

Considering Ecuador's New Water Law Through The Lens Of Indigenous Rights Under International Law

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their interests sufficiently.³ Many indigenous groups and individuals participated in widespread demonstrations attempting to highlight what they felt to be the flaws of this new law, but to little avail. The law passed, much to the disappointment of many of the indigenous groups of Ecuador.⁴

A subsequent analysis of the text of the new Water Law reveals that the indigenous groups likely had good reason to be concerned, especially when considering this new law in the context of international human rights norms. There are provisions in this law that are sufficiently vague enough to allow for state intrusion upon indigenous

aspect of the surrounding framework that will be considered is that of international law. While an exhaustive analysis of all of the obligations of Ecuador under international law will not be attempted in this article, the most salient principles from the following major international instruments will be examined: The International Labor Organization's Convention No. 169, the American Convention on Human Rights (as interpreted and applied by the Inter-American Court of Human Rights), and the United Nations' Declaration on the Rights of Indigenous Peoples.

A. The International Labor Organization Convention No. 169

The International Labor Organization (ILO), an international body that seeks to

sufficiently ensure that the consultations will safeguard indigenous peoples' needs, something that may not always be the case.¹⁸

Third, according to Article 7 of ILO Convention 169, states must allow indigenous groups to plan and prioritize development as they see fit and to exercise control over their own development.¹⁹ The full text of Article 7 reads:

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

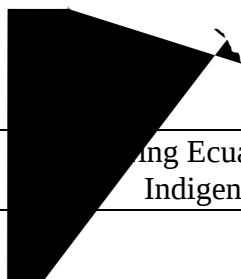
4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.²⁰

This provision codifies the right of self-determination for indigenous groups. By implication, it would therefore be impermissible for the state to decide what would or would not be best for its indigenous peoples. As part of this principle, states are also required to prioritize the welfare of the indigenous peoples that inhabit a particular area

¹⁸ , Part II.B.

¹⁹ ILO Convention No. 169, note 9, at art. 7 § 1.

²⁰ .



when considering economic development for that area.²¹ Under this principle, states are also required to conduct studies on the potential “social, spiritual, cultural and

prejudiced.”²⁷ If such activities are undertaken, indigenous peoples are to benefit from them or be compensated in case any damages are suffered.²⁸

Thus, under ILO Convention No. 169, Ecuador is bound by the principles of adopting special measures to protect the environment of its indigenous peoples, consulting with them when they are affected, allowing them to plan and prioritize their own development, and safeguarding the benefits of the natural resources on their lands.

B. The American Convention on Human Rights

The Organizations of American States has the goal “to achieve an order of peace and justice, to promote their

declined to consent to the project, the needs of the larger group would essentially be disregarded and subjugated by the requirement of consent.

Also troubling in the consent-or-consultation context is that the IACtHR has not further clarified what is actually encompassed in the clause “large scale developments or investment projects that would have a major impact.” Governments could conceivably exploit the ambiguity in the ruling. A state government could dispute the scale of a particular project or its effect on the environment of an indigenous group, thereby relieving itself of the duty to obtain the indigenous group’s consent as the project progresses. While the state government would still be under the obligation to consult with this indigenous group, there would be no guarantee that the opinion of the indigenous group would be taken into consideration. Their recourse would then be to litigate the issue in courts; a process costly in time and resources. It is not uncommon for litigation in the IACtHR to last several years, with some cases lasting as long as a decade.⁴⁶ An indigenous group could very well see disastrous effects to their lands during this period of time. Yet, this does beg the question of how, without the right to free prior informed consent, indigenous peoples’ right to self-determination can be fully realized.⁴⁷

Under the American Convention on Human Rights, Ecuador is bound to adhere to the standards of recognizing indigenous claims to land and their collective systems as part of those claims as determined by the IACtHR. These standards are not entirely clear, however. Ambiguity in the process by which Ecuador may be able to infringe legally upon indigenous rights remains something that could be detrimental to indigenous groups.

⁴⁶ , . . ., Verbeek, note 42.

⁴⁷ Verbeek, note 42, at 280-81.

C. United Nations Declaration of Rights of Indigenous Peoples

The Declaration of Rights of Indigenous Peoples was presented to the UN General Assembly and adopted on September 13, 2007.⁴⁸ In a press release regarding the United Nations Declaration of Rights of Indigenous Peoples (UNDRIP) the UN stated that Declarations generally “represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles.”⁴⁹ Despite its formal nature, however, the Declaration does not carry the binding force of law. Yet, it is instructive that Ecuador voted in favor of the Declaration⁵⁰ because it demonstrates a willingness on the part of Ecuador to embrace at least a commitment to the ideals in the Declaration, if not an intention of being legally bound by it.

Of the many principles outlined in the UNDRIP, there are three that are the most relevant to the purposes of this article. First, the UNDRIP recognizes that indigenous peoples have a spiritual connection to the lands they inhabit,

exploitation of mineral, water or other resources” as areas of particular concern when requiring consent of indigenous peoples.⁵⁷ Moreover, Article 19 not only guarantees indigenous peoples the right to “free, prior, and informed consent” before the state undertakes the activity, but also explicitly requires states to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions.”⁵⁸

The Declaration, however, has qualifications on the rights it delineates. First, even though indigenous groups have the right of self-determination,⁶⁴ the rights of indigenous peoples are not absolute and may only be exercised so long as they do not infringe upon the recognized human rights of someone else.⁶⁵ The standards of the UNDRIP are, in some cases, higher than those guaranteed in other international instruments, making the rights of indigenous peoples even more powerful.⁶⁶ But, the UNDRIP does recognize that other peoples' rights should not suffer as a result of the special political situation of many indigenous peoples.⁶⁷

II. ECUADOR'S CONSTITUTION

An analysis of one of Ecuador's newest domestic laws would not be complete by merely analyzing it under the framework of international law. It is also necessary to examine the Ecuadorian Constitution as part of that framework. The rights and obligations of the various aspects of Ecuadorian society as enshrined in the Ecuadorian Constitution also affect the interpretation and implementation of the new water law.

A. Rights and Obligations of the State

Under the Constitution, the Ecuadorian state reserves several rights that impact the new water law. First, "water is the unalienable property of the State" and cannot be

aimed at ensuring the full exercise of rights and the general welfare of society.”⁷⁰ Water is one of the sectors that come under the exclusive control of the national government.⁷¹ Third, the state also reserves the right to delegate participation in the management of strategic sectors to “mixed-economy companies in which [the State] has a majority shareholding,” to private enterprise, and to “the grassroots solidarity sector of the economy.”⁷² Such exceptional cases are to be set forth by law.⁷³ While seemingly not extraordinary, the reservation of these rights will become important when considering how the government chooses to administer these rights, especially considering its obligations to indigenous peoples under international law and its own constitution..

Some of the obligations the constitution creates for the Ecuadorian state, on the other hand, truly are extraordinary. Ecuador’s constitution is among the first to recognize and guarantee the rights to nature.⁷⁴ In Article 71, the Constitution acknowledges “Nature, or Pacha Mama,⁷⁵ where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.”⁷⁶ With regard to the state obligation, Article 71 states, “all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.”⁷⁷ Not only may the indigenous peoples of Ecuador claim this right, but also the entire populace may call upon the government to live up to its obligation to respect and protect nature. Article 71 also provides that the state shall create incentives for people and legal entities to “protect nature and to promote respect for all the elements comprising an ecosystem.”⁷⁸

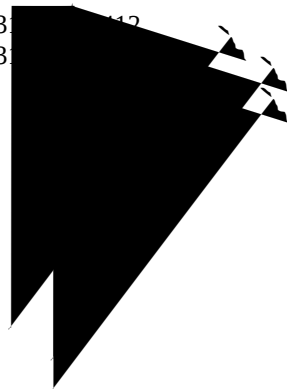
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. art. 3
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Relatedly, Article 72 acknowledges the right of nature to be restored.⁷⁹ This right to restoration exists independently of the obligation of the state (and persons and legal entities) “to compensate individuals and communities that depend on affected natural systems.”⁸⁰ Thus, the Ecuadorian state must use its authority to protect its citizens and their environment.⁸¹

B. Rights and Obligations of Ecuador’s People and Communities

Ecuador’s Constitution also recognizes various rights and obligations of its citizens and communities. Among the recognized rights of the people of Ecuador is the right to live in a “healthy and ecologically balanced environment that guarantees sustainability and the good way of living (sumak kawsay). . . .”⁸² Article 14 also states that environmental concerns, such as the protection of ecosystems, are matters of public interest.⁸³ Additionally, the Constitution recognizes “[p]ersons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living.”⁸⁴ Lastly, the Constitution recognizes “[t]he human right to water is essential and cannot be waived. Water constitutes a national strategic asset for use by the public and it is unalienable, not subject to a statute of limitations, immune from seizure and essential for life.”⁸⁵ Interestingly, the Constitution also notes that the state’s pursuit of promoting “environmentally clean technologies and nonpolluting and low-impact alternative sources of energy,” something the Constitution calls “energy sovereignty”, shall not affect the right to water.⁸⁶

⁷⁹ . at art. 72.

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⁸¹ . at art. 90.

⁸² Constitution

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individuals, but it seems to apply primarily to large-scale endeavors, thus implying that legal entities (likely corporations in this context) also have a duty to protect nature.

It is interesting to note that legal entities are not included in the call for people, communities, and the state to adhere to principles of the good way of living. In its entirety, Article 275 reads:

The development structure is the organized, sustainable and dynamic group of economic, political, socio-cultural and environmental systems which underpin the achievement of the good way of living (sumak kawsay). The State shall plan the development of the country to assure the exercise of rights, the achievement of the objectives of the development structure and the principles enshrined in the Constitution. Planning shall aspire to social and territorial equity, promote cooperation, and be participatory, decentralized, deconcentrated and transparent. The good way of living shall require persons, communities, peoples and nationalities to effectively exercise their rights and fulfill their responsibilities within the framework of interculturalism, respect for their diversity, and harmonious coexistence with nature.⁹³

Given the implicit obligations that legal entities have in Articles 71 and 73, it cannot be inferred that legal entities have no environmental or social obligations whatsoever. It is worth considering why legal entities have been left out of the somewhat moralistic code of behavior in the Constitution.

D. Role of International Law in Domestic Context

It is also necessary to examine what role international law has within the context of the Ecuadorian Constitution in order to determine what kind of weight to give it. While Ecuador has ratified or signed the instruments discussed previously, Article 417 subjects all international treaties signed by Ecuador to the provisions set forth in the Constitution.⁹⁴ And although Article 424 does provide for the supremacy of the Constitution, it also provides that “the Constitution and international human rights

⁹³ . at art. 275.

⁹⁴ . at art. 417.

treaties ratified by the State that recognize rights that are more favorable than those enshrined in the Constitution shall prevail over any other legal regulatory system or action by public power.”⁹⁵ In other words, there is a special place for the standards of the international human rights instruments carved out in Ecuadorian law.

Article 425 details the order of precedence of the laws: “the Constitution; international treaties and conventions; organic laws; regular laws; regional regulations and district ordinances; decrees and regulations; ordinances; agreements and resolutions;

A. Outline of Water Law

Organic Law of Hydrological Resources, Uses, and Exploitation of
Water⁹⁹

sumak kawsay or good way of living and the rights of nature established in the Constitution.”¹⁰⁰

- b) Indirect management, delegation, or externalization of the providing of public services related to the integral cycle of water by the private sector;

Competencies and attributions of the Singular Water Authority. The competencies are:

- a) Direct the National Strategic System for Water;
- b) Exercise the stewardship and execute the public policies relative to the integral and integrated management of water resources; and follow its fulfillment;
- c) Coordinate the formulation of policies on water quality and control of the pollution of the waters with the national environmental authority and the national sanitation authority;
- d) Elaborate the National Plan for Water Resources and the plans for the integral and integrated management for water resources by drainage basin; and approve national water planning;

[. . .]

) Establish mechanisms of coordination and complementarity with the Autonomous Decentralized Governments regarding the providing of public services of irrigation and drainage, potable water, sewage, sanitation, purification of residual waters and others established by law;

[. . .]¹⁰⁴

Most of what is contained in Article 18, including the portions not cited here, seem fairly ordinary, yet the duties become more interesting when considered in conjunction with

5. Participate in the promotion regarding the diffusion of ancestral knowledge on the natural properties of water;
6. Render accounts to the citizenship regarding its management;
7. Contribute and propitiate the resolution of controversies and conflicts that arise between users of water; and

Thus, the duties and obligations of the governing bodies as currently constituted in the new Water Law may not be in harmony with the principles of international law. Under ILO Convention 169, indigenous peoples should be able to exercise control over their own development.¹¹⁰ But, the structure of the water-governing bodies in the new law seems to inadequately protect indigenous peoples' rights related to environmental development. Similarly, the relative lack of authority of the IPWC calls into question its ability to be effective in the consultation-or-consent context under the rules articulated by the IACtHR¹¹¹ and under the standards for conflict resolution under the UNDRIP.¹¹²

C. Collective Rights

The Water Law specifically recognizes the rights of collectives. Article 48 reads: "Recognition of collective and traditional forms of management. Traditional and collective forms of management of water, specific to communes, communities, peoples, and nationalities are recognized and their collective rights will be respected in the terms set forth in the Constitution and the law."¹¹³ The phrase "communes, communities, peoples, and nationalities" becomes a term of art within the law, and refers to the different types of indigenous groups in Ecuadorian society.

More specifically, Article 71 details what some of those rights are, including a specific reference not only to the indigenous communities but also to the communities of descendants of Africa:

Collective rights to water. Communes, communities, peoples and indigenous nationalities, Afro-Ecuadorian people and from their own world view, enjoy the following collective rights to water:

¹¹⁰ notes 19–23 and accompanying text.

¹¹¹ notes 39–42 and accompanying text.

¹¹² notes 62–63 and accompanying text.

¹¹³ Ley de aguas, art. 48 (Ecuador), <http://www.agua.gob.ec/ley-de-aguas/> (last visited Nov. 19, 2015).

Given the recognition of collective rights in various sections of the law, what is most interesting is the tempering of authority of these indigenous groups to participate in upholding those rights when considered in context with other sections of the law. For example, Article 72 reads:

“

Yet, the following examples,

Objectives for the prevention and conservation of water. The Singular Water Authority, the National Environmental Authority and the Autonomous Decentralized Governments shall work in coordination with each other to fulfill the following objectives:

- a) Guarantee the human right to water for the good way of life or *sumak kawsay*, the rights recognized to nature and the preservation of all forms of life, in a sound and ecologically balanced environment free of pollution;
- b) Preserve the quantity of water and improve its quality;

current a National Inventory participatory and integral of the sacred and ritual places of water.

The administration and conservation of the sacred places in relation to water shall be carried out by the entities and organizations of peoples and nationalities in whose lands or territories they are found, with the support of programs and national projects of the public organisms and the Autonomous Decentralized Governments, in conformity with the Constitution and their own rights.¹²¹

Despite the distinct character of an inventory of places sacred to those very indigenous groups, the body that is specifically endowed with cultural knowledge is not included as part of the inventory-making process. Consequently, the true role of the IPWC is dubious. They may play a role according to some portions of the statute, but because of exclusion in other portions of the statute, its power is somewhat limited.

While the Water Law recognizes different types of collective rights, the structure of the law appears to functionally undermine the strength of those rights. Under ILO Convention 169, indigenous peoples must be allowed to participate freely in the consultation process, but there are provisions in the new law that subjugate their role in decision making.¹²² The rulings of the IACtHR¹²³ and the principles of the UNDRIP¹²⁴ also call for indigenous peoples to have a substantial role in decision-making processes, something the new law seems to weaken to a standard that is less than “substantial.”

IV. POSSIBLE ALTERNATIVES

To remedy the ambiguities in Article 7, the legislature could develop more definite criteria, than just when the technical or financial resources are lacking, for when private business would be allowed to enter into the management of water

¹²¹ . at art. 92 (Ecuador).

¹²² no and accompanying text.

¹²³ no accompanying text.

¹²⁴ no accompanying text.

resources. An additional provision that might help would be to imbue any entity from the private sector with all of the responsibilities and obligations that the government has toward the indigenous peoples. It is true that a provision of this type might hinder the profitability of certain business endeavors. But, if the government were to work with the private entities to support such endeavors (as the private entities would be helping the government fulfill one of their obligations), this could be an acceptable compromise that might help private entities be willing to help in these situations of need.

Also, if the legislature were to include some of the principles contained in the World Bank's Operational Directive 4.20: Indigenous Peoples,¹²⁵ this might help to mitigate some of the concerns regarding the potential harm that could occur in indigenous territories should private enterprise be allowed to engage in water management. As one author has suggested, the principal objective of this directive is to "ensure that indigenous peoples do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits."¹²⁶ If Ecuador were to include a requirement that the profits, obtained by the enterprise that has been authorized to engage in water resource management, be shared with the indigenous peoples involved in or affected by their projects, this could also mitigate the concerns of those indigenous groups. Granted, consultations would likely be necessary with these groups to determine what kind of benefits are "culturally compatible" with their ways of life, but this could also be an area in which the IPWC could help.

Lastly, to address the problems with the governing bodies, the legislature could expand the duties of the IPWC to include the consultations with indigenous groups. The legislature could also broaden the role of the IPWC as it pertains to its

function as a consulting body to the SWA. This way, indigenous groups might have a better ability to assist in regulatory determinations.

V. CONCLUSION

Ecuador's new Water Law is a monumental effort to protect the national interest of water resources. Yet, the law has some troubling defects. These defects are not insurmountable, however. If the legislature were to modify the new law to include broader protections for indigenous peoples and a greater role for the IPWC, the government of Ecuador could be safeguarded against undesirable potential consequences, such as litigation in the IACtHR, potential sanctions from ILO enforcement agencies, and admonishment from UN bodies regarding the UNDRIP. These protections would also likely help to alleviate some of the concerns regarding the participation of private enterprise in the management of water resources and the relative lack of indigenous participation in decision-making processes that the indigenous groups in Ecuador have previously expressed.

