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ARTICLE

New Transitions from Human Rights to the Environment to the Rights of Nature

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Abstract
The weaknesses of our environmental laws stem in large part from the fact that legal systems treat the natural world as property that can be exploited and degraded, rather than as an integral ecological partner with its own rights to exist and thrive. This article analyzes the recent rise of a new generation of environmental laws which reject the 'false dogma' of 'humans over nature' and instead recognize our interconnectedness with the natural world and acknowledge its rights to exist, persist, and maintain its vital cycles. The article focuses on the transition from an anthropocentric approach, denoted by the 'right to the environment', to a biocentric approach constructed around 'rights of nature'. This transition is evident in various new legal instruments – the Ecuadorian Constitution, certain Bolivian laws, and numerous ordinances of the United States – which incorporate and respect rights of nature, and grant legal rights to the natural world and enforcement rights to affected communities. These instruments serve as models for legal systems which can steer us towards more robust and effective environmental laws.

Keywords: Environmental law, Human right to the environment, Nature rights, Biocentrism

1. INTRODUCTION

> We, peoples and Nations of the Earth: considering that we are all of the Mother Earth, an indivisible living community of interrelated and interdependent beings with a common destiny.
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> Universal Declaration on the Mother Earth Rights, Cochabamba (Bolivia), 2010

The recognition and protection of 'rights of nature' represents a new approach in the field of environmental law. Traditionally, legal systems have considered nature as

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'property' and have promoted laws to guarantee the property rights of individuals, corporations and other legal entities. The consequence has been that environmental laws and regulations, despite their preventive approach, have developed so as to legalize and legitimate environmental harm.

Certainly, the recognition of individual rights in relation to the environment has had a significant influence at the supranational level. However, the recognition of a human right to an adequate environment has not been without controversy. Firstly, the protection of the environment through a human right to an adequate environment, rather than through protective rules, has had no discernible positive impact on the conservation of natural resources. Secondly, protection of the environment is not really an individual right but an unenforceable programmatic norm.

A new approach is emerging, however: the recognition of the rights of nature, which implies a holistic approach to all life and all ecosystems. In recent years, a series of normative precedents have surfaced, which recognize that nature has certain rights as a legal subject and holder of rights. These precedents potentially contribute not merely a greater sensitivity to the environment, but a thorough reorientation about how to protect the Earth as the centre of life.

From this perspective, known as 'biocentrism', nature is not an object of protection but a subject with fundamental rights, such as the rights to exist, to survive, and to persist and regenerate vital cycles. The implication of this recognition is that human beings have the legal authority and responsibility to enforce these rights on behalf of nature in that rights of nature become an essential element for the sustainability and the survivability of human societies.[1] This concept is based on the recognition that humans, as but one part of life on earth, must live within their ecological limits rather than see themselves as the purpose of environmental protection, as the 'anthropocentric' approach proposes. Humans are trustees of the Earth rather than being mere stewards.[2] The idea is based on the proposition that ecosystems of air, water, land, and atmosphere are a public trust and should be preserved and protected as habitat for all natural beings and natural communities.

Recognizing rights of nature, Ecuador, Bolivia and a growing number of communities in the United States (US) are developing their environmental protection policies on the premise that nature has inalienable rights. This is a radical move away from the assumption that nature is property – an assumption which has fostered climate change, the disappearance of natural areas, indiscriminate surface felling of trees, desertification of new territories, dumping of toxic substances,

[1] United Nations Environment Programme (UNEP), Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), Stockholm (Sweden), 16 June 1972, UN Doc. A/CONF.48/14/Rev. 1, available at: http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503, Principle 1 of which states that 'Man … bears a solemn responsibility to protect and improve the environment for present and future generations'.

[2] This idea is similar to the classic Christian view of the relationship between humans and the environment. The classic Islamic view also emphasizes that humans are stewards of creation, guardians of the Earth: M.C. Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge University Press, 2014), pp. 279–81.

oil slicks, and endless other actions that cause environmental damage. This article tracks the change from the anthropocentric to the biocentric perspective and its implementation, including the recent trend in attributing a greater role to human responsibility for environmental protection. The article also discusses new regulatory precedents which mark an evolution in environmental law, both nationally and internationally, aimed at achieving an environmental policy that is more consistent with the conservation of natural resources. Finally, the article explores the questions of who is able to claim the rights of nature and how legal systems can best defend them.

2. THE ANTHROPOCENTRIC APPROACH TO PROTECTING THE HUMAN ENVIRONMENT

The traditional mode of environmental protection is 'anthropocentric' in that it is based on the idea that a right to a healthy environment is inherent in the dignity of every person; that a healthy environment is a prerequisite for the enjoyment of human rights; that the human rights obligations of states should include the duty to ensure the level of environmental protection necessary to allow the full exercise of protected rights;[3] and that the rights-based approach is an appropriate way to create a coherent body of environmental law.[4] In most legal frameworks, environmental degradation is a cause for legal complaint only insofar as it is linked to human well-being. The perceived need to bring environmental considerations into the human rights sphere stems from the need to activate the elaborate legal machinery offered to citizens by human rights instruments.

The formal recognition of a universal right to an adequate environment, however, has faced a number of obstacles. The notion of state sovereignty, the lack of legally binding instruments, and problems of enforceability have impeded implementation of its protection. Yet, while it is true that currently there is no legally binding international instrument declaring a human right to the environment, a global environmental constitutionalism has emerged in which a right to the environment is protected by the interaction of international law, regional international law, and domestic (including subnational) law.

2.1. *International Recognition of a Human Right to the Environment*

The pioneering human rights documents of the 1940s and 1960s made no mention of a human right to a healthy environment. Although more recent human rights instruments do acknowledge the relationship between human rights and

[3] With regard to the rights approach, see K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, 2008), pp. 111–44; H. Rolston III, 'Rights and Responsibilities on the Home Planet' (1993) 18(1) *Yale Journal of International Law*, pp. 251–79; B. de Sousa Santos, *Refundación del Estado en América Latina. Perspectivas desde una epistemologia del Sur* (Instituto Internacional de Derecho y Sociedad, Programa Democracia y Transformación Global, 2010), pp. 63–6.

[4] C. Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45(2) *Southern California Law Review*, pp. 450–501.

environmental protection, references to a formal human right to the environment have actually become less explicit over the last 20 years.[5]

Although it does not explicitly refer to the environment, the Universal Declaration of Human Rights of 1948 (UDHR) provided the first legal basis for an adequate environment in international law. Article 25 established that '[e]veryone has the right to a standard of living adequate for himself and his family, health and well-being'.[6] Subsequently, the International Covenant on Civil and Political Rights (ICCPR)[7] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[8] both of 1966, referred to the right to a healthy environment in the context of the right to life. Article 6 ICCPR, for example, expressly identifies the need to improve the environment as a requirement for the proper development of the individual. Along the same lines, the Human Rights Committee has stated:

> The term 'the right to life is inherent in the human person' cannot be understood in a restrictive manner (...) the protection of this right requires the adoption of positive measures by States. In this respect, the Committee considers it appropriate that States take all possible measures to reduce infant mortality and increase life expectancy, especially adopting measures to eliminate malnutrition and epidemics.[9]

According to this view, the right to the environment is not a result of social development but actually precedes the law itself: without a suitable environment there are no humans, no society, and no laws.[10]

Perhaps the first prominent suggestion that there should be a human right to a healthy environment came from Rachel Carson in her 1962 book, *Silent Spring*:

> If the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem.[11]

The first formal recognition of a right to the environment can be found in the United Nations (UN) Declaration on the Human Environment in 1972 (Stockholm Declaration).[12] It stated in Principle 1 that a person has the fundamental right to freedom, equality, and the enjoyment of 'satisfactory living conditions in an

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5 P. Cullet, 'Definition of an Environmental Right in a Human Rights Context' (1995) 13(1) *Netherlands Quarterly of Human Rights*, pp. 25–40, at 29.

6 New York, NY (US), 10 Dec. 1948, GA Res. 217A (III), UN Doc. A/810, 71, available at: http://www.un.org/en/documents.udhr.

7 New York, NY (US), 16 Dec. 1966, in force 23 Mar. 1976, available at: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

8 New York, NY (US), 16 Dec. 1966, in force 3 Jan. 1976, available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

9 UN Office of the High Commissioner for Human Rights, General Comment No. 6, 'The Right to Life (Article 6)', 16th Session, 30 Apr.1982, para. 5, available at: http://www.unhchr.ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3.

10 W.P. Gormley, 'The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms' (1990) 3(1) *Georgetown Environmental Law Review*, pp. 85–116, at 97.

11 R. Carson, *Silent Spring* (Houghton Mifflin, 1962), pp. 12–3.

12 N. 1 above.

environment whose quality allows him to live with dignity and welfare'. In return for this right, the person has a solemn obligation 'to protect and improve the environment for present and future generations'. This idea is also expressed in the Preamble to the Declaration: 'The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world, ..., and the duty of all governments'. However, the Declaration did not provide the necessary mechanisms to ensure the effectiveness of these claims; nor is it legally binding.

Since the Stockholm Declaration, there has been a major trend in national legal orders towards recognizing the environment, often at a constitutional level, within a specific right with various characteristics, depending on the political context and legal traditions of each country. In addition, other rights-based approaches to environmental protection have appeared, consisting mostly of procedural environmental rights and the substantive right to the environment.[13] Moreover, although it is still true that no global human rights agreement explicitly includes a right to a healthy environment, in the last two decades many human rights bodies have interpreted universally recognized rights (such as rights to life and health) to require states to take steps to protect the environment on which the enjoyment of such rights depends. The result has been a rapid 'greening' of human rights law.

A global meeting of environmental law associations, held in Limoges (France) in November 1990, adopted a statement recommending 'that the right of man to the environment has to be recognized nationally and internationally in a clear and explicit way and states have the duty to ensure it'.[14] In similar terms, Article 1 of the Draft Charter of Environmental Rights and Obligations of the Individual, Groups and Organizations, adopted in Geneva (Switzerland) in 1990,[15] provides: 'All human beings have the basic right to an environment adequate for their health and well-being and the responsibility to protect the environment for the benefit of present and future generations'.

Subsequently, the World Commission on Environment and Development proposed as a legal principle: 'All human beings have the fundamental right to an environment adequate for their health and welfare'.[16] The Rio Declaration on

[13] D. Shelton, 'Human Rights and the Environment: Problems and Possibilities' (2008) 38(1–2) *Environmental Policy and Law*, pp. 41–9, at 42.

[14] The Declaration of Limoges was published by the International Centre of Comparative Environmental Law at the University of Limoges in 1990: see 'Déclaration de Limoges: réunion mondiale des Associations de droit de l'environnement, 13–15 novembre 1990', Faculté de droit et des sciences économiques, Presses Universitaires de France, Limoges, Paris, 1992; reprinted in (1991) 21(1) *Environmental Policy & Law*, pp. 38–40.

[15] Adopted on 11 May 1990 by a group of experts invited by the Dutch government at the Bergen Conference (Norway); the UN Economic Commission for Europe (UNECE) Draft Charter of Environmental Rights and Obligations was adopted by an intergovernmental meeting in Oslo (Norway) on 31 Oct. 1990, UN Doc. ENVWA/R.38, Annex I. See the Report of the Economic Commission for Europe on the Bergen Conference on Sustainable Development in the ECE Region, 8–16 May 1990, UN Doc. A/CONF.151/PC/10, Annex I, para. 7.

[16] Report of the World Commission on Environment and Development, Doc. UNEP/GC/14/13, 14 Apr. 1987. In 1990, the UN General Assembly (UNGA) adopted a milder statement in Resolution

Environment and Development of 1992[17] consolidated this trend by pointing out that all human beings are at the centre of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature. However, this statement is somewhat less specific than the provisions of the Stockholm Declaration and, in common with the Stockholm Declaration, no suitable means exist to enforce it. Despite these shortcomings, both the Stockholm and Rio Declarations have played an important role in the recognition of environmental problems and were a step in the development of international environmental law.

A year later, the 1993 World Conference on Human Rights was held in Vienna (Austria), at which a Declaration and a Programme of Action were adopted.[18] Although they do not expressly declare a human right to the environment, they link the fundamental right to development with the environment, and recognize that the illicit dumping of certain substances may violate the rights to life and health.[19]

In parallel with these developments, under the auspices of the UN Economic and Social Council (ECOSOC) important work has been undertaken by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which operates under the Commission on Human Rights.[20] This work covers the harmful effects of the illicit movement and dumping of toxic waste on the enjoyment of human rights, as well as the issue of human rights and the environment, through the work of Special Rapporteur Fatma Zohra Ksentini since 1989. The Sub-Commission concluded that the available information on human rights and the environment justified the need for a study of the environment and its relationship with human rights.[21]

45/94 'Need to Ensure a Healthy Environment for the Well-Being of Individuals', UN Doc. A/RES/45/94, 14 Dec. 1990: 'Everyone has the right to live in an environment adequate for their health and welfare'.

17 Declaration on Environment and Development, adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), 12 Aug. 1992, available at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

18 Vienna Declaration and Programme of Action, Report of the World Conference on Human Rights, Vienna (Austria), 14–25 June 1993, UN Doc. A/CONF.157/24 (Part I), 13 Oct. 1993, Ch. III, available at: http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.24+(PART+I).En?OpenDocument.

19 Ibid., Part I, para. 11 establishes that '[t]he right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. The World Conference on Human Rights recognizes that illicit dumping of toxic and dangerous substances and waste potentially constitutes a serious threat to the human rights to life and health of everyone. Consequently, the World Conference on Human Rights calls on all States to adopt and vigorously implement existing conventions relating to the dumping of toxic and dangerous products and waste and to cooperate in the prevention of illicit dumping. Everyone has the right to enjoy the benefits of scientific progress and its applications. The World Conference on Human Rights notes that certain advances, notably in the biomedical and life sciences as well as in information technology, may have potentially adverse consequences for the integrity, dignity and human rights of the individual, and calls for international cooperation to ensure that human rights and dignity are fully respected in this area of universal concern'.

20 The Sub-Commission on the Promotion and Protection of Human Rights was established by a decision of the Commission on Human Rights on 10 Feb. 1947. Its original name was the Sub-Commission on Prevention of Discrimination and Protection of Minorities (renamed by ECOSOC Decision 1999/256 of 27 July 1999, UN Doc. E/1999/99, p. 127, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=E/1999/99(supp)).

21 Sub-Commission on Prevention of Discrimination and Protection of Minorities, Decision 1989/108, 31 Aug. 1989, UN Doc. E/CN.4/Sub.2/1989/58.

Following the studies conducted in 1994, Rapporteur Ksentini presented a final report in which the concept of human rights and the environment accords more closely with the Stockholm Declaration of 1972 than it does with the 1992 Rio Declaration.[22] The findings of this report were based on a review of national and international legal standards on human rights and international environmental law.[23] In her final report, Rapporteur Ksentini described the legal foundations for environmental human rights and referred to a range of examples illustrating the interconnectedness of human rights and the environment. The report argued that environmental problems and their solutions are not issues unique to industrialized societies of the northern hemisphere, but are global in their extent and effect. It concluded that there has been a change in environmental law towards providing the right to a healthy and decent environment. This right was part of existing international law and might be implemented immediately through bodies dedicated to the protection of human rights. According to this report, the substantive elements of environmental rights included the right to development, life and health, together with procedural aspects such as public participation and access to effective national solutions.

In May 1994, the Draft Declaration of Principles of Human Rights and the Environment was produced at a Meeting of Experts on Human Rights and the Environment held at the UN in Geneva. The Draft Declaration of Principles expresses the environmental content of a broad spectrum of recognized human rights norms, and maps out the content of the right to a secure, healthy and ecologically sound environment, including both substantive and procedural components. In her conclusions, Rapporteur Ksentini noted that environmental damage has direct effects on the enjoyment of a series of human rights and that human rights violations in turn may damage the environment. Rapporteur Ksentini recommended that the human rights component of environmental rights immediately be incorporated into the work of various human rights bodies. Finally, the Rapporteur declared that the Draft Declaration of Principles should serve as the starting point for the adoption of a set of legal norms consolidating the right to a satisfactory environment.

Despite the important content of this document, there has been no attempt by the UN General Assembly (UNGA), the Human Rights Commission, or ECOSOC to finalize this project.

Following the progressive recognition of a human right to the environment, the UNGA declared in 1990 that everyone has the right to live in an environment

22 The preliminary report (UN Doc. E/CN.4/Sub.2/1991/8, 2 Aug. 1991) discusses the provisions of several international and national human rights instruments relating to the environment. At the request of the Subcommittee, Rapporteur Ksentini presented two more reports: one in 1992 (UN Doc. E/CN.4/Sub. 2/1992/7 on 2 July 1992 and Add.1); the other in 1993 (UN Doc. E/CN.4/Sub.2/1993/7, 26 July 1993). Rapporteur Ksentini's final report (UN ECOSOC, 'Human Rights and the Environment', UN Doc. E/CN.4/Sub.2/1994/9, 6 July 1994), presented to the Sub-Commission at the 46th session, provides a solid basis for continuing work.

23 The final report also includes the work on human rights and the environment within the Sub-Commission on Prevention of Discrimination and Protection of Minorities, culminating in the Draft Principles on Human Rights and the Environment, Annex to the Final Report of Special Rapporteur Ksentini, ibid. The text states that 'everyone has the right to a safe, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights are universal, interdependent and indivisible': UN Doc. E/CN.4/Sub.2/1994/9, ibid., Annex I, Pt I, para. 2.

adequate to ensure their health and well-being.[24] Similar expressions are found in various multilateral treaties dedicated to environmental protection.[25] The Institute of International Law, in its 68th session in Strasbourg (France), in 1997, stated that 'every human being has the right to live in a healthy environment'.[26]

Moreover, the seventh goal of the Millennium Development Goals (MDGs) is about ensuring environmental sustainability, including the incorporation of the principles of sustainable development into states' policies and programmes to reverse the loss of environmental resources.[27] Following and expanding the MDGs, the new Sustainable Development Goals (SDGs) are a universal set of goals, targets and indicators which UN Member States will be expected to use to frame their agendas and political policies over the next 15 years.[28] One of the shortfalls of the MDGs was their lack of focus on the environmental and the human rights dimension,[29] and the SDGs are intended to rectify this by ensuring that development is also balanced with environmental concerns. The SDGs aim to address economic, social, and environmental dimensions of sustainable development through the overarching framework of poverty eradication with enhanced environmental considerations. However, once again, rather than ensure the recognition of a human right to a decent environment, they address the challenges of the UN's MDGs and build on this experience in order to provide the foundation for a 'green economy'.[30]

In 2007, the UNGA adopted the UN Declaration on the Rights of Indigenous Peoples, which in Article 29 proclaims that '[i]ndigenous peoples have the right to the conservation and protection of the environment'.[31]

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24 See UN Doc. A/RES/45/94, n. 16 above.

25 E.g., the Convention on Biological Diversity (CBD), Rio de Janeiro (Brazil), 5 June 1992, in force 29 Dec. 1993, available at: http://www.cbd.int; the UN Framework Convention on Climate Change (UNFCCC), New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf; the UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCDD), Paris (France), 17 June 1994, in force 26 Dec. 1996, available at: http://www.unccd.int; and Convention 169 of the International Labour Organization on Indigenous and Tribal Peoples in Independent Countries, Geneva (Switzerland), 27 June 1989, in force 5 Sept. 1991, available at: http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169.

26 *Annuaire de l'Institut de Droit International*, Vol. 67-II, Strasbourg Session, Paris (France), 1998, p. 479.

27 Millennium Declaration, adopted by the UNGA, UN Doc. A/RES/55/2, 13 Sept. 2000, available at: http://www.un.org/millennium/declaration/ares552e.htm.

28 UNGA, Draft Outcome Document of the UN Summit for the Adoption of the Post-2015 Development Agenda, UN Doc. A/69/L.85, 12 Aug. 2015, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/69/L.85&Lang=E. The Summit, convened as a high-level plenary meeting of the UNGA, was held from 25 to 27 Sept. 2015 in New York, NY (US); see the Summit website at: http://www.un.org/sustainabledevelopment/summit. The deadline for the SDGs is 2030. See B. Boer (ed.), *Environmental Law Dimensions of Human Rights* (Oxford University Press, 2015), pp. 135–79.

29 Under the MDGs, the 7th goal of attaining environmental sustainability was isolated from the other goals. The approach resulted in very little progress as states saw the goal as environmental and accorded it less priority than others which were deemed more urgent, such as health, education and eradication of poverty.

30 J. Knox, 'Human Rights, Environmental Protection, and the Sustainable Development Goals' (2015) 24 *Washington International Law Journal*, pp. 517–27.

31 UN Declaration on the Rights of Indigenous Peoples, UNGA Resolution 61/295, 13 Sept. 2007, available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

In March 2012, the Human Rights Council decided to establish a mandate on human rights and the environment[32] which aimed, among other things, to study human rights obligations related to the enjoyment of a safe, clean, healthy, and sustainable environment, and to promote best practices regarding the use of human rights in the formulation of environmental policies.[33] In its first report the Council urged states and others to remember that the lack of a full understanding of the contents of all the human rights obligations related to the environment should not be interpreted to mean that such obligations do not exist.[34]

In June 2012, at the UN Conference on Sustainable Development, states renewed their commitment to 'the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations',[35] without asserting the real right of humans to a healthy and safe environment.

2.2. *Regional Recognition of a Human Right to the Environment*

Legal instruments at the regional level have also developed the concept of a human right to the environment. This regional recognition extends throughout Europe, Africa, and America. Regional human right agreements recognizing the right to a healthy environment have been ratified by more than 130 nations in these continents as well as in Asia, the Caribbean, and the Middle East. For its part, Asia has not established any structure for the recognition and legal protection of human rights comparable with that in other continents.

In Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[36] was adopted even before the international rights covenants.[37] Through this instrument, both the Commission of Human Rights and the European Court of Human Rights (ECtHR) were created. Although the right to an adequate environment is not explicitly incorporated and cannot be directly

32 UN Human Rights Council, Resolution 19/10 'Human Rights and the Environment', UN Doc. A/HRC/RES/19/10, available at: http://daccess-dds-ny.un.org/doc/Resolution/GEN/G12/131/59/PDF/G1213159.pdf?OpenElement.

33 John Knox was appointed in Aug. 2012, for a period of 3 years, to serve as the first independent expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy, and sustainable environment: ibid.

34 UN Human Rights Council, 'Report of the Independent Expert on the Issue of Human Rights Obligations related to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox', UN Doc. A/HRC/22/43, 24 Dec. 2012, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-43_en.pdf.

35 Resolution I of the Report of the UN Conference on Sustainable Development, 'The Future We Want', Rio de Janeiro (Brazil), 20–22 June 2012, UN Doc. A/CONF/216/16, para.1, endorsed by the UNGA in Resolution 66/288.

36 Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf. The text of the Convention is presented as amended by the provisions of Protocol No. 14 (available at: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/194) as from its entry into force on 1 June 2010.

37 On 16 Dec. 1966, the UNGA adopted two covenants in its Resolution 2200 A(XXI): ICCPR (n. 7 above) and ICESCR (n. 8 above), both of which reinforce the UDHR (n. 6 above). Following a 10-year hiatus, both covenants came into force in 1976: ICESCR, 3 Jan. 1976; ICCPR, 23 Mar. 1976.

invoked before these bodies, it has received protection in connection with the defence of other rights.[38] The Council of Europe proclaimed 1970 the 'Year of Nature', mobilizing public opinion and encouraging the celebration of the Stockholm Conference.[39] In the same year, the idea was conceived of adding a new protocol to the ECHR to ensure the right to a pure and clean environment.[40]

In 1971, a Parliamentary Conference on Human Rights was held in Vienna in which new rights were proposed, including the right to an adequate environment. Other attempts by the Council of Europe to establish a right to the environment were the addition of a protocol to the ECHR in 1973, known as the Steiger Project, and, more recently, the proposal of the Parliamentary Assembly of 1990 on the development of a European Charter and European Convention on Environmental Protection and Sustainable Development.[41] The first article of this text states: 'Every person has the fundamental right to an environment and living conditions conducive to his good health, well-being and full development of the human personality'. Despite these proposals, the Council of Europe has made no progress in respect of any of them.

There is no explicit right to a healthy environment in the framework of ECOSOC. However, the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),[42] adopted under the auspices of the UN Economic Commission for Europe (UNECE), recognizes the human right to a sound environment. It refers to 'the right of every person of present and future generations to live in an environment that ensures their health and well-being' (Article 1).[43]

One of the few regional instruments of a legally binding nature that recognize the human right to a healthy environment comes from Africa. Article 24 (Chapter I) of the African Charter on Human and Peoples' Rights (commonly referred to as the Banjul Charter), adopted in Nairobi (Kenya) on 27 June 1981, includes the right of 'all peoples to enjoy an average general satisfactory environment favourable to

38 ECtHR, 9 Dec. 1994, *López Ostra* v. *Spain*, appl. no. 16798/90, [1994] Series A, No. 303-C. In this case, a major environmental pollution incident was treated as a potential infringement of Arts 3 (right to human dignity) and 8 (right to privacy). With reference to Art. 2 ECHR (right to life), see ECtHR, 30 Nov. 2004, *Öneryildiz* v. *Turkey*, appl. no. 7407/76, [2004] ECHR 657, and ECtHR, 20 Mar. 2008, *Budayeva* v. *Russia*, appl. nos 15339/02. See M. Déjeant-Pons, 'Le Droit de l'Homme à l'Environnement au Niveau Fondamental Droit Européen dans le cadre du Conseil de l'Europe et la Convention Européenne des Droits de Sauvegarde l'Homme et des Libertés Fondamentales' (1994) 4 *Revue de l'Environnement Juridique,* pp. 373–419, at 387.

39 N. 1 above.

40 W.P. Gormley, *Human Rights and Environment: The Need for International Co-operation* (Sijthoff, 1976), pp. 76–83.

41 Recommendation 1130 (1990), 'Formulation of a European Charter and a European Convention on Environmental Protection and Sustainable Development', AREC 1130-28/9/90-27 E, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15164&lang=en.

42 Aarhus (Denmark), 25 Jun. 1998, in force 30 Oct. 2001, available at: http://www.unece.org/env/pp/treatytext.html.

43 The European Committee of Social Rights has interpreted the right to health protection, enshrined in Art. 11 of the European Social Charter, to include the right to a healthy environment: see European Committee for Social Rights, *Marangopoulos Foundation for Human Rights* v. *Greece*, Application No. 30/2005, Decision on the Merits, adopted 6 Dec. 2006, para. 195.

their development'.[44] In 2003, the African Union adopted a Protocol introduced under the Banjul Charter which states that women 'have the right to live in a healthy and sustainable environment' (Article 18) and 'the right to fully enjoy their right to sustainable development' (Article 19). The Arab Charter on Human Rights of 2004[45] contains a right to a healthy environment as part of the right to a standard of living, adequate welfare, and a decent life (Article 38).

In the American context, Article 11(1) of the Protocol of San Salvador adopted by the Organization of American States[46] affirms the right of everyone to live in a healthy environment. Parties are to promote its protection, preservation and improvement (Article 11(2)).[47] The Inter-American system of human rights and its two primary entities, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR), have carried out important work in the defence of human rights and the environment.[48]

Later, within the framework of the Hemispheric Conference on Sustainable Development held by the Organization of American States,[49] the non-binding Declaration of Santa Cruz[50] was adopted to specifically reaffirm the targets set out in both the Rio Declaration[51] and Agenda 21,[52] with special emphasis on Principle I of the Rio Declaration.

Similarly, the Declaration of Human Rights adopted in November 2012 by the Association of Southeast Asian Nations (ASEAN) incorporates a right to a safe, clean, and sustainable environment as a component of the right to an adequate standard of living.[53]

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44 Nairobi (Kenya), 27 Jun. 1981, in force 21 Oct. 1986, available at: http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf. Currently, 53 states have ratified the Charter, including Nigeria, Egypt, and South Africa.

45 22 May 2004, in force 15 Mar. 2008, available at: https://www1.umn.edu/humanrts/instree/loas2005.html.

46 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, San Salvador (El Salvador), 17 Nov. 1988, in force 16 Nov. 1999, available at: http://www.oas.org/juridico/english/treaties/a-52.html. Signatories include Argentina, Bolivia, Brazil, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.

47 The obligation of states to take necessary measures for the realization of the rights contained in the Protocol is limited by the provisions of Art. 1, which states that the available resources and the level of development will be considered. Although the Protocol of San Salvador includes a right to a healthy environment, it is excluded from proceedings before the IACtHR.

48 See, e.g., IACHR, In the case of the Yanomami Community, Resolution No. 12/85, Case No. 7615 (Brazil), 5 Mar. 1985, Annual Report of the IACHR 1984–85, Ch. III.1., OAS/Ser.L/V/II.66, Doc. 10 rev. 1, 1 Oct. 1985; IACHR, In the case of the Indigenous Mayan Communities in the District of Toledo (Belize), Report No. 40/04, Case 12,053, Background, 12 Oct. 2004, Annual Report of the IACHR 2004, Ch. III.C.5, OAS/Ser.L/V/II.122, Doc. 5 rev. 1, 23 Feb. 2005.

49 Santa Cruz de la Sierra (Bolivia), 7–8 Dec. 1996. This conference was attended by 34 Member States, including the US, as well as Brazil, Argentina, Mexico and Canada: see *Newsletter of the Organization of American States*, Vol. 2, No. 7, Jan. 1997, p. 1.

50 OAS GT/CCDS-51/96 rev. 2, 26 Nov. 1996.

51 N. 17 above.

52 UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, available at: https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf.

53 Phnom Pen (Cambodia), 18 Nov. 2012, para. 28f, available at: http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration.

2.3. *National Recognition of a Human Right to the Environment*

Beyond international protection, most of the action to protect and fulfil rights occurs at the national level. Since the 1972 Stockholm Declaration, constitutional recognition of the right to a healthy environment has spread rapidly around the world. It has emerged in two distinctive processes: through the legislator by explicitly including it in constitutions, and through domestic courts by implicitly interpreting other constitutional provisions.

A growing number of national constitutions recognize the right to an adequate environment as a fundamental right. By late 1998, 50 nations had explicitly recognized in their constitutions the right to a proper and healthy environment, and 33 others had recognized a duty to defend or protect the environment in their constitutions.[54] Today, 193 Member States of the UN recognize this through their constitutions, environmental legislation, court decisions, or through ratification of an international agreement. A total of 90 constitutions explicitly recognize the right to a healthy environment,[55] as do some subnational governments, including six American states, five Canadian provinces or territories, and a growing number of cities.

The first broad provisions to focus on the protection of the environment appeared in the constitutions of Switzerland (1971), Greece (1975), and Papua New Guinea (1975). Portugal (1976) and Spain (1978) were the first countries to recognize the right to live in a healthy environment. In total, the constitutional right to a healthy environment is recognized in over 100 countries, either explicitly or through judicial interpretation of other provisions. The Portuguese Constitution of 1976 became the first to adopt a constitutional right 'to a healthy and ecologically balanced human environment'. Article 9 provides for the duty of the state to protect fundamental rights; a requirement to protect Portuguese cultural heritage could emerge from this article. Article 66 of the Constitution expressly recognizes, among fundamental economic, social and cultural rights, the right to a 'healthy and ecologically balanced' environment and the corresponding duty to protect it. Moreover, the Portuguese Constitution recognizes the right of natural and legal persons to receive compensation for damage caused to the environment, and guarantees the right to information on environmental issues and the right to participate in making administrative decisions. This constitutional framework has been strengthened by the enactment of the Basic Environment Act of 1987 and the Law on Associations of Environmental Defence, which aim to develop in practice the constitutionally recognized right to the environment.[56]

In at least 12 other countries that do not have an explicit constitutional right to a healthy environment, supreme or constitutional courts have held that such a right is

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[54] A.P. Blaustein & G.H. Flanz (eds), *Constitutions of the Countries of the World* (Oceana Publications, 1998); D.R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012), pp. 124–30.

[55] R. Wolfrum & R. Grote (eds), *Constitutions of the Countries of the World* (Oceana Publications, 2011).

[56] G. Da Silva, 'Human Rights in the Portuguese Constitution' (1994) 4 *Revue Juridique de l'Environnement*, pp. 349–51, at 349.

implicit in the constitution, and enforceable in connection with the incorporation of other legal ideals, such as a right to life, health, or dignity.[57] However, it should be noted that courts in some countries – the US, for example – have rejected the argument that there is an implicit constitutional right to a healthy environment.[58]

In Italy, there is no explicit constitutional right to a healthy environment, although courts have interpreted certain constitutional rights as incorporating the right to live in a healthy environment. The first recognition of this concept came from the Italian Constitutional Court in 1987 when it held that, with regard to Articles 9 (the state's duty to safeguard natural beauty) and 32 (right to health) of the Italian Constitution, '[w]e must recognize the ongoing efforts to give specific recognition to the protection of the environment as a fundamental human right'.[59] In 1990, the Constitutional Court held that environmental protection must take priority over economic considerations when acceptable limits for human health are exceeded.[60] Since then, many cases have successfully invoked the right to a healthy environment.

Germany's Basic Law initially did not include the right to an adequate environment, although the right to protection was jurisdictionally accepted. Subsequently, a series of amendments were made to the Basic Law, the most recent being adopted as Article 20 on 27 October 1994, to the effect that the state should protect critical natural conditions for life.[61] Therefore, at present the German federal constitution does not provide a basic right to a decent environment; there is simply an objective obligation on the part of the state to 'protect the natural conditions of life, thereby taking responsibility for future generations' (Article 20a).

Article 225 of the Brazilian Constitution of 1988 (in Title VIII, concerning the social order) asserts a right to the environment belonging to present and future generations. It also requires environmental impact assessments.[62]

Among the constitutions which explicitly recognize the right to a decent environment, the Constitutions of Greece, Spain, Turkey, Chile, South Africa, and Colombia show a remarkable transition from a human right to the environment, to the rights of nature. The Greek Constitution of 1975 states in Article 24(1) that the

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57 These 12 countries are Bangladesh, Estonia, Guatemala, India, Israel, Italy, Malaysia, Nigeria, Pakistan, Sri Lanka, Tanzania and Uruguay.

58 J.P. Eurick, 'The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection through State and Federal Constitutions' (2001) 11(2) *International Legal Perspective,* pp. 185–222, at 185.

59 Review of the Constitutionality of Law No. 349, Establishment of the Ministry of Environment and Standards of Environmental Damage, 8 July 1986, Decision 210/1987, Constitutional Court of Italy, 22 May 1987: see G. Peccolo, 'Le Droit à l'Environnement dans le Constitution Italienne' (1994) 4 *Revue Juridique de l'Environnement,* pp. 335–8, at 335.

60 Review of the Constitutionality of Article 674 of the Penal Code and Article 2(7) of Presidential Decree No. 203, 24 May 1988 (Implementing EU Directives 80/779, 82/884, 84/360 and 85/203 on Air Quality Rules in relation to Specific Pollutants, and Pollution from Industrial Plants, under Art. 15 of Law No. 183 of 6 Apr. 1987), Decision 127/1990, Constitutional Court of Italy, 7 Mar. 1990.

61 M. Bothe, 'Le Droit à la Protection de l'Environnement en Droit Constitutionnel Allemand' (1994) 4 *Revue Juridique de l'Environnement*, pp. 313–18, at 313.

62 G. D'Avila Rufino, 'Le Droit de l'Homme a l'Environnement dans la Constitution de 1988 du Brésil' (1994) 4 *Revue Juridique de l'Environnement,* pp. 363–71, at 363.

protection of its natural and cultural environment is an obligation of the state, which must take special measures to preserve them.[63]

The Spanish Constitution describes 'the duty of defence of the environment'.[64] The Turkish Constitution, in the second paragraph of Article 56, states that 'it is the duty of state and citizens to prevent pollution, to protect the health of the environment, and to improve the environment'. Since 1994, the right to a healthy environment has been recognized under Article 23 of the Belgian Constitution. According to its Constitutional Court,[65] this article contains a 'standstill' clause, which precludes the authorities from reducing substantially the level of environmental protection without considering the public interest.[66]

Environmental constitutionalism has an especially firm foothold under section 24 of the South African Constitution. This is a remarkably progressive provision, embodying a subjective right to environmental quality for everyone, as well as requiring legislative action to protect the environment for future generations.[67]

A perfect achievement of the constitutional transition to rights of nature has occurred in France by the adoption a Charter for the Environment in the Preamble to the Constitution through Act 2005-205 of 1 March 2005. This Charter enshrines duties regarding environmental issues and recognizes that every person has the duty to take part in the preservation and improvement of the environment, and to prevent any environmental damage that may be caused.

Generally, the protection of the environment in constitutional texts is a relatively recent phenomenon. The right to live in a healthy environment still continues to gain recognition. New constitutions incorporating the right to a healthy environment were enacted in Kenya and the Dominican Republic in 2010 and in Jamaica, Morocco, and South Sudan in 2011. This new 'environmental constitutionalism' is the result of a confluence of constitutional law, international law, human rights, and environmental law;[68] it may also be a catalyst for stronger environmental laws, better enforcement of those laws, and enhanced public participation in environmental governance.

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63 G. Sioutis, 'Le Droit de l'Homme a l'Environnement en Grèce' (1994) 4 *Revue Juridique de l'Environnement*, pp. 329–34.

64 Constitution of the Kingdom of Spain, 1978, Art. 45: 'Everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it. The public authorities shall concern themselves with the rational use of all natural resources for the purpose of protecting and improving the quality of life and protecting and restoring the environment, supporting themselves on an indispensable collective solidarity', available at: http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.

65 Constitutional Court of Belgium, 14 Sept. 2006, Decision Nos 135/2006, B.10 and 137/2006, B.7.1; later confirmed by the Constitutional Court, 28 Sept. 2006, Decision No. 145/2006, B.5.1.

66 M. Martens, 'Constitutional Right to a Healthy Environment in Belgium' (2007) 16(3) *Review of European, Comparative & International Environmental Law*, pp. 287–97, at 287.

67 This section provides: 'Everyone has the right: (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that: (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.

68 J. May & E. Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2014), pp. 321–50, and L.J. Kotzé, 'Arguing Global Environmental Constitutionalism' (2012) 1(1) *Transnational Environmental Law*, pp. 199–233, at 199.

3. FROM AN ANTHROPOCENTRIC TO A BIOCENTRIC APPROACH

It is well established in international law that states should take measures to ensure respect for and protection of the environment as being essential for the fulfilment of human rights.[69] However, the current constitutional approach to environmental protection, based on the idea of a right to the environment, has contributed to its progressive deterioration, such that it undermines basic human rights to life, health, food, water and shelter.

One of the most significant obstacles to the effectiveness of a human right to the environment is state sovereignty. Currently, the only limit imposed by international law on sovereign authority over environmental management is the requirement to manage the environment in such a way that other states are not disadvantaged by the misuse of the natural resources.[70] Another obstacle to the recognition and realization of the right to the environment might be that, notwithstanding a burgeoning body of soft law and an undeniable willingness on the part of many international organizations to acknowledge a right to the environment, there is still no legally binding international instrument that explicitly recognizes this right. Other obstacles include the inability to exercise such a right because of the indeterminacy of the concept of 'environment' and the lack of procedural mechanisms to invoke its protection. These obstacles prevent full recognition of the right, although its implementation could be promoted by such mechanisms as information, participation, resources, and education. These may influence the political will of states and enable a human right to the environment to become legally binding.

The scope and utility of the right to a healthy environment remain the subject of ongoing debate. The existing international consensus is to protect the environment for the benefit of humans. This is because the idea of rights is built around property rights, which implies a relationship of superiority between humans and non-humans, as well as an appropriation of nature. This in turn allows the deployment of capitalist social metabolism,[71] as a way in which human societies organize their increasing exchanges of energy and materials with the environment, which is arguably the ultimate cause of the current ecological crisis.[72] The consequence of this ethos is that

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69 B. Lewis, 'Environmental Rights or a Right to the Environment? Exploring the Nexus between Human Rights and Environmental Protection' (2012) 8(1) *Macquarie Journal of International and Comparative Environmental Law*, pp. 36–47, at 36.

70 See, e.g., Stockholm Declaration, n. 1 above, Principle 21, which states: 'In accordance with the UN Charter and the principles of international law, States have the sovereign right to exploit their own resources pursuant to their own environmental policy and the obligation to ensure that the activities carried out within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond national jurisdiction'. The Rio Declaration (n. 17 above) in Principle 2, reproduces the provisions of Principle 21 of the Stockholm Declaration.

71 This term was used by Professor Martínez Alier to describe how the social metabolic order of capitalism is inherently anti-ecological, in that it systematically subordinates nature in its pursuit of endless accumulation and production on ever larger scales. Rather than acknowledging the natural limits, capital seeks to play a board game with the environmental problems it generates, moving them around rather than addressing the root causes: J. Martínez Alier, *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation* (Edward Elgar, 2003), p. 132.

72 J. Martínez Alier et al., 'Social Metabolism, Ecological Distribution Conflicts, and Valuation Languages' (2010) 70(2) *Ecological Economics*, pp. 153–8.

environmental goods and values are protected not because they have their own intrinsic value, but because of their role in satisfying human needs. Humans should therefore decide upon the degree of protection required. This formulation is the logical consequence of the traditional human rights concept.

In general, legal systems have an inherent anthropocentricity and most of them ignore the current social impulse which advocates the protection of a healthy environment on its own terms. Consequently, and despite the fact that the human right to the environment has become a social vindication, its relationship with other rights and environmental protection is still not guaranteed for either the current or future generations.

In the view of many, the very existence of environmental human rights reinforces the idea that the environment and natural resources exist only for the benefit of humans and have no intrinsic worth.[73] Anthropocentric approaches to environmental protection are seen as perpetuating the values and attitudes that are at the root of environmental degradation. The environment is protected only to the extent needed to protect human well-being. An environmental right thus subjugates all other needs, interests and values of nature to those of humanity. This ordering is criticized by proponents of deep ecology[74] and earth jurisprudence[75] on the basis that it effectively denies recognition of animals, plants, species, and ecosystems as rights holders.[76]

On the other hand, a degree of anthropocentrism may be a necessary part of environmental protection not because humanity is at the centre of the biosphere, but because humanity is the only species which possesses the consciousness to recognize and respect the morality of rights. In this view, the interests and duties of humanity are inseparable from environmental protection. In any event, a critical stance towards the idea of rights makes for a conceptual point of departure for the consideration of alternative rights-based approaches to environmental protection.

4. GREENER TIMES: TOWARDS PROTECTING NATURE

The 'biocentric approach' offers a novel perspective on environmental law. Legal systems have traditionally regarded nature as 'property'[77] which can be exploited and

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73 P.W. Birnie & A.E. Boyle, *International Law and the Environment* (Oxford University Press, 1992), p. 192.

74 B. Devall & G. Sessions, *Deep Ecology* (Gibbs Smith, 1985).

75 J. Koons, 'Earth Jurisprudence: The Moral Value of Nature' (2008) 25(2) *Pace Environmental Law Review,* pp. 263–339; J. Koons, 'What is Earth Jurisprudence? Key Principles to Transform Law for the Health of the Planet' (2009) 18(1) *Penn State Environmental Law Review,* pp. 47–70; C. Cullinan, *Wild Law: A Manifesto for Earth Justice*, 2nd edn (Chelsea Green, 2011).

76 A. Boyle, 'The Role of International Human Rights Law in the Protection of the Environment', in A. Boyle & M. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1996) pp. 43–69, at 48–9.

77 In the US, for instance, title to property carries with it the legal authority to destroy the natural communities and ecosystems which depend upon that property for survival. In fact, environmental laws in the US were passed under the authority of the 'Commerce Clause', which grants to Congress exclusive authority over interstate commerce. Treating nature as commerce has meant that all existing environmental law frameworks in the US are anchored in the concept of nature as property: C.A. Klein, 'The Environmental Commerce Clause' (2003) 27(1) *Harvard Environmental Law Review*, pp. 1–70, available at: http://scholarship.law.ufl.edu/facultypub/6.

degraded, rather than as an integral ecological partner with its own rights to exist and thrive. The consequence is that domestic laws and regulations on environmental protection effectively legalize environmental damage by regulating how much pollution or natural destruction of nature may lawfully occur. Within this paradigm, the recognition of a human right to the environment cannot be sufficient to ensure the protection of the environment. In the opinion of Bosselmann:

> [I]n the long term the existence of an environmental human right could be seen as self-contradictory. A better option is the development of all human rights in a manner which demonstrates that humanity is an integral part of the biosphere, that nature has an intrinsic value and that humanity has obligations toward nature. In short, ecological limitations, together with corollary obligations, should be part of the rights discourse.[78]

The recognition of a right of nature represents an integrated, holistic view of all life and all ecosystems. From this perspective, nature becomes not the object of protection but a legal subject: all forms of life have the right to exist, persist, maintain and regenerate their vital cycles. In parallel with this recognition is another: that humans have the legal authority and responsibility to enforce these rights on behalf of nature.

The 'biocentric' view is definitely a reaction to the severity of environmental conditions and the many threats to natural ecosystems. It is based on the idea that humans are part of nature and that the conservation of nature is, above all, a duty of human beings. According to this argument, any form of life is important for the balance of nature.[79] In recognition of the rights of nature, the Ecuadorian constitution, Bolivian legislation, and a growing number of communities in the US are orienting their environmental protection systems around the premise that nature has inalienable rights, as do humans. This is a radical idea and is certainly not without its critics and detractors. Yet this article argues that it is a reasonable response to the subordination of environmental protection to human interests and the large-scale environmental devastation that this subordination fosters.[80]

4.1. *Steps towards the Legal Recognition and Protection of a Right of Nature*

One of the first cases to feature a right of nature, *Sierra Club* v. *Morton* in 1972, was a historic case concerning the redwoods of California.[81] Corporate profiteers aimed to turn an old-growth forest habitat into an amusement park. A legal battle ensued in which judges and academics questioned whether trees were entitled to judicial

[78] K. Bosselmann, 'Human Rights and the Environment: Redefining Fundamental Principles?', in B. Gleeson & N. Low (eds), *Governing for the Environment: Global Problems, Ethics and Democracy* (Palgrave Macmillan, 2001), pp. 118–34.

[79] S. Emmenegger & A. Tschentscher, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law' (1994) 6(3) *Georgetown Environmental Law Review*, pp. 545–92, at 584.

[80] See, e.g., W.J. Smith, 'Beware the "Rights of Nature"', *The Daily Caller*, 30 Dec. 2011, available at: http://dailycaller.com/author/wsmith.

[81] 405 U.S. 727, pp. 741–43 (1972). See A. Pelizzon, 'Keeping the Fire: Impressions of Earth Jurisprudence' (2011) 14 *Southern Cross University Law Review*, pp. 6–12.

consideration. In his dissenting opinion, Judge William O. Douglas argued that 'inanimate objects' should have access to courts:

> The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. This suit would therefore be more properly labeled as Mineral King v. Morton.[82]

Justice Douglas continued:

> Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole – a creature of ecclesiastical law – is an acceptable adversary and large fortunes ride on its cases … So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life.[83]

Justice Douglas's reflection moved other authors from around the world to address this issue[84] – to mention a few: Christopher Stone[85] in the US, Godofredo Stutzin[86] in Chile, and Cormac Cullinan[87] in South Africa.

In 1982, over 100 UN Member States adopted the World Charter for Nature,[88] which states that humanity is a part of nature and 'life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients'. The Charter also establishes the duty of every person to act in accordance with its provisions and to ensure its objectives. The document recognizes the intrinsic value of nature, and it calls for humans to be guided by a moral code of conduct that does not

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82 *Sierra Club* v. *Morton*, ibid., p. 742–3.

83 Ibid., p. 743.

84 R. Frazier Nash, *The Rights of Nature: A History of Environmental Ethics* (The University of Wisconsin Press, 1989), pp. 130–6; S. Hanna et al. (eds), *Rights to Nature: Ecological, Economic, Cultural, and Political Principles of Institutions for the Environment* (Island Press, 1996), p. 298; M. Bell, 'Thomas Berry and an Earth Jurisprudence: An Exploratory Essay' (2003) 19(1) *The Trumpeter*, pp. 69–96; S. Boyle, 'On Thin Ice', *The Guardian,* 8 Nov. 2006, available at: http://www.theguardian.com/environment/2006/nov/08/ethicalliving.society; S. Harding, 'Earthly Rights', *The Guardian,* 3 Apr. 2007, available at: http://www.theguardian.com/environment/2007/apr/03/conservationandendangeredspecies; S.D. Cameron, 'When Does a Tree Have Rights?', *The Chronicle Herald,* 7 Jan. 2007, available at: http://www.precaution.org/lib/07/when_do_trees_have_standing.070108.htm.

85 Stone, n. 4 above, and by the same author, *Should Trees Have Standing?: Law, Morality, and the Environment* (Oxford University Press, 2010), pp. 157–80.

86 G. Stutzin, 'Un imperativo ecológico: reconocer los derechos de la Naturaleza' (1984) 1(1) *Revista Ambiente y Desarrollo*, pp. 97–114; G. Stutzin, 'Nature's Rights: Justice Requires that Nature Be Recognised as a Legal Entity', *Resurgence & Ecologist*, Issue 210, Jan./Feb. 2002, available at: https://www.resurgence.org/magazine/author897-godofredo-stutzin.html. Godofredo Stutzin was winner of the UNEP Global 500 Roll of Honour in 1990.

87 C. Cullinan, *Wild Law: A Manifesto for Earth Justice* (Green Books, 2002). Other references by the same author are: 'If Nature Had Rights, What Would We Have to Give Up?', *Orion*, Jan. /Feb. 2008, available at http://www.orionmagazine.org/index.php/articles/article/500; 'A History of Wild Law', in P. Burdon (ed.), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011), pp. 12–23; and *Wild Law: A Manifesto for Earth Justice*, 2nd edn (Green Books, 2011).

88 UNGA, 'World Charter for Nature', UN Doc. A/RES/37/7, 28 Oct. 1982, available at: http://www.un.org/documents/ga/res/37/a37r007.htm.

compromise the integrity of those ecosystems or species with which they coexist. It establishes that human activity must accord with the earth's limits, the common equity, and the precautionary principle. The Charter states that '[e]very form of life is unique, warranting respect regardless of its worth' to human beings.

Subsequently, in 2000, a group of non-governmental organizations (NGOs) adopted the Earth Charter, which 'seeks to inspire in all peoples a sense of global interdependence and shared responsibility for the welfare of the human family, the greater community of life and future generations'.[89] Its four pillars of sustainability are: (i) respect and care for the community of life; (ii) ecological integrity; (iii) social and economic justice; and (iv) democracy, non-violence and peace. The Earth Charter also recognizes the role of traditional, cultural, and spiritual knowledge of indigenous peoples, and principles of non-discrimination and self-determination. Although this document is not legally binding, its principles are considered to have universal relevance.

Some international treaties recognize the inherent value of the environment. The International Convention for the Regulation of Whaling,[90] the Convention on the Conservation of Migratory Species of Wild Animals,[91] the Convention on Biological Diversity,[92] and the Ramsar Convention[93] all, at least in part, recognize the value of the environment for its own sake insofar as they focus on environmental damage rather than on its impact on human beings. The ultimate goal of these treaties is certainly to serve human purposes; both treaty and customary international environmental law aim to resolve problems that matter to people, and our species' survival may depend on our ability to find more sustainable approaches. However, the focus of environmental treaties is primarily to constrain environmentally deleterious behaviour, rather than to prevent injury to people.

Other attempts to protect nature as a subject of law include the campaign of Polly Higgins, a United Kingdom (UK) lawyer and activist, to call on the UN to adopt a law recognizing the mass destruction of ecosystems as a crime against international peace – that is, as an 'ecocide'.[94] Ecocide is defined as 'the extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished'.[95] Founded on the duty to care for the planet, this crime would entail strict liability and would be compulsory even for states that have not subscribed to the International Criminal Court. Mining, extraction of fossil fuels and deforestation

89 The Earth Charter is available at: http://www.earthcharterinaction.org/invent/images/uploads/echarter_spanish.pdf.

90 Washington, DC (US), 2 Dec. 1946, in force 10 Nov. 1948, available at: https://archive.iwc.int/pages/view.php?ref=3607&k=.

91 Bonn (Germany), 23 Jun. 1979, in force 1 Nov. 1983, available at: http://www.cms.int/en/convention-text.

92 N. 25 above.

93 Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar (Iran), 2 Feb. 1971, in force 21 Dec. 1975, available at: http://www.ramsar.org.

94 'Eradicating Ecocide', available at: http://eradicatingecocide.com.

95 P. Higgins, D. Short & N. South, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59(3) *Crime, Law and Social Change,* pp. 251–66; also P. Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (Shepheard-Walwyn, 2010), p. 63.

could be classified as ecocide according to the 'eradicating ecocide campaign', which advocates a law against ecocide to be fully implemented by states by 2020.[96]

Over ten countries – including Georgia, Kyrgyzstan, Russia and Vietnam – already recognize a form of ecocide in their national laws. In 2011, the Hamilton Group held a mock trial in the UK Supreme Court to test the proposed crime of ecocide.[97] Crimes being considered for prosecution in the mock trial included the extraction of oil from Canada's tar sands, a major oil spill in the Gulf of Mexico, fracking for shale gas in Nigeria, and bauxite mining of the Niyamgiri Mountain in India. The trial was followed by a process of restorative justice[98] in 2012 between a fictitious company and victims including Earth (given voice by the Gaia Foundation), indigenous peoples, and future generations. Since January 2014, more than 112,000 people have signed a petition through the European Citizen's Initiative for a European Union (EU) directive on ecocide.[99] Although this number was insufficient to require follow-up action on the part of the European Commission, the initiative mobilized support and the volunteer groups behind it are now campaigning for ecocide laws across the world.[100]

Furthermore, a coalition – which includes End Ecocide in Europe, the European Network of Environmental Prosecutors, Globe EU, and Green Cross International – launched a campaign in the European Parliament calling for the establishment of a Criminal Court of the Environment and Health, at both the European and international levels, with enforceable penalties for environmental damage. If a crime of ecocide is recognized, the Criminal Court may allow an application through the Charter of Brussels, which would create a separate court. The Charter of Brussels has been open for signature since September 2014.[101]

In addition to the ecocide initiative, on 22 April 2010 – World Day of Mother Earth – participants at the World People's Conference on Climate Change and the Rights of Nature developed and adopted the Universal Declaration of the Rights of Mother Earth.[102] This Declaration acknowledges Mother Earth as a living being with

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96 Higgins launched her online campaign in 2014, seeking global support to exert pressure on national governments to vote for the proposed law if it is accepted by the UN Law Commission. In 2010, she submitted a proposal to the International Law Commission (ILC) to amend the Rome Statute to include an international crime of ecocide. The deadline for the text was January 2011, and a vote was scheduled on other amendments in 2012. A two-thirds majority of the 197 member states is required for it to be passed. The campaign to introduce a law of ecocide is still open, and is known as 'WISH20'.

97 Higgins, Short & South, n. 95 above. See also: https://www.youtube.com/playlist?list=PLFB4F5595F6740619&feature=viewall.

98 The Gaia Foundation, 'The Sentencing: Justice for the Earth Community', available at: http://www.gaiafoundation.org/blog/the-sentencing-justice-for-the-earth-community.

99 The European Citizens' Initiative (ECI) is a democratic tool allowing EU citizens to place issues on the EU policy agenda. When one million citizens from at least 7 EU countries support an initiative via electronic or traditional signature, the European Commission is obliged to consider a legislative proposal and a public hearing will be held in the European Parliament: see 'End Ecocide on Earth', available at: http://www.endecocide.eu/end-ecocide-continues-collect-signatures/?lang=en.

100 The initiative proposed is entitled 'End Ecocide in Europe: A Citizens' Initiative to give the Earth Rights'; further information is available at: http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2013/000002.

101 For further information, see the Charter of Brussels' website at: http://iecc-I tpie.org/en.

102 Adopted at the World People's Conference on Climate Change and the Rights of Mother Earth, Cochabamba (Bolivia), 22 Apr. 2010, available at: http://therightsofnature.org/universal-declaration.

rights, including the rights to life, to existence, and to continue its vital cycles and processes free from any human interference. In 2012, the UN Conference Rio+20 recognized the need to live in harmony with nature. The UNGA Resolution entitled 'The Future We Want' asserts:[103]

> We recognize that planet Earth and its ecosystems are our home and that 'Mother Earth' is a common expression in a number of countries and regions, and we note that some countries recognize the rights of nature in the context of the promotion of sustainable development. We are convinced that in order to achieve a just balance among the economic, social and environmental needs of present and future generations, it is necessary to promote harmony with nature.

In 2011, UK lawyer Peter Roderick proposed a 'Draft Declaration on Planetary Boundaries'[104] in order to recognize and respect the Earth's processes that sustain life, and to promote the responsibility to safeguard these processes from serious or irreversible harm. The Declaration is based on research conducted by Johan Rockström and colleagues and published in *Nature* in 2009.[105] According to this research, there are nine earth-critical processes and associated thresholds within which we must live in order to avoid irreversible damage to our planet. Three of these boundaries have been breached: climate change, biodiversity, and the nitrogen cycle.

These are just some examples of international trends, mostly from academia and social movements, which claim environmental protection through the recognition of the legal personality of nature. This 'biocentric' approach has also been demonstrated in some significant legal changes which deserve attention.

4.2. *New Laws for Nature*

Together with the 1917 Constitution of Querétaro, the Weimar Constitution of 1919 has the reputation of being a pioneer in elevating social rights to constitutional status. The Weimar Constitution, moreover, is also the first to protect nature. It provides in Article 150 that '[n]ature enjoys the protection and aid of the State'. Despite this precedent, other constitutions of the time did not follow this path, probably because of a lack of awareness of environmental damage. The first constitutions in the Americas are silent on the existence of living beings other than humans, emphasizing instead property rights related to land, water and nature.

During the 1980s and 1990s, a wave of reforms in environmental law swept across nearly all of South America. The Constitutions of Colombia (1991) and Bolivia (in the 2002 reforms) provided that 'all persons have the right to enjoy an ecologically balanced healthy environment'. Also in Bolivia, Environmental Law No. 1333 (27 April 1992)[106] recognized the right to a healthy environment for people and living things. Ecuador's Constitution in 1984 introduced 'the right to live in a

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103 See 'Resolution Adopted by the General Assembly on 27 July 2012 – The Future We Want', UN Doc. A/RES/66/288, 11 Sept. 2012.

104 The document is available at: http://planetaryboundariesinitiative.org/about-2/declarations/draftonpb.

105 J. Rockström et al., 'A Safe Operating Space for Humanity' (2009) 461 *Nature*, pp. 472–5, available at http://www.nature.com/news/specials/planetaryboundaries/index.html.

106 Bolivia, Gaceta Oficial, Ley del Medio Ambiente. Ley 1333, 27 Apr. 1992.

pollution-free environment and the states' obligation to promote the conservation of nature'. In 1998, Ecuador formally recognized both the precautionary principle and the right of individuals to protect the environment. A transition to a right of nature was included in Venezuela's Constitution, which recognizes the right and duty of each generation to protect and maintain the environment for its benefit and the future world.[107] The Venezuelan Constitution sets an example by guaranteeing citizens the right to a safe, healthy and ecologically balanced environment. The government, along with the people, will 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 the law'.[108] In the case of Colombia, the transition has started with a proposed constitutional referendum to recognize nature as a living source of food, life and learning, with inherent and inalienable rights such as the right to be respected and the right to continue vital cycles and processes.

All of these constitutional and legal provisions transcend the anthropocentric level and postulate a unity of life which has not been shaped by the opposition of nature and humans. This represents an innovative reality for what has been defined as their 'biocentric and ecological shift', witnessed by the central role accorded to the right of nature.

Rights of nature in the Bolivian and Ecuadorian Constitutions

Significantly, 90 or so years after Weimar, both Bolivia (in 2009) and Ecuador (in 2008) recognized in their Constitutions the rights of indigenous peoples and of all citizens to a healthy and balanced environment. Both Constitutions mention nature but, while Ecuador respects it as a living being with which one has to live in order to manage 'living well', the Bolivian Constitution views nature as a helpless and vulnerable object requiring state protection. It is worth mentioning that both countries have for a long time suffered from serious environmental problems arising from extractive industries (oil, and the mining of tin, silver, gold and other minerals). The texts also diverge radically on another point. Bolivia's Constitution sees the 'industrialization' of nature as a goal, whereas in the Ecuadorian case nature is presented, for the first time, as a subject of rights.[109] The Bolivian text links nature and modernity through progress, while the Ecuador Constitution breaks away from this perspective with a biocentric turn. It states that there must be a dynamic relationship between society, state and market, but each must be in harmony with nature. Nature is granted inalienable rights and thus made a subject of law.[110]

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107 Art. 127 of the Venezuelan Constitution states that '[i]t 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 … The State shall protect the environment, biological and genetic diversity, ecological processes, national parks and natural monuments, and other areas of particular ecological importance'.

108 Ibid.

109 A. Acosta & E. Martínez, *La naturaleza con derechos: de la filosofía a la política* (Ediciones Abya-Yala, 2011), pp. 317–68.

110 The Ecuadorian constitutional text has three Articles in which rights of nature are established. In Art. 71 (Nature, or *Pachamama*), where life is reproduced and occurs, it has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and

The Bolivian Constitution requires each state to protect all genetic resources and micro-organisms found in its ecosystems, as well as the knowledge associated with their use and exploitation. It also provides that the law will regulate the protection and use of forest species of socio-economic, cultural, and ecological relevance, giving special importance to the protection of coca. Ancestral coca is treated as a cultural heritage, a renewable natural resource, and a contributor to social unity (Article 384).[111] The indigenous worldview is reflected in the Preamble to the Bolivian Constitution:

> In ancient times mountains arose, rivers spread out from one place to another, lakes were formed. Our Amazonia, our swamps, our highlands and our plains and valleys were covered with greenery and flowers. We populated this sacred Mother Earth with different faces, and since that time we have understood the plurality that exists in all things and in our diversity as human beings and cultures. Thus, our peoples were formed, and we never knew racism until we were subjected to it during the terrible times of colonialism.

The Preamble reflects a dialogue with the past, recording that since time immemorial, plurality and diversity were respected. Everything had its place, and humans and nature coexisted in harmony. Harmony was broken by colonization, which introduced racism and altered the order in which indigenous people lived.

It was not until 2010 when Bolivia adopted the first legislative package in the world premised upon the ancient indigenous concept of nature as a living being. Specifically, the laws are Law No. 071 on the Rights of Mother Earth,[112] and Framework Act No. 300 of Mother Earth and the Integral Development of Good Living.[113] The Law on the Rights of Mother Earth endorses guiding principles, including the 'common good', and rejects multiculturalism and the commodification of nature. The Law requires the state and citizens to respect the rights of the Earth. Under the Law, companies and individuals responsible for causing environmental damage may be accountable for its repair. The Law also provides for an Ombudsman for Mother Earth to protect nature's interests.

In both constitutions, and most prominently in Bolivia, indigenous people have incorporated their demands to build plurinational states to represent them and their

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evolutionary processes. Art. 72 declares that nature has the right to be restored, apart from the obligation of the state to compensate individuals and communities which depend on affected natural systems. In cases of severe or permanent environmental impact, including those caused by the exploitation of non-renewable natural resources, the state is to establish the most effective mechanisms to achieve the restoration and is required to adopt adequate measures to eliminate or mitigate harmful environmental consequences. Art. 73 provides that the state is to apply preventive and restrictive measures to activities that might lead to the extinction of species, the destruction of ecosystems or the permanent alteration of natural cycles. The introduction of organisms and organic and inorganic material which might definitively alter the nation's genetic assets is forbidden. See M. Aparicio, 'El constitucionalismo de la crisis ecológica. Derechos y naturaleza en las constituciones de Ecuador y Bolivia', in A. Pigrau (ed.), *Pueblos indígenas, diversidad cultural y justicia ambiental. Un estudio de las nuevas Constituciones de Bolivia y Ecuador* (Tirant lo Blanch, 2013), pp. 459–524.

111 *Miradas: nuevo texto constitucional* (UMSA/IDEA, 2010).

112 Bolivia, Gaceta Oficial, Ley de derechos de la Madre Tierra, Ley No. 071, 21 Dec. 2010.

113 Bolivia, Estado Plurinacional de Gaceta Oficial, Ley marco de la Madre Tierra y Desarrollo Integral para Vivir Bien, 15 Oct. 2012.

cultural values, expressed in the '*vivir bien*' ('living well', or '*suma qamaña*' in Aymara). In the Bolivian legislation this meant that nature qualified as a 'subject of rights' – a truly normative leap. The concept that nature itself can possess rights runs counter to the classical liberal theories of government, which hold sway throughout much of the West and which view rights as possessed only by individual human beings. In the case of Ecuador, this is the expression of an alternative way of living: the *sumak kawsay* (in English 'living well', in Spanish '*buen vivir*') included in the Constitution of Ecuador in Chapter 7, Article 71, and it provides that nature, or *pachamama* (the Quechua world correlating to Mother Earth), has rights of existence, maintenance and regeneration of its cycles, structure, functions, and evolutionary process.[114] These rights are directly and immediately enforceable by and before any public authority, which means that any person or group may demand fulfilment of the rights of nature. *Pachamama* is an expression which comes from the Quechua language and demonstrates the important role in these reforms, in parallel with other actors (such as feminist, socialist, and ecological movements) of indigenous peoples. The *sumak kawsay* is presented as a new foundation for Ecuador and, in this sense, is included in the constitutional Preamble: 'We hereby decide to build a new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the *sumak kawsay*.'

Ecuador's new approach to environmental protection emerges out of its tragic record of abuse at the hands of the oil industry, including the disasters in the northern Amazon near Sarayaku and the infamous class action litigation against Chevron Texaco. The failure of the country's extraction-based economy and neoliberal reforms to bring economic prosperity to the region has resulted in a demand for new approaches to development.

Therefore, the reforms in Bolivia and Ecuador could be understood also as a regional process which emphasizes the recognition of human, environmental, and indigenous rights. As fruit of these constitutional developments, the UNGA, at its 63rd meeting on 22 April 2009, unanimously adopted the draft submitted by Evo Morales, the Bolivian President, stating that every 22 April should be celebrated as International Day of Mother Earth (rather than Earth Day).[115]

The effectiveness of constitutional rights of nature

In both Ecuador and Bolivia, indigenous movements have managed to incorporate their worldview, values, and requirements within their national constitutions. The main question, then, is to assess how effectively the Bolivian and Ecuadorian Constitutions are working. Thus far, they have not led to new laws or stopped oil companies from destroying some of the most biologically rich areas of the Amazon. One point of view is that both Constitutions challenge older paradigms of progress and development, and put the idea of harmony with nature on centre stage. In this

[114] E. Gudynas, 'Buen Vivir: Today's Tomorrow' (2011) 54(4) *Development*, pp. 441–7.

[115] Resolution adopted by the UNGA on 22 Apr. 2009, 'International Mother Earth Day', UN Doc. A/RES/63/278, 1 May 2009, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/278.

sense, nature is no longer seen as a set of natural resources to be exploited or as a chain of natural elements that comprise the environment and must be protected. The debate goes beyond this, and it intends to establish new ways of thought and living with a claim that nature has its own rights.[116] The actual implementation of nature's rights is now the challenge. Many conflicts have taken place in the last few years as a result of political decisions regarding the protection of nature. The way to make the principles contained in the Constitutions effective is through respect for collective rights, the establishment of a plurinational state, and an intercultural society that recognizes and respects indigenous peoples.[117]

However, the precarious situation of the many human rights organizations in Latin America, and in particular in Ecuador, complicates the protection of the rights of nature. Ecuadorian Executive Decree 16, approved on 4 June 2013, grants the President ample powers to monitor and dissolve NGOs. In December 2013, this Decree was applied against the Fundación Pachamama (Pachamama Foundation) in Ecuador, which was dissolved arbitrarily in less than three days and without following the minimum rules of due process. This organization was working for the rights of indigenous peoples and environmental rights. The order of closure said that the organization was interfering in public policies and threatening state security. The organization has denied any involvement in violent acts or acts contrary to human rights.[118]

Emerging rights of nature in the US context

Significantly, the Bolivian and Ecuadorian cases are not isolated, regional experiments. More than 24 towns and cities in the US have implemented ordinances that arguably are premised upon the rights of nature.[119] An ordinance adopted in 2006 in Tamaqua Borough, Pennsylvania,[120] prohibited corporations from spreading

116 A critical appraisal can be found in J. Jaria, 'The Rights of Nature in Ecuador: An Opportunity to Reflect on Society, Law and Environment', in R.V. Percival, J. Lin & W. Piermattei (eds), *Global Environmental Law at a Crossroads* (Edward Elgar, 2014), pp. 48–62; J. Jaria, 'El "modo de vida" en las constituciones de Ecuador y Bolivia: perspectiva indígena, naturaleza y bienestar (un balance crítico)', in Pigrau, n. 110 above, pp. 285–331.

117 A.E. Vargas Lima, 'El Derecho al Medio Ambiente en la Constitución Política del Estado Plurinacional de Bolivia' (2012) 18 *Anuario de Derecho Constitucional Latinoamericano,* pp. 251–67.

118 Amnesty International, 'Defending Human Rights in the Americas: Necessary, Legitimate and Dangerous', Dec. 2014, available at: https://www.amnesty.org/en/documents/amr01/0003/2014/en.

119 T.E. Kurth et al., 'American Law and Jurisprudence on Fracing' (2010) 47(2) *Rocky Mountain Mineral Law Foundation Journal*, pp. 277–345.

120 Tamaqua Borough, Schuylkill County, Pennsylvania Ordinance No. 612 of 19 Sept. 2006 to protect the health, safety, and general welfare of the citizens and environment of Tamaqua Borough by prohibiting corporations from engaging in the land application of sewage sludge; by prohibiting persons from using corporations to engage in land application of sewage sludge; by providing for the testing of sewage sludge prior to land application in the Borough; by removing constitutional powers from corporations within the Borough; by recognizing and enforcing the rights of residents to defend natural communities and ecosystems; and by otherwise adopting the Pennsylvania regulations concerning the land application of sewage sludge. The Ordinance states in s. 12 that people and their communities are trustees of nature, and communities of nature and ecosystems form part of the natural trust, and in s. 7.6 it establishes that 'Borough residents, natural communities, and ecosystems shall be considered to be "persons" for purposes of the enforcement of the civil rights of those residents, natural communities, and ecosystems'.

sewage sludge as fertilizer on farmland, even where the owner of the land consented. It recognized the rights of natural communities and ecosystems to exist and flourish, and recognized ecosystems as legal persons, allowing Tamaqua residents to pursue legal action on their behalf. With this ordinance, Tamaqua became the first US municipality to recognize the rights of nature and to enable residents to take action to vindicate those rights.

Similarly, a recent Pittsburgh city ordinance prohibits drilling for natural gas within the city. This ordinance elevates the rights of individuals, the community, and nature over corporate 'rights' and authorizes Pittsburgh residents to exercise those rights on behalf of threatened ecosystems.[121]

Since 2010, at least 18 municipalities in California, New York, New Hampshire, Maine, Maryland, Ohio, Pennsylvania, and Virginia have enacted Community Bills of Rights to ban natural gas drilling and hydraulic fracturing (fracking).[122] These are the first communities in the US not only to ban fracking or drilling but also to elevate the rights of people, the community, and nature over corporate rights and challenge the authority of the state to pre-empt community decision making. Provisions in these ordinances eliminate corporate personhood rights within the city for corporations seeking to drill, and remove the ability of corporations to wield the Commerce and Contracts Clauses of the US Constitution to override community decision making. Moreover, these ordinances demonstrate that attributing rights to nature is not limited to indigenous societies with a particular worldview. Some within Western society also promote change in this direction.

4.3. *Winds of Change for Environmental Law?*

Although social movements have succeeded in achieving some legal recognition of the rights of nature, the effectiveness of the 'biocentric' perspective remains an open

[121] For more information, see: http://earthlawcenter.org/static/uploads/documents/Marcellus_Shale_Ord_Pittsburgh_1.pdf. See also 'An Ordinance of the City Council of the City of Santa Monica Establishing Sustainability Rights', adopted 12 Mar. 2013, available at: http://www.smgov.net/departments/council/agendas/2013/20130312/s2013031207-C-1.htm.

[122] Specifically, the Town Mountain Lake Park Ordinance on Natural Gas Extraction (Ordinance No. 2011-01, 3 Mar. 2011); West Homestead, Pennsylvania, Community Rights Gas Extraction Prohibition (Ordinance of 2011); Town of Wales, New York Community Protection of Natural Resources (Intro. No. 2-2011, Local Law No. 2011, to amend Local Law 1-1993, adopted by the Town Board on 11 May 1993, by adding a new Ch. 162 known as the 'protection of natural resources'); Baldwin, Pennsylvania, Community Protection from Natural Gas Extraction Ordinance (Ordinance No. 838: an Ordinance of the Borough of Baldwin, Allegheny County, Commonwealth of Pennsylvania, banning commercial extraction within the borough); Wilkinsburg, Pennsylvania, Community Protection from Natural Gas Drilling Ordinance (adopted Ordinance No. 28-70, which enacts an enforceable Local Bill of Rights, along with a prohibition on natural gas extraction); Forest Hills Borough's Community Rights and Protection from Natural Gas Exploitation Ordinance (Ordinance No. 1017: an Ordinance of the Borough of Forest Hills, Allegheny County, Pennsylvania, banning the extraction of and/or exploration for natural gas within the borough of Forest Hills); State College Borough's Community Bill of Rights Home Rule Charter Amendment (Community Bill of Rights and Natural Gas Drilling Ban, Section 41.2-205, State College Borough Bill of Rights, available at: http://www.statecollegepa.us/DocumentCenter/Home/View/3028); Las Vegas, New Mexico's Community Water Rights and Local Self-Governance Ordinance (Ordinance No. 2013-01, available at: https://es.scribd.com/doc/139339332/Mora-County-Oil-and-Gas-Ordinance); amongst many others. All these ordinances were drafted in consultation with the Community Environmental Legal Defense Fund (CELDF): see http://celdf.org/resources-ordinances.

question. The first judicial attempt to enforce the rights of nature occurred in 2011, in a case brought in Ecuador against the Provincial Government of Loja 'for nature particularly in favor of the Vilcabamba river'. The case concerned the Vilcabamba-Quinara road expansion.[123] The government sought to build a highway without the required environmental impact studies; the project would negatively affect the flow of the river, causing floods and disrupting wildlife and the livelihoods of local communities. The Provincial Court of Loja granted an injunction against the Provincial Government of Loja, ordering it to stop violating the constitutional rights of the Vilcabamba River to exist and to maintain its vital cycles, structure, functions and evolutionary processes.[124]

This first successful application of the rights of nature arose out of Article 71 of the Ecuadorian Constitution.[125] The Chamber agreed that 'the action of protection is the only suitable and effective remedy to stop immediate and focused environmental damage'. Applying the precautionary principle, the judges ordered that:

> until such time it is objectively proven that no probable or certain danger exists over works carried out in a particular area producing contamination or environmental damage, it is the constitutional duty of judges to immediately pay attention to safeguarding and enforcing the legal protection of the rights of Nature, avoiding contamination by whatever means, or ensuring remedy. Note that with relation to the environment we shall consider not only certain damage, but also indications of possibility.[126]

The Court ordered the government to submit environmental impact studies, develop a plan for rehabilitation and remediation, and publicly apologize for starting the construction of a road without the necessary environmental licence.[127]

In its discussion, the Court referred to the Constitution as: 'unprecedented in the history of mankind, recognizing nature as a subject of rights'. As a matter of law, the Court modified the burden of proof, stating that:

> the plaintiffs did not have to prove potential damage. The Loja Provincial Government would have to provide evidence that the activity of opening a road neither affected nor would affect the environment in the future. It would be inadmissible to reject an action protecting Nature for the lack of proof presented, as in the case of possible or assumed already caused environmental damage through pollution, the non-existence of this damage should be proved not just by whoever is in a better position to do so but by the one who argues, ironically, that such damage does not exist.[128]

Despite the excitement surrounding this finding, it is important to remember that the judgment nevertheless borrows heavily from an essentially anthropocentric

123 *Wheeler* v. *Director de la Procuraduría General Del Estado en Loja, Juicio*, Sentencia Causa, 30 Mar. 2011, Acción de Protección No. 11121-2011-00010, Sala Penal de la Corte Provincial de Loja, available at: http://therightsofnature.org/first-ron-case-ecuador.

124 E. Daly, 'Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights' (2012) 21(1) *Review of European Community & International Environmental Law*, pp. 63–6.

125 *Wheeler*, n. 123 above.

126 Ibid., para. 5.

127 G. Smith, 'In Ecuador, Trees Now Have Rights' (2009) 23(4) *Earth Island Journal*, pp. 1–15.

128 *Wheeler*, n. 123 above, para. 10.

worldview, in that the Court tried to find a remedy not only for the river but also for the local community affected. The action on behalf of the defence was particularly noteworthy in this regard.[129] Accordingly, in stating that the Provincial Council is responsible for the damage, the Court ordered it to comply with the recommendations of the environmental authority and develop a remediation and rehabilitation plan of the affected areas of the Vilcabamba River, as a means of reparation for the violation of the constitutional rights of nature. The Court also required the Council to issue a public apology in the form of a quarter-page notice in a local newspaper for starting the road construction without the necessary environmental licence; this was intended to reflect moral reparation for the violation of the constitutional rights of nature and its impact on the local community.

Also in Ecuador, on 26 November 2010, an international alliance of environmental activists[130] filed a lawsuit against British Petroleum (BP) in the Ecuadorian Constitutional Court to defend the constitutionally recognized rights of nature with specific reference to the right of the sea beyond Ecuadorian territory, to claim justice in respect of the Deepwater Horizon disaster – the notorious BP oil spill in the Gulf of Mexico. The Constitution of Ecuador allows a citizen or group to present a case before the Constitutional Court of Ecuador in respect of a violation that has occurred in a different country and which affects the Earth as a whole. The claim challenged traditional approaches to choice of forum and mobilized new rights, which exist only in a few countries such as Ecuador and Bolivia. Instead of seeking financial compensation, the coalition called on BP to disclose information about the ecological destruction caused by the oil spill in the Gulf of Mexico, and to cease undersea mining.[131] This case illustrates the scope to change traditional approaches to compensation, in that the claimants demanded a course of action by BP rather than direct financial compensation. For example, the motion was made for BP to maintain the same quantity of oil underground as existed before the extraction, or use specific technical cleaning mechanisms, thus imposing an economical sanction or a change in behaviour by the company as a disincentive for repeating such actions.

On 26 July 2011, the case was admitted as Suit No. 0523-2012 in the Second Labour Court of Pichincha. The Court dismissed the motion on the grounds that the jurisdiction of Ecuador is exercised solely and exclusively within Ecuadorian territory in respect of unlawful activities carried out by individuals, corporations, and domestic or foreign undertakings within the territorial limits of Ecuador. The Court considered it inappropriate for an Ecuadorian judge to regulate and penalize any legal or natural person for acts or omissions committed in foreign territory. In addition, on appeal (No. 17111-2013-0002), the Provincial Court of Pichincha said that even in the case of a violation of rights of nature, as here, a national court could not claim to exercise

129 Ibid., para. 12.

130 The group included Nnimmo Bassey from Nigeria and Vandana Shiva of India (both winners of the Right Livelihood Award), and activists from Mexico, Peru and Ecuador, including the Chair of the Constitutional Review Panel of Ecuador.

131 *Justice for the Earth Community: Defending the Rights of Nature and Holding Corporations to Account* (Gaia Learning Centre, Sept. 2011).

jurisdiction over, or enforce judgment against, a foreign legal entity which does not even have an address in Ecuador, because the Ecuadorian judge would not be competent to hear such a case.[132]

Moreover, Ecuador's economic and political realities can thwart its constitutional rhetoric. Consider, for example, the Yasuní-Ishpingo, Tambococha, and Tiputini (ITT) initiative, which focused on a corridor of oil reserves within the Yasuní National Park. ITT was the first post-oil development initiative to recognize that the benefits accruing from the Amazon are greater than the economic benefits gained from oil extraction. The initiative would prevent 410 million tonnes of carbon dioxide (CO_2) emissions. In return, Ecuador expected a financial contribution from the international community, taking into account the principle of common but differentiated responsibilities.

The idea of the ITT initiative was that all peoples of the world could contribute to the establishment of a new global legal institution which transcends national and private interests. It would be a custodian for the atmosphere and for biological diversity, in which all humanity has a stake. Most importantly, it would protect the land and lives of the Tagaeri and Taromenane indigenous peoples who live in voluntary isolation. Oil production in Yasuní would be undertaken only upon application by the President, and only on the basis of a declaration of national interest by the National Assembly.[133]

However, in mid-August 2013, President Rafael Correa dismissed the plan to leave oil in the ground in the National Park. He argued that the world had failed Ecuador by contributing little of the money the government had hoped to raise, and said that oil revenues would be used to end poverty. The case of Yasuní is far more significant than the Loja decision, because the latter judgment could have been reached through a simple consideration of the state's obligations regarding environmental protection, without any account of the rights of nature. Indeed, the Yasuní case reflects the distance in Ecuador between formal rights and political and economic reality.

More encouraging is a 2010 case from Belize, in which the Chief Justice ruled that a reef is not owned but is a living being – a part of the national heritage of Belize that cannot be sacrificed for commercial interests.[134] The case began in 2009, when a cargo ship collided with the Mesoamerican Reef near Caye Glory in Belize, damaging 6,000 square metres of pristine reef. More than 225 million years old, the Reef is the largest in the Atlantic Ocean and is home to over 60 species of coral reef fish and 500 other species. The Court held the shipping company responsible and required it to pay 11 million Belize dollars (US$5.5 million), plus interest at 3% per year for environmental and ecological loss and the cost of restoration.

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132 Ibid.

133 A. Acosta et al., *Leaving the Oil in the Ground: A Political, Economic, and Ecological Initiative in the Ecuadorian Amazon* (Americas Program Policy Report, 2009).

134 Supreme Court of Belize, A.D. 2009, Claim No. 45 of 2009, Admiralty, *The Attorney General of Belize* v. *MS Westerhaven Schiffahrts Gmbh & Co KG* and *Reider Shipping BV*, Judgment, 26 Apr. 2010; see also Court of Appeal of Belize, A.D. 2011, Civil Appeal No. 19 of 2010, *MS Westerhaven Schiffahrts Gmbh & Co KG* and *Reider Shipping BV* v. *The Attorney General of Belize*, Judgment, 13–14, 19–20 Oct. 2010, 16 May 2011.

A further interesting development is the establishment, in January 2014, of the first International Rights of Nature Tribunal, as a result of the efforts of the Global Alliance for the Rights of Nature. Its inaugural meeting was held in Quito (Ecuador), the first country to acknowledge constitutional rights of nature. The role of this Tribunal is to promote the development of law which recognizes the rights of nature. It convenes in different parts of the world – for example, it was operative during the 2014 Conference of the Parties to the UNFCCC[135] (COP-20) in Lima (Peru).[136] The initiative arose out of a wide range of social movements and organizations from around the world, all moved by the desire to denounce the attacks which nature had suffered in the name of 'progress'. The Tribunal, a pioneer in the search for justice in crimes against life, was established as a permanent platform capable of hearing cases of violations of the rights of nature that take place around the world.

In its first session, the International Rights of Nature Tribunal included representatives from Argentina, Australia, Bolivia, Canada, Columbia, Ecuador, France, Germany, India, Romania, South Africa, Spain, Switzerland, the UK, and the US. After a full-day session, the court unanimously decided to admit nine cases that were considered emblematic of the violation of the laws of nature. These include cases involving pollution by Chevron-Texaco (Ecuador); the threat to the Great Barrier Reef as a result of coal mining (Australia); copper sky mining in the Cordillera del Condor reservoir case in Mirador (Ecuador); and hydraulic fracturing in the US. Also admitted were two cases representing systemic, global violations of the rights of nature: the first involving genetically modified or transgenic organisms and climate change; the other involving the proposed oil drilling in Yasuní-ITT (Ecuador).

It is fitting that a tribunal for the rights of nature originated in Ecuador, the first country to recognize such rights in its constitution. It is somewhat ironic, however, that Ecuador has abandoned its leadership and is currently promoting the expansion of oil production and large-scale mining in enormous remnants of the Amazon forest, all while carrying out a systematic campaign against those individuals and organizations who defend the rights of nature. The criminalization of popular resistance is undoubtedly a tool that the government will employ to further expand the extraction of resources.

5. CONCLUSIONS: BETTER HUMANS FOR A BETTER ENVIRONMENT?

Increasing environmental awareness has led to numerous efforts to protect the environment. The anthropocentric approach to environmental protection has not succeeded, so many advocate a new, biocentric approach, based on 'the rights of

[135] N. 25 above.

[136] C. Larrea, *La Explotación Petrolera en el Parque Nacional Yasuní y los Derechos de la Naturaleza*, available at: http://therightsofnature.org/wp-content/uploads/ITTDerechosNaturaleza.pdf. See also Global Alliance for the Rights of Nature, available at: http://therightsofnature.org/alberto-acosta-Yasuni-itt-case; https://www.youtube.com/watch?v=LrD7CdQMA6g, and http://derechosdelanaturaleza.org.

nature'. Treating environmental matters as human rights problems has improved environmental protection, but has resulted in the subordination of ecosystems to human interests. This article discusses the scope for a new relationship between humans and nature. It promotes the legal recognition of nature and favours laws that protect the natural world according to the needs of the biosphere. Under a biocentric approach, states recognize the global environment as a public interest which they have a responsibility to protect. The national economy should operate within the limits of nature. This will certainly not be an easy task, but what may seem utopian is slowly becoming a reality in many countries.

As yet, this new concept has not been widely translated into the world of laws and policies, or into society in general. However, there is a drive and a degree of willingness in Latin American countries and beyond to move from human rights to the environment to rights of nature. According to this concept, natural rights are not the opposite of human rights, but rather human rights are a subset of natural rights, because humans are a part of nature.

The recognition of such rights can give new impetus to adjudication, but the analysis also shows that just enacting grand statements in declarations and even constitutions is not enough and that, at this moment, attempts at empowering nature remain vulnerable (note the change of policy in Ecuador) and continue to need external (social and political) support to survive in a meaningful way.

Although there are practical difficulties, as seen in Ecuador and Bolivia, the legal enactments emerging out of the biocentric approach at least raise awareness of the need to change the way in which humans treat nature. The already established debate over the rights of nature is facilitating a dialogue between the Andean traditions and Western alternative discourses. The examples of Ecuador and Bolivia offer great encouragement to Western critics of a development model that is destructive to nature, who are striving to legally protect alternatives.

Ultimately, the goal is not the imposition of the biocentric view, but a global change in the way we conceive of environmental protection: it is important to protect nature, but not under the blanket of protecting human interests. Social movements and even academic efforts should be made to invest in this (r)evolution in favour of the rights of nature. But what makes the difference between 'evolution' and 'revolution' of the law is just a letter: the 'r' in responsibility by humans to protect nature, which must no longer be considered as 'our environment'. This means standing up for nature.