



## Earth Rights: The Theory

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On 22 April 2010 Bolivia hosted a Peoples' World Conference on Climate Change and Mother Earth Rights.<sup>1</sup> The conference was attended by over 35,000 people and concluded with President Evo Morales Ayma adopting a declaration, to be presented to the United Nations. The declaration draws inspiration from other authoritative agreements such as the Universal Declaration of Human Rights and the Earth Charter.<sup>2</sup> The preamble expressly acknowledges our profound dependence on and relationship with the Earth and that the 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 to benefit Mother Earth."<sup>3</sup> An extract from the declaration reads:

### **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.

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<sup>1</sup> See 'Peoples Conference on Climate Change and Mother Earth Rights' <<http://pwccc.wordpress.com/>> accessed 1 April 2010.

<sup>2</sup> Universal Declaration of Human Rights 1948 and Earth Charter 2000. See also the Stockholm Declaration 1972; 1983 World Charter for Nature; 1991 Caring for the Earth; Declaration of the Parliament of World Religions 1992, Earth Covenant 1996; Declaration on the Responsibilities of the Present Generations Towards Future Generations 1997; A Manifesto for Earth 2000; Millennium Development Goals 2000; A Manifesto for Life 2002.

<sup>3</sup> See 'Peoples Conference on Climate Change and Mother Earth Rights, 'Draft Universal Declaration of the Rights of Mother Earth' <<http://pwccc.wordpress.com/2010/02/07/draft-universal-declaration-of-the-rights-of-mother-earth-2/>> accessed 1 April 2010.

### **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.<sup>4</sup>

This declaration is the latest recognition of earth rights and follows the adoption of similar ordinances in the United States<sup>5</sup> and in the constitution of Ecuador.<sup>6</sup> These legal developments provide reason to pause and consider the argument for earth rights in detail. In particular, this paper contends that if the idea of earth rights is to command reasoned loyalty and gain broader political acceptance then it must be built on a secure intellectual footing. In the space available this paper will consider the kind of statement that a declaration of earth rights makes; the relationship between earth rights and human rights; the duties and obligations which earth rights generate and the forms of actions which can be used to promote earth rights. It will also consider importance of open public debate to the theory and practice of earth rights.

#### **1. What kind of statement does a declaration of Earth rights make?**

Earth rights can be seen first and foremost as articulating an ethical demand. They are not principally legal or proto legal and even though they have inspired legislation,

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<sup>4</sup> Ibid.

<sup>5</sup> See Thomas Linzey and Anneke Campbell, *Be The Change: How to Get What You Want In Your Community* (Gibbs Smith, Utah 2009). The Community Environmental Legal Defence Fund has assisted over 20 communities to adopt ordinances which recognise the rights of nature. See further <http://www.celdf.org>

<sup>6</sup> Linzey and Campbell (n 5) 133-135.

this is a further fact, rather than their constitutive character. Roderick Nash supports this statement in his historical survey of the origin and philosophical development of earth rights.<sup>7</sup> In particular, Nash credits the natural law tradition as the foundation of modern rights discourse.<sup>8</sup> While natural rights have been criticised as mere “bawling upon paper”<sup>9</sup> there is no denying their role in the formulation of human rights.<sup>10</sup> One important example is the “transforming radicalism”<sup>11</sup> John Locke’s natural rights thesis<sup>12</sup> had on the American Revolution, by fuelling the idea that English Parliament and Monarch were denying colonists their natural rights. President Thomas Jefferson argued that the “laws of nature and of nature’s God” are the foundations from which reason and conscience reveal “self-evident” truths; namely that “all men are created equal” in their possession of “certain unalienable rights.”<sup>13</sup> Following Locke, the rights articulated by Jefferson were, “life, liberty and the pursuit of happiness.”<sup>14</sup> Thirteen years later the French declaration of the “rights of man” resolved to “expound in a solemn declaration the natural, inalienable and sacred rights of man”.<sup>15</sup> The declaration notes further that all men “are born and remain free and equal” and that the “final end of every political institution is the preservation of the natural and imprescriptible rights of man.”<sup>16</sup>

The tendency of natural rights to take on expanded meaning has become “one of the

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<sup>7</sup> Roderick Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press, Wisconsin 1989) 13. Nash begins his analysis with the Great Charter of Runnymede (or Magna Carta), acceded to by King John in 1215.

<sup>8</sup> Ibid.

<sup>9</sup> Jeremy Bentham, *Anarchical Fallacies: Being an Examination of the Declaration of Rights Issued during the French Revolution* (1792) republished in Jeremy Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, New York 1987) 48.

<sup>10</sup> Commenting on the basis for human rights Dennis Lloyd notes, “[a]lthough the tendency at the present day is to endeavour to formulate these values in specifically positive-law terms, the natural origin of this mode of approach still remains fairly apparent”, *The Idea of Law* (Penguin Books, London 1991) 141.

<sup>11</sup> Bernard Bailyn, *Ideological Origins of the American Revolution* (Cambridge Press, Massachusetts 1967) 184.

<sup>12</sup> John Locke, *Two Treatises on Government* (Cambridge Press, Massachusetts 1967). All references to Locke, unless otherwise stated, are to numbered paragraphs.

<sup>13</sup> Thomas Jefferson quoted in Nash (n 7) 13.

<sup>14</sup> Locke (n 12). Locke notes at 6: “being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possession”.

<sup>15</sup> “Declaration of the Rights of Man and the Citizen 1789” in Jeremy Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, New York 1987) 26.

<sup>16</sup> Ibid.

most exciting characteristics of the liberal tradition.”<sup>17</sup> The moral argument for expanding natural rights beyond human beings began almost immediately after their first flourishing in the United States and Europe. For example, Jeremy Bentham claimed “[t]he day may come when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny.”<sup>18</sup> Bentham advanced liberal rhetoric, supported by utilitarian ethics to support this claim. “The question” he noted, “is not, Can they reason? nor Can they talk? but Can they suffer?”<sup>19</sup>

Alongside this utilitarian argument for expanding legal rights one finds a weaker yet persistent notion that also influenced the extension of legal rights to nature. It was the “revolutionary idea that the world did not exist for humanity alone.”<sup>20</sup> One important example of this reasoning came from the naturalist Aldo Leopold who in 1966 proposed a “Land Ethic” to influence human interaction with the Earth.<sup>21</sup> Leopold noted “there is as yet no ethic dealing with man’s relationship to the land and to the non-human animals and plants which grow upon it.”<sup>22</sup> Instead, he noted “we abuse the land because we regard it as a commodity belonging to us.”<sup>23</sup> For Leopold, environmental ethics represents a body of self-imposed limitations on freedom, which derive from the recognition that “the individual is a member of a community of interdependent parts.”<sup>24</sup> For Leopold, expanding our understanding of moral community was integral to environmental ethics. His land ethic entails the explicit recognition of nature’s “right to continued existence”<sup>25</sup> and seeks to “change the role of Homo Sapiens from conqueror of the land-community to plain member and citizen of it.”<sup>26</sup> Further Leopold notes that ethical concern for nature “implies respect for [our] fellow-members, and also respect for the community as such”.<sup>27</sup> Indeed, he notes “when we see the land as a community to which we belong, we may begin to use it

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<sup>17</sup> Nash (n 7) 13.

<sup>18</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Nabu Press, New York 1948) 311.

<sup>19</sup> *Ibid.*

<sup>20</sup> Nash (n 7) 19-20.

<sup>21</sup> Aldo Leopold, *A Sand County Almanac* (Ballantine Books, New York 1966).

<sup>22</sup> *Ibid* 238.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid* 239.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid* 240.

<sup>27</sup> *Ibid.*

with love and respect.”<sup>28</sup>

Finally, it is also important to note the influence of “geologist” Thomas Berry to this discourse. Berry is the inspiration behind a growing movement in law termed Wild Law or Earth Jurisprudence.<sup>29</sup> Central to this movement is the understanding that the interdependence of all things provides justification for recognising moral value and legal rights in all of nature. In his influential “Ten Principles for Jurisprudence Revision”<sup>30</sup> Berry argues that “the Universe is composed of subjects to be communed with” and that as subjects “each component of the universe is capable of holding rights.”<sup>31</sup> Consistent with the Bolivian declaration, Berry notes further that “every component of the Earth community, both living and nonliving has three rights: the right to be, the right to habitat or a place to be, and the right to fulfill its role in the ever-renewing processes of the Earth community.”<sup>32</sup>

This final point introduces an important point of engagement between earth rights, animal rights and human rights. In the context of the Bolivian declaration, the central tension is what is meant by the term “nature”?<sup>33</sup> While clearly a larger topic than can be addressed here, Berry offers a starting point in proposing a flexible and complementary understanding of rights.<sup>34</sup> He notes that “all rights in nonliving form are role-specific; rights in living form are species specific and limited.”<sup>35</sup> Thus Berry notes that “rivers have river rights”, “birds have bird rights”, and “humans have

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<sup>28</sup> Ibid.

<sup>29</sup> See further Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books, Devon 2002).

<sup>30</sup> Thomas Berry, *Evening Thoughts: Reflections on Earth as Sacred Community* (Sierra Club Books, San Francisco 2006) 149-150.

<sup>31</sup> Ibid 150.

<sup>32</sup> Ibid.

<sup>33</sup> For an important analysis see Neil Evernden, *The Social Creation of Nature* (John Hopkins University Press, Baltimore 1992).

<sup>34</sup> The flexible nature of rights was also recognised by Christopher D. Stone who in *Should Trees Have Standing?* (Oxford University Press, Oxford 2010) noted “...to say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have. Nor is it to say that everything in the environment should have the same rights as every other thing in the environment.”

<sup>35</sup> Berry (n 30) 150.

human rights.”<sup>36</sup> The difference is “qualitative, not quantitative” and seeks to integrate human beings and non-human animals into the term “nature”.<sup>37</sup>

## 2. Rights and obligations

In his critique of earth rights, Holmes Rolston III identifies the difficulties in recognising legal rights in nature. He notes that rights are a uniquely human construct and entail a multiplicity of bilateral jural relations.<sup>38</sup> When applied to nature, Rolston notes that framework “proves troublesome”.<sup>39</sup> Indeed, outside of human moral or legal analysis, nature does not have rights and it is unable to recognise the rights of others. Thus, a landslide that uproots a small pine forest does not violate the rights of the tree community. Even if the landslide kills human beings, it does not violate human rights. The mountain is not guilty of reprehensible behaviour and one cannot bring it to be shamed in a court of law. Legal rights correspond with legitimate claims and entitlements. Thus, in certain circumstances a mountain climber may have the right to be rescued by a mountain ranger, because of a pre-existing duty of care. If such a duty existed and the mountain ranger stood and watched the mountain slide engulf the mountain climber and he was in a reasonable position to rescue the individual, he could be morally as well as legally responsible. Reflecting on this point, Rolston notes:

Using the language of rights for rocks, rivers, plants and animals is comical, because the concept of rights is an inappropriate category for nature.<sup>40</sup>

An intellectually sound rights-based discourse must acknowledge and accept Rolston’s comments. It is plainly nonsense to speak of nature holding duties or to suppose that rights exist between one part of nature and another. The concept applies *only* in the context of human interaction with nature and would place duties

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<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> See further Wesley N. Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1993) 23 *Yale Law Journal* 16, 18.

<sup>39</sup> Holmes Rolston, ‘Rights and Responsibilities on the Home Planet’ (1993) 18 *Yale Journal of International Law* 251, 256.

<sup>40</sup> Ibid 257.

only on human beings. Reflecting on the types of rights identified by Wesley N. Hohfeld,<sup>41</sup> it is clear that the most suitable legal category for nature is a claim right, defined as “claims correlative to other persons’ duties.” Put another way – earth rights generate reasons for action for people who are in a position to help in the promoting or safeguarding of the underlying right.

In discussing human obligations, Immanuel Kant drew a helpful distinction between perfect and imperfect obligations.<sup>42</sup> A perfect obligation is a direct and immediate duty to take a course of action or refrain from a particular enterprise.<sup>43</sup> However, there are also less specific responsibilities in the general form of what Kant called “imperfect obligations”. Earth rights entail both of these types of obligation and their legislative recognition would impose on individuals a duty to consider ways through which environmental harm can be prevented (or minimized) and then decide on a reasonable course of action.<sup>44</sup>

It is pertinent to illustrate this distinction with an example. Consider a situation where river rights are recognised in the context of a small community whose major employer pollutes directly into the river. Many of the townspeople do not report this offence for fear of losing their jobs, however it is clear that the pollution is destroying the river ecosystem. In this example, three interrelated things are happening. First, the river’s right (or freedom) not to be polluted is being violated. This is clearly the principle wrongdoing in this example. Second, the company is violating the right of the river to be free from pollution. This is a violation of their “perfect obligation”. Finally, the townspeople who are doing nothing to stop the pollution are also transgressing their general and imperfect obligation to provide any help that they could reasonably provide.<sup>45</sup> These distinct issues illustrate a complex pattern of rights

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<sup>41</sup> Hohfeld (n 38) 18. Hohfeld argued that the term ‘right’ covered four different kinds of legal concepts. They are rights, liberties, powers and immunities. Hohfeld also offered to sets of connections among legal concepts. Right correlates with Duty, Liberty with No-Right, Power with Liability and Immunity with Disability.

<sup>42</sup> Immanuel Kant, *Critique of Practical Reason* (Bobbs-Merill, New York 1956) 34, and Amartya Sen, ‘Consequential Evaluation and Practical Reason’ (2000) 97 *Journal of Philosophy* 477.

<sup>43</sup> Ibid 34.

<sup>44</sup> Ibid 36.

<sup>45</sup> One could draw an analogy between this final point and someone who watches a child drown or a group of people who do not intervene when they could reasonably assist someone

and duties and can help explicate the evaluative framework of earth rights, which provides both perfect and imperfect obligations.

In noting this one should also bear in mind that a legal duty is not an absolute undertaking to perform or desist a particular action. Perhaps the most authoritative voice on this point is Ronald Dworkin who conceptualizes rights as “trumps”.<sup>46</sup> That is, he argues, rights should be understood in policy matters as always prevailing when competing against considerations of general welfare.<sup>47</sup> However, such claims can be overcome in the face of comparable, competing rights, or when facing the highest or most urgent concerns for the common good i.e. avoiding imminent loss of life. Amartya Sen supports this reasoning, noting that the imposition of a compulsory or absolute duty is “at some distance from the acknowledgment of reasons for action”, “lacks cogency” and “internal coherence.”<sup>48</sup> Indeed, as in all ethical and political judgments, there is need to assess and understand priorities, as well as room for discrimination in the way the obligation is carried out.<sup>49</sup>

### **3. Legislation, recognition and advocacy**

Finally, a theory of earth rights must consider through what forms of action the rights for nature can best be promoted and, in particular, whether legislation is the principle or even necessary means of implementation. In answer to this question, this paper submits that the implementation of earth rights cannot be sensibly restricted to the juridical model to which it is frequently confined. While important, legislation is supported by at least two other methods – recognition and advocacy. From this perspective earth rights cannot correctly be identified by legislation alone and must be viewed as operating through these three mechanisms.

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being assaulted or tortured. For example, in France there is a provision for criminal liability for omissions. See further Andrew Ashworth and Eva Steiner, ‘Criminal Omissions and Public Duties: The French Experience’ (1990) 10 *Legal Studies* 153.

<sup>46</sup> Ronald Dworkin describes “rights as trumps”. See *Taking Rights Seriously* (Harvard University Press, Cambridge 1977) 184-205. See also <[www.nybooks.com/articles/10713](http://www.nybooks.com/articles/10713)>.

<sup>47</sup> Ibid 194.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

Legislative recognition of earth rights began in 2006 in the form of municipal ordinances in the United States. These ordinances have been passed in over 20 regions and at present are being debated in the cities of Spokane Washington and Pittsburgh Pennsylvania.<sup>50</sup> Important elements of these ordinances are that they identify specific areas of nature and are not of general application; they empower local communities to assume the role of guardian for nature; and damages are measured with reference to the actual harm caused to the ecosystem rather than a human property owner. For example, the ordinance adopted in Blaine, Washington County provides that local wetlands, rivers and streams “possess inalienable and fundamental rights to exist and flourish within the Township of Blaine.”<sup>51</sup> Similarly, an ordinance adopted in Barnstead New Hampshire reads:

Natural communities and ecosystems possess inalienable and fundamental rights to exist and flourish within the Town of Barnstead. Ecosystems shall include, but not be limited to, wetlands, streams, rivers, aquifers, and other water systems.

Further up the legislative hierarchy, earth rights have been recognised in the constitution of Ecuador, which was adopted in 2008. The provisions relating to the rights of nature read:

Art. 1: 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. The application and interpretation of these rights will follow the related principles established in the Constitution.

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<sup>50</sup> See further <http://www.celdf.org>

<sup>51</sup> Mari Margil, ‘Stories from the Environmental Frontier’ in Peter Burdon (ed) *Wild Law: Essays in Earth Jurisprudence* (Wakefield Press, Adelaide 2010) 67.

Article 2: 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 system. In the cases of severe or permanent environment impact, including the ones caused by the exploitation of 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 3: The State will motivate natural and juridical persons as well as collectives to protect nature; it will promote respect towards all the elements that form an ecosystem.<sup>52</sup>

The recognition of earth rights in legislation is clearly an important method for supporting their public enforcement. However, there are other effective ways of advancing the cause of earth rights; the second avenue being what Charles Beitz has called the “recognition route”, where there is an acknowledgment, but not necessarily any legislation or institutional enforcement, of a behaviour or action.<sup>53</sup> The proposed Universal Declaration on Mother Earth Rights is perhaps the most important example of this, even though its proponents clearly hope that it ultimately will generate specific and formal legislative recognition. Whether this occurs or not, the proposed declaration could play a similar role in respect of earth rights to that played by the UN Declaration of Human Rights for human rights in the twentieth century. To this day, advocates for human rights point to this declaration as the single most important step in promoting global awareness and activities on human rights.<sup>54</sup> Subsequently, there have been additional international declarations on human rights, which provide recognition, rather than legal and coercive status.<sup>55</sup> This method could prove equally valuable for the promotion of earth rights and is

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<sup>52</sup> Linzey (n 5) 134-135.

<sup>53</sup> Speaking in regard to human rights, Beitz notes that they “play the role of a moral touchstone – a standard of assessment and criticism for domestic institutions, a standard of aspiration for their reform, and increasingly a standard of evaluation for the policies and practices of international economic and political organisations.” See further Charles Beitz, ‘Human Rights as a Common Concern’ (2001) 95 *American Political Science Review* 269-82.

<sup>54</sup> Sen (n 42) 343.

<sup>55</sup> For example see the Declaration on the Right to Development 1986.

motivated by the idea that its ethical force is strengthened by giving it “social recognition and an acknowledged status” even when “no enforcement is instituted.”<sup>56</sup>

The third avenue for recognising earth rights is advocacy. This route is already well developed in the context of environmental protection and entails organised agitation and urging compliance with certain basic claims regarding earth rights. This can also find expression in the monitoring of present and potential violations of these rights and avenues for social pressure to urge compliance. At the forefront of this avenue is the global NGO movement, which taken collectively, represents the largest social movement in human history.<sup>57</sup> The NGO sector has taken on increased importance in advancing earth rights through public discussion, education programs and most visibly, campaigning against clear violations. While the values invoked during the advocacy route often do not have legal status, few would consider the work useless by reason of its absence of legal backing.<sup>58</sup> Furthermore, even where some identified aspect of nature has a legal right, such as endangered species legislation, enforcement can be enhanced by public advocacy, which is to be distinguished from the process of legislation itself.

#### **4. Conclusion**

This paper has sought to provide a basic introduction to the theory of earth rights. In doing so, it is important to emphasise that theories of rights are sustained and progressed through robust intellectual engagement and public discussion. This point was articulated by Amartya Sen who notes:

...like the assessment of other ethical claims, there must be some test of open and informed scrutiny, and it is to such scrutiny that we have to look in order to proceed to a disavowal or an affirmation. The status of these ethical

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<sup>56</sup> Sen (n 42) 343.

<sup>57</sup> Paul Hawkin, *Blessed Unrest: How the Largest Social Movement in History is Restoring Grace, Justice and Beauty to the World* (Penguin Books, New York 2008) 2-3.

<sup>58</sup> See David Suzuki, *Good News for a Change* (Allen and Unwin, Sydney 2003).

claims must be dependent ultimately on their survivability in unobstructed discussion.<sup>59</sup>

In this sense, earth rights are linked with what John Rawls has labelled “public reasoning” and its role in “ethical objectivity.”<sup>60</sup> Indeed, the theory and implementation of earth rights are complementary and their joining is vital for both conceptual clarity and richness of practice.

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<sup>59</sup> Sen (n 42) 248-349.

<sup>60</sup> John Rawls, *A Theory of Justice* (1971) 67. See also Amy Guttmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press, Cambridge, 1996).