



Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian lawsuits Succeed and Others Fail

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Summary. — In 2008, Ecuador became the world's first country to include rights of Nature (RoN) in its constitution. The constitution presents RoN as a tool for building a new form of sustainable development based on the Andean Indigenous concept *sumak kawsay* (*buen vivir* in Spanish), which is rooted in the idea of living in harmony with Nature. While much is written on the ethical arguments regarding RoN (and *buen vivir*), few studies analyze how RoN might be implemented. We fill this gap by explaining why some efforts to apply Ecuador's RoN laws succeeded while others failed. We compare 13 RoN lawsuits using an original framework for analyzing the pathways and strategies RoN advocates (and their opponents) use to build (and counter) momentum behind judicial processes meant to buttress the enforcement of contested RoN norms. The case descriptions and analysis draw on primary documents and in-depth interviews conducted during 2014–15. Through process tracing, we identified key structural conditions and strategic decisions shaping the outcomes in each case. Our findings as of 2016 reveal unexpected pathways of influence involving a symbiotic process among civil society, state agencies, and the courts. Surprisingly, civil society pressure was the least successful pathway, as activists lost high-profile lawsuits. Nevertheless, they facilitated judicial momentum by working on less-politicized local cases and training lower-level judges. Instrumental use of RoN laws by the state produced unintended consequences, including establishing precedent and educating judges. Knowledgeable judges are unilaterally applying RoN in their sentencing, even when neither claimants nor defendants allege RoN violations. Ecuador's cases demonstrate how “weak” RoN laws can strengthen, providing important insight into the global contestation over sustainable development and the strategies and legal tools being used to advance a post-neoliberal development agenda rooted in harmony with nature.

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1. INTRODUCTION

For nine years, environmental activists have celebrated Ecuador's audacious move to include rights of Nature (RoN) in its 2008 Constitution. Ecuador's constitution pledges to build a new form of sustainable development based on the Andean Indigenous concept of *sumak kawsay* (translated into Spanish as *buen vivir*), which is rooted in the idea of living in harmony with Nature (Chuji, 2014; Oviedo, 2014). The Preamble “celebrates” Nature (which it identifies as Pachamama) and presents a guiding principle for the new development approach: that humans are part of Nature, and thus Nature is a vital part of human existence.¹ Ecuador's constitution presents *buen vivir* as a set of rights for humans, communities, and Nature, and portrays RoN as a tool for achieving an alternative model of sustainable development that challenges dominant neoliberal approaches. While much is written on the ethical arguments regarding RoN (and *buen vivir*), few studies analyze how RoN might be implemented. We begin to fill this gap by analyzing the application of RoN in Ecuador, the world's first country to grant Nature constitutional rights. As the United Nations moves toward implementing a Post 2015 Sustainable Development Agenda, Ecuador's experience provides important insight into the global contestation over how sustainable development should be conceptualized and practiced, as well as the strategies and legal tools being used to advance a post-neoliberal development agenda.²

Ecuador's RoN provisions resulted from the activism of a diverse array of indigenous, environmental, and leftist organizations that ascribe different meanings to these concepts (Aidoo, Martin, & Ye, in press; Gudynas, 2015; Radcliffe,

2012).³ *Buen vivir* therefore represents a variety of discursive and practice-related “platforms” (Gudynas, 2011) for considering and practicing alternative visions of development. Consequently, its implementation has varied widely, from natural resource extraction in biologically sensitive protected areas in order to finance poverty reduction policies (e.g., Yasuni National Park), to supporting communities' and Nature's rights against agro-industry. By analyzing the dynamics of contestation surrounding the application of RoN in Ecuador, this article provides new insight into the struggles to construct post-neoliberal development within the global market system.

Contestation over RoN quickly escalated after the constitution's signing in 2008. These rights immediately conflicted with the Ecuadorian government's plans to expand large-scale mining and oil extraction to finance development projects. Numerous lawsuits were filed to protect Nature's rights, including from economic development projects. Given the State's plan to fuel economic growth through increased extractivism, including in fragile and protected ecological areas, Ecuador constitutes a “hard case” for implementing RoN. This article presents a conceptual framework for understanding the tools and pathways through which Ecuador's RoN are applied in

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practice and the reasons why these rights are upheld in some cases and not others.

Ecuador's experience is important because of its interaction with a global movement promoting RoN internationally as a means of changing the way sustainable development is conceptualized and practiced. No longer a fringe idea advocated only by a handful of radical activists and leftist governments, RoN has become more mainstream. This counter norm is expressed in venues as diverse as U.S. municipal ordinances, for example in Santa Monica and Pittsburgh (Sheehan, 2014), New Zealand's treaties with its Māori population (Iorns Magallanes, 2014; Ruru, 2014), Supreme Court decisions in India (Radhakrishnan, 2012), Pope Francis' 2015 encyclical *Laudato Si*; UN General Assembly resolutions (including the 2015 resolution A/RES/70/208 to develop RoN jurisprudence), and the 2015 Paris Climate Talks, where RoN was advocated as a tool for curtailing fossil fuel emissions. In 2012, the International Union for Conservation of Nature (IUCN) made RoN "the fundamental and absolute key element for planning, action and assessment... in all decisions taken with regard to IUCN's plans, programmes and projects" (IUCN, 2012, pp. 147–148). It and other organizations are part of a new global governance network dedicated to implementing RoN as a means for living in harmony with Nature.⁴

To facilitate their efforts, RoN advocates created a new international governing institution: the International Tribunal for the Rights of Nature. This "people's tribunal" investigates, tries, and decides cases involving alleged violations of the Universal Declaration of the Rights of Mother Earth, adopted at the 2010 World People's Conference on Climate Change and the Rights of Mother Earth in Bolivia.⁵ Proposed by Alberto Acosta, former President of Ecuador's Constituent Assembly, the idea was inspired by the International War Crimes Tribunal and the Permanent Peoples' Tribunal, established by citizens to investigate and publicize human rights violations.⁶ Just as these tribunals provided social pressure to create and strengthen international human rights law, the International Tribunal for the RoN is meant to foster international RoN law.

The above anecdotes show how RoN jurisprudence is simultaneously developing in Ecuador and internationally. We use the Ecuadorian case as a lens for analyzing the interaction between global and local governance. We document below the formation of a global RoN network, the ability of Ecuadorian and foreign members of this network to institutionalize RoN norms in the Ecuadorian constitution, and the international reverberations of Ecuador's pioneering RoN laws. In addition to its impact on strengthening RoN in international discourse and organizations, Ecuador's experience also has broader relevance because emerging norms are imbued with meaning through their application in specific cases. As the first country to apply RoN laws, Ecuador's experience is influencing global notions of what RoN norms look like in practice. Given Ecuador's influence on international RoN mobilization, we argue that explaining variation in the application of Ecuador's RoN laws has value for understanding the strategies, pathways, and processes through which emerging global counter-norms strengthen.

The literature on norm emergence and development emphasizes institutionalization as an important mechanism (Finnemore & Sikkink, 1998, p. 900), and many studies examine how new norms get institutionalized in domestic and international laws (Carpenter, 2007; Risse, Ropp, & Sikkink, 1999; Sikkink, 2011). However, in the early stages of a norm's life cycle, when the norm is highly contested, laws often are not applied in ways that support the norm. For example, the

adoption of human rights laws cannot fully explain the pattern of human rights prosecutions. The effects of human rights laws are conditional on bottom-up legal mobilization over time (Dancy & Michel, 2015, p. 1). Yet, few studies examine the pathways and strategies norm entrepreneurs/advocates (and their opponents) use to build (and counter) momentum behind judicial processes meant to buttress the enforcement of emerging counter-norms.⁷ To fill this gap, we analyze the tools and pathways through which Ecuador's RoN are applied in practice and the reasons why these rights are upheld in some cases and not others.

We describe below four legal tools used to implement RoN and then compare 13 attempts to apply these tools through one of four pathways: (1) norm-driven civil society pressure, (2) instrumental government action, (3) bureaucratic institutionalization, and (4) professional interpretation by judges. We use this framework to explore several questions with global ramifications. Given that Ecuador's constitutional RoN have not eliminated new large-scale extractive projects, do they still matter, and if so, how? And what lessons does Ecuador's experience have for those working to implement RoN legislation in other countries and in international fora?

Our findings, based on case analysis from 2008 to 2016, reveal some unexpected pathways of influence and suggest that the pathways channeling efforts to apply RoN influence the prospects for success. Contrary to our expectations (based on the norms literature), civil society pressure was the least successful pathway. RoN activists faced two main obstacles: (1) the politicization that inevitably occurs around norm contests, and (2) judges' lack of knowledge about how to interpret RoN. Activists lost high-profile lawsuits. They succeeded only by working "below the radar" (Gash, 2015) on un-politicized local cases and training lower-level judges.

We argue, however, that highly politicized civil society pressure outside the courts contributed indirectly to judicial momentum. Anti-mining activists used Ecuador's RoN laws as a tool for mobilizing society and shaming the government. As a result, the government invoked RoN to justify and legitimize its development agenda. While the state often invoked RoN instrumentally (producing hypocritical positions), the result was to build precedent and raise awareness of RoN among judges. Judges knowledgeable about RoN are unilaterally applying RoN in their sentencing, even in cases where neither claimants nor defendants invoke RoN. One of our most interesting findings, which we explore below, is that RoN jurisprudence is being developed in Ecuador by judges, not because they are RoN advocates, but because they feel a professional responsibility to interpret and apply the law in its entirety. We argue that the Ecuadorian cases demonstrate the power of "weak laws"—legal provisions adopted by governments as "cheap talk" because they see little cost and have no intention of enforcing them (Snyder & Vinjamuri, 2004). Ecuador's constitutional RoN articles do matter in the sense that RoN activists are using them as tools to strengthen RoN jurisprudence and norms in a way that are having real impacts.

2. GLOBAL FOUNDATIONS OF THE RIGHTS OF NATURE MOVEMENT

The idea of RoN has roots in both Western and non-Western thinking, and has been expressed by writers from every continent. A common thread uniting these various traditions is the need to see humans as part of Nature, rather than separate and apart. As U.S. RoN scholar Thomas Berry argued, "the

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