

ARTÍCULO DE INVESTIGACIÓN

In the Name of Anthills and Beehives: An inquiry into the concept of rights of nature and its reasoning

En el nombre de hormigueros y colmenas: Una investigación sobre el concepto de los derechos de la naturaleza y su razonamiento

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ABSTRACT In this paper, I first investigate rights of nature legislation in Ecuador and Bolivia, namely the Constitution of the Republic of Ecuador 2008, Bolivia Law of the Rights of Mother Earth 2010, and the Framework Law of Mother Earth and Integral Development for Living Well 2012. I apply a two-pronged analytical approach to these legal texts, which investigates the characteristics of such rights and the logic of the supporting reasoning. By reading into the legal texts, I argue that: (a) the characteristic of rights of nature as codified in these legislation is human (fundamental) rights; and (b) the main reasoning to support such right-status is spiritual reasoning that is largely based on the indigenous cosmovision. I then turn to some iconic declarations on human rights and natural rights theories, which shows the concept of “human rights” is almost impenetrable when it comes to the idea of “human”. I conclude this paper by indicating that in order to give rights of nature a solid ground in our current legal systems, we have to rethink the ground of human rights.

KEYWORDS Human rights; indigenous cosmovision; rights of nature.

RESUMEN En este artículo, doy cuenta en primer lugar de la legislación sobre derechos de la naturaleza en Ecuador y Bolivia, a saber, la Constitución de la República del Ecuador de 2008, y las leyes de derechos de la Madre Tierra de 2010 y la ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien de 2012 en Bolivia. Se aplicó un doble enfoque analítico a estos textos jurídicos, con el propósito de investigar las características de tales derechos y la lógica de razonamiento que los apoya.

Como resultado del doble análisis realizado, en segundo lugar, sostengo que: (a) lo que caracteriza la codificación de los derechos de la naturaleza en estos textos jurídicos son los derechos humanos (fundamentales); y que (b) el principal razonamiento para apoyar dicho estatus de derechos es uno de tipo espiritual basado en gran medida en la cosmovisión indígena. En tercer lugar, presento algunas declaraciones icónicas sobre los derechos humanos y las teorías de los derechos naturales, que muestran que el concepto de "derechos humanos" es casi impenetrable cuando se trata de la idea de lo "humano". Concluyo este artículo indicando que para dar a los derechos de la naturaleza una base sólida en nuestros sistemas legales actuales, tenemos que repensar la base de los derechos humanos.

PALABRAS CLAVE Derechos humanos; indígenas cosmovisión; derechos de la naturaleza.

Introduction

This paper is an attempt to study arguably one of the most important developments in the current legal discourses: That is giving nature or natural objects rights. The fact that several countries in South America and Oceania have already put this idea into national legislation suggests that rights of nature may become one of the fundamental legal values in the near future¹.

However, this new and fast-expanding legal enterprise faces many challenges from both theoretical and practical perspectives. For instance, the Indian Supreme Court has suspended the highly praised Uttarakhand High Court decisions (No. 126 of 2014, 20 March 2017), which granted the rivers Ganga and Yamuna legal personality and fundamental rights. According to the Indian Supreme Court, the order is, among others, beyond the jurisdiction of the Uttarakhand High Court (No(s). 016879/2017). As I have argued elsewhere (Wu, 2017), this Supreme Court's decision might have a more solid legal ground than the well-praised Uttarakhand High Court's original order. This invokes the question: on what ground do we give nature rights?

1. By the time of writing, for the national level legislation on rights of nature, there are: Constitution of the Republic of Ecuador 2008, Bolivia Law of the Rights of Mother Earth 2010, and the Framework Law of Mother Earth and Integral Development for Living Well 2012, New Zealand Te Urewera Act 2014 and Te Awa Tupua Act 2017. As for the legislation concerning rights of nature that is at a sub-national level, there are, for instance, 2006 Tamaqua Borough in Pennsylvania, which is the first in the world to legitimise rights of nature. For court rulings, in 2016, Colombia's Constitutional Court ruled that the Rio Atrato possesses rights to "protection, conservation, maintenance, and restoration," and established joint guardianship for the river shared by indigenous people and the national government. In 2017, Indian Uttarakhand's high court issued an order giving rivers Ganga and Yamuna fundamental rights and legal personality, which, however, is currently suspended by the Indian Supreme Court.

In order to answer this question, in this paper, I apply a two-pronged analytical approach to the national legislation regarding rights of nature in Ecuador and Bolivia. The reasons to focus on these two countries are not only that they are the first countries in the world passed rights of nature legislation on a national level, but that they also have a similar historical, political, and cultural background regarding legitimising rights of nature, which makes the analysis representative and concise. The two-pronged analytical approach investigates: (a) the *characteristics* of rights of nature, and (b) the *reasoning* that supports these rights. I will argue respectively that: the characteristics of rights of nature are similar to fundamental rights; the main reasoning to support such rights status is indigenous spiritual reasoning. I then investigate the ground for granting human rights in the current legal systems by turning to some iconic human rights declarations and natural rights theories, which poses challenges as well as gives inspirations in terms of bestowing nature fundamental rights. I conclude this paper by indicating that in order to give rights of nature a solid legal ground, we need to rethink the foundations of human rights as well.

Status of the debate and the scope of the current discussion

So far, legal research on rights of nature can be categorised into four approaches: legal personality, legal practice, constitutionalism, and ecocentrism. Legal personality approach positions rights of nature as an operative legal term with little normative connotation (see, e.g. Boyed, 2017; O'Donnell & Talbot-Jones, 2018; Stone, 1972, 2010). Legal practice approach focuses on environmental legal practice, especially on court cases that invoke rights of nature. (see, e.g. Kauffman & Martin, 2016; O'Donnell & Talbot-Jones, 2018; Pecharroman, 2018). Constitutionalism approach puts rights of nature legislation against the background of constitutionalism, usually focusing on the environmental clause of a Constitution (see, e.g. Kotzé & Calzadilla, 2017; Kotzé, 2016). Ecocentrism approach contrasts eco-centric with anthropocentric legal systems, arguing in favour of the former over the latter (see, e.g. Borràs, 2016; Gear, 2015; Knauß, 2018). Legal personality and practice approaches focus on the application of the law, whereas constitutionalism and ecocentrism approaches take a more conceptual route. From another perspective, legal personality and constitutionalism discuss the characteristics of rights of nature, whereas legal practice and ecocentrism analyse their legal impact (Table 1).

Table 1. Four approaches to rights of nature legal research.

| | The Characteristics of Rights of Nature | The Impact of the Legislation |
|-----------|---|-------------------------------|
| Practical | Legal Personality Approach | Legal Practice Approach |
| Normative | Constitutionalism Approach | Ecocentrism Approach |

In this article, I focus on one question: what does it mean by giving nature rights in the current legal orders, which are predominantly anthropocentric? Therefore, commenting on the normative battles and consequently siding with one group, although a tempting invitation, is not the concern of this article. This restraint of normative ambition is a trade-off for making the following investigation possible: what are the theoretical obstacles that hamper the implant of rights of nature in the current legal systems? What could we do about it here and now?

Rights of nature legislation in Ecuador and Bolivia

In this part, I first compare rights of nature as codified in the Ecuador and Bolivia national legislation to the characteristics of fundamental rights. I then look into the main reasoning that supports such rights. Both sections are directly based on the relevant legal texts. In the last section of this part, I go beyond the legal texts and introduce the constitutional debates (or judicial background) behind these legislation to see whether the intention of the texts indeed coincides with the meaning of the texts.

Rights of nature as fundamental rights

To compare rights of nature with fundamental rights, we first need to understand what fundamental rights are. To answer this question, without digging into the rich discussion of fundamental rights, I use the definition from the Universal Declaration of Human Rights (UDHR)², in which human rights³ are defined as universal, inalienable, and indivisible. It is universal and inalienable because “[a]ll human beings are born free and equal in dignity and rights” (Art. 1); whereas it is also indivisible in the sense that human rights are inherent to every human being and therefore cannot be positioned in a hierarchical order. Thus, I will use these three characteristics as the criteria to determine whether rights of nature in the national legislation of Ecuador and Bolivia live up to such standard.

2. The reason I use this definition is that UDHR is the document that has universal value and endorsement.

3. In this article, I use “fundamental rights” and “human rights” interchangeably, for “[t]he term fundamental rights is used in a constitutional context whereas the term ‘human rights’ is used in international law. The two terms refer largely to the same substance.” *European Union Agency for Fundamental Rights* <https://fra.europa.eu/en/joinedup/about/what-are-fr> (The websites cited in this article were last accessed on 16 May 2020).

It is noted that a fundamental rights holder does not necessarily entitle a legal personhood, whereas a legal person most likely does not enjoy fundamental rights. Therefore, this article should be separated from the scholarly discussion on nature's legal personhood. A legal personhood is a legal operative status whose primary function is to assign rights and duties under a given legal system (Smith, 1928). Hence, fundamental human rights denote a normative status of the rights holders, whereas a legal person status connotes a legal capacity. They are, therefore, categorically different. While the debate on the relationship between fundamental rights and legal personhood is beyond the scope of the article, it suffices to say that the tests for determining whether rights of nature as codified in Ecuador and Bolivia legislation are fundamental rights or a legal personhood need to be done separately. This article will only conduct the test for fundamental rights.

Rights of nature in 2008 Ecuador Constitution

In 2008, Ecuador reformed its Constitution, including the codification of rights of nature, which makes it the first country in the world recognises rights of nature in its Constitution. The Constitution first indicates that “[n]ature shall be the subject of those rights that the Constitution recognizes for it” (Art. 10). Therefore, it recognises nature as a rights-holder without any precondition, which satisfies “universal” and “inalienable” characteristics. The specific rights that nature is subject to are further listed under Chapter Seven from Article 71 to 74. In general, it includes the right to exist and be defended (Art. 71); the right to restoration, without ignoring the rights of communities to integral reparations (Art. 72); the right to precaution and the application of restrictions (Art. 73); the right not to be commodified and to allow human and community activities within the framework of *sumak kawsay* (Art. 74). The content of rights concerns the existence, maintenance, and regeneration of nature as a whole, hence “indivisible”.

Rights of nature legislation in Bolivia

Right after Ecuador amended its Constitution, in 2010, Bolivia passed the Law of the Rights of Mother Earth (hereinafter referred to Law 071). Its single objective is “to recognize Mother Earth as a political subject enshrined with ... rights” (See <http://www.lse.ac.uk/GranthamInstitute/law/the-rights-of-mother-earth-law>). In 2012, Bolivia passed The Framework Law of Mother Earth and Integral Development for Living Well (hereinafter referred to Law 300), as a successor and an expanded version of Law 071.

In Law 071, Bolivia declares that Mother Earth takes on the character of collective public interests and entitles it right to life, to bio-diversity, to water, to clean air, to equilibrium, to restoration, and to free from pollution (Art.7). Herein, to recognise Mother Earth as a subject as a whole is to take it as a subject that entitles universal and inalienable rights; whereas all the rights listed above demonstrate an indivisible nature. Furthermore, it states that “[t]he exercise of individual rights is limited by the exercise of collective rights in the living systems of Mother Earth. Any conflict of rights must be resolved in ways that do not irreversibly affect the functionality of living systems” (Art. 6). Therefore, not only rights of nature are considered as fundamental rights under Law 071, they also have a “trump” position⁴—not only over other legal rights, but over individual (human) rights. This is a big step departing from the anthropocentric legal order and towards an eco-centric one.

However, in Law 300, such progressive position is toned down. Although Law 300 confirms the positive rights that are given to nature as established in Law 071, it also emphasizes the rights of the indigenous originary farmer nations and people and the intercultural and Afro-Bolivian communities (Art. 9 (2)), “the civil, political, social, economic and cultural rights of the Bolivian people for Living Well through integral development” (Art. 9(3)), and “[t]he rights of the rural and urban population to live in a fair, equitable and solidary society” (Art. 9 (4)). Therefore, it shows a more “human/society-centred” approach than the “Mother Earth-centred” approach as in Law 071.

Although there is undeniable continuity between Law 071 and Law 300 and a confirmed guarantee for rights of nature in both laws, it is seen that in Law 300, the central ideal is shifted towards Living Well and integral development, instead of the rights-status of Mother Earth. It thus creates the possibility to balance the rights of Mother Earth with other goals such as Living Well and integral development. In this sense, Law 300 steps back from the eco-centric characteristics of Law 071 and stays in the anthropocentric logic. Nonetheless, this does not mean that under Law 300, rights of nature are not considered fundamental. Contrarily, just like human rights can be balanced against other human rights, rights of nature may also be balanced against human rights or other fundamental legal reasoning. Therefore, although Law 300 put an anchor in the anthropocentric legal system, the “universal, inalienable, and indivisible” characteristics of rights of nature remain.

On what ground?

There are common principles that come across both countries’ rights of nature legislation, which are all based on the indigenous cosmivision in the said country. The

4. “Trump position” is understood in the Dworkinian sense. Dworkin (1984).

most salient principles include: a) Pachamama (Mother Earth), b) Sumak Kawsay (Living in harmony with nature), and c) Vivir Bien (Living Well)⁵.

Specifically, although Pachamama literally translated as Mother Earth, both countries' legislation speaks of Pachamama as synonymous of nature (Sólon, 2018, p. 121). Pachamama having rights is equal to nature having rights. This understanding may be derived from the indigenous spiritual understanding that nature (Earth) has the higher spirit that human as part of the universal scheme resides.

Sumak kawsay and vivir bien are two phrases that closely linked with each other. Sumak kawsay is an ancient Kichwa word, which means to live in harmony within communities, ourselves, and most importantly, with nature. The sumak kawsay way of living has permeated indigenous cultures for thousands of years, which is "embedded in the ethical values of indigenous cultures" (<https://www.pachamama.org/sumak-kawsay>). "Vivir Bien"— good living or living in harmony with nature—is also an idea that is deeply rooted in the indigenous philosophies, which affirms the need to live in harmony with Mother Earth and in equilibrium with all forms of life (Calzadilla & Kotzé, 2018, p. 403). Therefore, both concepts are based on indigenous culture and have a spiritual connotation.

These three phrases form the main reasoning supporting rights of nature in the legislation, which could be seen from their appearance in the legal texts. First of all, in both countries' legislation, Pachamama, being used interchangeably with "nature", is the subject of rights. In the Preamble of the Ecuador Constitution 2008, it is said that: "[c]elebrating nature, the Pacha Mama, of which we are a part and which is vital to our existence..." In Chapter Seven, where rights of nature are codified, it starts with the expression "[n]ature, or Pacha Mama, where life is reproduced and occurs, has the right..." (Art. 71). As for Bolivia, "mother earth" is in the title of both legislation: (i) Law 071 of the Rights of Mother Earth of 2010 (*Ley 071 de Derechos de la Madre Tierra*) and Framework Law 300 of Mother Earth and Integral Development for Living Well of 2012 (*Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien*). Similar to the legislation in Ecuador, "mother earth" is also the subject of the rights in both Law 071 and Law 300.

For sumak kawsay and buen vivir, in the Preamble of the Ecuador Constitution, it states "[h]ereby decide to build: A new form of public coexistence in diversity and in harmony with nature, to achieve the good way of living, the sumak kawsay." This is further confirmed in Section Two (Healthy Environment), where the rights of the population to have the "good way of living (sumak kawsay), is recognised" (Art.14). In the rest of the Constitution, sumak kawsay is also said to be guaranteed for the Amazon territory (Art. 250) and the underpinning of the overall development structure of the country (Art. 275). For Bolivia, before the two legislation, the 2009 Bolivia

5. The specific spell of each word may vary in different indigenous communities.

Constitution had already put to recognise ancestral principles, “especially those that underpin the Aymara culture, such as Vivir Bien or Suma Qamaña (living well)”, as “one of the ethical and structural principles of the state” (Calzadilla & Kotzé, 2018, p. 403). These two phrases were followingly invoked in the first Articles of both Law 071 and Law 300.

In sum, these three concepts and their corollary are all “based on the indigenous cosmivision” that “signifies living in complementarity, harmony and balance with Mother Earth and societies, in equality and solidarity and eliminating inequalities and forms of domination” (<https://thereddesk.org/countries/laws/law-300-framework-law-mother-earth-and-holistic-development-living-well>). These concepts are permeated in both countries’ rights of nature legislation and function as the main supporting arguments for granting nature fundamental rights. Moreover, these indigenous concepts are also seen as the alternative to the Western capitalism and neo-liberal way of development, which are mostly represented as the exploitative economy (Borros, 2017; Calzadilla & Kotzé, 2018; Gudynas, 2013). In this sense, these indigenous spiritual concepts function as a resistance to the anthropocentric explorative economy and development by grounding nature in law against human aggression.

Nevertheless, supporting rights of nature with indigenous cosmivision is not as novel as one may incline to think. In fact, as elaborated later in this article, the original rhetoric and arguments for supporting human rights are also religious. After all, spiritual reasoning may be the only reasoning that is ontologically strong enough to bestow fundamental rights. Therefore, the spiritual reasoning used in the above legislation is another proof that rights of nature are comparable to fundamental rights.

Constitutional debate on rights of nature

This section dives into the constitutional debates and legislation background. It demonstrates that indigenous cosmivision is not only the rhetorical but epistemological and even ontological support for legitimising rights of nature. More importantly, the link between the law and the indigenous culture is not only a speculation from reading the legal text but can be proved by the political and ideological influence of the indigenous communities in both countries during the legislating process.

Constitutional debate on rights of nature in Ecuador

In 2006, Rafael Correa was elected president in Ecuador after a decade of political instability⁶. During the election, Correa has been seen as a figure “with high popula-

6. From 1996 to 2006, there were nine presidents in Ecuador for a decade. <http://www.rulers.org/rule.html#ecuador>.

urity among the indigenous and the poor” (Tanasescu, 2013, p. 846). In fact, since the early 1990s, the indigenous movement with its organisation Confederation of Indigenous Nationalities of Ecuador (CONAIE) and its political arm—Pachakutik, has been a decisive electoral and political force. Therefore, it’s not surprising that indigenous communities continued their influence in drafting the 2008 Ecuador Constitution two years after the election.

Although the indigenous representatives in the Constitutional Assembly were small, their influence was decisive (Tanasescu, 2013, p. 947). During the assembly, the first extensive debate on the rights of nature appeared in the official transcription for 29th April 2008. The transcription shows that the chair of the day was Alberto Acosta. Acosta was the President of Ecuador’s Constitutional Assembly and the lead architect of the 2008 Constitution. He is also a visionary, environmentalist, and economist who is eager to look for an alternative development approach for Ecuador. The 29th April debate on the rights of nature was under Roundtable 5 on natural resources and biodiversity. This roundtable was chaired by indigenous leader Mónica Chuji. However, during Roundtable 5, it was observed that the voice to support constitutionalising rights of nature was not strong enough to pass such motion. Acosta, therefore, moved this motion to Roundtable 1 under the theme Fundamental Rights (Tanasescu, 2013, p. 851). This move again proved the innate connection between rights of nature and fundamental rights.

Another element that needs to be taken into account during the debate was that in late April, indigenous groups had lost their battle on rights to consent (which was only represented as rights to consultation in the Constitution). Rights of nature, therefore, became an important venue for indigenous groups to restrain the State’s power upon natural resources and aggression towards indigenous communities and their tradition.

Therefore, there is an apparent indigenous influence behind the agenda of rights of nature in the 2008 Ecuador Constitution. Such influence could be summarised as: rights of nature have their intellectual origins in the indigenous cosmovision⁷. According to an interview with Mari Margil (then associate director of the Community Environmental Legal Defense Fund (CELDF)), during the national assembly, the indigenous representatives had talked about rights of nature as strengthening collective rights (Tanasescu, 2013, p. 853). Such position only makes sense if one adopts the

7. “...by a majority of those I interviewed that the rights of nature have their intellectual origin in indigenous tradition” (Tanasescu, 2013, p. 847). Nevertheless, it is important to point out that Tanasescu stated in his informative article that the Constitution is more a product of the political and economic resistance to the Western way of development than following the indigenous footsteps. However, I view these two positions cannot do without each other in this context.

indigenous cosmovision to take nature as “one of us” and resists the Western modern dualism in terms of “us” (human) versus “other” (nature). Finally, such a standpoint further makes rights of nature an alternative approach to the capitalism and neo-liberal development approach. In this sense, in Ecuador, rights of nature are indeed an indigenous resistance to the anthropocentric legal and political systems.

Legal and political background of rights of nature legislation in Bolivia

In Bolivia, the political background is different yet still similar to Ecuador in terms of indigenous influence permeating the rights of nature legislation.

Before the two rights of nature legislation, Bolivia passed a new Constitution under its first indigenous President Evo Morales. The call for the establishment of a Constitutional Assembly essentially arose from a coalition of the largest indigenous and peasant organisations in Bolivia, which in 2004 formed the so-called Unity Pact (Pacto de Unidad) with the objective of ensuring their full participation in the constitutional drafting process and in the future governance of the country (Calzadilla & Kotzé, 2018, p. 400). As a result, although there are no explicit rights of nature mentioned in the 2009 Bolivia Constitution, there is an expression on the protection of mother earth and a recognition of ancestral principles, especially those that underpin the Aymara culture, such as *Vivir Bien* and *Suma Qamaña* (Calzadilla & Kotzé, 2018, p. 400).

On the other hand, there was an increasing frustration regarding Morales’ government policies among indigenous groups after the 2006 election. Nevertheless, it was said that a soon reached consensus between the legislators and the social movements made a solid ground for eventually passing Law 071 (See <https://therightsofnature.org/bolivia-law-of-mother-earth>).

However, two years later, Law 300 falls far behind the expectation of the indigenous communities in answering their requests for protecting mother earth via rights of nature. In fact, after Law 300 passed, the country’s two leading indigenous federations CONAMAQ and CIDOB (representing highland and lowland indigenous groups respectively) have disassociated themselves from the Mother Earth law, which they view as betraying the principles of *vivir bien* and the original declaratory legislation. The new law, CONAMAQ argues, is about legitimising Morales government’s developmentalist agenda, not about rethinking the extractivist model or transitioning towards the alternative, more ecological, model of development (<https://nacla.org/blog/2012/11/16/earth-first-bolivia%25E2%2580%2599s-mother-earth-law-meets-neo-extractivist-economy>). This disassociation with Law 300 is a powerful demonstration that indigenous communities claim authorship of their cosmovision, which they may or may not grant the State to use as the source for legislating State law.

However, such disassociation does not show retrospectively in Law 300 as the indigenous cosmovision is kept in the legal text.

In sum, with its first indigenous president elected in 2006, indigenous communities in Bolivia have put their impact on the rights of nature legislation. Although there seems to be a constant tension between the indigenous communities and Morales' government in terms of how faithful the government represents indigenous interests and keeps its original promises to the indigenous communities, such tension, in a way, proves that indigenous communities in Bolivia have a proactive role in the government on issues that matter to the indigenous interests. Thus, similar with the case in Ecuador, such impact could be seen from: first, the intellectual roots of rights of nature are found in the indigenous cosmovision; second, the strong political influence of indigenous communities throughout the legislative process; and third, an open resistance from the indigenous communities to the Western, capitalism and neo-liberal methods of development.

It is also seen from the two countries' legislation that rights of nature have their undeniable resembles with human rights both rhetorically and legally, which will be further investigated in the next part.

Human rights and their reasoning: a natural rights theory's perspective

The rights discussion is arguably one of the richest fields of human knowledge concerning law, politics, and ethics, to name a few. Despite the disagreements found in almost every aspect of rights, one thing those discourses have in common—up until now—is, as Gilbert (2018) puts it, “the concept of a right is close to an inescapable part of human condition” (p. 1). In other words, so far, fundamental rights are possessed by human and human only. Therefore, before we make the inquiry into the ground that gives nature fundamental rights, we may need to sort out the following question: what grounds human rights? This is perhaps too big a question to investigate in its fullness in the current discussion. Some analytical strategies are thus needed in order to narrow it down to a feasible scope. In the following part, I will expound on this topic by first briefly investigating some iconic documents concerning fundamental human rights with a focus on the reasoning and grounding. I then follow the inspirations of the natural rights theory provided by Margaret MacDonald, for its representativeness, convincingness, and relevance with the current discussion.

*Human rights declarations*⁸

We can, of course, trace back to time immemorial and find the evidence such as the concept of property rights and citizens of a polis, to get the inspirations for fundamental rights. However, those concepts are, at best, the sources for today's thinking on rights, whereas the concept of human rights has largely evolved and departed from the Ancient and Middle Age times. Thus, in order to keep the discussion concise and relevant to our current legal context, I put the pinpoint at the Enlightenment era, which, by no coincidence, is also the era marks the start of the Anthropocene. Three iconic documents may be enough to illustrate the reasoning behind this prevailing ideology⁹ of rights as we know it today: i.e. American Declaration of Independence (1776), French Declaration of the Rights of the Man and of the Citizen (1779), and later on, Universal Declaration of Human Rights (UDHR, 1948).

In the beginning of the American Declaration of Independence, it invokes "Laws of Nature" and "Nature' God" as the source to entitle the American people to separate from the British Empire. Then it follows its most famous paragraph:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

Similarly, this spiritual sentiment can also be found, albeit less saliently, in the French Declaration of the Rights of the Man and of the Citizen:

The representatives of the French people, organized as a National Assembly, ...have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man, in order that this declaration, being constantly before all the members of the Social body, shall remind them continually of their rights and duties...

Hence, the important ideological sources for human rights seem to have the following reasoning in common: human beings have rights that are bestowed by natural law (or God). These rights are inalienable to human on the ground of being human.

In a more contemporary and equally (if not more) important declaration that entails universal human rights, UDHR states that:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, ...

8. I use the term "declaration" with its speech act connotation (Searle, 2010).

9. I use "ideology" in a value-neutral way.

Article 1 All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Herein, human as being human replaces the reasoning of natural law (God) becomes the ground for human rights. Therefore, the spiritual connotation from the Enlightenment texts is taken away and replaced by “humanity”, which serves both as the start and the end of the logic circle (hence, a tautology). “Being human” is kept as the one and only ground for bestowing fundamental rights.

This leads to the next inquiry: what makes being human the ground for possessing fundamental rights?

An account of natural rights theory: human's capacity to reason

Natural rights, which corresponds with the idea of natural law, can be traced back to Stoics and Roman jurists (MacDonald, 1984, p. 21). The claim of natural rights is based on the presumption that “men are entitled to make certain claims by virtue simply of their common humanity...” (MacDonald, 1984, p. 21). To say that human rights as ideology could be understood through the theory of natural rights is because the fundamental logic of human rights as addressed in the above declarations aligns with the one found in the natural rights theories.

Where do natural law and rights come from? MacDonald's answer is simple, representative, and elegant. In summary, the capacity of reasoning, according to MacDonald, is the fundament for having natural rights according to natural law. This capacity is, by its full-fledged means, reserved to human being. MacDonald (1984) further argues that: “...the definition of ‘human being’ that every human being is, or must be, free—or possess any other ‘natural’ right through his freedom is ideal and not real. But the ideal as well as the actual is natural fact” (p. 22). In this sense, the tautology of rights is made sense under the light of natural law and natural rights. That is: human beings are building a society (or societies) on the basis of our capacity to reason in order to preserve and eventually fully align with such capacity. In a way, this tautology is inevitable. Just as social contract theorists have to assume there was a point before the contract established that granted the meaning and legitimacy to the social contract (MacDonald, 1984, p. 27), rights theorists have to assume there was a point before human's capacity to reason (that differentiates human from non-human) that grants the meaning and legitimacy to human's capacity to reason.

Social contract theories may further argue that human being establishes, enters, and maintains this society by making social contracts with each other. In order to make such contract, each human being should be her own autonomy: not only be able to understand, represent, and express her own perseverance, but also her own desires, awareness, and determination. That is, to put generally, the capacity to reason.

A recent theoretical endeavour that goes beyond (but based on) the social contract theories and explains the importance of human's capacity to reason in grounding fundamental rights is provided by Margaret Gilbert. In her book *Demands and Rights* (2018), she made a profound case of the foundations of human rights. That is, as she eloquently argued, joint commitments. In order to make joint commitments, a sense of shared-subjectivity is required¹⁰. In order to build a shared-subjectivity, the capacity to reason is the key. Particularly, she explained why fundamental rights should be reserved to human being:

The exponents of the natural Rights of Man were trying to express what they deemed to be the fundamental conditions of human social life and government. And it is by the observance of some such conditions, I suggest, that human societies are distinguished from anthills and beehives (p. 32).

Herein, it suffices to say that nature, for its lack of such capacity in its full-fledged forms, may suffer from having a solid ground that grants it fundamental rights the same way as human beings. The spiritual reasoning that is used to support rights of nature, as shown from the previous analysis, may not sit well or even clash with our current grounding for fundamental human rights: human societies create the concept of human rights to preserve the capacity of being human, where does nature stand in this picture? Thus, the almost impenetrable concept of "human" in "human rights" certainly casts a shadow on the plausibility of giving nature fundamental rights. Indeed, if we still bestow human rights on the basis of being human with human's capacity only, giving rights to nature becomes unimaginable.

Flip the argument: in order to give rights to nature, it is not enough to just legislate it by invoking spiritual reasoning—a new foundation and reasoning for human rights are also needed. Otherwise, even we grant nature fundamental rights (as in Ecuador and Bolivia), whenever there is a call for balancing between rights of nature and other human rights (or even other anthropocentric reasoning, such as right to development), rights of nature would stand little chance. This has been proven by the new legislation and court cases occurred since the rights of nature legislation passed in both countries¹¹.

10. Or in Margaret Gilbert's own term: shared intention.

11. For instance, right after the Ecuador 2008 Constitution, President Correa immediately launched a public campaign to pass a mining law that greatly expanded existing mining operations and initiated new sites, which was passed in January 2009. Later the same year, the government further proposed Water Law that similarly opposed the Constitutional rights for nature and indigenous communities (Kauffman & Martin, 2016). Other cases see, for instance, Tangabana Case; Paramos Condor Mirador case (<http://www.thepetitionsite.com/888/727/673/support-rights-of-nature-inecuador/>).

Nevertheless, we have already made the very first step towards this direction as seen in the two countries' legislation on rights of nature. However, it is not yet the time to pat ourselves on the backs and praise a job well done. Far from it, the work left to do is equally (if not more) difficult than the work has been done: a new way of thinking—not only about nature but also about human rights and their foundation. Without being able to rethink human rights and give them a new foundation that is compatible with rights of nature, the latter can only remain as “lofty rhetoric” (Boyd, 2018), with little to nil impacts on our current legal systems and human society.

Recap & conclusion

This paper starts with a two-pronged analysis of the rights of nature legal texts in Ecuador and Bolivia. It argues that the characteristics of rights of nature as codified in the legislation are comparable to human rights, and the reasoning to support such rights is largely based on the indigenous cosmovision—hence spiritual reasoning. Such rights status and their reasoning are not only proved from reading the legal texts, but also from the set intention found in the constitutional debates and legal/political legislative background in both countries. Because of such status and reasoning invoked, this paper further investigates the foundations of human rights by looking into some iconic human rights declarations and the natural rights theory proposed by Margaret MacDonald. The result is that human rights as we know it are based on being human with human's capacity only, which is fundamentally incompatible with the motion to extend the subjects of fundamental rights to other non-human entities. This means in order to build rights of nature as a solid legal concept, not only more effort is called for to tend to its legal arguments, reasoning, and practices, but a reconstruction of the foundations of human rights is equally, if not more, important. In order to give trees, anthills, and beehives standing, we may need to rethink where should human stand.

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Note

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