

Resisting Enclosure:

**The emergence of ethno-ecological governance in a
comparative study of the constitutions of Venezuela,
Ecuador and Bolivia**

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ABSTRACT

This thesis focuses on the Bolivarian Alliance (ALBA) with comparative case studies on Venezuela, Ecuador, and Bolivia. These three countries were among the first to which the 'Washington Consensus' of neoliberal globalisation was applied. Examining what the indigenous and environmental movements that formed in resistance to this globalisation mean for the evolution of new forms of ecological governance. This paper will trace the emergence of a counter-hegemonic, 'ethno-ecological' form of law and governance with its origins in grassroots agrarian movements. As these movements gained in momentum and formed alliances across local, regional, national, and global levels, they drew on their indigenous cultural traditions and cosmology to articulate a holistic and ecocentric worldview which views planetary nature not as 'natural resources' but as a Mother Earth deity. A process of constitutional transformation by way of constituent assemblies led to the incorporation of indigenous holistic and ecocentric conceptions such as 'living well'/ *sumak kawsay* / *suma qamaña* and 'Rights of Nature' into the constitutions of Bolivia and Ecuador. The global alliances formed in this process of constitutional transformation and their axial concerns with a global enclosure of the commons offer a glimpse of a trans-civilisational shared vision preparing the ground for a coherent global constitutionalism.

Keywords: ethno-ecological, ecological governance, Latin America, ALBA, counter-hegemonic globalisation, subaltern cosmopolitan legality, enclosures, commons, Pachamama, living well, *sumak kawsay*, *suma qamaña*, *vivir bien*, *buen vivir*, constitutional transformation.

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CHAPTER 1 - INTRODUCTION

Globalisation has fundamentally altered the nature of relations between and within nation-states. Globalisation's three major characteristics of instantaneous information exchange, a weakening of the nation-state, and strengthening of decentralisation processes¹ have also profoundly changed the formation and operation of international environmental law. The nation-state is no longer the sole type of actor on the world stage and can no longer claim a monopoly on policy-making or even areas such as provision of social services or public infrastructure.² The easing of restrictions on capital flows across national borders has allowed for the flourishing of a trans-national capitalist class who are supra-national in their operation and worldview. This has facilitated a 'neo-colonial' global economic order continuing a centuries-old unequal exchange in which the role of developing countries was generally centred around extraction of natural resources and the provision of cheap labour.³ To compete, governments engaged in a 'race to the bottom' in terms of environmental and social standards. Simultaneously, neoliberal reforms instigated by International Financial Institutions in the 1990s and 2000s, 'rolled back' the state from involvement in the social and ecological spheres through measures such as reforms devolving governance to local centres, minimisation of social welfare schemes, and shedding regulation of markets and the environment.⁴

This thesis focuses on Latin American countries where this 'Washington Consensus'⁵ was first (and most intensively) put into effect and what this has meant for the evolution of new forms of ecological governance. It will trace the emergence of an 'ethno-ecological' form of law and governance with its origins in grassroots agrarian movements. As these movements gained in momentum and formed alliances across local, regional, national, and global levels they drew on their indigenous cultural traditions and cosmology to articulate a holistic and ecocentric worldview which views planetary nature not as 'natural

¹ David Harvey, *A Brief History of Neoliberalism*, Oxford, Oxford University Press 2005, 3-4.

² The divestment of public utilities into private hands is usually one of the first stages of a privatization regime.

³ Eduardo Galeano, *Open Veins of Latin America: Five centuries of the pillage of a continent*, Cedric Belfrage (ed), New York, Monthly Review Press 1973.

⁴ See, Jane Kelsey, *Rolling Back the State: Privatisation of power in Aotearoa/New Zealand*, Wellington, Bridget Williams Books 1993.

⁵ A phrase coined by John Williamson in "What Washington Means by Policy Reform" in John Williamson (ed), *Latin American Readjustment: How Much Has Happened?* Washington, Institute for International Economics 1990. It describe ten basic policies (Fiscal policy discipline; stopping subsidies; tax reform, lowering the top tax rate and broadening the tax base; marketising interest rates; competitive exchange rates; trade liberalisation, ie. eliminating licensing and reducing tariffs to low and uniform levels; liberalization of inward foreign investment; privatisation of state enterprises; deregulation of markets; strong legal protections for private property rights) applied by Washington-based institutions such as the World Bank and IMF, applied in Latin America from 1989 onwards. The term has become synonymous with the imposition of neoliberal reforms in Latin American countries as characterized by the (simplified) mantra of "stabilise, privatise, liberalise." These policy prescriptions have been widely criticised as eroding the social protections provided by states, exacerbating economic inequality, and imposing a model of development akin to continued colonial exploitation. See, generally Joseph Stiglitz, *Globalization and Its Discontents*, New York, W.W. Norton & Co. 2002.

resources' but as a Mother Earth deity. A process of constitutional transformation by way of participatory democratic 'constituent assemblies' has led (to varying degrees) to the incorporation of indigenous holistic and ecocentric conceptions in the national constitutions of Venezuela, Ecuador and Bolivia.

In Latin America, neoliberal decentralisation reforms created the political space and means for the movements of resistance to develop their own leadership. This new space for political contestation at the local level allowed the development of indigenous leadership outside of traditional political and union structures. In turn, these movements have forged global alliances between peoples and organisations involved in parallel struggles around the globe. As the state vacated the realm of social provision and regulation, there has been a proliferation of grassroots social movements centred on the concerns of social justice, indigenous peoples and the environment.⁶ In opposition to the exclusion of people and nature from the processes of neoliberal globalisation, a worldwide agenda of Alternative Development⁷ operating at local, national, regional, and global levels has emerged. This sense of global community and citizenship unified by common concerns of these civil society groups is engendered in such fora as the World Social Forum.⁸

Neoliberal globalisation is hegemonic. This hegemony consists of a re-ordering of the global economic, political and legal order along the lines of a market mentality. The role of the state and the citizen is re-constructed as a purely rational deliberation between self-interested and calculating actors with no consideration of community or duty. In short, whereas the market once existed to meet the needs of society, society has now been brought into the service of the economy.

It is a contention of this thesis that hegemonic neoliberal globalisation operates as a new, truly global, enclosure movement. The far-reaching privatisations of public goods such as water in the neoliberal era are the clearest examples of such (mis)appropriation of common goods for private gain. Drawing on the work

⁶ In the 2008 World Social Forum, over 55% of the participating environmental organisations were from Latin America. Of 183 groups in total, 102 were from Latin America compared to 27 European, 17 African, 11 Asian, 7 North American, 1 Oceanian, and 18 of unspecified geographical origin. See, Carlos R. S. Milani, "Political Ecology, Environmental Movements and Transnational Contestation in Latin America" (2009) 3 *Revista de Gestão Social e Ambiental* 141, 147-148.

⁷ Roughly synonymous with 'anti-globalisation.'

⁸ The World Social Forum (WSF) was formed in Porto Alegre, Brazil in 2001. Its slogan is 'Another World is Possible.' In Principle 1 of its founding charter it defines itself as 'an open meeting place for reflective thinking, democratic debate of ideas, formulation of proposals, free exchange of experiences and interlinking for effective action, by groups and movements of civil society that are opposed to neo-liberalism and to domination of the world by capital and any form of imperialism, and are committed to building a planetary society directed towards fruitful relationships among Mankind and between it and the Earth.' Indigenous groups have become a dominant and distinctly anti-neoliberal element in the WSF. For instance, in the 2009 Forum, the Declaration of Indigenous Peoples issued at the end of the forum calls for a 'global restructuring of the whole capitalistic, Euro-centric and Uni-national state system and for unity between Mother Earth, society and culture.' See, Laura Fano Morrissey, "The Rise of Ethnic Politics: Indigenous movements in the Andean region" (2009) *Development* 1, 2.

of Commons theorists such as Elinor Ostrom,⁹ I propose that the ubiquitous ‘Tragedy of the Commons’¹⁰ scenario is a legitimising discourse for this global enclosure movement which serves the interests a ‘Global North’ drawing wealth and resources from the ‘Global South.’

Although the term ‘globalisation’ is generally taken to refer to the hegemonic neoliberal globalisation, theorists such as Boaventura de Sousa Santos¹¹ refer to globalisations in the plural. He proposes a counter-hegemonic globalisation that exists in parallel with and in strict opposition to neoliberal globalisation. Santos terms this, Counter-hegemonic globalisation: ‘the vast set of networks, initiatives, organizations, and movements that fight against the economic, social, and political outcomes of hegemonic globalisation, challenge the conceptions of world development underlying the latter, and propose alternative conceptions.’¹²

Claims are increasingly made by First World countries upon the global commons. The preservation and reclaiming of these commons has become a unifying concern for civil society (as opposed to State actors) comprised of social movements, NGOs and indigenous peoples which transcends differences of culture and nationality. The protection of rainforests of the Amazon from hydrocarbon extraction and international approaches to dealing with Climate Change are two of the salient examples of global commons to be analysed in this paper. This commonality of concern for the reclaiming and preservation of the commons has been the axial value around which significant and fruitful interaction across scales and levels of governance has taken place. More nuanced models of the interactions between state and non-state actors, such as Global Constitutionalism, have become necessary to account for the true dimensions of interplay between state and non-state bodies as the classical model of international law as taking place only between states becomes outmoded by the rapid pace of globalisations.

⁹ Winner of the 2009 Nobel Prize for Economics (the first woman ever to be awarded this prize) for her work on Cooperative Governance of Commons. See, Elinor Ostrom, *Governing the Commons: The evolution of institutions for collective action*, Melbourne, Cambridge University Press 1990.

¹⁰ Garrett Hardin, “The Tragedy of the Commons”, (1968) 162 *Science* 1243.

¹¹ Boaventura de Sousa Santos. Professor of Sociology, University of Coimbra School of Economics, sociologist of the law, and one of the leading intellectuals of the movement for a model of Alternative Development. His work on Counter-Hegemonic Globalisation and Subaltern Cosmopolitan Legality is central in Latin American legal and political discourse and forms the conceptual basis for this thesis and a coherent oppositional model of multilevel governance. See, Boaventura De Sousa-Santos, *Toward a New Legal Common Sense*, (2nd ed.) Lexis Nexis Butterworths, Wellington, 2002; Boaventura de Sousa-Santos and César A. Rodríguez-Garavito, *Law and Globalisation from Below*, Cambridge, Cambridge University Press 2005; Boaventura de Sousa Santos and César A. Rodríguez-Garavito, “Expanding the Economic Canon and Searching for Alternatives to Neoliberal Globalisation” in Boaventura de Sousa Santos (ed.) *Another Production is Possible: Beyond the capitalist canon*, London, Verso 2006. Boaventura de Sousa Santos, “Globalizations”, (2006) 23 *Theory, Culture & Society*, 393-399.

¹² Boaventura De Sousa-Santos, “Beyond Neoliberal Governance” in Boaventura and Rodriguez-Garavito, Cesar A. (eds.) *Law and Globalisation from Below: Towards a Cosmopolitan Legality*, Cambridge, Cambridge University Press, 2005, 29.

In a regional manifestation of counter-hegemonic globalisation, a radically new approach to regional governance is being pioneered in the regional integration programme of the ALBA¹³ (Bolivarian Alliance for the Peoples of Our America) bloc of countries. The Bolivarian¹⁴ aspect of the revolution is a pan-American regionality, thus dissolving to some extent the Westphalian notion of isolated and competitive sovereign states. There has been a simultaneous decentralisation and fracturing of the state into many bioregions and indigenous 'nations' within the state. The idea of the 'plurination' transcends and subverts the Westphalian 'nation state' while not dispensing with it entirely. The ALBA bloc was formed in explicit opposition to the privatisations of the 1990s and the proposals for a Free Trade Area of the Americas of the 2000s. The leading ALBA countries were radicalised by neo-imperialism (Venezuela), egregious privatisations (Bolivia, specifically in Cochabamba, El Alto and La Paz), and severe ecological damage (Ecuador). On the domestic level, counter-hegemony is manifested in the new national constitutions of Bolivia (2009), Ecuador (2008), and Venezuela (1999). Most novel in terms of environmental law is the strongly ecocentric normative focus of these constitutions and the incorporation of indigenous worldviews and concepts to interpret these provisions together with significant devolution of state power to local and indigenous groups.

A theme that will be re-iterated throughout this examination is that of multilevel governance; the interaction across different levels by largely non-governmental actors articulating common concerns points to a new 'devolved' way of making international law.

I will examine the institution of 'rights of nature' in article 71 of the 2008 Ecuadorian constitution highlighting its origins in the ideas of Christopher D. Stone, evolution into law as drafted by the CELDF as a local law initiative in Pennsylvania, and finally passage into law via the Constituent Assembly of Ecuador. I argue that this is a fine example of the multilevel interaction of counter-hegemonic globalisation by the practice of subaltern cosmopolitan legality as advanced by Santos.

A new area of legal scholarship, Global Constitutionalism, has arisen in concert with globalisation and deals with the interaction between different regulatory layers, overcoming the limitations of the traditional dualist and monist approaches to international law. Global constitutionalism provides a cogent account of multilevel governance offering a departure from the classical view that the discovery of values held in common across nation-states and societies is an impossibility and seeks to find just such commonality on a global scale.

I assert that this commonality of interest can be found in a global concern for the protection of global environmental commons. This is a natural corollary of the burgeoning recognition in some quarters of international law of the idea of Earth

¹³ *Alianza Bolivariana para los Pueblos de Nuestra América*. A counter-hegemonic regional bloc of which Venezuela, Ecuador and Bolivia are leading members.

¹⁴ Named for Simon Bolívar, whose pan-Latin American vision of regional unification provides the historical inspiration for the participating Latin American and Caribbean countries.

Community¹⁵ as advanced in Earth Jurisprudence,¹⁶ as well as the incorporation of indigenous worldviews in domestic and regional constitutions. Once this axial concern has been identified, the next important step is the development of agreed structures and procedures for shared levels of governance. It is contended here that the governance structures developed in the ALBA countries are instructive models in this respect also.

In the wake of the failure of the Copenhagen COP 15¹⁷ in 2009 to deal cooperatively with the global atmospheric commons, the Bolivian Government has initiated a Global Peoples' Conference on Climate Change and the Rights of Mother Earth that aims to provide a forum for the interaction of civil society and indigenous groups rather than being conducted purely under the traditional auspices of nation-states. The ultimate objective of the conference is agreement on a Universal Declaration on the Rights of Mother Earth, which is modelled after the Universal Declaration on Human Rights. Although its focus is on drafting by civil society organisations and indigenous and *campesino*¹⁸ groups rather than state technocrats, it is more analogous to the approach pioneered by the Earth Charter of 2000. I contend that the striking similarities between these two documents, despite their rather different provenances, strongly suggest a common recognition of inter-relatedness of all life as the axial concern.

The socio-political and constitutional changes that have taken place in Bolivia and Ecuador particularly have been the fruit of mass mobilization of popular indigenous movements. In this sense, it is not possible to meaningfully divorce the legal changes in these countries from their social and political context. Nor is it possible to separate the ecological from the indigenous cultural conceptions. They have a distinctive emphasis that is born of their origins with people who live close to the land. These movements are not only a departure from the hegemonic neo-liberal model but are no less than an ontological challenge¹⁹ to the dualism and monoculture of liberal modernity. The advance of relational worldviews as codified in the recognition of nature not as 'natural resources' but as the 'Mother Earth' *Pachamama* and the 'living well' *vivir bien / buen vivir / suma qawsay / suma qamaña* conceptions do not fit easily within

¹⁵ See, David C. Korten, *The Great Turning: From Empire to Earth Community*, Bloomfield, Kumarian Press, 2005.

¹⁶ See, Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice*, Totnes, Green Books 2003.

¹⁷ The 15th Conference of the Parties (COP 15) to the United Nations Framework Convention on Climate Change. Held between the 7th and 18th of December at the Bella Centre, Copenhagen, Denmark.

¹⁸ Such as *Via Campesina*. Created in 1992, this is a transnational social movement made up of 80 rural organizations from a total of 57 countries. It 'coordinates rural organizations, groups of small and medium-sized producers, movements of rural women and youth, indigenous communities, movements of people who have no access to productive land, and associations of migrant workers.' They treat ecology in the context of 'local distributive conflicts.' See, Milani above at note 3, 152.

¹⁹ Arturo Escobar, "Latin America at a Crossroads: Alternative Modernizations, Postliberalism, or Postdevelopment?" Revised version of paper prepared for the Wayne Morse Centre for Law and Politics and presented at the conference, "Violence and Reconciliation in Latin America: Human Rights, Memory, and Democracy," University of Oregon, Eugene, January 31- February 2, 2008. Revised, July 20 2009, 38.

the philosophical structure of a conventional modern constitution. This holistic relational worldview, known broadly as 'living well' is explicitly a rejection of the values of competition and capitalist accumulation ('living better') based in the deleterious effects upon nature that the pursuit of these goals engender. Taken from the perspective of Earth Community, communitarian identity, collective and participatory decision making, plurinationality and interculturality, and reclaiming of the commons, the decentralisation of governance and the global constitutionalist project are not a 'fracturing' of international law but an integration. This represents a recognition of the inter-relation and interconnectedness of different scales and levels of law, society and economy rather than the identification of only one level of nation-state as representative of the whole.

There is a dissonance between the normative and practice in the Bolivarian countries. In practice it would appear that Latin American constitutions, while beautifully expressive in their language and noble in their intent, are more 'theoretical' than the more measured and moderate language and the far more limited, but enforceable guarantees of the European and North American constitutions. It is too early to tell how justiciable the rights of indigenous peoples and nature will be in years to come. However, primacy is generally accorded to the rolling out of economic and social rights within a framework of 'endogenous development'.²⁰ This is funded by large-scale exploitation of oil, gas, and other extractive industries. Although the new constitutions of Bolivia and Ecuador suggest a shift to an ecological, post-development, post-industrial ethos, the Presidents are mostly following the conventional development path of industrialisation and (most pronouncedly in Venezuela) militarization in which 'the environment' can be plausibly sacrificed in pursuit of over-riding anthropocentric goals.

Ultimately this thesis aims to articulate the normative visions and procedural structures pioneered in these countries. These offer a glimpse of the possibilities of an ecocentric global constitutionalist framework which is built upon an incorporation of indigenous traditions and social movements leading to a true democratisation of international environmental law directed at the protection and reclaiming of the global commons from private enclosure.

The thesis is laid out in six parts.

Chapter Two outlines the parallel movements of globalisation, hegemonic and counter-hegemonic, examining how counter-hegemony has emerged 'from below' in resistance to hegemony imposed 'from above.' The techniques of resistance are appropriated from that of neoliberal globalisation but instead of being used for enclosure are manipulated to extend the bounds of the commons.

²⁰ Development 'from within.' This is a vision of development that focuses on converting economies from being extractive to building the capacity to 'value-add' within their own borders and provide for their own essential needs such as food, water and energy.

In Chapter Three, I propose that neoliberal globalisation represents a new global enclosure movement. Starting with the original enclosure movements in Tudor-Stewart and industrialising England, I apply Polanyi's concept of the 'protective counter-movement' to the creation of the Bolivarian Alliance to resist the encroachments of enclosure of Latin America's commons. Next, a critical examination of the 'Tragedy of the Commons' scenario as a legitimising discourse for enclosure and Elinor Ostrom's countervailing ideas on the possibilities for governing the commons communally without resorting to solely statist or market-based solutions.

Chapter Four draws on the insights of counter-hegemonic globalisation and commons scholarship in the tradition of Ostrom to consider multilevel governance. This will draw together the preceding examination of the commons with the inter-related constructs of ecological legal cosmopolitanism and multilevel governance as a path to Global Constitutionalism.

In Chapter Five, I analyse the trends that are apparent across the constitutions of Venezuela, Ecuador, and Bolivia; discerning a trend toward the constitutionalisation of what I call 'Ethno-Ecological' Governance in law.²¹

Chapter Six focuses on the regional level with an examination of the Bolivarian Alliance and its aim of regional integration as a movement of resistance to neoliberal hegemony. The agrarian reform program of ALBA will be analysed as a starting point of 'agro-ecological' emphasis which I contend is the starting point for an 'ethno-ecological' approach to governance.

Chapters Seven, Eight, and Nine are comparative case studies of – respectively – Venezuela, Ecuador, and Bolivia. The studies are each divided into four parts examining a different level of operation: the local, 'Indigenous Origins'; National 'Constitutions'; and, 'Global' before finally critically assessing the consistency of normative constitutional statements against the reality of continuing extractive models of development. The case studies aim to test the roots and effectiveness of counter-hegemony in each country with two considerations foremost. First, by examining the extent to which the traditionally excluded – indigenous peoples and Nature – have been incorporated into the operation of the law across multiple levels. Second by examining the extent to which 'enclosure' has been resisted or, as the case may be, the commons have been extended.

The comparative nature of this analysis does not advance all three constitutions as representing the movement toward ethno-ecological constitutional governance. Ecuador and Bolivia certainly represent positions on a spectrum of the ethno-ecological approach. Venezuela's approach to ecological governance, on the other hand, is presented as a contrasting position (consonant with that of

²¹ To adapt the phrase 'ethno-ecological identity' used by Susan Healey to describe a 'socio-political identity shaped by the unique human-environment relationships and struggles of highland and lowland peoples' in the Andean region of Latin America. See, Susan Healey, "Ethno-Ecological Identity and the Restructuring of Political Power in Bolivia" (2009) 36 *Latin American Perspectives* 84.

ALBA) characterised here as 'agro-ecological' and more nationalist in nature. This position is representative of the agrarian origins of the more developed indigenous discourses of the plurinations of Ecuador and Bolivia.

CHAPTER 2 – GLOBALISATIONS

[N]eo-liberal globalization, although being the hegemonic form of globalization, is not the only one. Throughout the world, local, national, and transnational social groups have been active in confronting neo-liberal globalization and in proposing alternatives to it. Aside from struggles that are originally transnational, I include in this vast set of confrontational politics social struggles that, though national or local in scope, are networked in different ways with parallel struggles elsewhere. Together, they constitute what I call counter-hegemonic globalization.²²

2.1 Hegemonic Neoliberal Globalisation

2.1.1 Neoliberal Governmentality

To understand the counter-hegemonic movement it is first necessary to examine the nature of hegemonic neoliberal globalisation.

Neoliberalism is the outgrowth of the economic ideology of the Libertarian liberals. This view of the state gives priority to the market economy as the most efficient means of distribution. The rights of the individual consist primarily in respect for individual property rights, ‘assuring to each the fruits of his own labour’.²³ Proponents of this version of state ‘neutrality’ see redistributive policies as an unacceptable violation of those core property rights and are fond of referring to them as ‘social engineering’. It is easy to understand how the passion for non-interference with the individual developed in an age of struggles for national independence and in a part of the world (the US) to which many had come in order to escape the oppression of European monarchical and theocratic power. However, I will suggest that this ‘enlightened self interest’ has outgrown its efficacy for two reasons. First, as forms of domination become more subtle and internalized, a society of atomized individuals with little sense of community will be easily manipulated by constant exigencies of ‘survival’ despite being surrounded by material abundance. A fortress mentality and general mistrust of ‘others’ keeps the gaze of the citizen on continued consumption of disposable culture and commodities while militating against a meaningful engagement in public discourse. Second, in an increasingly interconnected world, global patterns of exchange, consumption and trade/resource dependency are such that inequality is exacerbated by free capital flows. The liberal model of world economy evolved in a time when the popular worldview was that of a ‘civilised’ world situated around the North Atlantic and ‘the wild’, a limitless and largely invisible cornucopia of ‘natural resources’ and labour which the civilized were free to exploit.²⁴ This combination

²² Boaventura De Sousa-Santos, *Toward a New Legal Common Sense*, (2nd ed) Lexis Nexis Butterworths, Wellington, 2002, 458-459.

²³ Michael Sandel, “The Public Philosophy of Contemporary Liberalism” in *Democracy’s Discontent*, Cambridge, Harvard University Press, 1996, 11.

²⁴ This view of reality identified the right as ‘God-given’ and extended to a legitimising discourse of the ‘civilising mission’, not unlike Rudyard Kipling’s ‘White Man’s Burden’. International law was founded in a ‘colonial project’ allowing ‘just war’ against those who refuse the blessings of European civilization. For an examination of this as applied to relations between Amerindians of

of no contemplated limits to growth,²⁵ a popular psychology of conspicuous consumption and a concomitant treatment of non-human nature as merely a container for human activities has had unambiguously disastrous ecological consequences.

Although those economic policies and proposed role of the state form the nucleus of the current dominant interpretation, neoliberalism goes further to prescribe the very nature and purpose of a society. Wendy Brown analyses the practice of neoliberalism as 'Governmentality'.²⁶ This term looks to the relations of power underlying the rhetoric of market ideology to outline 'a mode of governance encompassing but not limited to the state, and one that produces subjects, forms of citizenship and behaviour, and a new organisation of the social.'²⁷ In this view, the neoliberal 'constructivist project'²⁸ is not - as it usually purports to be - simply an ontological claim describing the interaction of state, market and citizen but a normative claim 'extending and disseminating market values to all institutions and social action, even as the market remains an active player.'²⁹

The legitimacy of the state has increasingly become a function of continued economic growth. As this measure has emerged as the central concern of the state and by extension the citizenry, political and social discourse have been more and more cast in economic terms. This brings the state into subservience to the economy and makes of the citizen-subject an entrepreneurial entity. As the individual is cast as a competitive market actor, the separation between moral and economic decision-making is elided and morality and 'efficiency' become conflated. An insidious aspect of viewing the citizen as an entrepreneurial actor is that all responsibility is cast onto them by 'configuring morality as a matter of rational deliberation about costs, benefits and consequences.'³⁰

This creates the curious circularity of re-casting the citizen as a calculating utilitarian rather than the rule-abiding Kantian/Hobbesian moral agent of the traditional Liberal Democratic conception. Brown takes this as marking an 'historical-institutional rupture'³¹ in which:

Liberal democracy cannot be submitted to Neoliberal political governmentality and survive. There is nothing in liberal democracy's basic institutions or values ... that

the 'New World' and the Portuguese and Spanish invaders, see Antony Anghie's interpretation of the writings of Francisco de Vitoria in *Imperialism, Sovereignty and the Making of International Law*, Cambridge, Cambridge University Press 2005.

²⁵ Despite the admonitions of the Club of Rome Report in 1972 and many others since, the concept of 'limits to growth' and its logical extension, the 'steady state economy' have been treated as so many other inconvenient truths and remain at once broadly acknowledged yet left out of mainstream political discourse.

²⁶ Drawing on the terminology of Foucault. See, Michel Foucault "Society Must Be Defended": *Lectures at the Collège de France 1975-1976*, London, Penguin 2004 [1997], 284.

²⁷ Wendy Brown, "Neoliberalism and the End of Liberal Democracy" in *Edgework: Critical Essays on Knowledge and Politics*, Princeton, Princeton University Press 2005, 37.

²⁸ *Ibid.* 41.

²⁹ *Ibid.* 40-41.

³⁰ *Supra* note 27 at 42.

³¹ *Ibid.* 47.

inherently meets the test of serving economic competitiveness or inherently withstands a cost-benefit analysis.

Neoliberalism thus strips Liberalism of its positive normative values. Traditional models have become wholly inadequate to describe the nature of international legal and political relations. Competition between Westphalian³² nation-states - although still the fundamental unit of the dominant model of international law - does not adequately describe the supranational nature and operations of globalised capitalism. The truly imperial nature of neoliberal globalised hegemony has become clear in recent years not only in the post-9/11 War on 'terror' but more apropos to the area of this paper, in the neoliberal privatizations under the auspices of World Bank and International Monetary Fund (IMF) throughout Latin America. Brown observes that the word 'democracy' has been much abused as a kind of Trojan Horse for the insertion of market values in the place of the true liberal democratic values, suggesting an 'interregnum' in which 'neoliberalism borrows extensively from the old regime to legitimate itself even as it develops and disseminates new codes of legitimacy'.³³

Neoliberal privatization and foreign investment-based economic reforms are advanced not only as the predicates of democracy but as primary *indicators* of a state that can properly be entitled to a place at the table with First World nation-states. Ironically though, unrestricted movement of global capital can be a potentially anti-democratic force as unrestricted capital movement creates a 'virtual parliament' of investors and lenders, who can closely monitor government programs and 'vote' against them if they are considered irrational: for the benefit of people, rather than concentrated private power. They can 'vote' by capital flight, attacks on currencies, and other devices offered by financial liberalization. That is one reason why the Bretton Woods³⁴ system established by the US and UK instituted capital controls and regulated currencies.

Ultimately, the underlying extractive nature of economic exchange between the First and Third world is highlighted thus:³⁵

[L]iberal democracies of the first world have always required other peoples to pay – politically, socially and economically – for what these societies have enjoyed; that is, there has always been a colonially and imperially inflected gap between what has been valued at the core and what has been required from the periphery.

The 'counterrationality' to the 'deadly policies of the imperial American state'³⁶ (in the immediate term) and building a more just society (in the longer term) are advanced as a 'left vision of justice' that would focus on community rather than solely individual property rights; more participatory (rather than representative)

³² Named for the establishment of the modern Nation-State in the Peace of Westphalia in 1648.

³³ Supra note 27 at 47.

³⁴ Named for the meetings held at Mount Washington Hotel, Bretton Woods, New Hampshire, USA that devised the post-World War II global financial architecture, creating the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD) (now part of the World Bank Group).

³⁵ Supra note 27 at 51-52.

³⁶ Supra note 27 at 59. Although elsewhere (on the same page) Brown more accurately nominates the 'Euro-Atlantic States' as the seat of Neoliberal Governmentality.

democracy; improved access to institutions; ‘modestly egalitarian’ wealth distribution; meaningful avenues for and locations of ‘flourishing’³⁷; and a serious recognition of the ‘fragility and finitude’ of non-human nature.³⁸

2.2 Neoliberal Hegemony

The Anglo-American neoliberal order is often referred to as ‘hegemonic’. Indeed, hegemony³⁹ is a word that is bandied about with increasing frequency in political discourse – often with little real sense of its true meaning. It is not simply domination or coercion.

The nature of hegemony needs some elaboration here for us to properly examine the nature of its inextricable linkage to the scientific, technological and economic dominance of the First World nations and what this means for conceptions of governance. The concept of hegemony as developed by Antonio Gramsci has been a powerful influence in Latin American political thought. Indeed, its centrality in the thought of such thinkers as Boaventura de Sousa Santos is characteristic of a conceptual shift which has moved revolutionary thought beyond a challenge to the power of the coercive state to a more subtle and nuanced appreciation of the insidious nature of cultural domination by consent of the dominated and the necessity of changing the relations of power.⁴⁰

As defined by Antonio Gramsci, hegemony is:⁴¹

[t]he spontaneous consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is historically caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production.

This is visible in the experiences of many cultures around the world where ‘modernization’ has become synonymous with ‘westernisation’. Witness, for example, how the English language, the business suit, and the American and English cultural idiom have become the ‘uniform’ of serious international financial and political exchange.

I base my discussion of hegemony on the analysis of Douglas Litowitz who interprets Gramsci’s hegemony to consist in the establishment of a worldview that is undertaken via three mechanisms: universalisation, naturalization and rationalisation.⁴² Universalisation is the portrayal of the particular interests of the dominant group as the interests of all people. We see this in the dominant neoliberal philosophy in which individuals and states are cast as self-interested

³⁷ Which I suggest can be best interpreted in the sense of Aristotelian *eudaimonia*.

³⁸ Supra note 36.

³⁹ From the Greek, *Hegemon*: literally, ‘Leader.’

⁴⁰ For a discussion of the formative influence of Gramsci in recent Latin American political philosophy, see Raúl Burgos, “The Gramscian Intervention in the Theoretical and Political Production of the Latin American Left”, Carlos Pérez (trans.) (2002) 29 *Latin American Perspectives* 9.

⁴¹ Gramsci, Antonio, *Selections From The Prison Notebooks of Antonio Gramsci*, Quintin Hoare and Geoffrey Nowell Smith (eds.) London, Lawrence & Wishart, 1971, 12.

⁴² Douglas Litowitz, “Gramsci, Hegemony and the Law”, [2000] *Brigham Young University Law Review* 515, 525-526.

and calculating ‘market actors’ with social relations being determined under an essentially utilitarian calculus. Culturally, this is the dissemination of an ‘outlook [that] goes hand in hand with the general sentiment that people are naturally acquisitive and that the existing system is merely a fulfilment of that innate desire.’⁴³ The ‘strategy of naturalism’⁴⁴ carries over from this sentiment to conflate ‘culture’ and ‘nature’⁴⁵ in the sense that the fruits of the Northern culture cannot be separated from the cultural tree which has borne them. To continue the analogy, the consumption of these fruits further disseminates and propagates the seed that is carried within – in the form of continued abeyance to the dominant cultural values by participation in society, politics and the environment on the basis an economic rationality. Put another way, ‘subduing and co-opting dissenting voices through subtle dissemination of the dominant group’s perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of common sense.’⁴⁶ Rationalization refers to the perpetuation of the existing way of life through theoretical work.⁴⁷ This is the ‘manufacture of consent’,⁴⁸ the creation and dissemination of legitimising discourses for dominant interests.

Litowitz identifies three aspects of the operation of law that perpetuate hegemony: exclusivity, social construction, and closure. Exclusivity refers to the state monopoly on the enactment and enforcement of the law. That is to say, there is no “alternative” system of law to which the citizen may appeal. Social construction is the creation of worldviews. The outline of ‘legitimate’ conduct is defined not so much by what is specifically approved as by what is ‘criminalised’ or otherwise sanctioned. This produces a ‘social ontology’ evocatively expressed as a ‘double gesture of creating entities (partnerships, estates, freeholds) and then regulating these entities as if they predated the law and were awaiting regulation in the same way that a tree waits for a trimming.’⁴⁹ Closure refers to the law as a ‘bounded universe of possibilities’ – a closed system, in which law extends and legitimates itself by recasting any situation in the terms of the dominant legal discourse and answering its own questions in its own terms. In a paraphrase of Thomas Kuhn, ‘the legal system will only admit such puzzles as it is capable of solving.’⁵⁰ Thus, the paradigmatic nature of a system of law that is centered on strong private property rights will not permit the determination (or even the raising) of a question of, for instance, whether private ownership of ‘common goods’ such as water should be permissible.⁵¹

⁴³ Ibid. 525.

⁴⁴ Ibid. 526.

⁴⁵ This is not a reference to ecological systems or non-human organisms but an ontological claim, meant in the sense of: ‘the nature of things’.

⁴⁶ Supra note 42 at 519.

⁴⁷ Carried out by the ‘intellectuals’ of the ruling class. Gramsci’s intellectuals are a broad class including ‘lawyers, professors, politicians, scientists, and journalists.’

⁴⁸ See, Edward S. Herman and Noam Chomsky, *Manufacturing Consent: The political economy of the mass media*, New York, Pantheon Books 2002.

⁴⁹ Supra note 42 at 546.

⁵⁰ Thomas Kuhn, *The Structure of Scientific Revolutions*, (2nd ed.), Chicago, University of Chicago Press 1970 [1962], 37.

⁵¹ This has been a particularly contentious point in Bolivia where the mass popular resistance to privatization of water in the late 1990s and early-2000s acted as a catalyst for the indigenous and civil society groups to make water rights that are now in the 2009 constitution a top priority.

2.3 Counter-Hegemonic Globalisation

2.3.1 Neoliberal Governance

How is neoliberal hegemony to be contested in its own terms if not by a direct assault on the power of the state? Boaventura de Sousa Santos posits that in parallel to neoliberal globalisation has arisen a '*Counter Hegemonic Globalisation*', which uses the same legal and political innovations as its neoliberal *bête noir* but is strictly oppositional to it.

Santos defines Counter-Hegemonic Globalisation as: 'the vast set of networks, initiatives, organizations, and movements that fight against the economic, social, and political outcomes of hegemonic globalisation, challenge the conceptions of world development underlying the latter, and propose alternative conceptions.'⁵²

Counter-Hegemonic Globalisation is focused on the struggle against social exclusion, 'a struggle which in its broadest terms encompasses not only excluded populations *but also nature*.'⁵³

To see how exclusion operates in practice, it is necessary to understand the ways in which power has been shifted away from the state and has left only hollow facades to attack in such an assault. Santos links the simultaneous and interconnected ascendancy of the terms 'neoliberal' and 'governance'.⁵⁴

Santos asserts that the last thirty years have followed a progression of concepts as follows: 'from legitimacy to governability; from governability to governance'⁵⁵

The following brief excursion through the development of the idea of governance is useful both as a 'case study' on the application of hegemony and to put the disenfranchisement of individuals – and the diminishing opportunities for political engagement – in proper context as a function of power relations.

2.3.1.1 A crisis of legitimacy

The 'genealogy' of Governance extends back to the early 1970s. Santos, like Brown, takes the analysis of Habermas⁵⁶ as a starting point in ascribing the recognition of a 'crisis of legitimacy' to student, feminist and ecological movements. This legitimacy deficit⁵⁷ was founded in the perceived

⁵² Supra note 22.

⁵³ *ibid.*, 459. Emphasis added.

⁵⁴ Boaventura de Sousa-Santos and César A. Rodríguez-Garavito, *Law and Globalisation from Below*, Cambridge, Cambridge University Press 2005, 31.

⁵⁵ *ibid.*, 35.

⁵⁶ The significance of this is that Habermas uses the idea of a dialectic, an ongoing dialogue to arrive at principles of justice and social relations rather than attempting to derive them from an assumed 'original position' as Rawls does. The Habermasian approach has the distinct advantage of being able to evolve and adapt to concerns such as ecological crisis and sustainability that were outside the consideration of the social contractarian analysis undertaken by Rawls.

⁵⁷ This deficit is just as prevalent in international law as it is in domestic contexts. See Obiora Okafor, *Is There a Legitimacy Deficit in International Legal Scholarship and Practice?* (1997) 13 *International Insights* 91.

'exclusionary' nature of the social contract as interpreted within liberal democracies. The interests of ethnic minorities, immigrants, and indigenous peoples were totally outside the consideration of the social contract. It goes without saying that such considerations as ecology and cultural diversity were similarly excluded. Further to this, there was disempowering inclusion as well, for example with the co-option of women. The crisis was formulated in terms of social transformation, popular participation, social contract, social justice, power relations and social conflict.

2.3.1.2 Governability

In 1975, the Trilateral Commission report concluded that there was a crisis of legitimacy but that it was in fact one of excessive *inclusion*. In their view, the demands of the newly emergent social and indigenous groups upon the state were too onerous and governments would be increasingly unable (or unwilling) to deliver on their demands. This meant a 'reversion of common property rights won through years of hard class struggle (the right to a state pension, to welfare, to national health care) into the private domain.'⁵⁸ What was necessary was no less than the 'incapacitation of the state as a social regulator'.⁵⁹ The method of doing this was to reconstitute the nature of institutions of power. This has become known as the Washington Consensus⁶⁰ and it prescribed a general shift in the placement of power from the 'central state to devolution/decentralization; from the political to the technical; from popular participation to the expert system; from the public to the private; from the state to the market.'⁶¹ With this deft exit of the state from the provision of social services and responsibility for economic markets, the baton was passed to business. The privatization of the function of government was contingent on 'the three pillars' of privatization, marketisation and liberalization. This period in the 1990s saw an explosion in the number of civil society organizations, particularly in Latin America⁶² which arose to 'fulfil the human needs that the market cannot fulfil and the state is no longer in a condition to fulfil.'⁶³

2.3.1.3 Governance

From the mid-1980s to the mid-1990s, the process of hegemonic neoliberal globalisation was applied with great alacrity around the world. Latin America in particular was targeted as an economic laboratory. In this relatively brief historical period though, the shortcomings of the market approach to social and economic regulation became readily apparent. As this failure to deliver social goods became more apparent, it also became increasingly clear that the only group which continued to benefit was the trans-national capitalist class.⁶⁴

Santos stops short of defining Governance as a paradigm, instead preferring to call it the 'political *matrix* of neoliberal globalisation.'⁶⁵ The significance of this is

⁵⁸ Supra note 1 at 161.

⁵⁹ Supra note 54 at 36.

⁶⁰ See the explanation above at note 5.

⁶¹ Supra note 54 at 34.

⁶² See, Milani above at note 6.

⁶³ Supra note 54 at 34.

⁶⁴ William I. Robinson, *A Theory of Global Capitalism: Production, Class, and State in a Transnational World*, Baltimore, John Hopkins University Press 2004 (particularly chapter 2).

⁶⁵ Supra note 54 at 31.

best seen in terms of the binary of exclusion/inclusion. The matrix is based on selection of what will or will not be considered but the excluded will not then be present as excluded as it was in the era of Governability. The excluded will in fact be rendered invisible and therefore completely outside of rational consideration. This is a political manifestation of Litowitz's hegemonic 'naturalization' principle whereby a self-created reality is constructed and populated by concepts determined and defined by their interpreter.

Thus we learn more from Governance by looking at what it does not mention than what it does. Santos' analysis suggests a circularity of purpose as governance is posed as a synthesis of the demands for inclusion coming from the crisis of legitimacy and the disengagement of the state from the social and economic regulatory spheres when in fact it seeks to replace the idea of legitimacy with its own market-based legitimacy.

2.4. Northern Anthropocentric Dualism

The philosophical corollary to market ontology is dualism. Representative of this is John Rawls' theory of 'justice as fairness.' This social contractarian view is fundamental to the liberal democratic conception of justice and yet is unable to account for non-human nature. There have been numerous attempts to 'extend' liberal contract theory to include nature within its ambit and some are more compelling than others but the neoliberal orthodoxy as applied to nature is strictly dualistic. This is problematic when examining 'rights' as applied to the non-human world, as Rawls explicitly and unambiguously devoted his contract theory entirely to the human world. This repudiation is so thorough that it is worth quoting at some length:⁶⁶

The theory of justice as fairness fails to embrace all moral relationships, since it would seem to include only our relations with other persons and to leave out of account how we are to conduct ourselves toward animals and the rest of nature. I do not contend that the contract notion offers a way to approach these questions which are certainly of the first importance; and I shall have to put them aside. We must recognise the limited scope of justice as fairness and of the general type of view that it exemplifies.

Only 'moral persons'⁶⁷ are considered in the scheme. Moral persons have two characteristics; First, they have a conception of the good 'as expressed by a rational plan of life'; Second, they have acquired (or are at least capable of having) a sense of justice.⁶⁸ This excludes almost all animals and certainly cannot be taken to consider plants or ecosystems. Rawls gives 'no account ... of right conduct in regard to animals and to nature' that there is any requirement that justice be done to non-humans but concedes:⁶⁹

Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings of pleasure and pain and for the forms of life of which all animals are capable clearly imposes duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract

⁶⁶ John Rawls *A Theory of Justice*, Cambridge, Belknap Press 1971, 17.

⁶⁷ *ibid.* 504.

⁶⁸ *ibid.* 505.

⁶⁹ *ibid.* 512, emphasis added.

doctrine so as to include them in a natural way... *A correct conception of our relations to animals and nature would seem to depend on a theory of the natural order and our place in it.*

This is a classic statement of the false dichotomy between public and private discourse that an adherence to liberal 'neutrality' engenders.

The term 'natural resources' is particularly evocative of the instrumentalist approach to nature current in economic discourse. The inference is clear that non-human nature referred to in this manner is only as valuable as the amount of usable material it will yield as a unit of production. A finite lifetime is also ascribed to an organism referred to from this conceptual framework; it will grow and live until such time as it is to be used. It is implicit in such a naming that it *will* be used.

2.5 Conclusion

Counter-hegemony must first be understood in terms of what it opposes. The struggle against undemocratic expert rule, privatisation, and enclosure engenders a participatory democratic, communitarian resistance that seeks to share rather than appropriate. Equally, rule from above is met by resistance from below. What the two globalisations share, though, is the same *matrix* of decentralisation and interaction across multiple levels. The distinction to be found between the two is in the binary of exclusion and inclusion. Inclusion of society 'including nature'⁷⁰ is the key to appropriating the techniques of hegemony normally used for enclosure to extend the bounds of the commons. This requires no less than a re-invention of the ontology of capitalistic enclosure. The next chapter suggests the form this re-invention may take.

⁷⁰ Supra note 53.

CHAPTER 3 – ENCLOSURE OF THE COMMONS

3.1 A Global Enclosure Movement

3.1.1 Enclosures

The ‘commodification of life’ is one of the leading concerns of the indigenous and grassroots movements in the Latin American region and indeed, the Global South generally. In academic literature, an analogy is often drawn between the commodification and privatisation of ‘the commons’ under globalisation and the Enclosure movement in England and continental Europe of the fifteenth to eighteenth centuries.⁷¹ This movement entailed vast areas of common grazing land being enclosed by landlords and made property private through the creation of individual title. This process not only moved control of the land into the hands of a wealthy elite, it also created the preconditions for the industrial revolution by forming a landless and impoverished class who provided a ready source of cheap labour for the developing factory system.⁷²

In the last thirty years, the neoliberal encirclement, commodification and exploitation of natural resources have, under globalisation, taken proportions deserving of the name. Donald Nonini asserts that:⁷³

[C]orporations, allied with Northern scientists and universities, national and regional governments, and international financial institutions have, through a variety of mechanisms associated with neoliberal globalisation (international treaties, adjudication tribunals, structural adjustment policies, etc.) acted to *dispossess large portions of the world’s population of their commons’ resources and enclose them for profit making*. Those belonging to the corporate alliance ... have acted as if the people who have long depended on these resources for survival are no longer entitled to use them – or even to exist, since they have become increasingly superfluous to capitalist production.

For any common-pool resource to be reduced to private ownership, it must first be commodified.

This process involves the encirclement or circumscription of a part of the whole so that it may be separated and converted to a fungible unit of exchange. Thus nature becomes ‘natural resources’. The theoretical framework for this dualistic ‘semiotic conquest’ is furnished by ‘the resignification of nature as environment; [and] the reinscription of the Earth into capital via the gaze of science.’⁷⁴ A similar process has taken place with the scientisation of climate change and the commodification of environmental pollution into units of carbon.

⁷¹ Particularly in the fields of intellectual property and patent law. See, Stephen B. Scharper and Hillary Cunningham “The Genetic commons: Resisting the neo-liberal enclosure of life” in Donald M. Nonini (ed.) *The Global Idea of ‘the Commons’*, New York, Bergahn 2007, 53-65; Christopher May *A Global Political Economy of Intellectual Property Rights: the new enclosures?* London, Routledge 2000, 13.

⁷² Karl Polanyi *The Great Transformation*, Beacon Press 2001 [1944].

⁷³ Donald M. Nonini “Introduction” in Donald M. Nonini (ed.), *The Global Idea of ‘the Commons’*, New York, Bergahn 2007, 2-3. Emphasis added.

⁷⁴ Arturo Escobar, *Encountering Development: the making and unmaking of the third world*, New Jersey, Princeton University Press 1995, 202.

3.2 A Protective Counter-Movement – The ‘embeddedness’ of markets in society

Nineteenth century civilization alone was economic in a different and distinctive sense, for it chose to base itself in a motive rarely acknowledged as valid in the history of human societies, and certainly never before raised to the level of a justification of action and behavior in everyday life, namely, gain. The self-regulating market system was uniquely derived from this principle.⁷⁵

In *The Great Transformation*, Karl Polanyi observes that among political and economic systems in human history it is only under economic liberalism in the industrial age (and by extension neo-liberalism) that markets have become effectively divorced from their function of service to society. Instead society is subjugated and run as an adjunct to the economy.⁷⁶ He also communicates the essential insight that state intervention is central to creating and maintaining markets:⁷⁷

A belief in spontaneous progress must make us blind to the role of government in economic life. This role consists in altering the rate of change, speeding it up or slowing it down as the case may be; if we believe that rate to be unalterable - or even worse, if we deem it a sacrilege to interfere with it - then, of course, no room is left for intervention. Enclosures offer an example ... If the immediate effect of a change is deleterious, then, until proof to the contrary, the final effect is deleterious.

Using the enclosure movements in England as an example, Polanyi demonstrates that when an unchecked self-regulating market mechanism proves too destructive to continue, protective ‘double movements’ emerge. In England these were the protective enactments of the Tudor and early Stuart which slowed the rate of enclosures and, although they did not stop the process, were successful in slowing it sufficiently that it was not ruinous to the country.

Scholars in the field of economic sociology emphasise that capitalism is a constructed and continually reconstructed system, rather than a natural system that can be articulated only through one set of rules.⁷⁸ This is a direct counter to the readily accepted Economic Liberal and Marxist views that see only two possible political-economic outcomes for societies: Capitalism or Communism. Polanyi, by contrast, suggests that a range of alternatives are possible because markets can be embedded in as many different ways as there are forms of social organisation.

Many varieties of political economy developed as a result of different social and political choices which may be implemented through state intervention.

Peter Evans’ perspective is that neoliberal self-regulating markets have shown themselves to be ‘unsustainable’⁷⁹ on the dual counts of their inability to protect

⁷⁵ Supra note 72.

⁷⁶ An idea encapsulated by one of Margaret Thatcher’s more notorious utterances that “there is no such thing as society.”

⁷⁷ Supra note 72 at 125.

⁷⁸ See, Mark Granovetter, "Economic Action and Social Structure: The Problem of Embeddedness" (1985) 91 *American Journal of Sociology* 481.

⁷⁹ Peter Evans, “Is an Alternative Globalisation Possible?” (2008) 36 *Politics Society*, 271.

society and nature, but also an inability to protect capital from the potential chaos of its own markets.⁸⁰ Polanyi's "movements for social protection" formed as they were by 'an amorphous conglomerate of social interests ... their political impact depended on their ability to ... represent the breadth and variety of society's interest in protecting society and nature from the ravages wrought by the untrammelled dominion of the self-regulating market' anticipated 'the agglomeration of movements postulated by counter hegemonic globalisation.'⁸¹

The core difference between Polanyi's protective movements and modern day counter-hegemonic movements is that the protective movements were bound to the nation-state in the scope of their goals and strategies. Lacking a transnational perspective or organization, they were unable to 'organize at a level commensurate with the scale of the system they were trying to change.'⁸² Thus, although neoliberal hegemonic globalisation co-opts and constrains national governments from responding to calls for social protection, the possibilities for using communications technologies and social, cultural and organizational resources organising for counter-hegemonic organisation and mobilisation on a global scale.⁸³

The '21st Century Socialism' of the ALBA countries combines capitalism, state control and the market with an increasing recognition of common, communally-administered property. Although from the perspective of a 'counter movement', the state is requisite in clearing a space for the reclaiming of commons. The three countries examined, particularly Venezuela and Bolivia are most well known in the international media for their nationalisations and the creation of state-controlled companies for the primary industries. For this reason, it is generally considered that they are re-iterating the standard pattern of '20th century socialist' countries by putting all industry under central control. This is a misapprehension of the true nature and intention of these moves. Venezuela has held more closely to the direct state intervention of a protective counter movement, meanwhile it will be argued that Ecuador and Bolivia while currently pursuing rather conventional development paths are potentially embarking upon a far more radical shift towards a post-development model.

3.3 Beyond the Tragedy of the Commons

3.3.1 The Tragedy of the Commons

The 'Tragedy of the Commons' scenario still has currency in environmental thought as a legitimising discourse for enclosure, commodification, and privatisation. In Garret Hardin's classic essay, *The Tragedy of the Commons*,⁸⁴

⁸⁰ *ibid.*, 272.

⁸¹ Evans, 273.

⁸² *ibid.* 274.

⁸³ *ibid.*, 275.

⁸⁴ Garrett Hardin, "The Tragedy of the Commons" (1968) 162 *Science* 1243. A phrase most commonly attributed to Garrett Hardin. The originator of the phrase appears to be William Forster Lloyd who coined it in 1833 in his *Two Lectures on the Checks to Population*. The scenario goes back at least as far as Aristotle who wrote: 'That which is common to the greatest number has the least care bestowed upon it.' (*Politics*, 1261 b34).

published in *Science* in 1968, he outlines a type of ‘Malthusian trap’ in which a stable population will inevitably degrade the land upon which it relies for continued survival.⁸⁵

The tragedy of the commons develops in this way. Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy.

Using the simple example of a pasture shared between a group of herders, he concludes that ‘the commons, if justifiable at all, is justifiable only under conditions of low population density.’⁸⁶ Hardin’s herder example is remarkable for a number of reasons. First, he provides no empirical examples to confirm his thesis. He also assumes that there is no communication or trust between the herders and that each is acting entirely in their own short term interest. This would appear to hold true even to point at which those using the commons become aware that they are contributing to its destruction.

Hardin lists ‘all the reasonable possibilities’ for dealing with Commons as follows:⁸⁷

We might sell them off as private property. We might keep them as public property, but allocate the right to enter them. The allocation might be on the basis of wealth, by the use of an auction system. It might be on the basis of merit, as defined by some agreed-upon standards. It might be by lottery. Or it might be on a first-come, first-served basis, administered to long queues.

Two solutions have been proposed for this ‘tragedy.’ Hardin’s preference is for enclosure. That private property rights be assigned and traded. He refers to the need to ‘legislate temperance’⁸⁸ and calls for ‘mutual coercion mutually agreed upon.’⁸⁹

But there is at least a third option that is not considered; that of communal ownership, holding land in a Commons.

Many thinkers, such as George Monbiot, consider communal ownership to be the preferred solution.⁹⁰

⁸⁵ *ibid.* 1244.

⁸⁶ *ibid.* 1247

⁸⁷ *ibid.* 1245

⁸⁸ *ibid.*

⁸⁹ *ibid.* 1247.

⁹⁰ George Monbiot, “The Tragedy of Enclosure”, 270 *Scientific American*, 159-160 (1994).

Available at: <http://www.monbiot.com/archives/1994/01/01/the-tragedy-of-enclosure/>. (All websites hereafter as at April 21 2010). In this riposte, Monbiot observes that Hardin’s thesis ‘only works where there is no ownership.’ Giving the example of the world’s oceans: ‘[T]hese are not commons but free-for-alls. In a true commons, everyone watches everyone else, for they know that anyone over-exploiting a resource is exploiting them’ (at 159). For examples of the unintended consequences of actions based on this assumption see also, Monbiot, G., *No Man’s Land: An Investigative Journey Through Kenya and Tanzania*, Picador, 1994.

What Hardin is really envisioning in his herder scenario is not truly a limited access commons but an *open access* situation. His assumptions and conclusion therefore hold true only under the certain very particular conditions which are as follows: 'Careful game theoretical, experimental, and field research have shown Hardin's theory to be correct under specific and limited conditions. These conditions include participants that: (1) are fully anonymous, (2) have no property rights to the resource system, (3) cannot communicate, and (4) lack long-term interests in the resource.'⁹¹ These conditions are so particular as to be useful only in a very small number of arrangements rather than being universalisable as metaphorical policy prescriptions.

3.4 An Alternative: Common Pool Resources Governance

Many alternative forms of property have repeatedly been found to work effectively when well matched to the attributes of the resource and the harvesters themselves, and when the resulting rules are enforced, considered legitimate, and generate long-term patterns of reciprocity ... in spite of Hardin's persistent metaphor, today many people, ranging from policy makers, donors, practitioners, and citizen activists, to scientists from different disciplines, have begun to appreciate that there is a world of nuances between the State and the Market.⁹²

3.4.1 Governing the Commons

So, what is the alternative to the logic of the tragedy and its two choices of market or leviathan?

In her watershed work, *Governing the Commons*,⁹³ Elinor Ostrom counters the ubiquity of the tragedy of the commons scenario. She analyses numerous examples of existing resources in common ownership (Common Pool Resources – CPRs) that have not only survived but flourished within a 'self-financed contract enforcement game.'⁹⁴ Ostrom notes that '[a]t the heart of each of these models is the free rider problem. Whenever one person cannot be excluded from the benefits that others provide, each person is motivated not to contribute to the joint effort, but to free ride on the efforts of others.'⁹⁵ Dolšák

⁹¹ Frank van Laerhoven & Elinor Ostrom, "Traditions and Trends in the Study of the Commons", *International Journal of the Commons*, Vol. 1 no. 1, October 2007, 19.

⁹² Frank van Laerhoven & Elinor Ostrom "Traditions and Trends in the Study of the Commons" (2007) *International Journal of the Commons*, 3, 19.

⁹³ Elinor Ostrom, *Governing the Commons: the evolution of institutions for collective action*, Cambridge, Cambridge University Press 1990.

⁹⁴ Her theoretical workings are based in Game Theory and are intended to be an express rejection of the logic of the 'Prisoner's Dilemma' and Mancur Olson's 'Logic of Collective Action.' The Prisoner's dilemma is a well-known test of the rationality of decision making according to Game Theory in which two prisoners are held separately, each is asked to inform on the other in the knowledge that the consequences will be best if neither informs on the other, tolerable if one informs and the other doesn't and worst if both inform. Olson's hypothesis in *The Logic of Collective Action: public goods and the theory of groups* (Cambridge, Harvard University Press 1965) is that 'unless the number of individuals is quite small, or unless there is some coercion or some other special device to make the individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests.*' p2, emphasis in the original.

⁹⁵ Supra note 93 at 6.

and Ostrom conclude that the way to overcome these limitations is to re-embed the use of the common resource in social consciousness: 'Users who trust each other are more likely to restrain their use of the common pool resource and comply with agreed-upon limits of resource use. Further, users who are connected by multiple issues and over a longer period of time can use issue linkages and reciprocity to induce cooperation.'⁹⁶ It is this 'Social Capital' that is key to understanding the creative, communal decision making that can overcome the relentless repetition of tragedies of the commons.

3.4.1.1 *The Market*

Dolšak and Ostrom identify the main issues of commercialisation as they affect governance of the Commons, and particularly apropos to the Third World countries, 'as destroying the social fabric of communities, replacing traditional principles of co-operation with those of competition and causing resource deterioration. Commercialisation and access to markets shifts cultivation from traditional species to cash crops. Commercialisation also increases income differentiation in communities.'⁹⁷ Inherent in this vision is the primacy accorded to individualism and its concomitant dualism. This is in sharp contrast to the communal and collective world view of those who inhabit and use commons, particularly indigenous peoples.

3.4.1.2 *Leviathan*

Taking this individualism as a given, Hardin asserted that 'if ruin is to be avoided in a crowded world, people must be responsive to a coercive force outside their individual psyches, a 'Leviathan' to use Hobbes' term.'⁹⁸

The shortcomings of imposing central control over commons using metaphors as the foundation for policy formulation can themselves create tragedies. This is poignantly illustrated in this example which reflects the inadvertent consequences of nationalisation of natural commons in the Latin American countries examined.⁹⁹

Nationalising the ownership of forests in Third World countries, for example, has been advocated on the grounds that local villagers cannot manage forests so as to sustain their productivity and their value in reducing soil erosion. In countries where small villages have owned and regulated their local communal forests for generations, *nationalisation meant expropriation*. In such localities, villagers had earlier exercised considerable restraint over the rate and manner of harvesting forest products. In some of these countries, national agencies issued elaborate regulations concerning the use of forests, but were unable to employ sufficient numbers of foresters to enforce these regulations. The foresters who were employed were paid such low salaries that accepting bribes became a common means of supplementing their income. The consequence was that nationalisation created *open access resources* where *limited access common property resources* had previously existed.

⁹⁶ Nives Dolšak and Elinor Ostrom "The Challenges of the Commons" in *The Commons in the New Millenium: Challenges and adaptations*, Nives Dolšak and Elinor Ostrom (eds.) Cambridge, MIT Press 2003, 17.

⁹⁷ *Ibid.*, 18.

⁹⁸ *Supra* note 93 at 9.

⁹⁹ *Ibid.* at 23.

Another iteration of the paternalistic approach to local and indigenous populations is the “resurgent protectionist” conservation stance¹⁰⁰ which proposes that humans be removed from areas to be protected altogether. As locals are excluded from sensitive ecological areas, they are caught in a ‘conservation Catch-22’ in which, as they lose their ability to adapt traditional resource use institutions to reflect current circumstances, their broadening of economic activities and use of technologies for survival is ‘taken as evidence that they have lost their “natural conservationist” tendencies.’¹⁰¹ Tendencies which were predicated on people being in ‘a state of limited technology, subsistence production, and low population pressure.’¹⁰²

Both centralisation and privatisation assume that institutional change must be imposed from above. Ostrom concludes that ‘both are too sweeping in their claims ... instead of presuming that the individuals sharing a commons are inevitably caught in a trap from which they cannot escape, I argue that the capacity of individuals to extricate themselves from various types of dilemma situations *varies* from situation to situation.’¹⁰³ In acknowledging the broad interstices of Leviathan and Market, she avoids the ‘sterile dichotomy’¹⁰⁴ of forcing commons situations into one or the other. The ‘embeddedness’ of the market in society and the state is such that ‘[n]o market can exist for long without underlying public institutions to support it. In field settings, public and private institutions frequently are intermeshed and depend on one another, rather than existing in isolated worlds.’¹⁰⁵

The global commons movement includes resisters of intellectual property rights, builders of open- source software, those who oppose the assertion of copyright to stop the production of generic life-saving drugs in the Third World,¹⁰⁶ those who agitate for labour rights and welfare – conceived of as common entitlements.¹⁰⁷ The idea of commons in licensing of software for instance has produced outstanding software done not for profit but for the satisfaction of a job well done, or prestige, or respect of peers and family. Any of the numerous non-pecuniary enjoyments we take from our work. Such work is a continuing challenge to the hegemonic idea that work is only done by rational, self-

¹⁰⁰ Flora Lu, “‘The Commons’ in an Amazonian Context”, in Donald M. Nonini (ed.), *The Global idea of ‘the Commons’*, New York, Bergahn 2007, 41, 47.

¹⁰¹ *ibid.*, 49.

¹⁰² *ibid.*, 48. Such arguments have had currency in New Zealand with application to Māori. Both in regard to the interpretation of *kaitiakitanga* (the ‘guardianship’ of Māori over the environment as codified in section 7(a) of the Resource Management Act 1991) and, far less credibly, assertions that fishing quotas should only be awarded to Māori if they use traditional *waka* (canoes) and bone hooks as at the time of the signing of the Treaty of Waitangi (1840) when these obligations were formalised.

¹⁰³ *Supra* note 93 at 14.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*, 15.

¹⁰⁶ Heinz Klug, “Campaigning for Life: Building a New Transnational Solidarity in the face of HIV/AIDS and TRIPs” in Boaventura de Sousa-Santos and César A. Rodríguez-Garavito, *Law and Globalisation from Below*, Cambridge, Cambridge University Press 2005, 119-139.

¹⁰⁷ Ronen Shamir, “Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony?” in Boaventura de Sousa-Santos and César A. Rodríguez-Garavito, *Law and Globalisation from Below*, Cambridge, Cambridge University Press 2005, 92-117.

interested actors in exchange for payment and if the creators of the work are prepared to waive their 'right' to profit in perpetuity it becomes difficult for the holders of copyright for others' work to defend the legitimacy of their claims.

This idea of the global Commons is an interaction of the previously conceptually distinct spheres of Social Movements, Indigenous peoples, and non-human nature. Most significantly for the purposes of this analysis, the cosmology that has been extended to a national, regional and global level has its origins in a local, communal ethic borne of a strong relationality.

3.5 Conclusion

Neoliberal globalisation represents a new global enclosure movement. Counter-hegemony consists in resisting this enclosure and protecting the commons. The dichotomy presented by enclosure's legitimising discourse of 'Tragedy of the Commons,' presents two alternatives both of which have been shown to be unviable, undesirable, or both, of leviathan or the market. Ostrom's approach to commons governance offers a way that avoids the brutalism of both approaches and has the advantage of adapting to the culture in which it is embedded. This embeddedness of culture is also central to Polanyi's 'protective counter-movement.' ALBA asserts state control, but it is in order to re-embed commons as common property in the wake of comprehensive enclosures.

CHAPTER 4 – MULTILEVEL GOVERNANCE

4.1 Reform from above or Transformation from below?

This recognition of the flaws of imposition of reform from above points to the necessity of constructing an ecological order of the Commons ‘from below’. Commons literature has tended to focus on the local and community level.¹⁰⁸ While offering valuable insights, this has become an increasingly limiting boundary. In an increasingly globalised world and in the context of a discussion of the Latin American countries which have been more significantly (and negatively) affected than almost any others, this is an illusory distinction. No sooner has the idea of a global commons arisen than there have been attempts to enclose it.

As communities become more connected to national and global processes, they become ‘vulnerable to pressures and incentives that originate at other levels of social, political, and economic organisation.’¹⁰⁹ As such, self-organisation of communities at all levels becomes a highly important factor in the creation of social movements that are equipped to forge links horizontally or vertically between other groups. One of the defining characteristics of globalisation, in any of its forms, is an unprecedented compression of space and time scales¹¹⁰ so the success of groups in forming these links is instrumental in their ability to cross scales and levels.¹¹¹

4.1.1 Exclusion of Indigenous Peoples – Agrarian and Rights Struggles

Indigenous peoples have been the populations most harmed by neoliberal globalisation and are traditionally the most excluded group. As such, their struggle is the most instructive as to the possibilities and potentials of counter-hegemonic globalisation and the alternative conceptions of citizenship experienced therein. Rodríguez-Garavito and Arenas note that the rise of these movements is directly correlated to the ascendancy of neoliberal globalisation in their countries.¹¹² However, prejudice and discrimination against indigenous peoples of Latin America extends back to the ‘first conquest’ of the Spanish from 1492 onwards. The reaction to the ‘second conquest’ came exactly 500 years later when groups at first concerned primarily with agrarian issues but later became more indigenous in focus as their solutions to agrarian issues centered around ethno-ecological identity and relational worldview of the Andean cultures.¹¹³

¹⁰⁸ Fikret Berkes, “Commons in a Multilevel World” (2008) 2 *International Journal of the Commons*, 1, 1.

¹⁰⁹ *ibid.*

¹¹⁰ David Harvey, *The Conditions of Postmodernity*, Basil Blackwell, London (1989), cited in Young, O.R., F. Berkhout, G.C. Gallopin, M.A. Janssen, E. Ostrom, and S. van der Leeuw, “The Globalisation of socio-ecological systems: an agenda for scientific research” (2006) 16 *Global Environmental Change* 308.

¹¹¹ *ibid.*, 2.

¹¹² César A. Rodríguez-Garavito and Luis Carlos Arenas, “Indigenous Rights, Transnational Activism, and Legal Mobilisation” in *Law and Globalisation from Below*, Boaventura de Sousa-Santos and Cesar A. Rodriguez-Garavito, Cambridge, Cambridge University Press 2005, 242.

¹¹³ *Supra* note 21 at 97.

These struggles are particularly good illustrations of the multilevel, 'transcalar'¹¹⁴ nature of movement frames and issues utilised in subaltern cosmopolitan legality. At the level of localities and within nation-states, the vindication of claims to territory and autonomy to live by local laws, customs and traditional wisdom are ends in themselves. Furthermore, these successes have something of a 'demonstration effect' in providing a positive example and templates for resistance to other indigenous peoples in other localities. Solidarity amongst these groups leads to coordination and communication between other national and regional indigenous groups. Increasingly, these movements join forces with transnational ethnic and indigenous groups and at this level often have sufficient commonality with environmental and global social justice movements that they coordinate efforts on a global scale.

4.1.2 Global Social Justice and Environmental Movements – Global Commons

Social movements have been an essential part of the interpenetration of different scales and levels and have animated struggles against neoliberal hegemony and enclosure. They are 'increasingly taking form self-consciously as connected to, and even part of, a broader global counter-movement against the radical assaults of the corporate alliance... Although this new counter-movement has many elements and articulates very heterogeneous interests, one of its axial, global ideas is that of the commons.'¹¹⁵

This counter-movement is not merely reformist but one that aims to overturn the prevailing international order. In the words of Philip McMichael interpreting anti-globalisation movements through the lenses of Polanyi: 'a protective movement is emerging,' but not one that would simply regulate markets, instead it is 'one that questions the epistemology of the market in the name of alternatives deriving from within and beyond the market system.'¹¹⁶

4.2 Cosmopolitan Legality

4.2.1 The Idea of Cosmopolitanism

The idea of cosmopolitanism or 'world citizenship' has a lineage extending back at least to the late Roman Empire. But in this age of rapid transport, instantaneous communications, and ever enhanced capacities for 'doing evil at some point on our globe' there seems a greater possibility than ever of overcoming Kant's skepticism as to whether 'the oceans make a community of nations impossible.'¹¹⁷ The great promise of cosmopolitanism is that it offers an

¹¹⁴ To use Santos' analogous term.

¹¹⁵ Donald M. Nonini, "The Global Idea of 'the Commons'" in Donald M. Nonini (ed.) *The Global Idea of 'the Commons'*, New York, Bergahn 2007, 1-25, 22.

¹¹⁶ Philip McMichael, "Can We Interpret the Anti-Globalization Movement in Polanyian Terms?" Keynote address to 25th Anniversary Conference of Comparative Development Studies Program, Trent University 2001, 3. Quoted in Arturo Escobar, "Beyond the Third World: Imperial Globality, Global Coloniality and Anti-Globalisation Social Movements", *Third World Quarterly*, Vol. 25, No. 1, (2004), 207-230, 221.

¹¹⁷ Andrew Dobson, "Citizenship" in *Political Theory and the Ecological Challenge*, Andrew Dobson and Robyn Eckersley (eds.) Cambridge, CUP, 2006, 216.

‘alternative imaginary’¹¹⁸ beyond the local and nation-state. A leading theory is that of David Held who proposes a continuing process of integration at the regional and then global levels as essentially a continuation of the neoliberal globalisation process. The ‘thin atmosphere’¹¹⁹ of Held’s formulation has come in for heavy criticism. Roland Axtmann doubts that ‘capitalism as an inherently egalitarian system organized around the profit motive’ can possibly be an appropriate means for ameliorating and eventually overcoming the divide between rich and poor within (and between) states.¹²⁰ Axtmann also asserts that there are certain problems that only states can properly deal with: Integration and equality *within* states. The necessity for an agency to implement sustainability and environmental protection measures; and the need for a Westphalian unit of legitimacy in international relations.¹²¹ These are significant objections to Held’s cosmopolitanism on its own terms but I suggest that they overlook two deeper issues. First, Axtmann assumes that ‘top-down’ technocratic approaches are the only appropriate way to address the difficulties of competition between states; Second, he does not take into account the capacity for regional and local groups to act at a supranational level without the mediation of the state.

Bart Van Steenbergen characterizes the history of citizenship as one of ‘increasing inclusion’¹²² and casts the contrasting economic and ecological approaches as relation to nature in terms of *control* or *care*. In the control approach, the global citizen views their role as that of an ‘environmental manager’ whose role is to ensure that development is ‘sustainable’, but this sustainability is animated by an instrumentalism that conserves resources for future use rather than for their own intrinsic value. Also the tendency is to focus on one particular commoditised *part* of an ecosystem while excluding consideration of the relationship between the ecosystem and the ‘resource’ and the component and the ecosystem as a whole. The two core convictions of the environmental manager are that the environmental problems currently faced can be solved with ‘innovative technology and creative management’ without significant changes to the existing socio-economic system.¹²³

Care, however, is based in a sense of relatedness to nature and compassion for other living beings. It requires a holistic view of the place of humans in society and views the earth not as a place to escape or transcend but as a ‘breeding ground, a habitat, and as a life world.’ The citizen in this sense becomes an ‘*earth citizen*’.¹²⁴

¹¹⁸ Ibid. at 229. But see, Martti Koskenniemi, “Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalisation” (2007) 8 *Theoretical Inquiries in Law* 9.

¹¹⁹ Supra note 45 at 189.

¹²⁰ Roland Axtmann, “What’s Wrong With cosmopolitan Democracy?”, in Nigel Dower and John Williams (eds.) *Global Citizenship: A Critical Reader*, Edinburgh, Edinburgh University Press, 2002, 105.

¹²¹ Ibid. 107-108.

¹²² Ibid. 144.

¹²³ Ibid. 149.

¹²⁴ Ibid. 150. He goes further to identify the earth citizens perspective as one of seeing the earth as *Gaia*, the Greek earth mother deity roughly analogous to the Ecuadorian *Pachamama* which will be examined below in the discussion of *Sumak kawsay*.

Robyn Eckersley¹²⁵ makes a convincing move away from Held's cosmopolitanism and towards an ecological democracy that is able to reconcile global, state and local citizenship in a single model. Her integrative project envisions these different levels of citizenship and action not as a conflict but as a 'virtuous relationship'.¹²⁶ She takes as a starting point the discourse ethic of Habermas (like Santos and Brown) and identifies ecological interests as 'generalisable' interests which may be advanced and defended against private, sectional interests. By acknowledging that the human view of nature is 'incomplete, culturally filtered and provisional'¹²⁷ and that care must therefore be taken in relations with nature she is able to overcome the resistance in the discourse ethic to allowing individuals to speak for others and proposes a form of trusteeship held by humans for nature. There is much to recommend Eckersley's analysis of the limitations of Liberal Democracy and Neoliberalism and also her proposed 'constitutional renovations',¹²⁸ particularly the codification of the precautionary principle. However, her analysis fails to recognize the possibility that anyone other than the wealthy developed nations will lead the process of 'ecological modernisation' that she so elegantly outlines. As at 2004, she nominated the EU as the only example of meaningful regional integration but goes on to suggest that it is best for them to develop strategies within their own borders in the hope that their inspiring example will result in 'policy diffusion' to other states which will look toward them as templates.¹²⁹ Eckersley's skepticism as to the effectiveness of transnational environmental agreements between the EU countries is understandable but at the same time as observing that ecological reform is being led by wealthy developed countries, she must also concede that they are the prime drivers of neoliberal globalisation which as we have seen is at the root of much environmental despoliation in the global North and South. On this view, she can only conclude that the developing world will be reluctant to adopt 'green competitive strategies'.¹³⁰ This is certainly the case so long as the developing world continues to attempt to compete.

4.2.1.1 Subaltern Cosmopolitan Legality

Santos theorises an oppositional cosmopolitanism that he terms 'subaltern cosmopolitan legality.' This is a 'bottom-up', participatory approach. It has a 'transcalar,'¹³¹ character, applying legal strategies at different scales. This advances counter-hegemonic globalisation by targeting the 'global in the local and the local in the global'.¹³² But opting only for local strategies not only fails to see the frequent intersection of local and global interests within a globalised world, it also sees the community as a 'closed and static group' which does not

¹²⁵ Robyn Eckersley, *The Green State: rethinking democracy and sovereignty*, Cambridge, MIT Press, 2004.

¹²⁶ Ibid. 241.

¹²⁷ Klaus Bosselmann, "Ecological Justice and Law" in B. Richardson and S. Wood *Environmental Law for Sustainability*, Oxford, Hart 2006, 140.

¹²⁸ Supra note 125 at 243-244.

¹²⁹ Ibid. 251.

¹³⁰ Ibid. 252.

¹³¹ Ibid., 54. This is an analogous concept to the 'multilevel' governance referred to by Global Constitutionalists scholars.

¹³² Ibid., 53.

extend solidarity beyond its own bounds: ‘Solidarity among local alternatives is fundamental, not only for their own survival but to ensure the gradual consolidation of a cosmopolitan globalisation.’¹³³ The motivation behind this counter-hegemonic globalisation is summed up in this statement of Ecuadorian President, Rafael Correa on the dark side of cosmopolitanism:

“We who want to be citizens of the world cannot understand schemes that always end up trampling and enslaving the poorest. How can we understand so-called globalization that does not seek to create world citizens, but only consumers? It does not seek to create a global society, just a global market.”¹³⁴ Intriguingly, it was the neoliberal drive towards decentralization that created this space for the cultivation of popular movements and indigenous leadership at the municipal level:¹³⁵

Different historical trajectories have led to this surprising convergence. On the side of neoliberal governance, the driving impulse has been the rejection of state centralism and state coercion and the formulation of a new model of social regulation based on the interests and voluntary participation of the stakeholders. On the side of counter-hegemonic governance ... the originating impulse has been the rejection of the working class parties and labour unions as the privileged historical agents and modes of organization of progressive social transformation and the formulation of a new model of social emancipation based on the recognition of the plurality of emancipatory agency and social transformative goals.

These movements grew up in parallel with neoliberal globalisation and rapidly translated their social capital into political capital becoming, by the late 1990s, potent forces in national politics in the countries studied. The decentralisation reforms undertaken in Latin America in the 1990s were moved by neoliberal governments and the devolution to indigenous peoples begun in Ecuador’s 1998 constitution was part of a larger scheme to shift obligations upon the state to provide protections to them.

4.3 Global Constitutionalism

The idea of the Commons has emerged as a global idea.¹³⁶

Among the first proponents of the theory of Global Constitutionalism was Jost Delbruck in 1989 who, acknowledging the realities of then-nascent globalisation, proposed that international law would need to become more of a ‘universal legal community.’¹³⁷

¹³³ Boaventura de Sousa Santos and César A. Rodríguez-Garavito, “Expanding the Economic Canon and Searching for Alternatives to Neoliberal Globalisation” in Boaventura de Sousa Santos (ed.) *Another Production is Possible: beyond the capitalist canon*, London, Verso 2006, xxxix.

¹³⁴ *Democracy Now!* website, “Ecuadorian President: World Should Consider Abolishing IMF” in online headlines for June 26, 2009 available at: <http://www.democracynow.org/2009/6/26/headlines#13>.

¹³⁵ Supra note , 43.

¹³⁶ Donald M. Nonini, “The Global Idea of ‘the Commons’” in Donald M. Nonini (ed.) *The Global Idea of ‘the Commons’*, New York, Bergahn 2007, 1, 3.

¹³⁷ Jost Delbruck, *Volkerrecht* Dahm, Delbruck, Wolfrum (eds) (Vol I/1, 2nd ed., 1989) 21. Cited in Klaus Bosselmann & Sarah Lawrence, *Global Constitutionalism: A literature review*, unpublished paper, 2010, 3.

Articulating a theory of Global Constitutionalism as ‘multilayered governance’, Thomas Cottier proposes that ‘[c]osmopolitan schools of thought ... offer hope and a moral foundation upon which theories of multilayered governance can be built into law.’¹³⁸ He cites Rawls’ *Theory of Justice*¹³⁹ as typical of ethical frameworks that tend to assume ‘a shared community of values’¹⁴⁰ as the foundation for mutual trust required for social and political cohesion. Yet, in a pluralistic (and certainly a plurinational) society, there is no such homogeneity.

Which leads us to ask whether there are any such common values shared across traditional national boundaries ‘based upon a common heritage?’¹⁴¹ Cottier states that a ‘multilayered’ governance cannot work in the absence of such common ethical values and shared beliefs and so turns to theories of cosmopolitanism as a way beyond theories of nationalism or cultural relativism which both deny the possibility of common underlying values.¹⁴²

A multilevel governance is the only way to be certain that all levels of interaction between humans and the environment are covered by the law.¹⁴³ An analogy may be drawn between the potential of different regional groups to implement a more comprehensive regime of ecological protection than a single state could. The same arguments made by Anne Peters for the success of European Union international law¹⁴⁴ could perhaps be better made for the ALBA countries given a far greater political and economic cohesion between the Andean countries. This is particularly relevant to such a biodiverse region as the Andean/Amazonian interstices straddled by the ALBA countries.

The shared concern for the global atmospheric commons may well offer the ‘transcivilisational’ perspective¹⁴⁵ needed for such a global harmonisation of laws. The process of globalisation paves with its shifting of the state from the centre of consideration and the integration of non-state actors into the law making process.¹⁴⁶ An example of such a process may be the Global Peoples’ Conference on Climate Change and the unity of concern evidenced in the Earth Charter and Draft Universal Declaration of the Rights of Mother Earth, discussed below in the case study on Bolivia.

¹³⁸ Thomas Cottier, “Multilayered Governance, Pluralism, and Moral Conflict”, (2009) 16 *Ind. J. Global Legal Stud.*, 647, 661.

¹³⁹ See the discussion of Rawls above at 2.4.

¹⁴⁰ *Supra* note 138 at 653.

¹⁴¹ *ibid.*, 659.

¹⁴² *ibid.*, 660.

¹⁴³ Thomas Cottier and Maya Hertig, “The Prospects of 21st Century Constitutionalism” in [2003] *Max Planck Y.U.N.L.* 261 at 313.

¹⁴⁴ Anne Peters, “Compensatory Constitutionalism: The function and potential of fundamental international norms and structures” (2006) 19 *Leiden J Int’l L* 579, 595.

¹⁴⁵ Onuma Yasuaki, “A Transcivilisational Perspective on Global Legal Order in the Twenty-first Century: A way to overcome West-centric and judiciary-centric deficits in international legal thoughts” in Ronald St. John Macdonald and Douglas M Johnston (eds) *Towards World Constitutionalism*, Leiden, Martinus Nijhoff 2005, 151.

¹⁴⁶ Jost Delbruck, “Prospects for a “World (Internal) Law”: Legal Developments in a Changing International System” (2001-2002) 9 *Ind. J. Global Legal Studies* 401, 401-402.

4.4 Conclusion

This chapter has drawn together the insights of counter-hegemonic globalisation and commons scholarship in the tradition of Ostrom to countenance the possibilities for multilevel governance.

But the great challenge inherent in any such scheme of multilevel interaction to a common end is a common purpose. Put another way, effective cooperation is near impossible without a shared vision.

Finding a shared vision or common purpose is the goal of cosmopolitanism - and its counter-hegemonic version, subaltern cosmopolitan legality and Global Constitutionalism. I share Cottier's view that cosmopolitan thought, in this thesis *subaltern ecological* cosmopolitanism, offer a coherent axial set of concerns to deal with ecological issues on a global basis in a relational, holistic fashion.

The nature of that ethic is the topic of the next chapter.

CHAPTER 5 - EMERGING ETHNO-ECOLOGICAL CONSTITUTIONAL TRENDS IN LATIN AMERICA

5.1. Rights of Nature

The concept of 'Rights of Nature' is a recognition of the intrinsic worth of non-human nature. Most significantly, this is a recognition of a form of legal personality other than that of a species of property. The idea of recognizing the intrinsic worth of non-human nature, most famously advanced by Christopher Stone in his seminal paper, *Should Trees Have Standing?*¹⁴⁷ has had currency in academia since its publication in 1972. It is only very recently, however, that this concept has percolated into international law by way of Ecuador's 2008 Constitution.

Stone conceived of the idea as a way to overcome the limitations imposed by viewing nature as property. He highlighted the absurdities of the granting of legal 'personality' to corporations and even to ships but not to animals, trees, rivers and ecosystems. The legal difficulty was (and in most of the world remains) that only parties who could demonstrate to the Courts that their property or civil rights had been unjustifiably prejudiced could bring an action under law – if not, they lacked the *standing* to bring an action under law. Courts have traditionally construed this bar to be a high one and so this problem of standing has been the major obstacle to legally defending non-human organisms and ecosystems as a whole unless a competing property can be shown.¹⁴⁸

Stone's innovation was to propose that the interests of the voiceless in nature should be represented by a guardian or trustee. Unlike a conventional fiduciary relationship in law, it is not necessary for a special relationship or set of circumstances to give rise to this obligation – any legal person may bring an action on behalf of the non-human. This then imposes liability on the party causing the harm upon the guardian's showing that the integrity of the organism or ecological system has been compromised, notwithstanding the economic harm to any human. The judgment given is for the benefit of the ecosystem or organism, the party causing the harm must make such compensation as is necessary to 'make whole' the organism or system. They would pay compensation into a fund from which the guardian would draw.

There have been many objections made to this approach to including rights of nature in a liberal rights framework. A particularly damning dismissal is the

¹⁴⁷ Christopher D. Stone, "Should Trees Have Standing? Toward legal rights for natural objects" (1972) 45 *Southern California Law Review* 450.

¹⁴⁸ The United States legal standard is typical of the common law approach. The opinion of Justice Scalia in *Lujan v Defenders of Wildlife* 504 U. S. 555 (1992) sets the bar of standing such that plaintiffs or applicants 'bear the burden of showing standing by establishing, *inter alia*, that they have suffered an injury in fact, *i.e.*, a concrete and particularized, actual or imminent invasion of a legally protected interest.' (at 555) And further that 'one or more of their members would thereby be directly affected apart from the members' special interest in the subject.' (at 556).

characterisation of such rights as a ‘quick legal fix’ extending only very limited legal rights while leaving the underlying dualistic structure of law unchanged.¹⁴⁹ This skepticism is wholly justifiable in the context of an anthropocentric, liberal democratic scheme of negatively-stated rights. Indeed, writing some years later, Stone himself observed that what is really required is a ‘changed environmental consciousness.’¹⁵⁰ However, a possibility remains that in the Ecuadorian constitutional context the rights of nature may not be such an incongruous fit. The concept of *sumak kawsay*, its grounding in the holistic cosmology of *Pachamama*, and the ecocentric framing of the terms of the constitutional discourse in Ecuador are such that significant interpretive assistance and context are furnished within the constitution. This is a different scenario to that usually objected to in which the concept is a gloss on entrenched anthropocentric, property-based treatments of non-human nature.

The case study on Ecuador will pay particular attention to the cross scale, cross level interaction that took place between the US-based public law firm, Community Environmental Defence Fund (CELDF); the Pachamama Alliance, a NGO based in the US and Ecuador; and the Constituent Assembly of Ecuador in drafting the ‘Rights of Nature’ articles of the 2008 Constitution of Ecuador. Remarkably, the CELDF drew on its experience drafting such provisions at the municipal level in the United States in drafting constitutional provisions for a sovereign nation. There are few better current examples of an exchange that simultaneously crosses spatial, temporal, jurisdictional and institutional scales incorporating all levels.

This viewing of nature not as ‘environment’: that which surrounds us but from which we are separate,¹⁵¹ but as a ‘Mother’ of which we are an inseparable and indistinguishable part, is entirely consonant with the indigenous view of nature as *Pachamama* in the Aymara and Quechua cosmologies. The national constitutionalisation of these indigenous conceptions will be analysed more closely in the case studies of Ecuador and Bolivia. The global constitutionalisation of this awareness of the interconnectedness of Earth Community is evident in the Earth Charter and the Draft Declaration of the Rights of Mother Earth to be debated on at the Global Peoples’ Conference on Climate Change.¹⁵²

¹⁴⁹ Quoted in Klaus Bosselmann, “Justice and the Environment: Building Blocks for a Theory on Ecological Justice” in Klaus Bosselmann and Benjamin Richardson (eds) *Environmental Justice and Market Mechanisms*, Leiden, Kluwer 1999, 30, 37.

¹⁵⁰ In the epilogue, “Trees’ at Twenty Five,” in Christopher D. Stone, *Should Trees Have Standing? (25th Anniversary Edition)*, New York, Oxford University Press USA 1996, 164.

¹⁵¹ As per the distinction between *umwelt* (in-world: holistic ‘ecology’) and *mitwelt* (with-world: dualistic ‘environmentalism’) in Klaus Bosselmann, *Im Namen der Natur* [English: *In the Name of Nature: the concept of eco law*], Munich, Scherz 1992; *When Two Worlds Collide: Society and ecology*, Auckland, RSVP, 1995.

¹⁵² To be held in Cochabamba, Bolivia between April 20-22, 2010. See the case study on Bolivia below for a detailed discussion.

5.2 The ‘Plurinational and Intercultural’ State – Transcending the Westphalian Nation-state

Plurinationalism, as a political project, is the most important struggle for indigenous peoples in the region ... it represents another conception of law and democracy, which may take three forms: representative, participative and community democracy.¹⁵³

The question may be asked, ‘What is the cultural alternative to the monolithic Nation-State?’

The idea of the Plurination or ‘Multi-Country’ offers the coherence of the state but allows for difference in a way that the assimilationist tendency of nationalism does not.

5.2.1 Plurinationality

The concept of the ‘plurination’ or ‘multi country’ is a move both beyond and within the conventional international legal unit of the nation state and dealings between countries based on territorial sovereignty and formal equality. It is a recognition of the ethno-ecological identity of the indigenous peoples of the plurination.¹⁵⁴

A concept originally developed by CONAIE,¹⁵⁵ plurinationality is defined as:¹⁵⁶

The recognition of a multicultural society in the insoluble political unity of the state that recognises and promotes unity. Equality and solidarity among all existing peoples and nationalities ... regardless of their historical, political and cultural differences.

Bolivia’s constitutional reform in 1994 was the first time that it was recognised as a ‘multilingual, plurinational state.’¹⁵⁷ In Ecuador, the 1998 constitution included recognition of indigenous and Afro-descendant peoples and their collective rights. However, these took place within a broader scheme of neoliberal law reform and Walsh asserts that they although recognition was nominally extended it was a placatory measure in the interests of continuing structural adjustment programmes more smoothly without fundamentally challenging the uni-national nature of the state.¹⁵⁸ Only with the more recent constitutional reforms have these ideas moved to the centre of the identity of the state.

¹⁵³ Boaventura de Sousa Santos, quoted in Milagros Salazar, “Peru: Indigenous Organizations Aim for the Presidency”, *Upside Down World*, May 29, 2008. Available at: <http://upside-downworld.org/main/content/view/full/1309/76/>.

¹⁵⁴ New Zealand can (contentiously) be considered a ‘plurination.’ The Maori electoral option to register to vote within a Maori list is an unusual measure among the world’s democracies. Walsh also suggests that Belgium, Finland (The Saami Parliament), Switzerland, and Canada may also be considered to be plurinational to a greater or lesser degree. *Supra* note 160 at 71-73.

¹⁵⁵ Ecuador’s largest indigenous federation.

¹⁵⁶ CONAIE, *Políticas para el Plan de Gobierno Nacional. El Mandato del CONAIE*, January 2003, 2. Quoted from Catherine Walsh, “The Plurinational and Intercultural State: De-Colonisation and State Re-Founding in Ecuador” (2009) 6 *Kult* 65, 78.

¹⁵⁷ *Supra* note 21 at 85. Article One of the 2009 Constitution reads: ‘Bolivia, free, independent, sovereign, multi-ethnic and pluricultural, embodied in a single republic, adopts representative democracy as its form of government, based on the union and solidarity of all Bolivians.’

¹⁵⁸ Catherine Walsh, “The Plurinational and Intercultural State: De-Colonisation and State Re-Founding in Ecuador” (2009) 6 *Kult* 65, 69.

5.2.2 Interculturality

As stated in the Constitution of Bolivia:¹⁵⁹

Cultural diversity is an essential foundation of the Plurinational State Community. Interculturality is the instrument for cohesion and harmony and balance between all peoples and nations. Interculturality will take place with respect to differences and equal footing.

Interculturality is considered to be ‘part and parcel of decolonisation’¹⁶⁰ countering the monocultural view imposed by the dominant culture and instead embracing cultural difference and traditions.

Walsh argues for the ‘complementarity of interculturality and plurinationality’¹⁶¹ as the dual components of the relational awareness and practice required to move towards ‘living well’. The two concepts are related as follows: ‘While the plurinational allows a departure from the uni-national frame through its emphasis on the pluri-national as a more adequate structure to unify and integrate, interculturality points to the relationships and expressions of relationships to be constructed.’¹⁶² The embrace of these, it is asserted, would lead to a re-imagining and re-founding of the state by abandoning conventional development narratives based on a monolithic state and private ownership. Instead a communitarian-collective, relational worldview would be cultivated focusing on the aims of solidarity, complementarity, cooperation, and self-determination.

These two conceptions together have the potential to escape the bounds of the liberal democratic state and its uninational, monocultural and hegemonic state structure. They combine to decolonise and strengthen participation in democracy with the aim of achieving *sumak kawsay* / *suma qamaña*.

5.3 ‘Living Well’: The incorporation of the indigenous *Cosmovisión*

5.3.1 “Living Well” or “Living Better”?

Inherent in the Bolivarian project, and particularly the works of José Martí, is the idea that a new indigenous identity and means of relating to nature must be (re)constructed in the indigeneity and culture of the peoples - oppressed and indigenous – in explicit counterpoint to the mentality of the coloniser and their imported concepts of private property and individualism. This is to be the new

¹⁵⁹ Article 99(I). The terms are used twenty-four times in the Bolivian constitution, primarily in the sections on education: Articles 77-98. In the Venezuelan constitution, there are two mentions: Article 100, inducements and incentives will be provided by the state as ‘folk cultures comprising the national identity of Venezuela enjoy special attention, with recognition of and respect for intercultural relations under the principle of equality of cultures.’ Article 121 affirms the right of ‘native peoples’ to an ‘intercultural’ and ‘bilingual’ education.

¹⁶⁰ Supra note 158 at 79.

¹⁶¹ *ibid.*, 83.

¹⁶² *ibid.*, 84.

vision of *el Hombre del Sur* (The Man of the South), incorporating the traditional wisdom of *los sombras*.¹⁶³

In sharp contrast to the neoliberal view that life satisfaction is best achieved by leaving individuals to accumulate material possessions, and that the purpose of society is to increase GDP; the idea of *buen vivir*,¹⁶⁴ *vivir bien*,¹⁶⁵ *sumak kawsay*,¹⁶⁶ *suma qamaña*,¹⁶⁷ or 'living well' is based on connecting and engaging with community and finding satisfaction in voluntary simplicity, or living 'within limits.' The idea was finalised in an international format in the *Declaration of the Children of the Earth*¹⁶⁸ framed to reject the 'planetary suicide of the commoditization of life,' identifying the primary agents of environmental destruction as 'capitalism, competition, and the accumulation of wealth.'¹⁶⁹

Evo Morales, President of Bolivia, in an interview in December 2009 at the Copenhagen COP15, made this distinction between the pursuit of happiness in quantitative material abundance, 'living better' and qualitative happiness in 'living well':¹⁷⁰

It's changing economic policies, ending luxury, consumerism. It's ending the struggle to, or this searching for living better. Living better is to exploit human beings. It's plundering natural resources. It's egoism and individualism. Therefore, in those promises of capitalism, there is no solidarity or complementarity. There's no reciprocity. So that's why we're trying to think about other ways of living lives and living well, not living better. Not living better. Living better is always at someone else's expense. Living better is at the expense of destroying the environment.

To properly conceptualise 'living well,' we must look to the conception of nature as *Pachamama*. *Pachamama* is the Mother Earth deity of the Andean and Amazonian peoples. 'Mother' Earth deity similar to Gaia or the Māori Papatuanuku. *Pachamama* is thus comprised of all nature and nature is the body of *Pachamama*. For example, oil is seen as the 'blood' of *Pachamama* and to draw oil from the ground is in this sense a form of vampirism.

'Living well' is the organizing principle for an alternative, ecological form of citizenship. Founded in understanding of and respect for *Pachamama*, it is the expression of an ancestral ontology about living 'within limits' which has been revived as an explicit alternative to the 'long neoliberal night' and the discourse of development and unlimited economic growth.

¹⁶³ 'The shadows.' This refers to the ritual and mystical elements of the indigenous *cosmovisión*. See, Marisol de la Cadena, "Política Indígena: Un análisis más allá de 'la política'", *WAN Journal* 4:139-171 (2008) [Spanish].

¹⁶⁴ Spanish (Ecuador).

¹⁶⁵ Castilian (Bolivia).

¹⁶⁶ Quechua (Ecuador).

¹⁶⁷ Aymara (Bolivia).

¹⁶⁸ Passed at the end of a two-day "National Summit of Indigenous Communities and Peoples of Peru and the International Forum: Indigenous Agenda, the European Union and the Decolonisation of Power and Knowledge" held on May 12-13, 2008. This conference was attended by delegates of the Quechua, Aymara, Lafquenche, Guambiano, Toba, Colla, Poccra, and Ashaninka 'nations.'

¹⁶⁹ Elsa Chanduví Jaña, "'Living Well,' a development alternative," *Latina America Press*, June 5th 2008.

¹⁷⁰ Evo Morales, interview with Amy Goodman, *Democracy Now!* 17 December 2009.

At its most elemental ethical level, 'living well' is a conception shared by Aymara and Quechua as part of a formulation of the fundamental moral principles for human conduct in harmony with nature: '*ama qhilla, ama llulla, ama suwa*' (do not be lazy, do not lie, do not steal), *suma qamaña* (living well), *ñandereko* (harmonious life), *teko Kavi* (good life), *ivi Maradi* (land without evil) and *qhapaj Nan* (noble path or life).¹⁷¹

This precept has little in the way of formal definition. In fact, it is considered as the verbalization of ancient principles that are to be lived and internalized by following and setting good examples, not purely by intellectualization. Importantly, these principles are not advanced in the Kantian sense of duty, nor out of Benthamite self-interest, but as a choice between living in harmony with nature or causing imbalance which will harm not only oneself but the body on which all community depends.

In terms more familiar in the Academy, 'living well' includes the concepts of deep ecology, relational rights, and decolonisation in 'an ancestral practice of respectful coexistence with nature, society and human beings.'¹⁷²

5.3.1.1 Relationality

In sharp contrast to the dualistic worldview of Northern liberalism and neoliberal economic thought, 'living well' is ecocentric and holistic in nature. It is based on an ontological assumption of 'relationality,' that 'all beings exist always in relation and never as 'objects' or individuals.'¹⁷³ This relational understanding is also at the core of nature as *Pachamama*.¹⁷⁴

Arturo Escobar suggests that a relational worldview must lead to a 'politics of responsibility' that is 'a sequitur of the fact that space, place, and identities are relationally constructed.'¹⁷⁵ Put another way, we are defined in all relevant senses by our interconnection with all other living things. A relational awareness such as this implicates us in acting responsibly towards all other living beings, human and non-human.

5.3.1.2 Communalism - Return to the Commons

The liberal emphasis on strong private property rights and philosophical individualism are countered in the indigenous cultures of the Amazon and Andes in which the 'commons' are 'culturally embedded.'¹⁷⁶ The rules of collective ownership are taught from childhood and are not 'explicitly named rules, but rather implicit understandings.'¹⁷⁷

¹⁷¹ As framed in Article 8 of the Bolivian Constitution of 2009.

¹⁷² Pablo Davalos, "The Sumak Kawsay ("Good Living") and the Development Closures" at <http://alainet.org/active/23920>, May 6 2008 [Spanish]. Economist Pablo Dávalos served as undersecretary to Rafael Correa when the now-President was Minister of the Economy under the previous Administration of Alfredo Palacio in 2005. He is now an advisor to the Confederation of Indigenous Nationalities of Ecuador (CONAIE).

¹⁷³ Supra note 19 at 38.

¹⁷⁴ A close analogy can be drawn between Pachamama and Papatuanuku of Māori cosmology. Similarly, a relational responsibility of *kaitiakitanga* as care for Papatuanuku is analogous to the *sumak kawsay* or *suma qamaña* care for Pachamama.

¹⁷⁵ Supra note 19 at 41.

¹⁷⁶ Supra note 99, see particularly 42-44.

¹⁷⁷ *ibid.*, 43.

In Flora Lu's study of the Huaorani of north-eastern Ecuador¹⁷⁸ she finds that 'communally-held resources are critical to indigenous subsistence, and common property regimes can represent important expressions of sociality and cultural values.'¹⁷⁹

In the 'communal system' a radical alternative can be found to the (neo)liberal order. This difference resides in the holistic perspective which engenders an opposite to the individualism, dualism, and focus on private property rights of Northern liberalism. To quote Félix Patzi Paco at some length:¹⁸⁰

By the communal or the communitarian concept we mean the collective property of resources combined with their private management and utilisation... our point of departure for the analysis of communal systems is doubtlessly the indigenous societies. In contradistinction to modern societies, indigenous societies have not reproduced the patterns of differentiation nor the separation among domains (political, economic, cultural, etc.); they thus function as a single system that relates to both internal and external environments ... The communal system thus presents itself as opposed to the liberal system.

Thus the extension of recognition to indigenous worldviews and ways of life must of necessity include and protect a conception of common property and communal ownership.

5.4 Conclusion

In analysing the trends that are apparent across the constitutions of Venezuela, Ecuador, and Bolivia trends of increasing relationality as manifested in respect for difference (interculturality) and the holism of plurinationality; ecocentrism (the Rights of Nature); and communality ('living well') become apparent.

It is this incorporation of indigenous worldviews into a holistic, ecocentric, and pluralistic conception that represent the constitutionalisation of 'Ethno-Ecological' approaches to governance in law.

¹⁷⁸ The same region in which the current litigation against Chevron is taking place.

¹⁷⁹ Supra note 100 at 50.

¹⁸⁰ Félix Patzi Paco, *Sistema Comunal. Una Propuesta Alternativa al Sistema Liberal*, La Paz, CEA 2004, 171-172 [Spanish]. Patzi Paco is an Aymaran Sociologist and was the first Minister of Education in Bolivia's Morales Government.

CHAPTER 6 – REGIONAL INTEGRATION

*Alianza Bolivariana para los Pueblos de Nuestra América (ALBA)*¹⁸¹

6.1 The Bolivarian Alliance

In the name of freedom, the United States of North America seemed to have been destined by Providence to plague America with miseries.¹⁸²

We have to create an integration with a different focus, a focus upon coordination, complementarity and cooperation among fraternal countries, transcending the merely commercial.¹⁸³

The national constitutional movements of Venezuela, Ecuador and Bolivia have a unifying ideology centered on the ALBA regional bloc. ALBA was first conceived and formed in explicit opposition to the Free Trade Agreement of the Americas (FTAA) but has grown to form a coherent vision of regional integration in Latin America. Its origins in counter-hegemony to the Anglo-American model of globalised capitalism and neo-colonial international law have made it a global centre for an alternative approach to economic and ecological governance.

Until recently there was great skepticism around the idea of cogent regional citizenship outside the European Union. Such sentiments are exemplified by Richard Falk: ‘Vague ideas of ... Latin American consciousness ... although widely shared, fall far short of establishing the sort of bonds of loyalty and allegiance associated with Westphalian citizenship.’¹⁸⁴ It must be noted that at the time he was writing in 2002 there was little to indicate the strong regional ‘pan-American’ movement that would emerge in 2006. Taking the ALBA integration into account, probably the most significant distinction to be drawn between the two is that the European integration is an extension of existing

¹⁸¹ In English: ‘Bolivarian Alliance for the People of Our Americas’. Alba also means ‘dawn’ in Spanish. Until very recently (June 24, 2009) the ‘Alliance’ was the ‘Alternative’ (*Alternativa*), commonly called the Bolivarian Alternative. Nonetheless, the nature of the movement as one of oppositional resistance remains unchanged. At the time of writing, membership stands at eight countries: Venezuela, Cuba, Bolivia, Ecuador, Nicaragua, Dominica, Antigua and Barbuda, and St Vincent and the Grenadines. Three other states are officially recorded as having observer status: Paraguay, Haiti and Iran. Honduras had joined during the Presidency of Manuel Zelaya but the coup government that deposed him pointedly left the alliance upon taking power. The term ‘Nuestra América’ (‘Our America’) has a special resonance in Latin America and the Caribbean. It is the title of a short essay written by Cuban revolutionary José Martí, published in the Mexican paper *El Partido Liberal* (30 January 1891). In it, he outlines the foundational ideas of the project that is continued in the Bolivarian Revolution. For an excellent distillation of the five main concepts in Martí’s piece and a ‘clairvoyant preview of the European American century, and the need to create an alternative to it’ see, Boaventura de Sousa Santos “Nuestra America: Reinventing a Subaltern Paradigm of Recognition and Redistribution” (2001) 18 *Theory Culture Society* 185, particularly 193-197.

¹⁸² Simon Bolívar, 1829.

¹⁸³ Rafael Correa, (Justin Delacour trans) “Interview with Ecuadoran President Rafael Correa”, *NACLA.org*, June 18 2009, available at: <http://ecuador-rising.blogspot.com/2009/06/interview-with-ecuadoran-president.html>.

¹⁸⁴ Richard Falk, “An Emergent Matrix of Citizenship; Complex, Uneven, and Fluid”, in Nigel Dower and John Williams (eds) *Global Citizenship: A Critical Reader*, Edinburgh, Edinburgh University Press 2002, 24.

neoliberal hegemony whereas the ALBA integration is counter-hegemonic and formed in explicit resistance to the 'neocolonial' economic policies of the global North. The realisation that economic relations in the twenty-first century will be largely between regional blocs has certainly aided cohesion between the Latin American states which have formed a vision of 'endogenous development'¹⁸⁵ which motivates much of the action at national levels. This and an intention to disengage from the US dollar based international financial exchange system have led them to examine the introduction of a regional currency along the lines of the Euro, the SUCRE.¹⁸⁶

6.2 Resistance to Empire – The Move to Earth Community

The story of counter-hegemony is one of resistance; resistance to the hegemony of Empire.

The Bolívarian revolution is so named to invoke the spirit of Simon Bolívar (1783-1830), '*El Libertador*'¹⁸⁷ who led the campaigns to emancipate Latin America from the yoke of Spanish imperial domination. The territories won in these 'wars of liberation' were united as a short-lived federation of *Gran Colombia*¹⁸⁸ comprised of what are today Venezuela, Colombia, Ecuador, Bolivia, Panama, and Peru.

Bolívar had a vision for a larger regional integration; a unified federation of states. But his rule was characterized by a highly centralized government with strong executive powers. Divisions between the three 'departments' led to the dissolution of the *Gran Colombia* as a federation, twelve years after it was formed.

In the present age, and most acutely since the conclusion of World War Two, Latin America has formed a new culture of resistance to the "second conquest"¹⁸⁹ of 'neo-colonialism', the imperial corollary of the neoliberal era.

¹⁸⁵ Development 'from within.' This model is based on escaping extractive economic dependency by developing a national manufacturing and refining capacity, assuring food security and fostering industry in the region to reduce dependency on foreign imports.

¹⁸⁶ First announced in November 2008, to be introduced in January 2010. The SUCRE is an acronym for the Spanish translation of 'Single Regional Compensation Payment System'. Also the name of the constitutional capital of Bolivia (named for Antonio Jose de Sucre, a Latin American independence hero who was a major collaborator with Bolívar) will provide a common unit for exchange purposes within ALBA, and progress towards a common currency. It is not yet a hard currency, but an electronic compensation system for trade within the ALBA region. The SUCRE will be used in coming months for Venezuelan rice exports to Cuba and asphalt exports to Bolivia, as well as Bolivian wood, food, textile, and artisan craft exports to other ALBA countries. The Sucre will have an initial value of US \$1.25, and will only be used by ALBA members for ALBA deals, mediated by the ALBA joint bank created last year. See, James Suggett, "Honduras Withdraws from ALBA, El Salvador Won't Join Despite FMLN Support", *Venezuela Analysis*, January 15, 2010. Available at: <http://www.venezuelanalysis.com/news/5070>.

¹⁸⁷ 'The Liberator.'

¹⁸⁸ Lasting from 1819 to 1831, it encompassed present-day Colombia, Venezuela, Ecuador, and Panama. This common history can be seen in the current flags of Colombia, Venezuela and Ecuador which all have the same horizontal bands coloured yellow, blue, and red.

¹⁸⁹ César A. Rodríguez-Garavito and Luis Carlos Arenas, "Indigenous Rights, Transnational Activism, and Legal Mobilisation" in *Law and from Below*, Boaventura de Sousa-Santos and Cesar A. Rodriguez-Garavito, Cambridge, Cambridge University Press 2005, 244.

The spirit of Bolívar's resistance to imperial Spain has been revived as the peoples of Latin America seek emancipation from another imperial hegemony, that of American Empire.¹⁹⁰

It is intriguing that the liberal ideology has become one of domination. In the time of the American Revolution and the founding of the American republic, Liberal Democracy was an ideology of emancipation from the theocracy and monarchy of the European order. Just as Latin America now resists American Empire, America was founded in resistance to the British Empire. David C. Korten, introducing the concept of 'earth community' notes two distinct groups emerging in this time which continue to dominate liberal political discourse.¹⁹¹ He characterizes the participatory democracy as 'a self organizing populist uprising that created the social and institutional infrastructure of a coherent, nonviolent, and radically democratic bottom-up resistance movement similar in its underlying dynamic to the global peace and justice movement of our own time.'¹⁹² Nonetheless, elite interests assert themselves as 'nascent empire'¹⁹³ and manifest as 'plutocracy cloaked in the guise of democracy'.¹⁹⁴ In this sense it would appear that the liberal democratic tradition of freedom carries the seeds of both domination and emancipation.

6.3 The Principles of ALBA

Two notable elements of the formulation of ALBA's principles is their fundamental opposition to neoliberalism and the centrality of agrarian concerns as they have been impacted upon by commodification of commons and ways of life. The embeddedness of culture in agriculture is expressed most clearly in the statement of Principle 5 that 'agriculture is ... a way of life and it cannot be treated like any other economic activity.' It will be seen that the demands of indigenous movements had their origins in agrarian concerns and the movements coalesced around these issues first and the ethno-ecological identity that they espouse emerged later as an organising principle.¹⁹⁵

6.3.1 Governing Principles of the ALBA¹⁹⁶

1. Neo liberal integration prioritizes the liberalization of the commerce and foreign investment; However, the Bolivarian Alternative for Latin America (ALBA) is a proposal that focuses its attention on the fight against poverty and social exclusion.
2. In the proposal of the ALBA, crucial importance is given to human rights, labour rights, women's rights, and to the defence of the atmosphere and ecosystems.

¹⁹⁰ In view of this, it is ironic that Venezuela has recently (as of February 10, 2010) awarded record oil extraction concessions in the Orinoco basin with a consortium of companies including Chevron (US) and Repsol (Spain). See, Brian Ellsworth and Marianna Parraga, "Venezuela Seals Biggest Oil Deals Under Chavez", *Reuters*, February 10 2009.

¹⁹¹ Supra note 15 at 176-180.

¹⁹² Ibid. 177.

¹⁹³ In the portentous words of the first US President, George Washington.

¹⁹⁴ Supra note 15 at 180.

¹⁹⁵ This is seen most clearly in the case study on Bolivia tracing the origin of the current ruling party to the coca grower's movement of the 1990s.

¹⁹⁶ Venezuelan Ministry of Integration and Foreign Trade - BANCOEX, "ALBA in the Caribbean", 4-5. Available at http://www.alternativabolivariana.org/pdf/alba_mice_en.pdf,

3. In the ALBA, the fight against the protectionist policies and the ruinous subsidies of the industrialized countries cannot deny the right of the poor countries to protect its farmers and agricultural producers
4. For the poor countries, where the agricultural activity is fundamental, the conditions of life of a million farmers and natives would be seen irreversibly affected if it happens a flood of imported agricultural goods, still in the cases in which subsidy does not exist.
5. Agricultural production is much more than the production of merchandise, is the base to preserve cultural options, is a form of occupation of the territory, defines modalities of relation with the nature and has to directly do with the security and nourishing self-sufficiency. In these countries agriculture is, rather, a way of life and it cannot be treated like any other economic activity.
6. ALBA must attack obstacles to integration at the root, that is to say:
 - a. The poverty of most of the population;
 - b. The deep inequalities and asymmetries between countries
 - c. Unequal Interchange and conditions of international relations
 - d. The weight of an "impossible to pay" debt
 - e. The imposition of the policies of structural adjustment of the IMF and the WB and the rigid rules of the WTO that undermines the bases of social and political support
 - f. Obstacles to access information, knowledge, and technology that are derived from the present agreements of intellectual property; and,
 - g. To pay attention to the problems that affect the consolidation of a true democracy, such as the monopolized social mass media.
7. To face such a call, Reformation of the State that only took us to unfair processes of deregulation, privatization and disassembling of the capacities of public management.
8. As an answer to the brutal dissolution that the State suffered for more than one decade of neo liberal hegemony, the fortification of the State and governments, on the bases of the participation of the citizen in public matters, prevails now
9. It is necessary to question the vindication of the free market and commerce, as if only these concepts were enough to automatically guarantee the advance towards greater levels of growth and collective well-being.
10. Without a clear intervention of the State directed to reduce the disparities between countries, the free competition between unequal countries will lead us to make the damage to the weakest worst.
11. To deepen integration in Latin America requires an economic agenda defined by the sovereign States, outside all ominous influence of the international organisms.

The objectives of integration as a reversal of neoliberal enclosures are elucidated by the 'obstacles' at Principle 6(f) bringing information, knowledge and technology into the commons by rejecting intellectual property enclosures; and, 6(e) rejecting the neoliberal governance that dis-embedded the state from society. Instead facilitating an extension of the 'double movement' to ameliorate the human cost of privatizations and structural adjustment programmes.

6.4 Counter-Hegemonic Regional Integration

ALBA has been built up incrementally, initially by (mostly) bilateral agreements. The first alliance was forged between Venezuela and Cuba in 2002 focusing on the exchange of Venezuelan oil and gas for Cuban medical equipment and expertise. In just seven years, ALBA has grown to its current membership of nine countries, with Ecuador joining in 2009.

The traditional balance of power between Latin America, Europe and the US has also changed significantly. The traditional 'Atlantic Triangle' relationship has been replaced by a new 'Pacific Triangle' with Asia, Latin America and the US at each point.¹⁹⁷ More recently, the countries of ALBA, as well as Brazil, are working to develop a new 'East-West' trade alliance with Russia and China. Part of this is the 'Multimodal Megaproject Manta-Manaos',¹⁹⁸ referring to the cities in Ecuador and Brazil, respectively, that will be the project's two central hubs with a highway running across the continent between the two. China and Russia have largely supplanted the former economic and military (respectively) primacy enjoyed by the US. This new-found autonomy has allowed the ALBA countries to break from the dominance of the Bretton Wood institutions and issue challenges that would have been unthinkable in the 1980s.¹⁹⁹

The ALBA countries have issued outright repudiations of not only predatory economic practices but the existing capitalist world order itself. Typical are such uncompromising statements as the following, issued as a rejection of the proposed agreement at the most recent Summit of the Americas:²⁰⁰

Capitalism is destroying humanity and the planet...The financial system is in crisis because it is quoting the value of financial paper at six times the real value of goods and services being produced in the world. This is not a "failure of the regulation of the system" but rather a fundamental part of the capitalist system that speculates with all goods and values in the pursuit of obtaining the maximum amount of profit possible. Until now, the economic crisis has created 100 million more starving people and more than 50 million new unemployed people, and these figures are tending to increas[e].

The integration project enables Bolivarian principles of real and effective public involvement – via grassroots and community based decision-making procedures – in the devising and implementation of state policy. For example, a central feature of its governance structure is the Council of Social Movements, conceived of in ALBA's founding Charter, framed at the 2007 Summit, and institutionalised at the 2008 Summit.²⁰¹ This international Council brings

¹⁹⁷ Detlef Nolte & Bert Hoffmann, "Latin America's New Geopolitical Position and its Implications for Europe", *German Institute of Global and Area Studies: Discussion Paper*, Jun. 2007, at 2, available at http://www.giga-hamburg.de/dl/download.php?d=/content/staff/nolte/publications/nolte-hoffmann_07_giga_discussion_paper.pdf

¹⁹⁸ This is a central project of the IIRSA integration programme.

¹⁹⁹ Supra note 199.

²⁰⁰ Document of the Bolivarian Alternative for the Peoples of Our Americas (ALBA) Countries for the 5th Summit of the Americas, in *Americas Summit: ALBA Nations Condemn Capitalism*, *Global Research* (Apr. 18, 2009), available at <http://www.globalresearch.ca/index.php?context=va&aid=13243>

²⁰¹ Paul Kellogg, "Regional Integration in Latin America: Dawn of an alternative to neoliberalism?" 29 *New Political Science*, 187, 206 (2007).

together the corresponding national Councils, which comprise delegates from the most representative local lobby groups of each member state. It operates alongside the top-level Council of Ministers and has the two-fold duty of channelling popular opinion into ALBA initiatives and overseeing public interest in existing projects.²⁰² In this way, ALBA at once transforms popular participation from passive to active by endowing community groups with a direct route to top-level decision-making processes, sponsoring a new kind of democratisation in international law.

Overall, it aims to effect a re-politicisation of all levels of government throughout member states.²⁰³ Its mechanisms ensure that ordinary people have occasion to voice their disenchantment with current policies and express new ones, or at least the priorities that should guide their development. This new model of *participatory democracy* is characterised as both right and responsibility; citizens have a duty to become involved so as to fully realise the potential of the guaranteed rights.

Tailored bilateral treaties thus recognise local difference and promote complementarity – as opposed to comparative advantage – by exchanging the resources and services a party is best equipped to supply with those of which they are most in need. In many cases, barter is employed rather than strict economic exchange. It also creates a participatory space for the flourishing of diversity in a manner that the dominant regime fails to achieve. Combined, these ethics embody a shift from standardisation to actualisation, from homogeneity to plurality, and from formal equality to meaningful equity.

This sentiment is expressed in strong terms by President Rafael Correa of Ecuador in a recent interview: “Competition is a concept that is already very debatable at the level of economic agents, but at the level of countries – fraternal countries – are you going to compete? It’s a complete absurdity. And how have they competed? Whoever mistreats the labour force most, whoever puts it in the most precarious position, because that is the only way to gain competitiveness. And we deteriorate the standard of living of our population and, above all, our working class. And the ones that most benefit from the cheapest products are the First World.”²⁰⁴

6.5 ALBA as a Multilevel Entity

The Bolivarian Alliance defies the conventional ‘nested scales’²⁰⁵ interaction that is posited by mainstream theories of international law. Thomas Muhr observes that although it is generally considered a plurinational, sub-national bloc, ALBA’s counter-hegemony is ‘competing with the hegemonic paradigm on the global, regional, sub-regional, national and a range of sub-national/local scales, the systematic de- and reconstruction of hegemonic social structures across multiple levels and scales transcends international relations by

²⁰² See Miriela Fernandez Lozano, “From Protest to Proposals for Integration”, *Bilaterals.org*, Oct. 25, 2008 at http://www.bilaterals.org/article.php3?id_article=13577.

²⁰³ See Terry Gibbs, “Business as Unusual: What the Chávez Era Tells us About Democracy under Globalisation”, 27 *Third World Quarterly* 265, 269 (2006).

²⁰⁴ <http://ecuador-rising.blogspot.com/2009/06/interview-with-ecuatoran-president.html>

²⁰⁵ Supra note 93.

employment of trans-national mechanisms.²⁰⁶

But in addition to this, ALBA employs two other integration mechanisms:

[F]irstly, bi-national agreements, as between Venezuela and Argentina, Brazil and Uruguay, are intended to culminate in a collective network; and, secondly ... direct agreements between ALBA governments and sub-national/local entities (mayoralties; civil organisations) that bypass the national government.

6.6 Conclusion

ALBA is an ostensibly a regional integration bloc but it is unique in its explicitly counter-hegemonic origins and purpose. For the purposes of this examination, the most significant aspect of this categorisation as 'counter-hegemonic' is the multi-level nature of interactions effecting a protective counter-movement to resist the enclosure of common cultural and environmental heritage via privatisations and the ethic of competition between states. Replacing these with the ethics of complementarity and reciprocity emphasising cooperation, a way of life around sufficiency drawing on the indigenous conceptions of 'living well' rather than abundance is being developed. As importantly, regarding approaches to ecological governance, the agrarian reform program of ALBA and that of Venezuela - as will be seen - is the starting point of an 'agro-ecological' emphasis which is a mid-point between agrarianism and an 'ethno-ecological' approach to governance.

²⁰⁶ Thomas Muhr, "Nicaragua Re-visited: From Neo-liberal "Ungovernability" to the Bolivarian Alternative for the Peoples of Our America (ALBA)" (2008) 6 *Globalisation, Societies and Education* 147, 159-160.

CHAPTER 7 - CASE STUDY: VENEZUELA

7.1 Local / Indigenous

In mainstream media discourse, there is an undue and generally unfavourable focus on the persona of President Hugo Chávez Frías.²⁰⁷ However, this belies the influence and power of grassroots movements in Venezuela in the ongoing Bolivarian Revolution.

In the one country in this analysis where a long enough time has elapsed since the adoption of the constitution to see a program of law emerge, there have been some positive developments balanced with a conventional development approach of super exploitation of natural resources.

Venezuela has an indigenous population estimated at 2.1% of the population but a 'severe governability'²⁰⁸ crisis²⁰⁹ allowed the space for contestation of indigenous issues. With the creation of the national indigenous organisation, CONIVE,²¹⁰ indigenous groups were able to 'jump scales' and move what had been strictly local struggles for recognition and autonomy into national contention. The watershed for this movement has been the region of Amazonas which has an indigenous population of 43%.²¹¹ The constituent assembly of 1999 was a seminal stage in the codification of constitutional indigenous rights in Venezuela. Chávez followed through on a campaign promise to provide three seats for indigenous delegates in the assembly, facilitating unprecedented representation on the national stage. Through alliances with the Catholic Church, and inter-American indigenous movements, CONIVE were able to develop and gain support for concrete policy proposals.²¹² When passed in 1999, the constitution of Venezuela represented the most progressive statement of indigenous rights in Latin America.²¹³

On the other hand, ecological groups have traditionally been weak in Venezuela. They formed primarily in the middle-classes and professional associations and although supported by civil society organisations, never forged connections with the indigenous peoples' groups. This 'submerged network' had some influence but lost influence when the social movements shifted their emphasis to economic and social rights in the face of the recession of the late-

²⁰⁷ As just one example, Dr Lee Salter and Dr Dave Weltman of the University of the West of England, UK, have exposed ongoing and systematic bias in the BBC's news reporting on Venezuela. Analysis of ten years of BBC reports on Venezuela since the election of Hugo Chavez to the presidency as part of an ongoing research project so far show that the BBC's reporting falls short of its legal commitment to impartiality, truth and accuracy. See: Lee Salter, "A Decade of Propaganda? The BBC's Reporting of Venezuela" *venezuelanalysis.com*, 14 Dec. 2009, available at: <http://venezuelanalysis.com/analysis/5003>.

²⁰⁸ See, section 2.3.1.2 on Governability above.

²⁰⁹ Donna Lee van Cott, *Andean Indigenous Movements and Constitutional Transformation: Venezuela in Comparative Perspective*, Latin American Perspectives, Vol. 30, No. 1, Indigenous Transformational Movements in Contemporary Latin America (Jan., 2003), pp. 49-69, 51.

²¹⁰ *Consejo Nacional Indio de Venezuela* (National Indian Council of Venezuela). Created in 1989 by the regionally-based FIB (Federación de Indígenas del Estado de Bolívar – Bolívar Indigenous Federation).

²¹¹ Supra note 209 at 52.

²¹² *ibid.*, 55.

²¹³ *ibid.*, 50.

1980s and 1990s.²¹⁴ In the context of the economic recovery led by oil exploitation and a lingering connotation that ecology is a bourgeois concern, little traction has been gained since then.

7.2 The Constitution of the Bolivarian Republic of Venezuela 1999

7.2.1. Environmental Rights

Article 127

It is the right and duty of each generation to protect and maintain the environment for its own benefit and that of the world of the future. Everyone has the right, individually and collectively, to enjoy a safe, healthful and ecologically balanced life and environment. The State shall protect the environment, biological and genetic diversity, ecological processes, national parks and natural monuments, and other areas of particular ecological importance. The genome of a living being shall not be patentable, and the field shall be regulated by the law relating to the principles of bioethics. It is a fundamental duty of the State, with the active participation of society, to ensure that the populace develops in a pollution-free environment in which air, water, soil, coasts, climate, the ozone layer and living species receive special protection, in accordance with law.

Article 127, creating a positive right to ‘safe, healthful and ecologically balanced life and environment,’ is something of an omnibus provision. But in the environmental protections it guarantees, apart from the conventional protections such as natural reserves, a focus on protections from enclosure can be discerned. This is seen most clearly in the prohibition on patenting the ‘genome of a living thing’ but in a global sense also in the protection of ‘climate’ and the ‘ozone layer’ which are well outside the conventional bounds of the nation-state.²¹⁵

Article 128

The State shall develop a zoning policy taking into account ecological, geographic, demographic, social, cultural, economic and political realities, in accordance with the premises of sustainable development, including information, consultation and male/female participation by citizens...

With a more localised focus, Article 128 creates a purportedly bio-regional regime in accordance with ‘the premises of sustainable development’ although this is a notoriously evasive definition which given the state focus on rural agricultural development and extractive industries tends to be a very ‘weak’ form of sustainability.

Article 129

Any activities capable of generating damage to ecosystems must be preceded by environmental and socio-cultural impact studies. The State shall prevent toxic and

²¹⁴ See, María Pilar García, “The Venezuelan Ecology Movement: Symbolic effectiveness, social practices, and political strategies”, in Arturo Escobar & Sonia E. Alvarez (eds), *The Making of Social Movements in Latin America: Identity, Strategy and Democracy*, Boulder, Westview Press 1992, 150.

²¹⁵ Rights are also asserted to ‘space and the common heritage of mankind’ in Article 12.

hazardous waste from entering the country, as well as preventing the manufacture and use of nuclear, chemical and biological weapons. A special law shall regulate the use, handling, transportation and storage of toxic and hazardous substances. In contracts into which the Republic enters with natural or juridical persons of Venezuelan or foreign nationality, or in any permits granted which involve natural resources, the obligation to preserve the ecological balance, to permit access to, and the transfer of technology on mutually agreed terms and to restore the environment to its natural state if the latter is altered, shall be deemed included even if not expressed, on such terms as may be established by law.

Article 129 implies terms to return an area to 'ecological balance' into any agreement and in a direct assault on intellectual property protections generally asserted by Northern companies to prevent technology transfers, imposes an obligation to do so although on 'mutually agreed terms.'

In a provision which is central to the Bolivarian programme of advancing food sovereignty, the constitution mandates that the state is to promote 'sustainable agriculture' as the 'strategic basis for rural development'. To this end, the state 'shall promote actions in the national and international economic context to compensate for the disadvantages inherent to agricultural activity.'²¹⁶ These considerations are more clearly elucidated in the ALBA principles. Namely, principles 3 and 4 which address the distorting effects of agricultural subsidies.

7.2.2 Indigenous Rights

In May 2001, Venezuela passed a law in the National Assembly adopting the International Labour Organization Convention 169 on Tribal and Indigenous Peoples.²¹⁷

Compliance with the Convention imposes certain obligations upon the state. Those that are relevant to ecological governance are the following.

Article 7.4 obliges the state to take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 13.1 invokes respect for the special importance of these peoples' relationship with their lands or territories for their cultures and spiritual values and for the collective aspects of this relationship. Recognition of the rights of ownership and possession of the peoples concerned of the lands which they traditionally occupy is advanced in Article 14.1. Under Article 15.1, the state must safeguard their rights, including their rights of use, management and conservation, to the natural resources in their lands and territories.

The official language of Venezuela is Spanish. Although the 'use of native languages has official status for native peoples' is to be 'respected' but they are not technically official languages.²¹⁸

Article 119

The State recognises the existence of indigenous peoples and communities and their

²¹⁶ Article 305.

²¹⁷ In the *Ley Aprobatoria del Convenio 169 de la OIT*. Published in the *Gaceta Oficial* No. 37.305, on 17 October, 2001.

²¹⁸ Article 9.

social, political and economic organization, their cultures, manners and customs, languages and religions, as well as their habitat and aboriginal rights over the lands which they have ancestrally and traditionally occupied and which are necessary to develop and guarantee their ways of life. The National Executive has the corresponding duty, with the participation of the indigenous peoples concerned, to demarcate and secure their collective ownership rights to their lands, which will be inalienable, unmortgageable, not subject to distraint and untransferable...

Moves have been made by the National Executive to implement Article 119. *Misión Guaicaipuro* was conceived to distribute land title to all twenty-eight of Venezuela's indigenous peoples. However, there have been some conflicts and attacks against the peoples given collective title to ancestral lands.

Article 120

Exploitation by the State of the natural resources in native habitats shall be carried out without harming the cultural, social and economic integrity of such habitats, and likewise subject to prior information and consultation with the native communities concerned. Profits from such exploitation by the native peoples are subject to the Constitution and the law.

Article 120 refers to native 'habitats' as the term 'territories'²¹⁹ is already used in other legislation.²²⁰ However, the implementation of this article has been inconsistent and in some cases completely disregarded. The Constitution also recognises the right of the indigenous peoples to maintain and develop their identities, cultures, cosmovisions, values, spirituality, sacred sites and languages²²¹ and to maintain and promote their own economic practices based on reciprocity, solidarity and exchange, and their traditional productive activities.²²² Intellectual property commons are protected with regard to indigenous knowledge: 'Collective intellectual property rights in the knowledge, technologies, and innovations of native peoples' are guaranteed and protected. As a corollary, the patenting of traditional indigenous knowledge is expressly prohibited.²²³

Representation of indigenous peoples is guaranteed at the national legislative level.²²⁴ However, contrary to the 'plurinational' concept of the state included in the constitutions of Bolivia and Ecuador, Article 126 declares the 'native peoples' to be 'part of the Nation, the State and the Venezuelan people which is one, sovereign, and indivisible.'

Decentralisation²²⁵ is identified as a 'national policy' to 'add depth to democracy' and 'bring power closer to the people.'²²⁶

²¹⁹ The term 'territories' is already used in Venezuela as an administrative designation applied to areas under the direct jurisdiction of the Federal Government rather than the authority of States, which enjoy a greater degree of self-governance.

²²⁰ *Ley de Demarcacion y Garantia del Habitat y Tierras de los Pueblos Indigenas.*

²²¹ Article 121.

²²² Article 123.

²²³ Article 124.

²²⁴ Article 125. Three seats are set aside for indigenous representatives at the National Assembly.

²²⁵ Articles 157-158.

²²⁶ Article 158.

7.3 Significant Initiatives Enacted Since the Constitution

7.3.1 Law on Biological Diversity 2000

Venezuela ratified the Convention on Biological Diversity²²⁷ on 12th September 1994. A National Biodiversity Strategy and Action Plan was adopted in April 2001, in partial compliance with the Convention. One of 15 approaches for strategic intervention set out in the Plan focuses on indigenous and local communities being incorporated into biodiversity management. This will be achieved by a dual strategy. First by promoting their engagement in monitoring, control and co-management in their ancestral territories; second, to record, systematise and disseminate the traditional knowledge of biodiversity these participants have.²²⁸

7.3.2 Land Reform Law 2001

This law was passed consistent with Article 307 of the constitution, which authorises the expropriation of underutilised land if justified by the need to increase food sovereignty.²²⁹ Venezuela's National Land Institute, INTI, has taken public ownership of more than 12,000 acres of land previously held by wealthy families and multi-national corporations, redistributing it to small-holding farmers. Tens of thousands more acres are under review. The government plans to promote new forms of communal management and sustainable agriculture managed by either cooperative businesses or the state.²³⁰

7.3.3 Law for Integrated Agricultural Health 2008

This law officially established 'agroecology'²³¹ as the scientific basis for sustainable agriculture in Venezuela. On this basis, toxic agrochemicals are being phased out. There are still divergent and contradictory views within the government as to which path Venezuela's agricultural sector should take but the government has 'consistently showed a willingness to learn from social movements.'²³² Recommendations of these movements that have been adopted include: The passage of a moratorium on genetically modified crops, and the founding of an agroecological institute in the state of Barinas, run in

²²⁷ The Convention on Biological Diversity, like the Ozone Layer convention and Montreal Protocol, treat biodiversity as a global commons.

²²⁸ 'Integrated Management and Conservation of the Caura River Basin', GEF: Concept Proposal for Pipeline Entry, United Nations Development Project 2002.

²²⁹ Food sovereignty is a concept originating from the Vía Campesina international peasants' network, defined, in short, as the right of people to determine their own food and agricultural policies. It involves restoring control over food distribution and food production from corporate agribusinesses and international financial institutions back to individual nations/tribes/peoples—and ultimately, to all those who produce the food as well as the general non-farming population.

²³⁰ Christina Schiavoni and William Camacaro, "The Venezuelan Effort to Build a New Food and Agriculture System", (2009) *Monthly Review*, July-August.

²³¹ Simply put, the application of the principles of ecology to agriculture. This is particularly relevant to the regional drive to reduce dependence on imported pesticides and fertilisers. See, Jules Pretty, "Agricultural sustainability: concepts, principles and evidence" (2008) *Philosophical Transactions of the Royal Society* 363, 447-465.

²³² Miguel Ángel Nuñez (Venezuela-based Institute for the Production and Research of Tropical Agriculture (IPIAT)), personal communication, January 22, 2009. Quoted in supra note 229.

partnership with Brazil's Landless Workers Movement (MST) and Vía Campesina. Currently, development of a National Agroecology Plan is underway with consultation at all levels from farmers to agricultural experts and state representatives.²³³

7.3.4 Government-Initiated Environmental 'Missions'

7.3.4.1 *Misión Arbol – 'Tree Mission'*

Launched in 2006, this is a scheme to reforest the country based in a decentralised participatory model. The *Misión Arbol* is a community-based plan involving local communities, environmental activists, ecologists and Ministry of the Environment employees to collaborate in five years to collect 30 tons of seeds, plant 100 million plants, and reforest 150,000 hectares of land, in both rural and urban areas.

7.3.4.2 *Misión Energía – 'Energy Mission'*

This is an initiative to replace radiant light bulbs with the newer energy-saving type. Community volunteers, known as 'brigadiers' are enlisted to do this with a dual purpose of carrying out the primary objective of the scheme and increasing community engagement.

7.3.4.3 *Urban Organoponic Gardens*

Beginning in 2005, the Chávez administration began funding the establishment of urban gardens based on the Cuban model.²³⁴ Many of these organic-hydroponic gardens have already been constructed with a model garden named 'Bolívar 1' in central Caracas covering 1.2 acres being run by a cooperative in a poor neighbouring suburb.

7.4 Global

The international focus of the Chávez government has been on regional integration as carried out through the ALBA bloc. Venezuela has, however, been a vocal critic of the Copenhagen COP-15 and the globalised capitalist model in general. The ALBA policy on Climate Change has been articulated and promulgated more clearly by Evo Morales of Bolivia.²³⁵ This is due in no small part to the fact that Venezuela is the world's fifth-largest oil producer and is subject to criticisms of hypocrisy when objecting to the scale of carbon emissions in the industrialised world.²³⁶ Most of Venezuela's global interaction has involved sending oil at reduced prices to nearby countries in exchange for services and in 'solidarity' measures under the auspices of ALBA.

²³³ Supra note 229.

²³⁴ This began in Cuba during the 'Special Period' of the early 1990s when the US embargo and collapse of former trading partner, the Soviet Union left Cuba with a shortage of oil and without access to petroleum-based fertilizers and pesticides. This necessitated a new model of urban, organic farming. For an account of this and the introduction of the method to Venezuela, see Emily Cohen, "The New Green Movement in Cuba", *Peace Review*, 16: 1 (2004), 99-105, 103.

²³⁵ Bolivia's stance and global initiatives will be discussed in detail in the case study on Bolivia.

²³⁶ See, for example Nicholas Kozloff's criticism of Venezuela's participation in the South America Regional Infrastructure Integration Initiative. Nicholas Kozloff, "Copenhagen Climate Summit: Hugo Chavez is an Inappropriate Environmental Messenger", *mongabay.com* Dec. 17 2009. Available at: http://news.mongabay.com/2009/1216-kozloff_chavez.html.

7.5 Extractive Model of Development

7.5.1 Regional Integration

Latin American and Caribbean integration is constitutionally mandated by the State.²³⁷

This particular provision is applied with great alacrity and the centrepiece of Venezuela's foreign policy is the movement for Bolivarian regional integration. Although designed to lessen Latin American dependence on the United States, the integration is rooted in a conventional extractive model of development and is based on a number of ecologically damaging megaprojects to run electricity transmission, oil pipelines and energy generation across the continent.

The South America Regional Infrastructure Integration Initiative (known by its Spanish acronym, IIRSA) is the most significant of these. This scheme will involve heavy infrastructural investment to build the roads and pipelines necessary to exploit the natural resource potential of the Amazon and Andean regions. These roads and lines will cut clear across the Amazon destroying unique ecosystems and also displacing indigenous peoples who have so far resisted interaction with external elements.²³⁸

7.5.2 Orinoco Project

The national boundaries of Venezuela encompass 24% of the world's proven oil supplies. Early in 2010, the government announced an agreement between the state-run oil company, Petroleos Venezuela (PDVSA) to run two new projects to extract oil in the Carabobo region of the Orinoco belt.²³⁹ The first project is with a consortium led by Spain's Repsol, the second is with US-based Chevron²⁴⁰ This region has been untapped and will require huge infrastructural development such as building roads to remote regions that currently have no roads of any kind, inserting industrial electricity supply and building extraction machinery. However, the region is believed to hold the largest oil reserves in the country. The scale of extraction will be massive, estimated at 1.2 million barrels per day. The location of the concessions in a key region of the Amazon River delta is predicted to cause significant pollution.

7.6 Conclusion

Overall, the approach to the environment in Venezuela is better characterised as 'agro-ecological' rather than 'ethno-ecological'. The domestic initiatives and laws within the state are focused primarily on agrarian concerns aiming at

²³⁷ Article 153.

²³⁸ See, Timothy J. Kileen, *A Perfect Storm in the Amazon Wilderness: Development and conservation in the context of the Initiative for the Integration of the Regional Infrastructure of South America (IIRSA)*, Arlington, Conservation International 2007.

²³⁹ Brian Ellsworth and Marianna Parraga, "Venezuela Seals Biggest Oil Deals Under Chavez", *Reuters*, Feb. 10 2010.

²⁴⁰ Chevron is currently being sued for widespread environmental destruction by indigenous peoples in north-eastern Ecuador. See the case study on Ecuador, below at section 8.

redressing the unequal distribution of land and redressing a lack of food sovereignty typical of the import-driven model of a cash-rich extractive economy. Such rural environmental initiatives as there are have therefore prioritised food sovereignty and lessening dependence on imported agricultural chemicals and supplies. They therefore only offer a 'weak' form of sustainability. The indigenous rights promulgated in the 1999 constitution were the most advanced on the continent at the time although, as will be seen below, they have been eclipsed by those of the Ecuadorian and Bolivian constitutions. One of the most significant aspects of this difference is the statement of uni-national statehood over plurinationality.

The other focus of regional energy integration mega-projects is causing massive environmental damage in many ecologically-sensitive and megadiverse parts of the country. Despite the Article 120 constitutional guarantees of consultation with and respect for indigenous peoples they are largely ignored and displaced by these projects.

Venezuela international interactions are generally in its role as the animating force of the Bolivarian Alliance focused more on regional integration than ecological integrity.

CHAPTER 8 – CASE STUDY: ECUADOR

8.1 Local / Indigenous

8.1.1 Ecologismo Popular

CONAIE, the indigenous federation of Ecuador is the oldest in Latin America starting in 1986. The movement has pioneered and promulgated the concepts of plurinationality and interculturality. It has had a significant role on the national political stage since the early 2000s and popular uprisings led by the federation have seen the ouster of two presidents prior to Correa. Representing 95% of the indigenous in Ecuador, CONAIE has something of its own cultural hegemony. This is not to infer that the Quechua are an entirely homogenous people, there are 18 dialects of the language, but the shared vision of these Andean people appears to be robust enough to tolerate difference and is united in a common worldview.

8.2 The ‘Pluri-National’ Constitution of Ecuador 2008 ²⁴¹

We, the sovereign people of Ecuador,
 We recognize our ancient roots, forged by women and men from different villages,
 Celebrating nature, *Pachamama*, of which we are a part and is vital for our existence,
 Invoking the name of God and recognizing our different ways of religiosity and spirituality,
 We appeal to the wisdom of all cultures to enrich us as a society,
 As an heir of the liberation struggles against all forms of domination and colonialism,
 and with a deep commitment to the present and future
 We decided to build:
 A new form of citizenship, diversity and harmony with nature, to achieve the good life,
 The *Sumak kawsay*; a society that respects all aspects of the dignity of people and communities.

8.2.1 The Constitution

The Preamble above encapsulates the alternative nature of this constitution. A recognition of ‘ancient roots’ invokes a recognition of the interconnectedness of humans with all nature as embodied in *Pachamama*, Mother Earth. The founding of the constitutional process in counter-hegemony is highlighted in ‘liberation struggles against all forms of domination and colonialism,’ from the continued colonialism of humanitarian and anti-drug ‘interventions’ to the commodification of life. Calling on the commonality of a global culture the constitution aims to construct an ecological citizenship recognising the

²⁴¹ The 2008 Constitution has not yet been authoritatively translated into English. The Spanish version is no longer available at the website of the Constituent Assembly but is maintained at the *Political Database of the Americas* maintained by the Edmund A. Walsh School of Foreign Service, Georgetown University. Available at: <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html>. The translated sections reproduced here are my own approximate translations based on free translations and should be treated as provisional only. Nonetheless, I have made no interpretive assumptions that have not been confirmed by separate articles or websites and my translation as it is has been sufficient to get a sense of the meaning of the provisions.

interconnectedness of all peoples to nature. Although a comprehensive review of this constitution is beyond the scope of this work,²⁴² I will highlight the following themes of Rights of Nature; multilevel interaction in the drafting process; incorporation of the precautionary principle; and *sumak kawsay*, 'living well'.

The common denominator underlying all of them is the idea of increased inclusion of people and nature in a participatory democratic project.²⁴³

8.2.2 Rights of Nature

The 2008 Constitution is the first national legal instrument ever to incorporate recognition of the intrinsic worth of non-human nature.

Articles 71, 72 and 397 of the 2008 Ecuadorian constitution affirm the elimination of the 'standing' requirement. Articles, 73 and 74 are the most closely 'related principles' as mentioned in Article 71. These affirm the ecological integrity that predicates the assigning of value to nature beyond that of property:

Article 71: Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution.

Every person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public organisms.²⁴⁴ The application and interpretation of these rights will follow the related principles established in the Constitution.

Article 72: Nature has the right to an integral restoration. This integral restoration is independent of the obligation on natural and juridical persons or the State to indemnify the people and the collectives that depend on the natural systems.

In the cases of severe or permanent environmental impact, including the ones caused by the exploitation on non-renewable natural resources, the State will establish the most efficient mechanisms for the restoration, and will adopt the adequate measures to eliminate or mitigate the harmful environmental consequences.

Article 73: The State will apply precaution and restriction measures in all the activities that can lead to the extinction of species, the destruction of the ecosystems or the permanent alteration of the natural cycles.

The introduction of organisms and organic and inorganic material that can alter in a definitive way the national genetic heritage is prohibited.

Article 74: The persons, people, communities and nationalities will have the right to benefit from the environment and form natural wealth that will allow wellbeing. The environmental services cannot be appropriated; its production, provision, use and exploitation, will be regulated by the State.

²⁴² Running to 444 articles over 48 pages.

²⁴³ This is an ongoing project. Rafael Correa: "I maintain that Ecuador and Latin America have elections but have yet to arrive at what is democracy. In truth, I don't believe that there is democracy in a country where there is so much injustice, so much inequality." Justin Delacour (trans), "Interview with Ecuadorian President Rafael Correa", *North American Council on Latin America*, June 18 2009, available at: <http://ecuador-rising.blogspot.com/2009/06/interview-with-ecuadoran-president.html>.

²⁴⁴ This refers to the public bodies that will adjudicate or review such claims.

[...]

Article 397: In the case of environmental damage, the State will act immediately to ensure the health and restoration of the ecosystem. In addition to the appropriate sentence repeated the state against the operator of the activity that caused the damage on the obligations of reparation, under the conditions and procedures established by law. Responsibility also rests on the server or servers responsible for environmental monitoring. To secure the individual and collective right to live in a healthy and ecologically balanced environment, the State agrees to:

1. Permit any natural or legal person, group or collective human right to take legal action and seek judicial and administrative bodies, subject to its direct interest, for the effective protection of those on the environment, including the possibility of applying for injunctions to stop the environmental damage or threat of litigation matters. The burden of proof regarding the absence of actual or potential harm is upon the manager of the activity or the defendant.

As we will see in the following section, this is not the first time that Rights of Nature have been employed as legal counter-hegemony.

8.2.3 Multilevel Interaction: Community Environmental Legal Defence Fund and Ecuador's Constituent Assembly

The importation of the constitutional provision for Rights of Nature has followed an interesting trajectory. As part of the broad local and international consultation process, the Ecuadorian constituent Assembly worked with the Pennsylvania, US based Community Environmental Legal Defence Fund (CELDF) in concert with the Pachamama Alliance.²⁴⁵ Although the incorporation of legal recognition for non-human organisms is unprecedented in national constitutions, the CELDF had in fact drafted similar provisions for municipal bodies in the US.

On September 19, 2006 a pioneering Ordinance was passed into law by the Tamaqua Borough Council in Schuylkill County, Pennsylvania. This locality was radicalized by years of suffering negative environmental and health consequences of private companies using human waste to fertilise fields in the district, then evading liability through the use of corporate structures. The 2006 Ordinance made the Tamaqua borough the first municipality in the United States to recognise Rights of Nature and also to permit residents to bring lawsuits to vindicate those rights. The Tamaqua law also (1) banned corporations from engaging in the land application of sludge within the Borough; (2) recognized that ecosystems in Tamaqua possess enforceable rights against corporations; and (3) asserted that corporations doing business in Tamaqua will henceforth be treated as “state actors” under the law, and thus, be required to respect the rights of people and natural communities within the Borough.²⁴⁶

²⁴⁵ The Pachamama Alliance is an NGO based in San Francisco, USA and Ecuador. A delegation from the CELDF visited Montecristi, Ecuador on two occasions in November 2007 and February 2008 to consult with the Constitutional Assembly as a whole and several *Mesas* (committees).

²⁴⁶ This work has continued apace. On May 1, 2007, the same municipality passed the ‘Tamaqua Borough Corporate Waste and Local Control Ordinance’ which prohibits the use of corporate personality to avoid liability for the dumping of toxic wastes, see “Tamaqua Bans Corporate Waste”, available at:

<http://www.celdf.org/PressReleases/TamaquaBansCorporateWasteDumping/tabid/462/Default.a>

This is a fine illustration of the type of participatory democracy facilitating ‘self rule’ in the civic republican tradition that is alluded to by Michael Sandel.²⁴⁷ The concept is referred to by Thomas Linzey, the director of the CELDF, as ‘home rule’²⁴⁸ but is based in the very same principles of true democratic liberty depending on the ability of citizens to share in self-government. However, in this case, the inclusion of nature has moved the centre to a significantly more eco-centric conception than what would be considered in the historic civic republican frame of reference.

The wording of Articles 71 and 72 in the Ecuadorian constitution recognizing the rights of nature are closely based on that used in the 2006 Tamaqua Ordinance.²⁴⁹

This multilevel interaction between a Pennsylvania-based public law firm and the Amazonian state of Ecuador is not as obscure as it may at first seem and is in fact an object lesson in the possibilities for meaningful exchange of ideas between entities that would not normally interact in the conventional state-centric model and hence the experience and practice of governance across scales and levels simultaneously. Both are reacting to severe environmental destruction caused by private interests. Both have found that the dominant legal system not only fails to recognize their claims but that the juridical construct of corporate personality extends recognition and protection to private companies while refusing to recognize or protect non-human nature. This operation of the hegemonic concept of ‘Closure’²⁵⁰ has radicalized the citizens of both places to challenge the dominant conception of nature as property leading them to the novel subaltern cosmopolitan legal approach of limiting corporate ‘rights’ and affirming the rights of nature.

[spx](#). Similar provisions have now been passed in over 100 municipalities in Pennsylvania and Maine.

²⁴⁷ Supra note 23 at 3.

²⁴⁸ ‘Home Rule’ is the authority to act in municipal affairs, transferred from state law, as set forth by the General Assembly, to a local charter, adopted and amended by the voters. Whether ‘Home Rule’ is applicable is determined on a state by state basis and must be balanced against State and Federal legislation. See generally, “What is Home Rule?”, CELDF website, available at: <http://www.celdf.org/HomeRule/WhatIsHomeRule/tabid/114/Default.aspx>. For a discussion of the allowance of Home Rule in Pennsylvania, see “PA and Home Rule”, CELDF website available at: <http://www.celdf.org/HomeRule/PennsylvaniaandHomeRule/tabid/116/Default.aspx>.

²⁴⁹ The precise wording recommended to the Ecuadorian Constitutional Assembly by the CELDF was as follows: ‘*Natural communities and ecosystems possess the inalienable right to exist, flourish, and evolve within Ecuador. Those rights shall be self-executing, and it shall be the duty and right of all Ecuadorian governments, communities, and individuals to enforce those rights. Suits brought to enforce those rights shall be filed in the name of the natural communities or ecosystem whose rights have been violated, damages shall be awarded to fully restore the natural communities or ecosystems, and awarded damages shall be applied exclusively towards returning the natural community or ecosystem to its previous state.*’ The main difference to note is that the constitution as passed leaves greater discretion as to how the damages are to be applied. Rather than the paying of damages into a dedicated fund as was also the original formulation of Professor Stone, the state will establish ‘the most efficient mechanisms’. This is not necessarily a dilution of the original intention, it may well allow for more practical measures such as restoration or mitigation schemes. It may also close the door on the possibility of ‘efficient breach’ by companies who stand to profit nonetheless.

²⁵⁰ Supra note 42.

8.2.4 The Precautionary Principle

Article 396 is a variation on the precautionary principle.²⁵¹ One of the long-standing principles of an international environmental law, it is included in principle 6(a) of the Earth Charter and is also advanced by Robyn Eckersley as one of the prerequisites of a 'Green State'.²⁵²

Article 396: The State shall adopt policies and measures to prevent negative environmental impacts, where there is certainty of harm. If in doubt about the environmental impact of any action or omission, although there is no scientific evidence of harm, the State shall take effective and appropriate protective measures. Liability for environmental damage is objective. Any damage to the environment, in addition to the sanctions, also implies the obligation to fully restore the ecosystem and to compensate individuals and communities affected. Each of the actors in the production, distribution, marketing and use of goods or services bear the direct responsibility to prevent any environmental impact, to mitigate and repair the damage it has caused, and to maintain a permanent system of environmental control. Legal action to prosecute and punish for environmental damage are imprescriptible.

8.2.5 Sumak kawsay - 'Living Well'

Contemporary imperial societies organize for money making. Traditional societies organize for living.²⁵³

Indigenous rights in the constitution of Ecuador are not discussed separately in this case study as, for the purposes of analysing their part in ecological governance, they are implicit in the concept of *sumak kawsay* and the scheme of development which implements it.

Sumak kawsay is referred to 5 times in the 2008 constitution, once in the preamble and in four articles. Remarkably, in the section on development, it is cited as the primary consideration guiding decision makers:

Article 14: Recognizes the right of population to live in a healthy environment and ecologically balanced, to ensure sustainability and good living, *Sumak kawsay*. Declares the preservation of public environmental conservation of ecosystems, biodiversity and integrity of heritage the country's genetic patrimony, preventing environmental damage and [assuring] recovery of degraded natural areas.

The right to a healthy environment is codified in other constitutions but the Ecuadorian constitution is unique in connecting the environment to cultural/spiritual precepts in the realization of the *Sumak kawsay*. This is an example of the framing of otherwise rather ephemeral principles in the language of rights. This is carried out especially in Title VII of the constitution as 'The Scheme of Good Living'.²⁵⁴ This 'transculturation'²⁵⁵ serves two purposes. First

²⁵¹ Stated in Principle 15 of the Rio Declaration as: 'Where there are any threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.

²⁵² Robyn Eckersley, *The Green State: Rethinking democracy and sovereignty*, Cambridge, MIT Press, 2004, 135.

²⁵³ Supra note 15 at 291.

²⁵⁴ *Régimen del Buen Vivir*.

it makes the rights justiciable. Although the *sumak kawsay* will be interpreted and practiced in ways unique to the Amerindian peoples living relatively autonomously in the Amazon and remote Andean regions, it will also increasingly be brought for determination in the courts.²⁵⁶ Secondly, it brings the system of rights into line with the international regime of rights as expressed in the ILO Convention 169²⁵⁷ and second and third generation rights of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.²⁵⁸

Article 250: The territory of the provinces Amazon is part of an ecosystem necessary for the balance of the environment of the planet. This territory constitute a constituency land for which there is special planning a collection a law which will include aspects social, economic, environmental and cultural, with an order land that will ensure conservation and protection of ecosystems and the principle of Sumak kawsay.

Remarkably, the constitution creates a National Development Scheme which is to make Sumak kawsay the fundamental objective of development as set out in Article 275. One of the main concerns with the statement of a general principle that is not amenable to clear and easy interpretation in the context of an existing, property-focused legal system is that it is left to be defined, interpreted and implemented in a non-specific time frame and manner. Although, in New Zealand a significant body of law has developed regarding interpretation the concept of *kaitiakitanga*²⁵⁹ which is a mandatory consideration in the granting of resource consents under the Resource Management Act 1991. Alternatively, this flexibility may be a significant advantage, allowing the concept to be adapted to novel situations and emerging social perspectives without the concepts being 'frozen' in time.²⁶⁰

Article 275: The development scheme is organized, sustainable and dynamic economic systems, political, socio-cultural and environmental which guarantee the realization of the good life of Sumak kawsay. The National Development Scheme is to ensure implementation of the rights, the objectives of the development scheme and principles enshrined in the Constitution. Facilitate planning social and territorial cohesion, promote consultation, and will be participatory, decentralized, devolved and transparent. The good life requires that people, communities, peoples and nationalities effective enjoyment of their rights and exercise responsibilities in the

²⁵⁵ Tatiana Roa Avendaño, "El Sumak Kawsay en Ecuador y Bolivia: Vivir Bien, identidad, alternativa", Agua viva CENSAT, May 29, 2009, available at: <http://censat.org/noticias/2009/5/27/El-Sumak-Kawsay-en-Ecuador-y-Bolivia-Vivir-bien-identidad-alternativa/> (last accessed July 3 2009) [Spanish].

²⁵⁶ Particularly the newly created Environmental Court.

²⁵⁷ See discussion of the Convention above in the case study on Venezuela.

²⁵⁸ For a neat summary of the insistence of the Latin American countries on the inclusion of these rights during the negotiation of the terms of the Universal Declaration of Human Rights, see Geoffrey Robinson, *Crimes Against Humanity*, 3rd ed., Melbourne, Penguin 2008, 37-38.

²⁵⁹ Section 7(a) of the Act. It is most commonly translated as 'guardianship'. Although a more evocative definition is given in the Ngati Awa Claims Settlement Act 2005 where *kaitiakitanga* is translated as '*collective custodianship*' in the 'Apology' at (18) of the Preamble. For a comprehensive examination of *kaitiakitanga* in the context of Māori cosmology see, Andrea Tunks, "Tangata Whenua Ethics and Climate Change" (1999) 1 *NZJEL* 67.

²⁶⁰ For the New Zealand interpretations addressing this concern see, Ministry for the Environment (MfE), *Case Law on Tangata Whenua Consultation*, 1999.

context of multiculturalism, respect for their diversity, and peaceful coexistence with nature.

Chapter One of the Title VII is entitled 'Inclusion and Equity'. Article 340 sets out the targeted areas in which to ensure the 'performance, guarantee and enforcement' of the rights and objectives initiated by the National Development Scheme is set out in:

Article 340: '[A] system of inclusion and social equity is the set of articulated and coordinated systems, institutions, policies, standards, programs and services that ensure the performance, guarantee and enforceability of the rights recognized in the Establishment and enforcement of objectives of the development scheme. The system is linked to the National Development Scheme and the national system of decentralized participatory planning; will be guided by the principles of universality, equality, equity, progressivity, interculturality solidarity and non-discrimination; and work under quality criteria, efficiency, effectiveness, transparency, accountability and participation. The system consists of the fields of education, health, safety social risk management culture Physical and sport, housing and housing culture, communication and information leisure, science and technology, population, human security and transportation.

But this is not to suggest that there is only one narrative or one correct way of living. Indeed, there has been a resistance to the ossification of a 'code' of Sumak kawsay principles. In consonance with the idea of the 'plurination' is the recognition that there is a plurality of conceptions of how best to live. What is specifically codified in Article 340 above is the 'decentralized participatory planning' method of discussion of these ideas and approaches to ecological ethics. There is an extensive decentralization of power to localities with the freedom to choose representative, direct, communal or indigenous versions of democracy for governance of local affairs.²⁶¹ Indigenous groups are able to practice their own traditional justice in their territories and their decisions and punishments are to be respected by state bodies except where they substantially clash with other provisions of the constitution.

But the sumak kawsay is not to be rooted solely in 'ancient' or 'traditional' practices. Article 387 makes it the responsibility of the State to promote and generate knowledge in terms of the 'good life' through science and technology but also to 'rescue' traditional, indigenous knowledge:

Article 387: It shall be the responsibility of the State to:

[...] 2. Promote the generation and production knowledge, foster scientific and technological research, and promote traditional knowledge, thus contributing to the achievement of the good life as Sumak kawsay; and

[...]

4. Ensuring freedom of establishment and research in the framework of respect to ethics, nature, environment, and rescue of ancestral knowledge.

²⁶¹ Title IV, Part One 'Participatory Democracy', Articles 95 to 117 generally.

8.3 Global

8.3.1 Yasuní Ishpingo-Tambococha-Tiputini (ITT) Initiative

One third of Ecuador's oil reserves are under the Yasuní-ITT National Park. The park is one of the most biodiverse areas in the world and home to three indigenous tribes that live in voluntary isolation from the outside world.²⁶²

The Government of Ecuador formally announced its intention leave the country's largest oil reserves permanently off-limits to exploitation in June 2007 under the Yasuní-ITT Initiative. The estimated 850-million barrel Ishpingo-Tambococha-Tiputini (ITT) oilfields sit under the eastern third of Yasuní National Park. In exchange for forgoing the projected revenue from oil exploitation, Ecuador has sought financial commitments from the international community of \$350 million a year for 10 years to support its transition toward a more sustainable economy. This would prevent the release 436 million tones of carbon dioxide into the atmosphere.²⁶³ Spain gave Ecuador \$200,000 to help set up an international trust fund in 2009 and by December, Ecuador's government said Spain, Germany, Belgium, France and Sweden had offered to cover nearly half the \$3.5 billion. However, the donor countries imposed conditions on the donations centred on the funds being put into a trust fund to be supervised and collectively administered by the donor countries, and for the area under the scheme to be expanded to include other parts of the park. Correa rejected these conditions, calling their conditions an "unacceptable" and "embarrassing" affront to Ecuador's sovereignty.²⁶⁴ The Foreign Minister in charge of the negotiations, Fander Falconi, resigned shortly afterwards. "If they don't accept our conditions, they can keep their money and we'll drill," Correa said in his weekly radio address.²⁶⁵ He has set a June 2010 deadline for an agreement, announcing in March 2010 a 'Plan B' involving drilling with "minimum environmental impact."²⁶⁶

8.3.2 Chevron – Ecuador International Litigation

We can't let little countries screw around with big companies like this - companies that have made big investments around the world.²⁶⁷

The *Aguinda v Chevron Texaco* litigation is unusual for its multilevel nature. A class action lawsuit was brought against Chevron in 1993 in the Southern District New York Court by the Amazon Defence Coalition,²⁶⁸ representing over

²⁶² The Waorani, Tagaeri and Taramenane People.

²⁶³ At current cap-and-trade prices of \$10 per ton this saves \$4.36 billion in mitigation costs.

See, <http://www.liveyasuni.org>.

²⁶⁴ "Ecuador Says It Has 'Plan B' if Yasuni Initiative Fails" 17 March 2010. Available at <http://ecuador-rising.blogspot.com/2010/03/ecuador-says-it-has-plan-b-if-yasuni.html>.

²⁶⁵ Associated Press, "Ecuador Minister resigns over Amazon Oil Project", January 12 2009.

²⁶⁶ Supra note 265.

²⁶⁷ An anonymous senior executive of Chevron as quoted in *Newsweek*, July 29 2008.

²⁶⁸ *Frente de Defensa della Amazonía*, an alliance of Amazonian grassroots environmental groups and communities. On their website, they identify as 'part of a regional, national and global struggle for environmental and collective rights in the Ecuadorian Amazon.' See, "Who We Are" at <http://www.texacotoxico.org/eng/node/1>.

30 000 indigenous and local inhabitants from North Eastern Ecuador. They are suing for damages as a result of severe historic environmental pollution between 1967 and 1990. Texaco (later acquired by Chevron in a 2001 merger) began prospecting for oil in 1964 and began large scale oil extraction in 1967. In 1990, Petroecuador, the state oil company, took over their operations. The legacy of pollution has been significant and permanent. There are uncovered oil waste pits and many of the inhabitants of the area have suffered from a dramatically increased incidence of cancers and birth defects in children.²⁶⁹ The lawsuit asserts that the dumping caused 1 400 deaths by cancer.

An agreement was signed between Texaco and Ecuador in 1995 by which the company was released of all future liability for the effects of pollution if Texaco mitigated the damage in a three-year, \$40 million clean-up operation. The plaintiffs argue that the operation was ineffective and that the area remains polluted. In September 2009, Chevron brought the suit to an international arbitration court in The Hague arguing that the government of Ecuador should have to pay any damages awarded as the 1995 agreement releases them from liability.²⁷⁰ In December 2009, the Ecuadorean government filed with the South District New York Court to permanently stay the arbitration proceedings. Chevron have lobbied the office of U.S. Trade Representative, Ron Kirk and Congress to revoke Ecuador's preferential trade treatment under the 1991 Andean Trade Preferences Pact unless the 1995 agreement is upheld.

The case has centred around a jurisdictional debate with Ecuador finally being selected as the *forum conveniens*.

In 1999, Texaco undertook before a New York Federal Court to abide by the verdict of an Ecuadorian court if the American court would dismiss the environmental case. At that time, Texaco were confident that exertion of their considerable influence on Ecuador's government and court system would allow them to escape liability. However, with the election of Correa and corresponding change in legal environment, Chevron have attempted again – unsuccessfully – to have the case moved to the US. The environmental case, *Aguinda v ChevronTexaco*²⁷¹ was lodged in Ecuador in 2003 and is being argued in a court in the rainforest oil town of Lago Agria.²⁷² A court-appointed Special Master found that the company could be liable for US\$27.3 billion in clean up costs and damages.²⁷³ A verdict is expected in the first half of 2010.

Meanwhile, in a separate arbitration relating to the terms of the US-Ecuador

²⁶⁹ Studies have found these rates to be as much as 30 times higher than elsewhere in Ecuador. See Suzana Sawyer, *Crude Chronicles: Indigenous Politics, Multinational Oil, and Neoliberalism in Ecuador*, Durham, Duke University Press 2004, 103.

²⁷⁰ Angel Gonzalez and Ben Casselman, "Chevron Plaintiffs Ask U.S. Court for Action", *Wall Street Journal*, January 15, 2010.

²⁷¹ *Aguinda v. Texaco Inc.*, 303 F.3d 470 (2d Cir. 2002).

²⁷² In an ironic twist, Lago Agria, founded as a company town, is Spanish for Sour Lake, named for the Texan town where Texaco was founded.

²⁷³ *Frente de Defensa de la Amazonia* (Amazon Defence Coalition), "Chevron Hit with Motion for Preliminary Injunction in Federal Court to Stop Arbitration", February 10, 2010. available at: <http://chevrontoxico.com/news-and-multimedia/2010/0210-chevrontoxico-hit-with-motion-for-preliminary-injunction-in-federal-court.html>. Chevron are contesting the credentials of the specialist.

Bilateral Investment Treaty of 1993,²⁷⁴ the Permanent Court of Arbitration at The Hague ruled, on March 30th 2010, that Ecuador must pay Chevron up to US\$700 million because the country's courts took too long to rule on lawsuits originally filed by Texaco between 1991 and 1993.²⁷⁵

8.4 Extractive Model of Development

The childish left, indigenous, and ecological movements are starting to rise, having meetings to promote an uprising against the mining companies. With the law in hand we will not allow these abuses, we cannot allow uprisings, which block paths, threaten private property, and impede the development of a legal activity; mining.²⁷⁶

These are the words of President Rafael Correa, speaking in January 2009. In stark contrast to the hopes of a 'new urban-rural alliance being born that embraces the principles of ecology,²⁷⁷ and the ecocentric focus of the 2008 constitution the focus at national government level is on a more conventional development model.

Ecuador relies on oil extraction for 34% of its Gross Domestic Product. This money is used to fund the ambitious social programs and economic and social rights guaranteed by the 2008 constitution. The broader ALBA regional vision of 'endogenous development' is for the 'value added' operations to take place within the region and countries of extraction. But in the shorter term revenues are being sought from extractive ventures in which transnational corporations with the requisite expertise and capital are given concessions and pay increased royalties to the state. There are also issues that bring state sovereignty to the fore. In a close alliance with Hugo Chávez, Correa is focused on building a strong regional bloc - financially and in terms of energy and food security – to resist US hegemony. Ecuador and Venezuela also share a border with Colombia which has increasingly become the site of cross-border conflicts and has a strong US military presence.²⁷⁸

8.4.1 Mining Law 2009

The tensions between the constitutional ecological protection and guarantees to indigenous peoples as against extractive interests in Ecuador are exemplified

²⁷⁴ *Ecuador-US Bilateral Treaty*. Entered into force in 1997. Available at: http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/Ecuador_BIT_AG.asp.

²⁷⁵ The decision of the Court is available as a PDF at: <http://www.chevron.com/documents/pdf/EcuadorBITEn.pdf>.

²⁷⁶ Rafael Correa, speech of January 12 2009. Quoted in Raúl Zibechi, "Ecuador: The logic of development clashes with movements", Eliot Brockner (trans.), *Americas Program Report*, March 17 2009. Available at: <http://americas.irc-online.org/am/5965>.

²⁷⁷ "The Plight of the Protests Against Mining", *Acción Ecológica*, Quito, 24 January 2009.

²⁷⁸ In 2007, Ecuador refused to renew the lease on the site of the US military base in Manta rhetorically suggesting: "We'll renew the base on one condition: that they let us put a base in Miami - an Ecuadorean base." Manta was particularly prized as its location allowed US 'anti-drug' flights to cover the entire South American continental landmass. See, Phil Stewart, "Ecuador wants Military Base in Miami", *Reuters*, Oct. 22 2007. In response, the US added three new military bases to its existing four in Colombia. See, "Colombia-US Base Accord Reached", *BBC*, Aug. 15 2009.

by the *Ley de Minería* (Mining Law).²⁷⁹ There has been significant civil unrest around the law when first proposed with one protestor killed during widespread demonstrations on September 30th 2009. Many fear privatisations of the water for use in mining which is expressly prohibited by the constitution. Article 28²⁸⁰ authorises any business to prospect for minerals, even on community and indigenous lands. The law affords only a right of consultation to the local peoples, rather than the power of veto that was originally promised. The consultation²⁸¹ that is provided for is consistent with one provision of the constitution²⁸² which states that if the community or indigenous peoples object to this prospecting, the conflict ‘will be resolved with the decision of the higher administrative authority.’ But this is inconsistent with another constitutional provision²⁸³ which directs that such conflicts must be resolved mandatorily in accordance with the wishes of the locals being consulted and consistent with international instruments to which Ecuador is a signatory, such as the UN Declaration on the Rights of Indigenous Peoples. No matters have yet been adjudicated under this law but it would seem likely that the local authority may be preferred over deference to international legal agreements. Of particular concern is the ‘Public Utility’ section²⁸⁴ of the Mining Law which leaves open the possibility that the protection of locals’ right to water, community food sources, protected zones and indigenous territories will be compromised by mining concessions ‘by simply citing a supposed collective benefit.’²⁸⁵ Similarly, ‘National Interests’²⁸⁶ allows for the government to override local objections if it judges a project to be sufficiently important on a national fiscal scale.²⁸⁷

8.5 Conclusion

Ecuador has one of the most established indigenous movements in Latin America and a large minority of the population who identify as indigenous. Their influence in the years leading up to and during the constituent assembly, as well as their crucial role in the election of President Correa have been major factors in producing a constitution that has imported revolutionary ecological and indigenous concepts into law. One of the most striking aspects of this new

²⁷⁹ Approved by the Legislative Commission on January 12, 2009. I draw part of this analysis from the report of Ecuadorian environmental group, *Acción Ecológica*, “Informe sobre el proyecto de Ley de Minería,” as quoted in Raúl Zibechi, “Ecuador: The logic of development clashes with movements”, Eliot Brockner (trans.), *Americas Program Report*, March 17 2009, available at: <http://americas.irc-online.org/am/5965>.

²⁸⁰ ‘Prospecting Freedoms’.

²⁸¹ Mining Law Article 90: Special People’s Consultation Proceedings.

²⁸² Constitution of Ecuador 2008, Article 398.

²⁸³ Constitution of Ecuador 2008, Article 57.

²⁸⁴ Mining Law Article 15: Public Utility.

²⁸⁵ Mario Melo, lawyer for the Pachamama Foundation. Quoted in Zibechi, supra note 273.

²⁸⁶ Article 16: State Dominion Over Mines and Oil Fields.

²⁸⁷ Compare to the subsumption of kaitiakitanga to ss 6 & 8 under the RMA as in *Ngati Maru Iwi Authority Incorporated v Auckland City Council* (High Court, Auckland AP 18-SW01, 24 October 2002) in which Baragwanath J considered that it is ‘arguable that ss 6 and 8 factors should be the subject of “inbuilt preference”, to use the expression employed by Cooke P in another context: *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1998] 1 NZLR 78, when considered against s7 interests.’

constitution is that Ecuador has become the first country in the world to extend rights to non-human organisms (Article 71). Ecuador has also led the way in bringing the indigenous *cosmovisión* into a legal format and has provided a meaningful framework for implementation of *sumak kawsay* as the basis for an alternative development that has an ecocentric, holistic focus. Perhaps the greatest achievement from a normative viewpoint is that indigenous Andean cosmology and ecological rights of nature have been integrated into a structure of 'ethno-ecological' identity. At the time of writing, no actions have been brought under Article 71 and it remains to be seen how the newly-created Environmental Court will deal with such claims. This promises to be a fruitful area for future research. In the meantime, the executive branch of government led by a forceful President is pursuing a rather more conventional development narrative than that laid out in the constitution centred on the *sumak kawsay* and respecting *Pachamama*. A striking example of multilevel legal interaction is the lawsuit between the Amazon Defence Coalition and Chevron. Although the interaction between the constituent assembly and the CELDF was a unique and promising example of the potential of multilevel governance, the global cooperation required in the innovative Yasuní-ITT scheme appears to have been stalled by a strong stance of sovereign non-interference in Correa's refusal to share administration of the fund with donor nations. Nonetheless the example provided to the rest of the world and particularly Bolivia in the inclusion of rights of nature and an ethno-ecological vision in the constitution represent huge advances in law.

CHAPTER 9 – CASE STUDY: BOLIVIA

9.1 Local/Indigenous

Probably the most striking aspect of the Bolivian population is the fact that a majority (estimated 60%)²⁸⁸ of the population are of indigenous origin. The Bolivian constitution is often characterized as the ‘indigenous’ constitution. Ethno-ecological identity, while it took until the late 1990s to be consolidated is fundamental; based in a sophisticated ‘vertical integration’²⁸⁹ model of pre-Columbian social and economic organisation.²⁹⁰ This reflects the origins of the constitutional change originating with the powerful indigenous movements in Bolivia. Many commentators place the beginning of this process as 1992,²⁹¹ the five hundred-year anniversary of the ‘discovery’ of the Americas by Christopher Columbus. This was when the Coca Growers Union became a centre of resistance to US hegemony as imposed in the ongoing ‘War on Drugs.’ Repeated military interventions had been justified from 1986 to 1992 by coca eradication schemes. Motivated by the increasing threat of their most culturally-embedded crop being criminalised and livelihoods threatened, the Coca Growers, led by now-President, Evo Morales staged an escalating series of protests. These demonstrations galvanised the predominantly rural population and successfully built an indigenous movement from the ground up.²⁹² Motivated primarily by agrarian concerns, peasant grievances, and land rights, only later did a coherent ethno-ecological vision emerge as this movement, became the MAS²⁹³ and took national primacy.²⁹⁴

9.2 National - The ‘Indigenous’ Constitution of Bolivia 2009²⁹⁵

The Bolivian Constitution of 2009 is more comprehensive than the constitutions of Venezuela or Ecuador in its detailing of both environmental and indigenous rights.

The origins of the constitutional process in counter-hegemony is clear in the preamble to the constitution states explicitly that it is ‘anti-colonial’; ‘Plurinational’; and, more evocatively, that it ‘puts behind us the colonial, Republican, neoliberal state.’

²⁸⁸ Supra note 209 at 52.

²⁸⁹ *ibid.*, 86.

²⁹⁰ *ibid.*

²⁹¹ Supra note 21 at 93.

²⁹² *ibid.*, 93

²⁹³ *ibid.*, 95. MAS is the ‘Movement Toward Socialism’, the current ruling party led by Morales.

²⁹⁴ *ibid.*, 97.

²⁹⁵ The translated sections reproduced here are my own approximate translations based on free translations and should be treated as provisional only. Nonetheless, I have made no interpretive assumptions that have not been confirmed by separate articles or websites and my translation as it is has been sufficient to obtain a sense of the meaning of the provisions.

9.2.1 Suma qamaña / Vivir bien / Living Well

Article 8

I. The state assumes and promotes as ethical and moral principles of pluralistic society: ama qhilla, ama llulla, ama Suwa (do not be lazy, do not lie, do not steal), *suma qamaña* (living well [*vivir bien*]), ñandereko (harmonious life), teko Kavi (good life), ivi maraei (land without evil) and qhapaj Nan (the path or noble life).

II. The state is based on the values of unity, equality, inclusion, dignity, freedom, solidarity, reciprocity, respect, complementarity, harmony, transparency, balance, equal opportunities, social and gender equity in participation, welfare, responsibility, social justice, distribution and redistribution of goods and social goods, to *live well* [*vivir bien*].

Suma qamaña is mentioned three other times. Once as an objective of education;²⁹⁶ Twice as an aim of economic organisation in accordance with the principles of 'complementarity, reciprocity, solidarity, redistribution, equality, sustainability, balance, justice and transparency';²⁹⁷ and as a guiding principle for redistributive policies to bring about equality.²⁹⁸

9.2.2 Integration

The extent of multilevel integration envisioned in the Constitution of Bolivia can be seen in this article which promotes international and regional cooperation between states and peoples but also codifies a positive duty of the state to foster connections with indigenous peoples around the world.

Article 266

I. The State shall promote the principles of just, equitable and with appreciation of asymmetries, relations of social, political, cultural and economic cooperation with the other states, nations and peoples of the world and, in particular, will promote Latin American integration.

II. The state will strengthen the integration of its original indigenous nations and peoples with the world's indigenous peoples.

This search for a shared global indigenous vision will be examined more closely in the analysis of the global constitution to follow.²⁹⁹

²⁹⁶ Article 80(I): 'education-oriented training individual and collective development of skills, aptitudes and physical abilities and intellectual linking theory with productive practice to the conservation and protection of the environment, biodiversity and the land to live well.'

²⁹⁷ Article 307(III): 'Plural economy articulates the different forms of economic organization on the principles of complementarity, reciprocity, solidarity, redistribution, equality, sustainability, balance, justice and transparency. The social economy complements the individual interest and living well as a community.'

²⁹⁸ Article 314: To eliminate poverty, social exclusion and bring about economic achievement for the good life in its many dimensions, Bolivian economic organization has the following purposes:

1. A generation of the social product to be achieved within the framework of respect for the rights of Individuals, as well as the rights of peoples and nations.
2. The production, distribution and redistribution of wealth and economic surplus.
3. Reducing inequalities in access to productive resources.
4. The reduction of regional disparities.

²⁹⁹ See below at section 9.3.

9.2.3 Right to Healthy Environment - Rights of Nature?

Article 33

People have a right to a healthy environment, protected and balanced. The exercise of this law should allow individuals and groups of present and future generations, as well as other living beings, developed in normal times.

Article 34

Any person, individually or on behalf of a community is empowered to exercise legal actions in defence of the right to environment, without prejudice to the obligation for public institutions to act on its own against attacks on the environment.

Article 34 deals with the issue of standing by allowing any person to bring a legal action whether their own interests are directly affected or not. Although, this is not done as comprehensively as in the Ecuadorian Articles 71 and with a less ecocentric emphasis. It must be read in concert with the preceding Article 33 right to a healthy environment and, significantly, is not explicitly an extension of legal personality to non-human organisms but is framed as an elimination of the standing requirement in order to allow 'defence' of the, still anthropocentric, right to environment.

9.2.4 Duties

Article 109

The duties of the Bolivian and Bolivians:

[...] 15. Protect and defend the natural resources and contribute to their sustainable use, to preserve rights of future generations.

16. Protect and defend a suitable environment for the development of living beings.

These duties are stated not in a purely anthropocentric way but in consideration of 'all living beings.' In an acknowledgement of intergenerational justice, the rights of future generations are also explicitly protected.³⁰⁰ It is the duty of the state to protect and preserve biodiversity,³⁰¹ including ancestral knowledge.³⁰²

9.2.5 Establishment of Agri-Environmental Court

A new, specialized environmental court has been established in the Constitution to deal with '[r]esolution of appeals and nullity actions in farming, forestry, environmental, water use rights and use of renewable natural resources, water, forest and biodiversity; prosecutions of acts violating wildlife, flora, water and environmental demands and practices which endanger the ecological system and conservation of species or animals.'³⁰³ Its guiding principles are 'social function, integrity, immediacy, sustainability, and interculturality.'³⁰⁴

Crimes against the environment are given a special status. Article 112 lists 'crimes against the environment' as 'imprescriptable', along with 'genocide, crimes against humanity, treason, war crimes.' It is considered an act of treason

³⁰⁰ As in the Earth Charter 2000, Principle 4.

³⁰¹ Articles 380-383.

³⁰² Article 382.

³⁰³ Article 190(1).

³⁰⁴ Article 187. See the preceding section on Interculturality within the Plurinational state at 5.2.2.

to 'undertake actions for the disposition of the natural resources of social ownership of the Bolivian people for businesses, individuals or foreign states.'³⁰⁵

With regard to entering into international treaties, specific principles to be regarded are listed as 'Harmony with nature, protect biodiversity, and the prohibition of forms of appropriation closed for the exclusive use and exploitation of plants, animals, micro-organisms and any living matter.'³⁰⁶ Also constitutionally guaranteed are '[f]ood security and sovereignty for all' which would preclude many of the international 'free-trade' agreements advanced by wealthy industrialised countries and a total ban on the 'import, production and marketing of genetically modified organisms and toxic elements that harm health and the environment.'³⁰⁷

9.2.6 Nationalisation of Resources

Under Article 312, all natural resources are 'owned by the Bolivian people and will be administered by the State.'³⁰⁸ This is to be done with a focus on endogenous development to counter the dependence on primary extractive exports, but 'in the context of sustainable development, in harmony with nature.'³⁰⁹ However, collective and individual ownership of land will be guaranteed.³¹⁰ Exploitation of resources in any given area is contingent on the 'free, prior, and informed' consultation of local and indigenous peoples but stops short of requiring their consent. In the case of indigenous people 'the consultation will take place while respecting their own rules and procedures.'³¹¹ It is forbidden for any individual or corporation to assert ownership of any natural resource but the state may assert a property right.³¹²

Although this would appear to be a clear move to the 'leviathan' side of the dichotomy proposed by Ostrom,³¹³ it is tempered by significant devolution to indigenous 'nations' and campesino farmers who are accorded a high degree of autonomy regionally and locally. Within these autonomous regions, as will be seen in the next section, the constitution provides for a collectivity more akin to a commons situation.

9.2.7 Indigenous Rights

Among the rights of indigenous peoples listed in Article 30 is the 'right to live in a healthy environment, with proper use and management of ecosystems.'³¹⁴ However, set as it is at the head of the document as a fundamental concern, it is taken to be an influence informing all policy formation and execution. It may also be taken to be inferred in the provisions regarding indigenous autonomy:

³⁰⁵ Article 125(I)(2).

³⁰⁶ Article 256(II)(7).

³⁰⁷ Article 256(II)(8).

³⁰⁸ Article 312(II)(2).

³⁰⁹ Article 312(II)(3).

³¹⁰ Article 312(II)(2).

³¹¹ Article 352.

³¹² Article 357.

³¹³ See section 3.3 above, 'Beyond the Tragedy of the Commons'.

³¹⁴ Article 30(II)(10).

Article 289

Rural indigenous autonomy consists of self-government and the exercise of self-determination for rural indigenous nations and native peoples who share territory, culture, history, language, and unique forms of juridical, political, social, and economic organization.

The Bolivian constitution cements some of the rights outlined in the 2007 UN Declaration on the Rights of Indigenous Peoples,³¹⁵ which supports indigenous self-government and self-determination. Concretely, the constitution gives indigenous people organized in an autonomous territory the right to write their own statutes, as long as these do not violate any laws or the constitution. Indigenous communities will decide how to manage development—economic and otherwise—and how to administer local natural resources.³¹⁶ In cognisance of the “resurgent protectionist”³¹⁷ position where an ecocentric focus can be to the detriment of original inhabitants, when areas that are protected as natural reserves by the state overlap with the territories of indigenous people, ‘management will be held subject to the rules and procedures of the Indigenous peoples and nations, subject to [their] respecting the establishment of these areas.’³¹⁸ Specific protection is given to community economic organisation, specifically in the Polanyian sense of the form in which markets are embedded in culture,³¹⁹ as ‘the systems of production and reproduction of social life, based on the principles and vision of the original indigenous peoples and nations [,] and peasants.’³²⁰ Local indigenous governments will also be allowed to levy some taxes and appropriate the funds for schemes of their own device.

Fulfilling a long-standing demand of Bolivia’s indigenous groups, the constitution enshrines the right of autonomous indigenous territories to carry out community justice according to their traditional practices, as long as government laws are not violated.³²¹ Provision is also made for a future law to determine the ‘coordination and cooperation’ between the jurisdictions of the Indigenous Court and the Agri-Environmental Court.³²²

Uncontacted tribes who wish to remain in isolation, and indigenous peoples ‘in danger of extinction’, will be ‘protected and respected in their individual ways of life and collectively.’³²³ African descendants are also recognised ‘so far as appropriate’ as having the status and economic, social and political rights of indigenous people of Bolivia.³²⁴

Most significantly from an ecological commons governance perspective, Article 294(I) provides for indigenous ancestral territories to be held as ‘collective property’ or ‘community possessions’.

³¹⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295 UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/295 (2007).

³¹⁶ Articles 290-297.

³¹⁷ In the phraseology of Flora Lu, *supra* at note 99.

³¹⁸ Article 385.

³¹⁹ See section 3.2 above.

³²⁰ Article 308.

³²¹ Specifically, the right to life and ‘rights established in this constitution.’ (Article 191(II)). See generally, Articles 191-193. The decision of the ‘indigenous campesino court’ is final with no right of appeal to the Agri-Environmental Court or any other court in the land (Article 192).

³²² Article 193.

³²³ Article 31.

³²⁴ Article 32.

The cultural significance of water to indigenous people is affirmed in Article 374(II).³²⁵

9.2.8 Environmental Rights

The chapter relating specifically to environmental rights and obligations makes it the duty of the state and individuals to 'preserve, protect and sustainably use natural resources, preserve biodiversity and maintain environmental balance.'³²⁶ The right of citizens to participate in environmental management includes a right to be consulted and informed in advance of decisions that may affect the quality of the environment.³²⁷ The use and manufacture of chemical, biological, and nuclear weapons in Bolivia is prohibited, as is the 'internment, transit, and stockpiling' of nuclear and toxic waste.³²⁸

Article 345

The environmental management policies are based on:

1. Participatory planning and management, with social control.
2. The enforcement of environmental impact assessment and quality control environment, without exception, and horizontally to any activity of production of goods and services they use, processing or affect natural resources and the environment.
3. Responsibility for carrying out any activity that produces environmental damage and its civil penalties, criminal and administrative breaches of the rules of protection environment.

Article 346

The natural heritage is in the public interest and strategic importance for the sustainable development of the country. Conservation and exploitation for the benefit of the people shall be the responsibility and role exclusively of the State, and not compromise sovereignty over natural resources...

Article 347

- I. The State and society are to promote the mitigation of adverse effects on the environment, and environmental liabilities affecting the country. States the responsibility for environmental damage, applicability of historical and environmental crimes.
- II. Those engaged in environmental impact must, in all stages of production, avoid, minimise, mitigate, cure, repair and compensate for environment and health damage caused and also, establish the necessary security measures for neutralise the effects of potential environmental liabilities.

9.2.9 Water Resources

There is a particularly strong emphasis on water resources and rights in the Bolivian constitution. This is unsurprising given two outstanding factors. First, Bolivia is one of the driest countries on Earth and access to water has long been a point of contention. Second, the recent history of privatisations of water and resistance to these have been defining moments in the recent political history of the country, which were catalysing events in the mobilisation and

³²⁵ Which states: 'The State shall recognise, respect and protect the traditions and customs of the communities, their local government and native Indian peasant organizations on rights [to], management [of], and sustainable management of water.'

³²⁶ Article 342.

³²⁷ Article 343.

³²⁸ Article 344(I).

lasting influence of the protest movements that grew up in this resistance.³²⁹ Water is guaranteed as a right for all people in Article 8 and, in more detail, in Article 373 preserved as a common resource that is constitutionally barred from privatisation:

Article 373

I. Water is a fundamental right to life under the sovereignty of the people. The State shall promote the use and access to water based on principles of solidarity, complementarity, reciprocity, equality, diversity and sustainability.

II. Water resources in all their surface and underground forms are finite, vulnerable, and play a strategic social, cultural and environmental role. These resources are not subject to private appropriation and they and their services will not be licensed.

The state is responsible for sustainable use strategies based on ‘social participation, ensuring access to water for all its inhabitants.’³³⁰ There are special protections for ‘[f]ossil water, glaciers, wetlands, groundwater, mineral, and medicinal’ waters,³³¹ watersheds,³³² and the zones of waterways used for spawning of aquatic life and ‘buffer zones’ of rivers in the context of effects on ecosystems but balancing the two considerations of preservation of their natural state and to ‘ensure development and welfare of the population.’³³³

9.2.10 Coca

Article 384: The State protects the cocaine originated as ancient and cultural heritage, natural renewable resource Bolivia’s biodiversity, and as a factor of social cohesion in its natural state is not narcotic. Revaluation, production, commercialisation and industrialisation will be governed by law.

Coca has a special status in the constitution. President Evo Morales was a coca grower and formerly head of the Coca Growers Union, which was a significant agent for the mobilisation of agrarian campesino and indigenous movements in the 1990s and 2000s. He has championed its use³³⁴ both as a natural medicine and as the cultural heritage of Aymara and Quechua peoples. Morales also proposes the commercialisation of coca. For instance, in April 2010, a soft-drink called *Coca Colla*³³⁵ made from coca leaf was approved by the government and

³²⁹ The ‘Water Wars of 2000’ in Cochabamba, as well as similar conflicts in El Alto and La Paz were reported around the world. *La Coordinadora Por la Defensa del Agua y la Vida*, the civil society coalition of union leaders, environmental activists and rural-water stewards that led demonstrations against the privatisation of Cochabamba’s water supply in 2000 has to date been one of the most successful ‘anti-globalisation’ movements. See, Oscar Olivera & Tom Lewis, *¡Cochabamba! Water War in Bolivia*, Cambridge, South End Press 2004.

³³⁰ Article 374(I).

³³¹ Article 374(III).

³³² Article 375.

³³³ Article 376.

³³⁴ He famously chewed coca leaves while giving a speech at a March 11, 2009 meeting of the UN Commission on Narcotic Drugs in Vienna, Austria. See, Jonathan J. Levin, “Bolivia’s Morales Asks UN to Recognise Legal Coca Use in Letter”, Bloomberg, March 12 2009.

Available at:

http://www.bloomberg.com/apps/news?pid=20601086&sid=aHyt0477z4MI&refer=latin_america.

³³⁵ Ostensibly named for the Colla peoples of the Bolivian highlands.

released for sale in the domestic market.³³⁶ These moves are clear symbolic counter-hegemonic challenges to US hegemony as applied through the 'War on Drugs' used to justify military and police intervention in Latin America since the 1980s. However, the proposed commercialisation of the national coca crop would cause its own environmental problems as it would almost certainly result in deforestation if land were cleared to cultivate on a large scale.

9.3 Global - Climate Change

The 20th century has been the century of the human rights. First with the approval of the civil and political rights in 1948, and second, with the approval of the economical, social and cultural rights in 1966. Now, the 21st century has to become the century of the Rights of Mother Earth and all natural beings ... A shared vision for a long term cooperative action requires the recognition of the rights of not only the human beings, but also of the rights of Mother Earth and of all its beings.³³⁷

9.3.1 Introduction

On 22 April 2009 President Evo Morales Ayma of Bolivia called on the General Assembly of the United Nations to develop a Universal Declaration of the Rights of Mother Earth. His proposal has received backing from nine countries of the Bolivarian Alliance for the Peoples of Our America (ALBA).

At the Copenhagen Fifteenth Convention of the Parties (COP 15), held between the 7th and 18th of December 2009 in Copenhagen, Bolivia (along with Venezuela) was one of a smaller number of delegations from the Global South in active and outspoken opposition to the mainstream negotiations and the 'Copenhagen Accord' drafted by the United States, China, India, South Africa and Brazil but rejected by most of the other delegations.³³⁸

9.3.2 The Global Peoples' Conference on Climate Change and the Rights of Mother Earth

The only way to get negotiations back on track not just for Bolivia or other countries, but for all of life, biodiversity, our Mother Earth, is to put civil society back into the process.³³⁹

³³⁶ See, Rory Carroll, "Coca Colla: The new 'real thing' in Bolivia", *Guardian*, 14 April 2010. Available at: <http://www.guardian.co.uk/world/2010/apr/14/coca-colla-real-thing-bolivia>.

³³⁷ From the *Proposal for a Declaration of Rights of Mother Earth in the UN Framework Convention on Climate Change* as included in the FCCC/AWGLCA/2009. Available at: http://unfccc.int/files/kyoto_protocol/application/pdf/bolivia110909.pdf.

³³⁸ 'As social organizations of Bolivia at the Pre-Conference of indigenous peoples and nations and inter-cultural communities, held in the city of Cochabamba from the 29th and to the 30th of March 2010, we establish that:

1. We reject and condemn the attempt to impose the so-called "Copenhagen Understanding" for not being an official outcome of the COP 15, for threatening and violating the rights of Mother Earth, for not respecting the rights and voices of developing countries of indigenous peoples and nations, intercultural communities, social organizations of Bolivia and the world.' See, <http://pwccc.wordpress.com/2010/02/04/pre-conference-of-the-indigenous-native-peasants-and-social-organizations-of-bolivia-on-climate-change-and-rights-of-mother-earth-2/#more-1070>.

³³⁹ Pablo Solon, Bolivia's ambassador to the UN, at a press conference during UNFCCC negotiations in Bonn on 10 April 2009. Available at : http://unfccc2.meta-fusion.com/kongresse/100409_AWG/templ/play.php?id_kongresssession=2608&theme=unfccc.

Inspired by widespread dissatisfaction with the Copenhagen Accord, in January 2010 President Evo Morales announced the *Conferencia Mundial de los Pueblos sobre Cambio Climático (CMPCC) y Derechos de la Madre Tierra*.³⁴⁰

Maria Souviron, the Bolivian ambassador in London stressed the multilevel participation on which the conference will be focused: "The invitation is to heads of state but chiefly to civil society. We think that social movements and non government groups, people not at decision level, have an important role in climate talks."³⁴¹

It is expected that there will be 7,500 delegates in attendance, mostly from civil society groups, with confirmed government delegations from Cuba, Venezuela, Nicaragua, Bolivia, Ecuador, Honduras, Dominica, Antigua and Barbuda, St Vincent and the Grenadines, France and Mexico.³⁴² The ambit of this conference is to be significantly more ambitious in scope than simply emissions mitigation. Working Groups have been formed around, among other things, Indigenous Peoples, Shared visions (see also opening quote), Harmony with Nature, Mother Earth Rights, Forest, Agriculture and Food Sovereignty.

9.3.3 Universal Declaration of the Rights of Mother Earth³⁴³

The most significant undertaking of the CMPCC will be the preparation of a draft 'Universal Declaration of the Rights of Mother Earth' (UDRME) to be passed on the final day of the conference.³⁴⁴ This is a concept that has been adopted by the Bolivian government³⁴⁵ from a proposal made by Polly Higgins, an English environmental lawyer who presented the proposal for a Universal Declaration of Planetary Rights to the United Nations (UN-UKA) Climate Change Conference in Northern Ireland on 6th November, 2008.³⁴⁶ It has the full backing of the ALBA

³⁴⁰ The 'Global People's Conference on Climate Change and Rights of Mother Earth.' The CMPCC is to be held in Cochabamba, Bolivia from April 20-22, 2010.

³⁴¹ John Vidal, "China, India, Brazil and South Africa Prepare for Post-Copenhagen Meeting" *Guardian*, January 13 2010, available at:

<http://www.guardian.co.uk/environment/2010/jan/13/developing-countries-basic-climate-change>.

³⁴² According to news reports as at April 14th 2010. See, AFP, "7 500 Due for Alternative Climate Change Conference in Bolivia", Apr. 14 2010.

³⁴³ The full text of the Draft Declaration of the Rights of Mother Earth is reproduced in Appendix I.

³⁴⁴ This will be April 22, 2010: Earth Day.

³⁴⁵ Bolivia framed the proposal to be included in the FCCC/AWGLCA/2009 as follows:

'The global warming is affecting not only human beings, but also all natural beings and Mother Earth. We are now inheriting the consequences of Climate Change because up till [sic] now we never respected the rights of our Mother Earth. A shared vision for a long-term cooperative action requires the recognition of the rights of not only the human beings, but also of the rights of Mother Earth and of all its beings. In this framework, it is essential to count with a Universal Declaration of Mother Earth's Rights to be developed within the United Nations.' Available at:

http://unfccc.int/files/kyoto_protocol/application/pdf/bolivia110909.pdf.

³⁴⁶ Although her initial proposal was quite different. She suggested six fundamental rights: The right to diversity, the rights to ecological integrity, the freedom of the natural cycles of life, the right not to be polluted, the right to restorative justice, the freedom of a clean and healthy environment. Higgins has now shifted her attention to promoting 'ecocide' as an international crime. A move toward this level of criminalisation of crimes against the environment is made in Articles 112 and 125(I)(2) in the Constitution of Bolivia.

bloc.³⁴⁷

The main aims of the conference are to organise a world people's referendum on global warming, draw up an action plan to create an international climate justice tribunal, and agree on new commitments to be negotiated within United Nations scenarios.

9.3.3.1 Relation to the Universal Declaration of Human Rights

This declaration is modelled on the Universal Declaration of Human Rights (UDHR).³⁴⁸ By using the language of legal rights, it becomes possible to make the care and preservation of non-human nature justiciable by moving that which has previously been treated by law in terms of property rights into the realm of existing legal, social, and economic structures.

Another significant influence on the draft declaration is the thought of Thomas Berry,³⁴⁹ whose philosophy has formed the basis of 'Earth Jurisprudence'.³⁵⁰ His thinking is epitomised in the sentiment that the Earth is a communion of subjects and not a collection of objects.³⁵¹ This idea of 'earth community'³⁵² is entirely consistent with the *cosmovisión* of the Aymara and Quechua cultures as well as many other indigenous traditions.

9.3.3.2 Relation to the Earth Charter

In its relation to Earth Charter, the potential of this declaration as a global constitutional document can be more clearly seen. The most striking aspect of the declaration is its ecocentric focus. This paradigmatic shift follows in the tradition of the Earth Charter 2000, which states as its first principle that all living beings are interdependent and have value regardless of their utility to human beings.³⁵³ Another significant similarity to the Earth Charter is the focus on civil society, grassroots and indigenous movements in the consultation and drafting process. The declaration is not intended to supplant the UDHR or the Earth Charter, but to be read in concert with them. For instance, while the framework is laid out in the UDRME, the Earth Charter offers more specific detail for implementation.

The Earth Charter is particularly prescient in noting 'universal responsibility' in its preamble, stating the importance of our identification with 'the whole Earth Community as well as our local communities. We are at once citizens of different nations and of one world in which the local and the global are linked.'

³⁴⁷ As proclaimed in the Final Declaration of the VIIth ALBA-TCP (People's Commerce Treaty) Summit, Dec. 14 2009: '[We] Greeted the inclusion of item "Harmony with Nature" on the agenda of the General Assembly of the United Nations, while *reiterating* their commitment to the Universal Declaration of Mother Earth and to establish guiding principles to restore harmony with nature in the twenty-first century.' Available at:

<http://www.alternativabolivariana.org/modules.php?name=News&file=article&sid=5726>.

³⁴⁸ *Universal Declaration of Human Rights*, GA Res 217 UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/217 (1948). This use of the UDHR as a model is explicitly acknowledged in the preamble. Many of the provisions of the UDRME are direct transliterations of UDHR articles.

³⁴⁹ His thinking is summarised in Marilyn Evelyn Tucker (ed.), *Evening Thoughts: Reflecting on Earth as Sacred Community*, San Francisco, Sierra Club Books 2006.

³⁵⁰ *Supra* note 16.

³⁵¹ This is entirely consistent with the relationality expressed by Escobar at 5.3.1.1 above.

³⁵² Also the formulation of David C. Korten as quoted above at note 15.

³⁵³ Earth Charter 2000, Principle 1(a).

This is achieved by finding a ‘shared vision of basic values to provide an ethical foundation for the emerging world community.’³⁵⁴ This interconnectedness and cross-level praxis is recognised in the frequent iteration of calls for action ‘at all levels’ in the Earth Charter.³⁵⁵

Similarly, the UDRME seeks to set a ‘common standard’ for human conduct based in such a shared vision in the preamble.³⁵⁶

9.3.3.3 A World Referendum on Climate Change

The aim is to have the following five questions to be put on October 12th, 2010 in order to have the results ready for consideration at the COP 16 to be held in Cancun, Mexico in December 2010.³⁵⁷

- 1) Do you agree with re-establishing harmony with nature while recognizing the rights of the Mother Earth? YES or NO
- 2) Do you agree with changing this model of over-consumption and waste that represents the capitalist system? YES or NO
- 3) Do you agree that developing countries reduce and reabsorb their domestic greenhouse gas emissions for temperature not to rise more than 1 degree Celsius? YES or NO
- 4) Do you agree with transferring all that is spent in wars and for allocating a budget bigger than used for defence to climate change? YES or NO
- 5) Do you agree with a Climate Justice Tribunal to judge those who destroy Mother Earth? YES or NO

9.3.3.4 Climate Justice Tribunal

It has been suggested that this proposal is to be developed in the United Nations. This brings the initiative closer to the ‘thick’ sense of constitutionalism envisioned by Bodansky by using an existing framework of international legal interaction.

9.4 Extractive Model of Development

9.4.1 Lithium development plans

In the Uyuni salt flats in Bolivia’s highlands sit the world’s largest supply of lithium.³⁵⁸ Lithium is an essential element in the batteries of electronic equipment. Estimated at 5.4 million tons, this reserve is half the world’s known supply. As part of the broader regional priority of endogenous development, the government has constituted a new state-owned company to run “the full chain of lithium production,” including “exploration, development, industrialization, and

³⁵⁴ Earth Charter 2000, Preamble.

³⁵⁵ See Principles 3(a), 5(a), and 13. Note also the incorporation of the principle of Subsidiarity in Principle 13(f).

³⁵⁶ In the second to last paragraph of the preamble in the context of the UDRME being read alongside the UDHR.

³⁵⁷ *Position of the Pre-Conference of the Indigenous, Native, Peasant, and Social Organizations of Bolivia on Climate Change and the Rights of the Mother Earth*. Available at:

<http://pwccc.wordpress.com/2010/02/06/pre-conference-of-the-indigenous-peoples-and-social-organizations-in-bolivia-on-climate-change-and-rights-of-mother-earth/#more-1121>.

³⁵⁸ Damian Kahya, “Bolivia Holds key to Electric Car Future”, *BBC News*, Nov. 9 2008.

marketing.” The state would retain 60% of revenues.³⁵⁹ However, the environmental impacts will be significant, pumping the brine underlying the flats, as is required for large-scale commercial extraction, may lower the water table which would render an already barely tenable desert ecosystem uninhabitable.³⁶⁰

9.5 Conclusion

The Bolivian constitutional ecocentrism stops short of according intrinsic rights to non-human organisms as was done in the constitution of Ecuador and the concept of ‘living well’ while embedded culturally among the Aymara majority and cast as a central consideration to guide interpretation of the constitution is not laid out as clearly or comprehensively as in the Ecuadorian constitution. However, the indigenous ethno-ecological vision and program of indigenous rights is more thoroughly articulated in Bolivia than in any other country studied and, at the time of writing, anywhere in Latin America.

Most promisingly for the future operation of ethno-ecological governance, Bolivia’s global advocacy and facilitation of a *Pachamama*-centred Declaration for the Rights of Mother Earth provides the conceptual framework that aligns with the subaltern cosmopolitanism required to transcend national boundaries. In its similarity to the Earth Charter and ecological principles in general as developed in other societies it offers the most promise as a conceptual framework to deal with the axial concerns that form the basis of a global constitutionalism.

³⁵⁹ Emily Achtenberg, “Bolivia’s Lithium Challenge”, *North American Council for Latin America*, Apr. 12, 2010.

³⁶⁰ Eitan Hadok, “Salt n’ Power”, *Scientific American*, March 18, 2010.

CHAPTER 10 – CASE STUDIES: COMPARATIVE DISCUSSION

The case studies have aimed to test the roots and effectiveness of counter-hegemony in each country by tracing their interactions across the local, national, regional and global levels.

First, by examining the extent to which the traditionally excluded – indigenous peoples and Nature – have been incorporated into the operation of the law across multiple levels.

Second by examining the extent to which enclosure has been resisted or, as the case may be, the commons have been extended.

A first observation when the three countries are compared is the difference that appears to be made by the proportion of the population that is indigenous.

Ecuador has a strong minority of 34% of the population; Bolivia has an indigenous majority of 60%; Venezuela, however, has only 2.1% indigenous population.

This difference in demographic would appear to be significant in the formation of the plurinational state and the degree to which the indigenous cosmovision has been incorporated into the fabric of the constitution as the predominance of the ethno-ecological conception in public discourse correlates closely to the proportion of indigenous population.

Bolivia, with a clear majority, has become the facilitator of international discussion of ecocentric global constitutionalism as evidenced in the pioneering Draft Declaration of the Rights of Mother Earth and their convening of the CMPCC which is beginning as these words are written.

To re-iterate the point made at the beginning of this paper, the comparative nature of this analysis does not advance all three constitutions as representing the movement toward ethno-ecological constitutional governance. Ecuador and Bolivia certainly represent positions on a spectrum of the ethno-ecological approach. Venezuela's approach to ecological governance, on the other hand, is presented as a contrasting position (consonant with that of ALBA) characterised here as 'agro-ecological' and more nationalist in nature. This position is representative of the agrarian origins of the more developed indigenous discourses of the plurinations of Ecuador and Bolivia.

The difference in the scheme of extending the 'living well' conceptions is very different between the two constitutions which include it. Ecuador's constitution sets out a far more coherent scheme of development in its *régimen del buen vivir*, the Bolivian approach leaves far more to interpretation by including it as a central interpretative principle in the preamble without putting in place a mechanism for implementation.

Although the new constitutions of Bolivia and Ecuador suggest a shift to an ecological, post-development, post-industrial ethos; the Presidents are mostly following the conventional development path of industrialisation in which 'the

environment' can be plausibly sacrificed in pursuit of over-riding anthropocentric goals.

Both the concept of plurinationality and indigenous conceptions were advanced by the vigorous advocacy of the indigenous movements in Bolivia and Ecuador. These movements had their origins in agrarian movements of farmers and *campesinos* increasingly alienated by the privatisations and enclosure of arable land and resources by the neoliberal reforms of the 1990s – 2000s. Only later did an explicitly ethno-ecological vision emerge that was other than a reaction to the modernist vision of the development narrative.

Thus, a progress can be discerned from agrarian to agro-ecological, to ethno-ecological across the chronological order of the constitutions and perhaps as progress along a continuum of relational awareness.

It is too early to tell how justiciable the rights of indigenous peoples and nature will be in years to come. However, as the case studies indicate, primacy is generally accorded to the rolling out of economic and social rights within a framework of endogenous development. This is funded by large-scale exploitation of oil, gas, and other extractive industries. First there is overwhelming poverty and a set of economic and social rights to be extended before a third generation of ecological rights can be countenanced but this discourse has begun as glimpsed in the FCCC/AWGLCA/2009 formulation as quoted above.³⁶¹

³⁶¹ At the head of 9.3.

CHAPTER 11 - CONCLUSION

The contention of this thesis has been to show that in response to a neoliberal global enclosure movement, a counter-hegemonic globalisation movement has arisen to reclaim and preserve commons and that in the process an ethno-ecological approach to governance has emerged. Drawing on ancient wisdom traditions of holism, ecocentrism and communality, this ethno-ecology offers a comprehensive normative basis for countering the ecological destruction wrought by the dualistic, anthropocentric, individualistic ethic of the industrialised world.

Regionally, the protective 'double-movement' of the Bolivarian Alliance has prioritised agrarian reforms to reverse the enclosures inherent in neoliberal privatisations and vestigial colonial land-holding. Nationally, this has been codified in law by a multilevel interaction between states, indigenous peoples, grassroots ecological movements, social justice movements and international NGOs.

Movements that began as oppositional have reached across time and space (just as these scales have been collapsed by globalisation) to reconnect with and draw upon traditional wisdoms through global alliances united by common global concerns.³⁶²

As these movements progress, merely oppositional positions questioning the capitalist world order and its Faustian counterpart of unlimited economic growth, a coherent framework of holism and ecocentrism is emerging 'from below' in international discourse as articulated through processes drawing on the vast majority of people and their common concerns grounded in a relational awareness of the interconnectedness of all life.

This ethic is not only accessible to local indigenous inhabitants but when applied to global enclosures of global commons the striking similarity of the Draft Universal Declaration of the Rights of Mother Earth and the Earth Charter suggest a globally-shared vision that has the potential to offer a trans-civilisational ecological ethic.

The process of counter-hegemonic globalisation and its counterpart, subaltern cosmopolitan legality, have appropriated the neoliberal techniques used to decouple the state from society. This is done with the intention not of minimising the obligation of the state to its citizens, but in such a way as to enfranchise the traditionally excluded civil society groups, social movements, and indigenous peoples. As the Westphalian state ceases to be the sole fundamental unit of international law, interactions occur vertically and horizontally across scales and levels. Nation-States devolve into Pluri-Nations.

When civil society - as represented by social movements and indigenous peoples - follows a participatory democratic process, enclosure of the Commons

³⁶² Note, for instance, the maturing of the Bolivarian *Alternative* into the Bolivarian *Alliance* in June 2009.

at all levels has emerged as an axial concern. A survey of Commons theory as it applies to jurisdictional and institutional scales reveals that solutions conceived at the finer levels of scale by indigenous groups and social movements that are best placed to build solutions 'from below' are both viable and desirable. In their formation as opposition to the liberal democratic and neoliberal forms of government and governance respectively, they invert the predominant pattern of coarsest scale reform being imposed 'from above' by National and Trans-National entities. These blunt instruments have proven to be highly destructive when applied to complex and biodiverse systems.

Many of the above concerns are answered by the constitutionalisation of an ethno-ecological cosmology; in this framework, the inclusion of the recognition of inalienable rights of nature may achieve more than simply overcoming the obstacle of legal standing as in common law systems of law.

These solutions, based in resistance to scientific dualism, commodification and enclosure, are found in the recognition of indigenous *cosmovisión* and its incorporation into law as an embrace of the cultural embeddedness of the Commons.

The re-claiming of the Commons necessarily re-embeds the market in society and the culture in agriculture.

In this sense, the ecological, social, cultural, and economic become integrated in one holistic vision and relational ethic, as embodied in the *cosmovisión* of the indigenous peoples of the countries studied.

Remarkably, this vision inherently respects difference and although all-encompassing is not monolithic. It is universal, yet highly localised which offers the greatest possibility yet for a Global Environmental Constitution.

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APPENDIX I - DRAFT UNIVERSAL DECLARATION OF THE RIGHTS OF MOTHER EARTH 2010

Preamble

We, the peoples of Earth:

gratefully acknowledging that Mother Earth gives us life, nourishes and teaches us and provides us with all that we need to live well;

recognising that Mother Earth is an indivisible community of diverse and interdependent beings with whom we share a common destiny and to whom we must relate in ways that benefit Mother Earth;

acknowledging that by attempting to dominate and exploit Mother Earth and other beings, humans have caused severe destruction, degradation and disruption of the life-sustaining communities, processes and balances of Mother Earth which now threatens the wellbeing and existence of many beings;

conscious that this destruction is also harmful to our inner wellbeing and is offensive to the many faiths, wisdom traditions and indigenous cultures for whom Mother Earth is sacred;

acutely conscious of the critical importance and urgency of taking decisive, collective action to prevent humans causing climate change and other impacts on Mother Earth that threaten the wellbeing and survival of humans and other beings;

accepting our responsibility to one another, future generations and Mother Earth to heal the damage caused by humans and to pass on to future generations values, traditions, and institutions that support the flourishing of Mother Earth;

convinced that in order for communities of humans and other beings to flourish we must establish systems for governing human behaviour that recognize the inalienable rights of Mother Earth and of all beings that are part of her;

convinced that the fundamental freedoms and rights of Mother Earth and of all beings should be protected by the rule of law, and that the corresponding duties of human beings to respect and defend these rights and freedoms should be enforced by law proclaim this Universal Declaration of the Rights of Mother Earth to complement the Universal Declaration of Human Rights and to serve as a common standard by which the conduct of all human beings, organizations, and cultures can be guided and assessed;

and pledge ourselves to cooperate with other human communities, public and private organizations, governments, and the United Nations, to secure the universal and effective recognition and observance of the fundamental freedoms, rights and duties enshrined in this Declaration, among all the peoples, cultures and states of Earth.

Article 1. Fundamental rights, freedoms and duties

- (1) Mother Earth is an indivisible, self-regulating community of interrelated beings each of whom is defined by its relationships within this community and with the Universe as a whole. Fundamental aspects of these relationships are expressed in this Declaration as inalienable rights, freedoms and duties.
- (2) These fundamental rights, freedoms and duties arise from the same source as existence and are inherent to all beings, consequently they are inalienable, cannot be abolished by law, and are not affected by the political, jurisdictional or international status of the country or territory within which a being exists.
- (3) All beings are entitled to all the fundamental rights and freedoms recognized in this Declaration without distinction of any kind, such as may be made between organic, living beings and inorganic, non-living beings, or on the basis of sentience, kind, species, use to humans, or other status.
- (4) Just as human beings have human rights, other beings may also have additional rights, freedoms and duties that are specific to their species or kind and appropriate for their role and function within the communities within which they exist.
- (5) The rights of each being are limited by the rights of other beings to the extent necessary to maintain the integrity, balance and health of the communities within which it exists.

Article 2. Fundamental rights of Mother Earth

Mother Earth has the right to exist, to persist and to continue the vital cycles, structures, functions and processes that sustain all beings.

Article 3. Fundamental rights and freedoms of all beings

Every being has:

- (a) the right to exist;
- (b) the right to habitat or a place to be;

- (c) the right to participate in accordance with its nature in the ever-renewing processes of Mother Earth;
- (d) the right to maintain its identity and integrity as a distinct, self-regulating being;
- (e) the right to be free from pollution, genetic contamination and human modifications of its structure or functioning that threaten its integrity or healthy functioning; and
- (f) the freedom to relate to other beings and to participate in communities of beings in accordance with its nature.

Article 4. Freedom of animals from torture and cruelty

Every animal has the right to live free from torture, cruel treatment or punishment by human beings.

Article 5. Freedom of animals from confinement and removal from habitat

- (1) No human being has the right to confine another animal or to remove it from its habitat unless doing so is justifiable with reference to the respective rights, duties and freedoms of both the human and other animal concerned.
- (2) Any human being that confines or keeps another animal must ensure that it is free to express normal patterns of behavior, has adequate nourishment and is protected from injury, disease, suffering and unreasonable fear, pain, distress or discomfort.

Article 6. Fundamental duties of human beings

Human beings have a special responsibility to avoid acting in violation of this Declaration and must urgently establish values, cultures, and legal, political, economic and social systems consistent with this Declaration that:

- (a) promote the full recognition, application and enforcement of the freedoms, rights and duties set out in this Declaration;
- (b) ensure that the pursuit of human wellbeing contributes to the wellbeing of Mother Earth, now and in the future;
- (c) prevent humans from causing harmful disruptions of vital ecological cycles, processes and balances, and from compromising the genetic viability and continued survival of other species;
- (d) ensure that the damage caused by human violations of the freedoms, rights and duties in this Declaration is rectified where possible and that

those responsible are held accountable for restoring the integrity and healthy functioning of affected communities; and

(e) enable people to defend the rights of Mother Earth and of all beings.

Article 7. Protection of the law

Every being has –

- (a) the right to be recognised everywhere as a subject before the law;
- (b) the right to the protection of the law and to an effective remedy in respect of human violations or attacks on the rights and freedoms recognized in this Declaration;
- (c) the right to equal protection of the law; and
- (d) the right to equal protection against any discrimination by humans in violation of this Declaration and against any incitement to such discrimination.

Article 8. Human education

- (1) Every human being has the right to be educated about Mother Earth and how to live in accordance with this Declaration.
- (2) Human education must develop the full potential of human beings in a way that promotes a love of Mother Earth, compassion, understanding, tolerance and affection among all humans and between humans and other beings, and the observance of the fundamental freedoms, rights and duties in this Declaration.

Article 9. Interpretation

- (1) The term “being” refers to natural beings which exist as part of Mother Earth and includes a community of other beings and all human beings regardless of whether or not they act as a corporate body, state or other legal person.
- (2) Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms in it.
- (3) Nothing in this Declaration may be interpreted as restricting the recognition of other fundamental rights, freedoms or duties of all or specified beings.

Article 10. Fundamental rights, freedoms and duties

- (1) Mother Earth is an indivisible, self-regulating community of interrelated beings each of whom is defined by its relationships within this community and with the Universe as a whole. Fundamental aspects of these relationships are expressed in this Declaration as inalienable rights, freedoms and duties.
- (2) These fundamental rights, freedoms and duties arise from the same source as existence and are inherent to all beings, consequently they are inalienable, cannot be abolished by law, and are not affected by the political, jurisdictional or international status of the country or territory within which a being exists.
- (3) All beings are entitled to all the fundamental rights and freedoms recognized in this Declaration without distinction of any kind, such as may be made between organic, living beings and inorganic, non-living beings, or on the basis of sentience, kind, species, use to humans, or other status.
- (4) Just as human beings have human rights, other beings may also have additional rights, freedoms and duties that are specific to their species or kind and appropriate for their role and function within the communities within which they exist.
- (5) The rights of each being are limited by the rights of other beings to the extent necessary to maintain the integrity, balance and health of the communities within which it exists.

Article 11. Fundamental rights of Mother Earth

Mother Earth has the right to exist, to persist and to continue the vital cycles, structures, functions and processes that sustain all beings.

Article 12. Fundamental rights and freedoms of all beings

Every being has:

- (a) the right to exist;
- (b) the right to habitat or a place to be;
- (c) the right to participate in accordance with its nature in the ever-renewing processes of Mother Earth;
- (d) the right to maintain its identity and integrity as a distinct, self-regulating being;

- (e) the right to be free from pollution, genetic contamination and human modifications of its structure or functioning that threaten its integrity or healthy functioning; and
- (f) the freedom to relate to other beings and to participate in communities of beings in accordance with its nature.

Article 13. Freedom of animals from torture and cruelty

Every animal has the right to live free from torture, cruel treatment or punishment by human beings.

Article 14. Freedom of animals from confinement and removal from habitat

- (1) No human being has the right to confine another animal or to remove it from its habitat unless doing so is justifiable with reference to the respective rights, duties and freedoms of both the human and other animal concerned.
- (2) Any human being that confines or keeps another animal must ensure that it is free to express normal patterns of behavior, has adequate nourishment and is protected from injury, disease, suffering and unreasonable fear, pain, distress or discomfort.

Article 15. Fundamental duties of human beings

Human beings have a special responsibility to avoid acting in violation of this Declaration and must urgently establish values, cultures, and legal, political, economic and social systems consistent with this Declaration that:

- (a) promote the full recognition, application and enforcement of the freedoms, rights and duties set out in this Declaration;
- (b) ensure that the pursuit of human wellbeing contributes to the wellbeing of Mother Earth, now and in the future;
- (c) prevent humans from causing harmful disruptions of vital ecological cycles, processes and balances, and from compromising the genetic viability and continued survival of other species;
- (d) ensure that the damage caused by human violations of the freedoms, rights and duties in this Declaration is rectified where possible and that those responsible are held accountable for restoring the integrity and healthy functioning of affected communities; and
- (e) enable people to defend the rights of Mother Earth and of all beings.

Article 16. Protection of the law

Every being has –

- (a) the right to be recognised everywhere as a subject before the law;
- (b) the right to the protection of the law and to an effective remedy in respect of human violations or attacks on the rights and freedoms recognized in this Declaration;
- (c) the right to equal protection of the law; and
- (d) the right to equal protection against any discrimination by humans in violation of this Declaration and against any incitement to such discrimination.

Article 17. Human education

- (1) Every human being has the right to be educated about Mother Earth and how to live in accordance with this Declaration.
- (2) Human education must develop the full potential of human beings in a way that promotes a love of Mother Earth, compassion, understanding, tolerance and affection among all humans and between humans and other beings, and the observance of the fundamental freedoms, rights and duties in this Declaration.

Article 18. Interpretation

- (1) The term “being” refers to natural beings which exist as part of Mother Earth and includes a community of other beings and all human beings regardless of whether or not they act as a corporate body, state or other legal person.
- (2) Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms in it.
- (3) Nothing in this Declaration may be interpreted as restricting the recognition of other fundamental rights, freedoms or duties of all or specified beings.

APPENDIX II – THE EARTH CHARTER 2000

PREAMBLE

We stand at a critical moment in Earth's history, a time when humanity must choose its future. As the world becomes increasingly interdependent and fragile, the future at once holds great peril and great promise. To move forward we must recognize that in the midst of a magnificent diversity of cultures and life forms we are one human family and one Earth community with a common destiny. We must join together to bring forth a sustainable global society founded on respect for nature, universal human rights, economic justice, and a culture of peace. Towards this end, it is imperative that we, the peoples of Earth, declare our responsibility to one another, to the greater community of life, and to future generations.

EARTH, OUR HOME

Humanity is part of a vast evolving universe. Earth, our home, is alive with a unique community of life. The forces of nature make existence a demanding and uncertain adventure, but Earth has provided the conditions essential to life's evolution. The resilience of the community of life and the well-being of humanity depend upon preserving a healthy biosphere with all its ecological systems, a rich variety of plants and animals, fertile soils, pure waters, and clean air. The global environment with its finite resources is a common concern of all peoples. The protection of Earth's vitality, diversity, and beauty is a sacred trust.

THE GLOBAL SITUATION

The dominant patterns of production and consumption are causing environmental devastation, the depletion of resources, and a massive extinction of species. Communities are being undermined. The benefits of development are not shared equitably and the gap between rich and poor is widening. Injustice, poverty, ignorance, and violent conflict are widespread and the cause of great suffering. An unprecedented rise in human population has overburdened ecological and social systems. The foundations of global security are threatened. These trends are perilous—but not inevitable.

THE CHALLENGES AHEAD

The choice is ours: form a global partnership to care for Earth and one another or risk the destruction of ourselves and the diversity of life. Fundamental changes are needed in our values, institutions, and ways of living. We must realize that when basic needs have been met, human development is primarily about being more, not having more. We have the knowledge and technology to provide for all and to reduce our impacts on the environment. The emergence of a global civil society is creating new opportunities to build a democratic and humane world. Our environmental, economic, political, social, and spiritual challenges are interconnected, and together we can forge inclusive solutions.

UNIVERSAL RESPONSIBILITY

To realize these aspirations, we must decide to live with a sense of universal responsibility, identifying ourselves with the whole Earth community as well as our local communities. We are at once citizens of different nations and of one world in which the local and global are linked. Everyone shares responsibility for the present and future well-being of the human family and the larger living world. The spirit of human solidarity and kinship with all life is strengthened when we live with reverence for the mystery of being, gratitude for the gift of life, and humility regarding the human place in nature.

We urgently need a shared vision of basic values to provide an ethical foundation for the emerging world community. Therefore, together in hope we affirm the following interdependent principles for a sustainable way of life as a common standard by which the conduct of all individuals, organizations, businesses, governments, and transnational institutions is to be guided and assessed.

PRINCIPLES

I. RESPECT AND CARE FOR THE COMMUNITY OF LIFE

1. Respect Earth and life in all its diversity.

- a. Recognize that all beings are interdependent and every form of life has value regardless of its worth to human beings.
- b. Affirm faith in the inherent dignity of all human beings and in the intellectual, artistic, ethical, and spiritual potential of humanity.

2. Care for the community of life with understanding, compassion, and love.

- a. Accept that with the right to own, manage, and use natural resources comes the duty to prevent environmental harm and to protect the rights of people.
- b. Affirm that with increased freedom, knowledge, and power comes increased responsibility to promote the common good.

3. Build democratic societies that are just, participatory, sustainable, and peaceful.

- a. Ensure that communities at all levels guarantee human rights and fundamental freedoms and provide everyone an opportunity to realize his or her full potential.
- b. Promote social and economic justice, enabling all to achieve a secure and meaningful livelihood that is ecologically responsible.

4. Secure Earth's bounty and beauty for present and future generations.

- a. Recognize that the freedom of action of each generation is qualified by the needs of future generations.
- b. Transmit to future generations values, traditions, and institutions that support the long-term flourishing of Earth's human and ecological communities.

II. ECOLOGICAL INTEGRITY

5. Protect and restore the integrity of Earth's ecological systems, with special concern for biological diversity and the natural processes that sustain life.

- a. Adopt at all levels sustainable development plans and regulations that make environmental conservation and rehabilitation integral to all development initiatives.
- b. Establish and safeguard viable nature and biosphere reserves, including wild lands and marine areas, to protect Earth's life support systems, maintain biodiversity, and preserve our natural heritage.
- c. Promote the recovery of endangered species and ecosystems.
- d. Control and eradicate non-native or genetically modified organisms harmful to native species and the environment, and prevent introduction of such harmful organisms.
- e. Manage the use of renewable resources such as water, soil, forest products, and marine life in ways that do not exceed rates of regeneration and that protect the health of ecosystems.
- f. Manage the extraction and use of non-renewable resources such as minerals and fossil fuels in ways that minimize depletion and cause no serious environmental damage.

6. Prevent harm as the best method of environmental protection and, when knowledge is limited, apply a precautionary approach.

- a. Take action to avoid the possibility of serious or irreversible environmental harm even when scientific knowledge is incomplete or inconclusive.
- b. Place the burden of proof on those who argue that a proposed activity will not cause significant harm, and make the responsible parties liable for environmental harm.
- c. Ensure that decision making addresses the cumulative, long-term, indirect, long distance, and global consequences of human activities.
- d. Prevent pollution of any part of the environment and allow no build-up of radioactive, toxic, or other hazardous substances.
- e. Avoid military activities damaging to the environment.

7. Adopt patterns of production, consumption, and reproduction that safeguard Earth's regenerative capacities, human rights, and community well-being.

- a. Reduce, reuse, and recycle the materials used in production and consumption systems, and ensure that residual waste can be assimilated by ecological systems.
- b. Act with restraint and efficiency when using energy, and rely increasingly on renewable energy sources such as solar and wind.
- c. Promote the development, adoption, and equitable transfer of environmentally sound technologies. Internalize the full environmental and social costs of goods and services in the selling price, and enable consumers to identify products that meet the highest social and environmental standards.
- d. Ensure universal access to health care that fosters reproductive health and responsible reproduction.
- e. Adopt lifestyles that emphasize the quality of life and material sufficiency in a finite world.

8. Advance the study of ecological sustainability and promote the open exchange and wide application of the knowledge acquired.

- a. Support international scientific and technical cooperation on sustainability, with special attention to the needs of developing nations.
- b. Recognize and preserve the traditional knowledge and spiritual wisdom in all cultures that contribute to environmental protection and human well-being.
- c. Ensure that information of vital importance to human health and environmental protection, including genetic information, remains available in the public domain.

III. SOCIAL AND ECONOMIC JUSTICE

9. Eradicate poverty as an ethical, social, and environmental imperative.

- a. Guarantee the right to potable water, clean air, food security, uncontaminated soil, shelter, and safe sanitation, allocating the national and international resources required.
- b. Empower every human being with the education and resources to secure a sustainable livelihood, and provide social security and safety nets for those who are unable to support themselves.
- c. Recognize the ignored, protect the vulnerable, serve those who suffer, and enable them to develop their capacities and to pursue their aspirations.

10. Ensure that economic activities and institutions at all levels promote human development in an equitable and sustainable manner.

- a. Promote the equitable distribution of wealth within nations and among nations.

- b. Enhance the intellectual, financial, technical, and social resources of developing nations, and relieve them of onerous international debt.
- c. Ensure that all trade supports sustainable resource use, environmental protection, and progressive labor standards.
- d. Require multinational corporations and international financial organizations to act transparently in the public good, and hold them accountable for the consequences of their activities.

11. Affirm gender equality and equity as prerequisites to sustainable development and ensure universal access to education, health care, and economic opportunity.

- a. Secure the human rights of women and girls and end all violence against them.
- b. Promote the active participation of women in all aspects of economic, political, civil, social, and cultural life as full and equal partners, decision makers, leaders, and beneficiaries.
- c. Strengthen families and ensure the safety and loving nurture of all family members.

12. Uphold the right of all, without discrimination, to a natural and social environment supportive of human dignity, bodily health, and spiritual well-being, with special attention to the rights of indigenous peoples and minorities.

- a. Eliminate discrimination in all its forms, such as that based on race, colour, sex, sexual orientation, religion, language, and national, ethnic or social origin.
- b. Affirm the right of indigenous peoples to their spirituality, knowledge, lands and resources and to their related practice of sustainable livelihoods.
- c. Honour and support the young people of our communities, enabling them to fulfil their essential role in creating sustainable societies.
- d. Protect and restore outstanding places of cultural and spiritual significance.

IV. DEMOCRACY, NONVIOLENCE, AND PEACE

13. Strengthen democratic institutions at all levels, and provide transparency and accountability in governance, inclusive participation in decision making, and access to justice.

- a. Uphold the right of everyone to receive clear and timely information on environmental matters and all development plans and activities which are likely to affect them or in which they have an interest.
- b. Support local, regional and global civil society, and promote the meaningful participation of all interested individuals and organizations in decision making.

- c. Protect the rights to freedom of opinion, expression, peaceful assembly, association, and dissent. Institute effective and efficient access to administrative and independent judicial procedures, including remedies and redress for environmental harm and the threat of such harm.
- d. Eliminate corruption in all public and private institutions.
- e. Strengthen local communities, enabling them to care for their environments, and assign environmental responsibilities to the levels of government where they can be carried out most effectively.

14. Integrate into formal education and life-long learning the knowledge, values, and skills needed for a sustainable way of life.

- a. Provide all, especially children and youth, with educational opportunities that empower them to contribute actively to sustainable development.
- b. Promote the contribution of the arts and humanities as well as the sciences in sustainability education.
- c. Enhance the role of the mass media in raising awareness of ecological and social challenges.
- d. Recognize the importance of moral and spiritual education for sustainable living.

15. Treat all living beings with respect and consideration.

- a. Prevent cruelty to animals kept in human societies and protect them from suffering.
- b. Protect wild animals from methods of hunting, trapping, and fishing that cause extreme, prolonged, or avoidable suffering.
- c. Avoid or eliminate to the full extent possible the taking or destruction of non-targeted species.

16. Promote a culture of tolerance, nonviolence, and peace.

- a. Encourage and support mutual understanding, solidarity, and cooperation among all peoples and within and among nations.
- b. Implement comprehensive strategies to prevent violent conflict and use collaborative problem solving to manage and resolve environmental conflicts and other disputes.
- c. Demilitarize national security systems to the level of a non-provocative defence posture, and convert military resources to peaceful purposes, including ecological restoration.
- d. Eliminate nuclear, biological, and toxic weapons and other weapons of mass destruction.
- e. Ensure that the use of orbital and outer space supports environmental protection and peace.
- f. Recognize that peace is the wholeness created by right relationships with oneself, other persons, other cultures, other life, Earth, and the larger whole of which all are a part.

THE WAY FORWARD

As never before in history, common destiny beckons us to seek a new beginning. Such renewal is the promise of these Earth Charter principles. To fulfil this promise, we must commit ourselves to adopt and promote the values and objectives of the Charter.

This requires a change of mind and heart. It requires a new sense of global interdependence and universal responsibility. We must imaginatively develop and apply the vision of a sustainable way of life locally, nationally, regionally, and globally. Our cultural diversity is a precious heritage and different cultures will find their own distinctive ways to realize the vision. We must deepen and expand the global dialogue that generated the Earth Charter, for we have much to learn from the ongoing collaborative search for truth and wisdom.

Life often involves tensions between important values. This can mean difficult choices. However, we must find ways to harmonize diversity with unity, the exercise of freedom with the common good, short-term objectives with long-term goals. Every individual, family, organization, and community has a vital role to play. The arts, sciences, religions, educational institutions, media, businesses, nongovernmental organizations, and governments are all called to offer creative leadership. The partnership of government, civil society, and business is essential for effective governance.

In order to build a sustainable global community, the nations of the world must renew their commitment to the United Nations, fulfil their obligations under existing international agreements, and support the implementation of Earth Charter principles with an international legally binding instrument on environment and development.

Let ours be a time remembered for the awakening of a new reverence for life, the firm resolve to achieve sustainability, the quickening of the struggle for justice and peace, and the joyful celebration of life.

APPENDIX III – BOLIVIA 2011 - ACT OF THE RIGHTS OF MOTHER EARTH

CHAPTER I

OBJECT AND PRINCIPLES

Article 1. (SCOPE). This Act is intended to recognize the rights of Mother Earth, and the obligations and duties of the Multinational State and society to ensure respect for these rights.

Article 2. (PRINCIPLES). The binding principles that govern this law are:

- 1. Harmony.** Human activities, within the framework of plurality and diversity, should achieve a dynamic balance with the cycles and processes inherent in Mother Earth.
- 2. Collective good.** The interests of society, within the framework of the rights of Mother Earth, prevail in all human activities and any acquired right.
- 3. Guarantee of the regeneration of Mother Earth.** The state, at its various levels, and society, in harmony with the common interest, must ensure the necessary conditions in order that the diverse living systems of Mother Earth may absorb damage, adapt to shocks, and regenerate without significantly altering their structural and functional characteristics, recognizing that living systems are limited in their ability to regenerate, and that humans are limited in their ability to undo their actions.
- 4. Respect and defend the rights of Mother Earth.** The State and any individual or collective person must respect, protect and guarantee the rights of Mother Earth for the well-being of current and future generations.
- 5. No commercialism.** Neither living systems nor processes that sustain them may be commercialized, nor serve anyone's private property.
- 6. Multiculturalism.** The exercise of the rights of Mother Earth requires the recognition, recovery, respect, protection, and dialogue of the diversity of feelings, values, knowledge, skills, practices, skills, transcendence, transformation, science, technology and standards, of all the cultures of the world who seek to live in harmony with nature.

CHAPTER II

MOTHER EARTH, DEFINITION AND CHARACTER

Article 3. (Mother Earth). Mother Earth is a dynamic living system comprising an indivisible community of all living systems and living organisms, interrelated,

interdependent and complementary, which share a common destiny.

Mother Earth is considered sacred, from the worldviews of nations and peasant indigenous peoples.

Article 4. (LIVING SYSTEMS). Living systems are complex and dynamic communities of plants, animals, microorganisms and other beings and their environment, where human communities and the rest of nature interact as a functional unit under the influence of climatic, physiographic, and geological factors, as well as production practices, Bolivian cultural diversity, and the worldviews of nations, original indigenous peoples, and intercultural and Afro-Bolivian communities.

Article 5. (LEGAL STATUS OF MOTHER EARTH). For the purpose of protecting and enforcing its rights, Mother Earth takes on the character of collective public interest. Mother Earth and all its components, including human communities, are entitled to all the inherent rights recognized in

this Law. The exercise of the rights of Mother Earth will take into account the specificities and particularities of its various components. The rights under this Act shall not limit the existence of other rights of Mother Earth.

Article 6. (EXERCISE OF THE RIGHTS OF THE MOTHER EARTH). All Bolivians, to join the community of beings comprising Mother Earth, exercise rights under this Act, in a way that is consistent with their individual and collective rights.

The 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.

CHAPTER III

RIGHTS OF MOTHER EARTH

Article 7. (RIGHTS OF MOTHER EARTH)

I. Mother Earth has the following rights:

1. To life: The right to maintain the integrity of living systems and natural processes that sustain them, and capacities and conditions for regeneration.

2. To the diversity of life: It is the right to preservation of differentiation and variety of beings that make up Mother Earth, without being genetically altered or structurally modified in an artificial way, so that their existence, functioning or

future potential would be threatened.

3. To water: The right to preserve the functionality of the water cycle, its existence in the quantity and quality needed to sustain living systems, and its protection from pollution for the reproduction of the life of Mother Earth and all its components.

4. To clean air: The right to preserve the quality and composition of air for sustaining living systems and its protection from pollution, for the reproduction of the life of Mother Earth and all its components.

5. To equilibrium: The right to maintenance or restoration of the interrelationship, interdependence, complementarity and functionality of the components of Mother Earth in a balanced way for the continuation of their cycles and reproduction of their vital processes.

6. To restoration: The right to timely and effective restoration of living systems affected by human activities directly or indirectly.

7. To pollution-free living: The right to the preservation of any of Mother Earth's components from contamination, as well as toxic and radioactive waste generated by human activities.

CHAPTER IV

STATE OBLIGATIONS AND SOCIETAL DUTIES

Article 8. (OBLIGATIONS OF THE PLURINATIONAL STATE). The Plurinational State, at all levels and geographical areas and across all authorities and institutions, has the following duties:

1. Develop public policies and systematic actions of prevention, early warning, protection, and precaution in order to prevent human activities causing the extinction of living populations, the alteration of the cycles and processes that ensure life, or the destruction of livelihoods, including cultural systems that are part of Mother Earth.
2. Develop balanced forms of production and patterns of consumption to satisfy the needs of the Bolivian people to live well, while safeguarding the regenerative capacity and integrity of the cycles, processes and vital balance of Mother Earth.
3. Develop policies to protect Mother Earth from the multinational and international scope of the exploitation of its components, from the commodification of living systems or the processes that support them, and from

the structural causes and effects of global climate change.

4. Develop policies to ensure long-term energy sovereignty, increased efficiency and the gradual incorporation of clean and renewable alternative sources into the energy matrix.

5. Demand international recognition of environmental debt through the financing and transfer of clean technologies that are effective and compatible with the rights of Mother Earth, among other mechanisms.

6. Promote peace and the elimination of all nuclear, chemical, and biological arms and weapons of mass destruction.

7. Promote the growth and recognition of rights of Mother Earth in multilateral, regional and bilateral international relations.

Article 9. (DUTIES OF THE PEOPLE) The duties of natural persons and public or private legal entities:

1. Uphold and respect the rights of Mother Earth.

2. Promote harmony with Mother Earth in all areas of its relationship with other human communities and the rest of nature in living systems.

3. Participate actively, individually or collectively, in generating proposals designed to respect and defend the rights of Mother Earth.

4. Assume production practices and consumer behavior in harmony with the rights of Mother Earth.

5. Ensure the sustainable use of Mother Earth's components.

6. Report any act that violates the rights of Mother Earth, living systems, and/or their components.

7. Attend the convention of competent authorities or organized civil society to implement measures aimed at preserving and/or protecting Mother Earth.

Article 10. (DEFENSE OF MOTHER EARTH). Establishing the Office of Mother Earth, whose mission is to ensure the validity, promotion, distribution and compliance of the rights of Mother Earth established in this Act. A special law will establish its structure, function, and attributes.