relating to the management of the environment – the European Court of Human Rights is constrained by legal doctrines such as standing and pleading formalities in hearing environmental cases. Similarly in the EU, there is no indication

in the cases decided by the Court of Justice of the European Union that procedural rules are interpreted in such a way to accommodate environmental interests.³⁶ Likewise, the courts in the United States have declined to relax standing and other procedural requirements that would judicially accommodate claims based on environmental rights.³⁷

CONCLUDING REMARKS

The *Wheeler* case, along with the case against the illegal miners in Ecuador, demonstrates the ability of courts to promote environmental protection. Vindicating the rights of nature can be a much more effective method than the traditional public trust doctrine, which still prevails in the United States and elsewhere.³⁸ The public trust doctrine imposes an affirmative duty on the State to protect the environment as a collection of natural resources for public use. As such, it primarily protects the peoples' use of the environment – that is, their 'common heritage'³⁹ – but not the environment itself. Thus, it limits how the government can use natural resources but does not typically protect the resources themselves against human use or abuse. These two cases from Ecuador may prompt other courts to see the environment not from an anthropocentric perspective, but from the perspective of nature itself.

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³³ Article 37, Charter of Fundamental Rights of the European Union [2000] OJ C 364/01.

³⁴ O. Houck, 'Foreword: The Missing Constitution', in J. May, *Principles of Constitutional Environmental Law* (ABA/ELI, 2011), xxiii, at xxv.

³⁵ *Ibid.* ('The hostility of the Supreme Court, as a whole, to environmental issues is a matter of record.')

³⁶ The classic example is ECJ 2 April 1998, Case C-321/95, *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission*, [1998] ECR I-165.

³⁷ See, e.g., Supreme Court of the United States 12 June 1992, *Lujan v. Defenders of Wildlife*, 504 US 555 (1992).

³⁸ See, e.g., Supreme Court of India 13 December 1996, *M.C. Mehta v. Kamal Nath and Others* (1997) 1 SCC 388.

³⁹ Supreme Court of California 14 April 1983, *National Audubon Society v. Superior Court of Alpine County*, 33 Cal.3d 419 (1983).