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New Pathways for Legal Research

Environmental Rights Between Constitutional Law and Local Context: Reflections on a Moving Target

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Abstract

Environmental rights such as the right to a sound environment and rights of nature, while playing an increasingly important role in global environmental governance and protection, frequently do not correspond to articulations of fundamental experiences of injustice by communities particularly affected by serious environmental degradation caused by, for example, extractive activities or major infrastructure projects. We present three empirically grounded case studies that employ concepts and methods from anthropology to demonstrate this. The work is still in progress, but sufficiently well advanced to present some findings. Our ethnographic research in Ethiopia and Mongolia reveals that vulnerable local communities take recourse to constitutional environmental rights far less often than expected. The reasons for this range from rule-of-law issues to local perceptions of vulnerability and relevant norms. Conversely, where environmental rights are demanded or claimed at the local level, they are often not translated adequately into the law of the state. Our case study on Ecuador, where rights of nature as a specific type of environmental rights have been included in the constitution, shows that transfers from local practice, while potentially having a transformative effect, may lead to conceptual selectivity, ambiguity, lack of clarity, and overlaps with existing state norms and, hence, redundancies. Environmental rights are, therefore, a moving target whose concrete added value hinges on context—as methods of law and anthropology serve to illustrate.

Keywords: Environmental justice; environmental rights; environmental anthropology; political ecology; legal pluralism; ethnographic fieldwork; right to a sound/healthy environment; rights of nature; economic; social; and cultural rights

A. Introduction

We aim to show the extent to which environmental rights in constitutions correspond to local articulations of environmental (in)justice within communities that are vulnerable to severe environmental degradation resulting from activities such as extractivism and large-scale infrastructure projects. Our inquiry serves to test the added value of such rights in their various contexts and to generate deeper insights into the environmental effect on different sectors of society, whether it

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makes sense to formulate environmental concerns as rights claims,¹ what alternative conceptions of environmental justice exist, and what consequences ensue from a choice among different alternatives in a practical sense. For the purposes of this article, we have selected case studies from Ethiopia, Mongolia, and Ecuador to investigate how people refer to environmental rights or to different norms expressing perceptions of injustice.²

In this vein, we have examined the extent to which constitutional law aptly captures Indigenous knowledges and ontologies when it explicitly incorporates environmental rights—such as the rights of nature—and how such congruency or divergence becomes manifest in, for instance, court cases. Our work is situated at the juncture of environmental and human rights law, on the one hand, and environmental anthropology, on the other hand.³ Investing in law and anthropology research has allowed us, as legal academics, to venture onto new terrain, operating on the premise that small places can represent large issues.⁴ We combine notions of fundamentality and vulnerability: Where environmental rights aim to address fundamental experiences of injustice, local situations of high vulnerability may help identify how fundamental these norms are in practice and what they add to existing guarantees such as rights to health, food, water, an adequate standard of living, and so forth.

B. Environmental Rights in Ethiopia: The Case of the GIBE III Dam on the Omo River⁵

The Ethiopian case study is aimed at understanding the absence of claims anchored in constitutional environmental rights as guaranteed in Article 44, Paragraph One of the Constitution—the right to a clean and healthy environment—in a context of increasing environmental challenges to local communities. The focus of the research is on how the construction of a dam that interrupts the natural flow of the Omo River affects two agro-pastoralist communities—Dasanech and Nyangatom—whose way of life depends on access to the waters of the river.

¹See Alan Boyle, *Human Rights and the Environment – Where Next?*, 23 EUR. J. OF INT'L L. 613–642. (2012).

²Other sites are also part of our investigations through the work of associated members of our research group: Marie Courtoy (UCLouvain) conducts research in France, Senegal and Guadeloupe, see Marie Courtoy, “To Leave is to Die:” States’ Use of Mobility in Anticipation of Land Uninhabitability, in this issue; Jenny García Ruales, Philipps-Universität Marburg, works in the Ecuadorian Amazon; and Jenni Viitala, University of Helsinki, also focuses on Ecuador as well as on Finland. Their profiles can be found at <https://www.eth.mpg.de/ercc-team>.

³See e.g. DAVID BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS AND THE ENVIRONMENT* (2012); DAVID BOYD, *THE RIGHTS OF NATURE—A LEGAL REVOLUTION THAT COULD SAVE THE WORLD* (2017); DANIEL P. CORRIGAN & MARKKU OKSANEN, *RIGHTS OF NATURE – A RE-EXAMINATION* (2021); John G. Merrills, *Environmental Rights*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 663–680. (2008); BEN BOER, *ENVIRONMENTAL LAW DIMENSIONS OF HUMAN RIGHTS* (2015); ANNA GREAR AND LOUIS J. KOTZE, *RESEARCH HANDBOOK ON HUMAN RIGHTS & THE ENVIRONMENT* (2015); TIM HAYWARD, *CONSTITUTIONAL ENVIRONMENTAL RIGHTS* (2004); *ENVIRONMENTAL RIGHTS: THE DEVELOPMENT OF STANDARDS* (Stephan j. Turner, Dinah L. Shelton, Jona Razzzque, Owen McIntyre & James R. May eds., 2019); JAMES R. MAY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM* (2012); LOUIS KOTZÉ, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM IN THE ANTHROPOCENE* (2016); Helena Kopnina & Eleanor Shoreman-Ouimet, *An Introduction to Environmental Anthropology*, in 1 *ROUTLEDGE HANDBOOK OF ENVIRONMENTAL ANTHROPOLOGY*, 3–9. (2017); RAYMOND BRYANT, *INTERNATIONAL HANDBOOK OF POLITICAL ECOLOGY* (2015); TOM PERREAULT, GAVIN BRIDGE, & JAMES MCCARTHY, *THE ROUTLEDGE HANDBOOK OF POLITICAL ECOLOGY* (2015); TEENA GABRIELSEN, CHERYL HALL, JOHN M. MEYER, & DAVID SCHLOSBERG, *THE OXFORD HANDBOOK OF ENVIRONMENTAL POLITICAL THEORY* (2016); Dirk Hanschel & Elizabeth Steyn, *Environmental Justice*, in *THE OXFORD HANDBOOK OF LAW AND ANTHROPOLOGY* (2022); Steve Vanderheiden, *Environmental and Climate Justice*, in *THE OXFORD HANDBOOK OF ENVIRONMENTAL POLITICAL THEORY* 321–332. (2016); Giovanna Di Chiro, *Environmental Justice and the Anthropocene Meme*, in *THE OXFORD HANDBOOK OF ENVIRONMENTAL POLITICAL THEORY* 362–382. (2016); Joan Martínez-Alier, *Global Environmental Justice and the Environmentalism of the Poor*, in *THE OXFORD HANDBOOK OF ENVIRONMENTAL POLITICAL THEORY* 547–562. (2016).

⁴Thomas Hylland Eriksen, *Small Places, Large Issues: An Introduction to Social and Cultural Anthropology*, 4 *ANTHROPOLOGY, CULTURE & SOC’Y* (2015).

⁵This case study is being undertaken by Aduletif K. Idris, a second-year PhD candidate. Owing to Covid, direct ethnographic engagement and data collection has only been possible in recent months. The analysis and findings are based on fieldwork carried out from September to November 2021, now resumed in February 2022.

Considering the manifest and severe environmental consequences and the fact that the language of environmental rights, broadly conceived, does not inform public discourses regarding the suffering of the affected communities, three research questions arise: First, are environmental rights sensitive to the specific sociocultural, legal, and political contexts in which they must operate? Second, what is the utility of environmental rights in ensuring the resilience of vulnerable communities, especially in comparison to alternative legal and political strategies? And third, what factors inform the choice among different alternatives?

There are at least three ways in which the research questions are connected to an interdisciplinary approach based on the combination of law and anthropology when looking at our cases in Ethiopia. First, the use of anthropology has conceptual relevance. Theories developed by legal anthropologists enable us to frame the research questions and develop hypotheses. There is a vast literature showing the varied ways in which vulnerable communities develop mechanisms to subvert power through the use of the law.⁶ One way identified by legal anthropologists is the strategic deployment of law and the language of rights as a mechanism of resistance and protest in non-judicial settings.⁷ These theories in the field of legal anthropology allow us to frame questions to better understand the relevance and effectiveness of the ideals contained in laws providing for environmental rights as a tool of resilience for local communities in contexts where judicial remedy is not available. Therefore, the approach is guided by already existing theories for analysis to develop new hypothesis and build on those theories based on the ethnographic data.⁸

Second, the use of anthropology has methodological importance. Despite the ratification of numerous human rights conventions and the adoption of an extensive bill of rights including a range of environmental rights in its current constitution, judicial enforcement of human rights has been dismal in Ethiopia. This is attributed to the manifestly authoritarian governance prevalent not only since the adoption of the Federal Constitution in 1991, but throughout its modern history. Even where there are no effective judicial processes and remedies, human rights in general—and environmental rights in particular—are useful. As a hegemonic idea since at least the post-World War II era, people deploy it in different forms and arenas to resist and contest power and pursue their individual or collective interests.⁹ What is rather puzzling in the Ethiopian case is the virtual absence of claims anchored in the principles of constitutionally guaranteed environmental human rights in the conflicts with evident environmental dimensions such as construction and operation of large hydroelectric power plants, while other rights are routinely invoked.

It is obvious that understanding the context in which the constitutional rules on environmental rights have been adopted becomes relevant in answering why they are not invoked. One relevant question relates to re-evaluating the assumptions regarding the social legitimacy of these rules. More often than not, we assume that if a certain right is constitutionally entrenched, it must at least enjoy strong normative legitimacy among the elite involved in the constitution making. This is because constitutions are believed to reflect strongly held values and goals of the actors involved in their making.¹⁰ However, for various reasons, certain rights—even some without any social legitimacy—can be inscribed into constitutions through unreflective borrowing from transnational sources.¹¹ This observation helps us explore the motivations behind the inclusion of environmental rights in the Ethiopian Constitution of 1995. In understanding the motivations of

⁶MARK GOODALE, THE POWER OF RIGHT(S): TRACKING EMPIRES OF LAW AND NEW MODES OF SOCIAL RESISTANCE IN BOLIVIA (AND ELSEWHERE) 130–62 (Mark Goodale & Sally Engle Merry eds., 2007).

⁷LAW AGAINST THE STATE: ETHNOGRAPHIC FORAYS INTO LAWS TRANSFORMATIONS 1–22 (Julia Eckert, Brian Donahoe, Christian Strümpell & Zerrin Ozlem Biner eds., 2012).

⁸Stefan Timmermans & Iddo Tavory, *Theory Construction in Qualitative Research: From Grounded Theory to Abductive Analysis*, 30 SOCIO. THEORY 167–86 (2012).

⁹Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 125 (1998) (dubbing the Twentieth Century as the “Age of Human Rights”)

¹⁰ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009).

¹¹Kevin Cope, *The Intermestic Constitution: Lessons from the World's Newest Nation*, 53 VA. J. OF INT'L L. 667 (2013).

different actors, ethnographic methods such as in-depth interviews and participant observation provide a much wider perspective than text-based analyses, ultimately allowing one to paint a more complex picture.

Understanding the utility of environmental rights to ensure resilience of vulnerable communities and the factors that go into choosing from among diverse legal and/or political strategies in a specific sociocultural, legal, and political context requires empirical research efforts. The doctrinal approach is simply inadequate for addressing this endeavor. For this reason, the anthropological method of ethnography is essential to understand communities in their social context and with all their complexity, and how they use and contest rules regarding environmental rights.

Finally, the ethnographic works on the cultures of the communities Nyangatom and Dasanech in South Omo are full of what in anthropology is known as “thick” descriptions, which are critical for the general research framework.¹² Despite the fact that the presumed autonomy and objectivity of law has long been debunked, most traditional legal education continues to promote the view that law is a distinct and a self-contained logical system. For a traditionally trained legal scholar, most solutions one can think of for any social issue start and end with the law. If a certain law’s objectives are not achieved, the instinct is to seek explanations for the failure either in the rule making or in the interpretation and application of the rules. However, thick description in anthropology provides a wider context in which legal rules are made, applied, and contested. By engaging law through anthropology, one is able to appreciate what law can and cannot do, no matter how “perfectly” designed it is.

A particular context we focus on in this case study is the influence of authoritarian political culture as a possible explanation for why fundamental rights are routinely violated without redress. Preliminary data already indicates that the basic assumptions of classic rule-of-law concepts, such as the primacy of the law, do not hold. For example, officers in the environmental protection agency responsible for the enforcement of anti-pollution regulations are reluctant to enforce the law when the violation is caused by a government entity. A lawyer specializing in environmental public interest litigation in Addis Ababa stated:

As part of the requirement to exhaust administrative remedies, I usually engage with experts and officials from the Commission for Protection of the Environment and urge them to take administrative measures such as issuing fines where appropriate. However, they tell me that they are unable to issue fines against government institutions. They say, “We are a government institution; how can we sanction another government institution?”¹³

This is not an isolated opinion; it reflects the sentiment underlying an Amharic proverb that roughly translates as: “Just as one cannot plow the sky, one cannot sue the king.” This sentiment perhaps partially explains why there are very few attempts to pursue the implementation of constitutionally entrenched environmental rights through the judicial avenue.

Enforcement of environmental laws with reference to high-profile, government-sponsored infrastructure projects such as the construction and operation of the examined hydropower dam is even less likely. For example, the power to evaluate the process of conducting environmental impact assessments and, ultimately, approving them—a key tool in the enforcement of substantive as well as procedural aspects of environmental rights—was, until the end of 2020, legally delegated to the very agency overseeing the planning and operation of power generation, creating a clear conflict of interests. We can then tentatively conclude that environmental rights are not

¹²See e.g., Uri Almagor, *Name-Oxen and Ox-Names Among the Dassanetch of Southwest Ethiopia*, 18 PAIDEUMA 79–96 (1972); Lucy Buffavand, “The Land Does Not Like Them:” *Contesting Dispossession in Cosmological Terms in Mela, South-West Ethiopia*, 10 J. OF E. AFR. STUD. 476–93 (2016). YNTISO GEBRE, ENVIRONMENTAL CHANGE, FOOD CRISES AND VIOLENCE IN DASSANECH, SOUTHERN ETHIOPIA (2012).

¹³Interview with Melkamu Ogo, in Addis Ababa, Eth. (Oct. 8, 2021).

enforced, whether the claims are made by individual citizens or are the result of interventions by regulatory authorities.

However, there are instances where rules on environmental rights, such as prior consultation, are relatively better enforced. The source of funding for a particular dam seems to be a good indicator of how seriously environmental standards and procedures will be taken. Early data indicates that where the funding for a dam happens to come from local sources, the rules are routinely ignored. The Head of the Department for Environment and Safety at the Ethiopian Electric Power corporation admitted that the primary motivation for complying with impact assessment procedures and public participation is satisfying funding institutions such as the World Bank.¹⁴ The realization that procedural rules in funding agreements have a better chance of enforcement and real influence than constitutionally entrenched fundamental rights opens a way to developing new questions and hypotheses examining the values attached to the constitutional entrenchment of environmental rights.

C. Environmental Rights in Mongolia—The Case of Mining in South Gobi¹⁵

One would normally expect that constitutionalizing environmental rights would strengthen the overall legal framework on environmental protection and provide positive environmental outcomes.¹⁶ Mongolia's Constitution contains all genres of environmental protection provisions. The substantive right to a healthy environment recognizes that "each citizen has the right to a healthy and safe environment and to be protected against environmental pollution and ecological imbalance."¹⁷ In this regard, the Constitution also establishes the responsibility of the Mongolian government to "undertake measures for the protection of the environment, the sustainable use and restoration of natural resources."¹⁸ In addition, every citizen has the sacred constitutional duty to protect the environment and nature.¹⁹ Furthermore, constitutional amendments enshrine procedural environmental rights, such as the right to access environmental information concerning large-scale extraction activities.²⁰ Following the recognition of the fundamental right to a safe and healthy environment, Mongolia adopted numerous environmental laws, administrative norms, and environmental standards.²¹ Yet all of these measures have failed to provide positive environmental outcomes on the ground.²²

The Mongolian case study focuses on three *soums* (districts), namely Gurvan Tes, Tsogttsetsii, and Khanbogd, all located near large-scale extraction activities in South Gobi *aimag* (province). South Gobi is where Mongolia's most significant coal and copper mines are located, and it suffers from the associated environmental degradation. The Nariin Sukhait coal mining complex, the Tavan Tolgoi coal mines, and the Oyu Tolgoi copper mine, which combined generate close to

¹⁴Interview with Ato Tadesse, in Addis Ababa, Eth. (Nov. 15, 2021).

¹⁵The analysis and conclusions are based on Bayar Dashpurev's field research carried out from September 2021 to February 2022 in South Gobi province (Umnugobi aimag), Mongolia.

¹⁶See BOYD (2012), *supra* note 3; TIM HAYWARD, CONSTITUTIONAL ENVIRONMENTAL RIGHTS (2005).

¹⁷Mongol Ulsiin Undsen Khuuli [CONSTITUTION] 1992, ch. II., art. 16.2: The Right to a Healthy and Safe Environment, and to be Protected Against Environmental Pollution and Ecological Imbalance (Mong.); See unofficial English translation: https://www.constituteproject.org/constitution/Mongolia_2001?lang=en.

¹⁸Mongol Ulsiin Undsen Khuuli [CONSTITUTION] 1992, art. 38.2 (Mong.).

¹⁹*Id.* at art. 17.2.

²⁰*Id.* at art. 6.2.

²¹Mongolia has ratified seventeen of eighteen major international human rights treaties and some two-dozen international environmental conventions and agreements. In addition, the country has passed fifteen major environmental laws, enacted nearly one-hundred environmental administrative norms, and published thirteen policy statements and hundreds of environmental standards.

²²John Knox, the special rapporteur on human rights and the environment, visited Mongolia in 2017 and issued the report depicting insufficient implementation of environmental protection rules. John H. Knox, *The United Nations Mandate on Human Rights and the Environment*, 2 CHINESE J. ENV'T L. 83–92 (2018).

eighty percent of the state's mineral wealth, are located in this part of the country. The communities near these gigantic mines share similar environmental stressors, including displacement, lack of access to water resources and grazing lands, massive soil degradation, dusty soil (*tüüren*²³) and related dust storms, and so forth. One would therefore expect South Gobi to be a place where constitutional environmental rights are claimed and contested. However, such claims and contestations have not been brought to courts or other judicial bodies.

We aim to understand why the local communities prefer not to claim constitutional environmental rights through the judiciary, but do invoke these rights as leverage to negotiate with the state and the corporate entities in South Gobi. The initial findings support the hypothesis that the constitutional environmental rights are not conceptually coherent with the fundamental injustices encountered by these communities in their space. Combining law and anthropology enables us to show the limitations of the law in practice. From a legal perspective, the absence of judicial practice might be related to how local courts implement procedural environmental legal rules in South Gobi. Legal scholars focus on the ways environmental cases reach the judicial system, including (i) individual claims related to concrete violations or potential violations of environmental rights; (ii) public interest litigation pursued by non-governmental organizations and even local governments aimed at protecting the environment in general terms; and (iii) review of the constitutionality of laws, decrees, and other decisions by the *Ulsyn Ikh Khural* (the Mongolian Parliament) and other bodies based on fundamental environmental rights.²⁴ However, tracing these procedural rules with regard to available remedies from a doctrinal perspective misses the specific empirical realities that can have a decisive influence on implementation practices, as the following examples show.

It is challenging for herders from communities affected by mining to demonstrate violations of subjective environmental rights in their setting. In many cases, they cannot recognize or know for certain that their rights have been infringed due to mining and mining-related developments. The power asymmetries between herding families and mining companies are immense. Eighty-nine herding families live near Oyu Tolgoi, the world's third-largest copper mine; some 328 herding families operate near Tavan Tolgoi, the nation's largest coal mine; and close to thirty herding families live in areas adjacent to the Nariin Sukhait mining complex—these are insignificant numbers in the face of the state's major development interests. These herding families are generally composed of two or three members—most of them male—and there are significant distances between the places where they live, which tend to be anywhere from three to ten kilometers from one another.

In addition, beyond customary use rights, there are no clear and concrete legal rights attached to the pastures and natural resources. One herder from Gurvan Tes, near the Nariin Sukhait mining complex, said, "I could not find some of my livestock because a week ago, I went to the *soum* center to join a protest and left my livestock unguarded."²⁵ In contrast to judicial proceedings, political demonstrations, in most instances, last for a couple of days. No herders can leave their livestock for the amount of time it would take to pursue a lengthy judicial process, especially because they have no concrete rights over the resources. These communities avoid claiming environmental rights through formal legal processes for several reasons: They have no knowledge of

²³Locals frequently use the term *tüüren* to refer to fine, sandy soil that easily gives rise to dust and dust storms. This exact word does not appear in the *Modern Mongolian–English Dictionary*. MODERN MONGOLIAN–ENGLISH DICTIONARY (Hangin Gombojav, 1987). Most likely, it derives from the word *tüür*, meaning "dim, vague, not clear"—precisely the visibility conditions when there is a dust storm.

²⁴Numerous procedural rules provide access to the courts, including the *Zakhirgaanii Khereg Shuukhed Hyanan Shiidverlekh Tuhai Khuuli* [ADMIN. CT. PROCEDURE LAW] (2016), arts. 1.1., 52.5.1., and 18.3; the *Baigali orchnyng khamgaalakh tukhai khuuli* [GEN. ENV'T PROTECTION LAW] (1995), art. 32.1; and the Mongol Ulsiin Undsen Khuuli [CONSTITUTION] 1992, arts. 66.1. & 66.2 (Mong.). See also unofficial English translation: =https://www.constituteproject.org/constitution/Mongolia_2001?lang=en.

²⁵Interview with a local herder from Gurvan Tes *soum*, in Umnugobi Province (South Gobi), Mong. (Oct. 30, 2021).

how the legal framework operates; they are generally not immediately aware of potential violations; they are outnumbered and not heard; and legal procedural rules are not convenient for or compatible with the nomadic way of life.

Furthermore, the state and its mining practices have divided these communities into opposing groups, which has prevented them from collaborating and initiating strategic and public interest litigation or pursuing other available legal remedies. There are the *uuguul* (Indigenous) and *suuguul* (newcomers); the *mungu avsan* (those who accept compensation from mining companies) and the *mungu avaagui* (those who reject compensation); the *nuluulliin busiinkhen* (those who reside within mining impact zones) and the *nuluullin busiinkhen bish* (those who do not); the *malchyn* (herders) and the *mal bukhii irgen* (town residents who own livestock but do not herd them themselves). As a result, cooperation and communication between community members is not just limited by geography, but is also hindered by political, social, and cultural arrangements. A herder from Khanbogd *soum* near the Oyu Tolgoi mine observed that “these opposing groups put me in a difficult position to pursue legal remedies.”²⁶ Local meetings end in many unnecessary quarrels because one belongs to an opposing group. As a result, local communities are resigned to the pressing environmental distress and fail to initiate time-sensitive legal proceedings to resolve the critical issues at hand.

In order to have more profound knowledge of these phenomena and how environmental distress leads to marginalizing herding families and making them vulnerable, the research methods had to be expanded to include ethnographic tools focused on the actors on the ground and the analysis of how power is exercised. Combining law and anthropology has provided us with an analytical framework to deconstruct certain legal concepts, such as constitutional environmental rights. Theory in the context of legal anthropology allows us to understand that fundamental substantive and procedural rights are vernacularized, hybridized, and legalized in various social contexts.²⁷

The concept of hybridity is very useful in the Mongolian case study to characterize how attitudes have changed in relation to overarching ideologies.²⁸ Anthropologists take recourse to the framework of hybridity in ways that show how new neoliberal projects intrude on traditional ideologies and vice versa, and how the holders of the traditional ideology indigenize (*mongolchloch*, “Mongolize”) neoliberal conceptions.²⁹ It is fair to conclude that the environmental rights enshrined in the Mongolian Constitution of 1992 did not escape this fate. The language of environmental rights was a legal transplant, and the members of the constitutional convention adopted it without much comment or serious discussion. It is through subsequent practice in specific contexts only that the meaning of constitutional environmental rights has gradually started taking shape.

The South Gobi case study shows that, although legal cases invoking environmental rights are non-existent, the language of environmental rights is relied upon for other means and in different spaces. It seems that the communities, while not using the formal language of the right to a safe

²⁶Interview with Boldmaa Danakhuu (*Tenten akh*) from Khanbogd *soum*, in Umnugobi Province (South Gobi), Mong. (Jan. 12, 2022).

²⁷The various social and cultural contexts change the meaning of rights, as anthropologists have noted in their writings; see, e.g., SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE ix 269 at 3, (2006); MARK GOODALE & SALLY ENGLE MERRY, THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL 384 (2007); RICHARD ASHBY WILSON, CONCLUSION TYRANNOSAURUS LEX: THE ANTHROPOLOGY OF HUMAN RIGHTS AND TRANSNATIONAL LAW, 342–69, (Mark Goodale and Sally Engle Merry eds., 2007).

²⁸Anthropologists have investigated the concept of hybridity in Mongolian contexts from various socio-economic and cultural perspectives. See URADYN E. BULAG, NATIONALISM AND HYBRIDITY IN MONGOLIA, (1998); see also METTE M. HIGH, FEAR AND FORTUNE: SPRIT WORLDS AND EMERGING ECONOMIES IN THE MONGOLIAN GOLD RUSH (2017); Caroline Humphrey, *Chapter 1 Exemplars and Rules: Aspect of the discourse of moralities in Mongolia* (2010) https://www.miasu.socanth.cam.ac.uk/files/humphrey_1997_exemplars_and_rules.pdf.

²⁹BUMOCHIR DULAM, THE STATE, POPULAR MOBILISATION AND GOLD MINING IN MONGOLIA: SHAPING ‘NEOLIBERAL’ POLICIES, (2021).

and healthy environment in their daily communication, make use of these rights in various specific contexts vis-à-vis mining companies, subcontractors, truck drivers, and local and national authorities, including local police officers, local environmental protection officers, the Mongolian Ministry of Transportation, and members of Parliament elected from the local community.

The case study also suggests that communities do not intuitively recognize the need for environmental rights. Rather, they invoke these rights, if at all, simply because they exist in the Constitution. For example, a female herder in Gurvan Tes *soum* in the vicinity of the Nariin Sukhait mining complex, who formerly worked as a pre-school teacher, is known in her community for writing convincing claims related to the rights narrative. She said, “I don’t know much about law and the concept of environmental rights, but the language is extravagant, and it makes my letters sound intelligent.”³⁰

Besides, unless a lawyer raises the language of environmental rights in every interview, it is most likely that the herders themselves will never refer to the rights narrative in their discussions. Instead, herders from these communities use the term *ezen*—rather vague a concept related to “property,” stewardship, and knowledge of a given territory—to justify their claims. The concept of *ezen* comes up in diverse contexts. For example, a herder from Khanbogd *soum* stated, “We have lived in this place many generations. We *ezen* (stewards; masters) can hunt (*avakh*) a small spotted deer from here.”³¹ A herder from Tsogtsetsii *soum* said that “this grazing land is crucial for breeding racehorses; therefore, I, the *ezen*, am responsible for looking after the land.”³² Another herder explained, “Last month, I lost my way coming home. I could not recognize my *ezen* (my own land) because of massive land destruction.”³³ The concept is even used in religious contexts. Some say that *Khanbogd khairkhan*, a mountain, has its own *ezen* (spirit master; higher being), depicted as a beautiful woman riding a white camel. There are many other narratives where the concept of *ezen* is used. The herders try to reconcile *ezen* with the concept of environmental rights.

Even when communities seek to implement constitutional environmental rights in popular mobilization efforts, they invoke the rights in a way that is contrary to the normative understanding. For instance, herding families mobilize environmental rights against incompetent authorities who are not legally obliged to restore their infringed rights. Despite this, herders continue to call for their “environmental rights” in their protests. Thus, environmental rights become leverage to assert their interests to the mining companies, subcontractors, financial institutions, etc. They invoke “environmental rights” to claim loss of livestock, pastureland, *uvuljoo-khavarjaa* (homestead), and access to water sources and to seek compensation and employment, instead of implementing environmental rights to safeguard and improve their environment and nature. For example, in one instance, herding families hung whips on the gates leading to the Oyu Tolgoi copper mine and demanded compensation. On another occasion, herders protested by assembling a traditional yurt in front of the Oyu Tolgoi gates and demanded employment at the mine. In both protests, their justification was that Oyu Tolgoi was responsible for the degradation of the environment, and especially of their pasture lands. One herder who protested these same activities said, “I have two unemployed daughters. The Oyu Tolgoi company must employ them because they have destroyed our land and resources.”³⁴

Positivist legal analysis cannot explain the perspectives of herding families who employ the language of environmental rights to get a job in a mining company, for instance. Thus, mere examination of formal rules does not tell us much about the actual effect on communities.

³⁰Interview with Uranmandakh Tsetsgee from Gurvan Tes *soum*, in South Gobi Province, Mong. (Nov. 2, 2021).

³¹Interview with a herder from Khanbogd *soum*, in South Gobi province, Mong. (Jan. 12, 2022).

³²Interview with a herder from Tsogtsetsii *soum*, in South Gobi province, Mong. (Nov. 25, 2021).

³³Interview with a herder from Tsogtsetsii *soum*, in South Gobi Province, Mong. (Nov. 14, 2021).

³⁴Interviews and observations while attending a protest at the Oyu Tolgoi mine on Jan. 5, 2022.

Ethnographic fieldwork and observations within these families have proven to be valuable tools to seriously address the matter.

Fieldwork in the South Gobi has revealed that herders question whether the state legal order achieves the objectives and purposes it is meant to serve. Direct interactions with herding families near the Oyu Tolgoi mine, the Nariin Sukhait mining complex, and the Tavan Tolgoi mines have shown that the laws of Mongolia cannot adequately address the nature of their struggles in relation to mining developments. As one female herder living in the vicinity of the Oyu Tolgoi mine said, “You should have come in spring the, when we have dust storms. Then you would really feel how herders’ lives and these ‘rights things’³⁵ are in danger.”³⁶ Another male herder near the Tavan Tolgoi mines angrily demanded, “Stop asking questions around these herders’ families; go to the west side of the mine and just sit there for two hours. Then you will understand the herders’ problems and how your laws have failed us.”³⁷ And in fact we did so, and as we sat there, the dust filled our mouths and noses and burned our eyes. After spending a couple of days with a herder’s family at their homestead near the unpaved, dusty roads used to transport coal, a male herder challenged: “What can you do to stop this coal transportation now? Right now? Our lives and livelihoods are in danger! Otherwise, you are just a wanderer for us, a *khereggui amitan* (useless creature)!”³⁸

One question that emerged from the fieldwork is why herders often think of themselves as responsible for protecting nature and the environment. Their responses are related to various competing concepts regarding environmental protection, but never explicitly invoke environmental rights. Testimonies rely heavily on concepts such as *ezen*, which, as stated previously, is closely related to the notion of stewardship and property in the Mongolian context, and *üüreg* (duty), whereby herding families express their sense of their customary responsibility to protect the land and its resources. This sense of duty is even prescribed in the Constitution, which states that “protecting nature is every citizen’s sacred duty (*juramt üüreg*).” However, there is also a rather new and growing sentiment among herding families, that is, that they have exclusive rights and benefit entitlements to natural resources. This sense has been engendered by imported notions such as corporate social responsibility, self-governance, sustainability, etc.

However, the law cannot recognize these herding families’ exclusive access and benefit entitlements over the rest of the public. Therefore, they question whether the legal rules that have been transplanted from other legal systems serve the proper purposes. To them, these legal rules are like a *khereggui amitan* (useless creatures), something that fails to connect with real lives and issues in these places. They demand to know: Where are the environmental rights that are meant to protect their environment? Interdisciplinary research has hence shown the limitations of national law and has obliged us to re-evaluate our approach toward the efficacy of the legal order.

D. Rights of Nature in the Ecuadorian Constitution³⁹

Whereas the Ethiopian and Mongolian cases illustrate a certain detachment of local communities from constitutional environmental rights, our Ecuadorian example is based on a strong pledge by Indigenous peoples for the incorporation of such constitutional rights in the specific format of rights of nature, hence adding to the “right to live in a healthy and ecologically balanced

³⁵In the interview, the herder refers to “rights” as “objects” or “things.”

³⁶Interview with a herder from Khanbogd *soum*, in South Gobi province, Mong. (Oct. 22, 2021).

³⁷Interview with a herder (Odsuren) from Tsogttsetsii *soum*, in South Gobi province, Mong. (Nov. 17, 2021).

³⁸Interview with a herder (Okhinoo) from Tsogttsetsii *soum*, in South Gobi province, Mong. (Nov. 14, 2021).

³⁹This case study was conducted by Dr. Mario G. Aguilera. His postdoctoral research draws on his doctoral thesis on environmental human rights in Latin America and the Caribbean and on his participant observation while advising the Ecuadorian National Assembly (2009–2013), including particularly the Commission on Biodiversity and Natural Resources.

environment.”⁴⁰ A closer look reveals that the result within the state law—Chapter VII of the Constitution—is potentially transformative, but is, in practice, fuzzy, ambiguous, and selective.

In a context of political and social changes in Ecuador, a National Constituent Assembly was convened in 2007, and a new Constitution was adopted in 2008. This process was based on wide public participation and opened the possibility of setting up an intercultural dialogue on development paradigms and discussing historically and structurally asymmetric power relations among people, and between humans and the environment, thereby highlighting the vulnerability of certain sectors of society and nature.⁴¹ As a result, the constitutional designers adopted *buen vivir* or *sumak kawsay*—“the good way of living” in Spanish and Quechua, respectively—as a national state development objective.⁴² Considered a necessary condition for *sumak kawsay*, the 2008 Ecuadorian Constitution also includes legal recognition of “Nature” or *Pacha Mama* (“Mother Earth”) as a rights-bearing subject.⁴³

Within the context of giving legal advice in the Commission of Biodiversity and Natural Resources in the first Ecuadorian Parliament after the approval of the 2008 Constitution, this case study deals with the intrinsic limitations of a doctrinal approach to developing constitutional contents that include Indigenous language, and thus are based on Indigenous knowledge. The study is based on observations and participation in several legislative debates regarding nature protection, including witnessing the Assembly members’ reluctance to discuss or debate the rights of nature, hailing from their lack of understanding of the ontologically different conceptions and practices regarding the relationship between humans and nature.

With the aim of developing the scope and meaning of these rights to address the degradation of the environment and its implications for Indigenous and local communities, whose livelihoods depend on the land and its natural resources, we embarked on an interdisciplinary process for this project. Doctrinal analysis complemented by an anthropological perspective made it possible to revisit the way in which those rights emerged by analyzing the Constituent Assembly’s transcripts and engaging in interviews and conversations with constitution makers, ultimately revealing the values and goals of the actors involved in the constitution-making process.⁴⁴

It is possible to identify two main strands to the emergence of the rights of nature in the 2008 Ecuadorian Constitution. First, is the recognition of these rights as a tool aimed at changing the liberal, market-oriented norms of environmental governance, thereby protecting the rights to existence and to development of human beings. Second, is the recognition of the rights of nature as a product of an intercultural legal translation process that represents the dialogue between the state legal system—including the language of rights—and Indigenous biocultural normative ontologies, which highlight the key role of Indigenous peoples in attaining the national state

⁴⁰CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION OF THE REPUBLIC OF ECUADOR], 2008 (Ecuador). Unofficial English translation: =https://www.constituteproject.org/constitution/Ecuador_2021?lang=en.

⁴¹See Joel I. Colón-Ríos, *The Rights of Nature and the New Latin American Constitutionalism*, N.Z. J. OF PUB. & INT’L L. (2015), Victoria University of Wellington Legal Research Paper No. 119/2017, 107–08, =<https://ssrn.com/abstract=2871584>.

⁴²As noted in the Constituent Assembly’s transcripts, the notion *Sumak Kawsay* is based in the non-anthropocentric Andean Indigenous cosmovision of living in harmony with nature. See Asamblea Nacional Constituyente, *Informe de Mayoría “Capítulo I: Principios General del Régimen de Desarrollo, 7 ‘RÉGIMEN DE DESARROLLO’*, Montecristi (2008). The 2008 Ecuadorian Constitution Preamble states that “We women and men, the sovereign people of Ecuador ... CELEBRATING nature, the Pacha Mama (Mother Earth), of which we are a part and which is vital to our existence, ... CALLING UPON the wisdom of all the cultures that enrich us as a society, ... 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* ...” CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, *supra* note 40, at pmb1.

⁴³See CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, *supra* note 40, at Art. 10 (“Nature shall be the subject of those rights that the Constitution recognizes for it”), Art. 71, 72 (establishing the rights of Nature to include: the rights to integral respect for its existence, to maintain and regenerate its life cycles, structure, functions, and evolutionary processes, and to be restored.)

⁴⁴ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

objective of “the good way of living,” particularly for understanding and implementing the rights of nature.⁴⁵ This background enables us to understand the moral environmental ambivalence found in the Ecuadorian Constitution by simultaneously considering nature a rights-bearing subject and a “resource” instrumental to the country’s developmentalist agenda.⁴⁶

This framework also allows us to reflect on how successfully the Ecuadorian legal system has developed and implemented the rights of nature, what the underlying interests and consequences of such an endeavor are, and whether it has genuinely incorporated Indigenous notions.⁴⁷

In its recent ground-breaking case of Los Cedros Protected Forest, the Ecuadorian Constitutional Court reiterates that, almost thirteen years after the drafting of the Constitution, the content of the rights of nature still seems to be poorly defined, taking only mainstream aspects of the modern environmental law framework into consideration.⁴⁸ In the Court’s view, neither public nor private actors in Ecuador consider the rights of nature to be justiciable. They also fail to adequately apply constitutional environmental principles, such as *in dubio pro natura*, prevention, and precaution.⁴⁹ As a result, the Court felt it necessary to declare explicitly that recognition of *Pacha Mama* as a rights-bearing subject and its rights cannot be considered mere rhetorical lyricism, ideal, or declaration, but a fundamental constitutional value entailing rights with full normative force.⁵⁰ In addition, the Court recalled that the constitutional notion of *Pacha Mama*, which was built upon an intercultural convergence of the knowledge of Indigenous peoples and modern Western science, draws on the universal archetype of the mother and thus recalls the essential relationship between human beings and nature.⁵¹

The Court clarified that the rights of nature protect nature as a legal interest in itself, independent of the benefits it might provide to humanity.⁵² According to the Court, the new juridical model, which moves away from considering nature as a production input, implies that “to harmonize its relationship with nature, it is the human being who adapts appropriately to natural processes and systems, hence the importance of having scientific knowledge and community

⁴⁵See Mario G. Aguilera Bravo, *Human Rights and the Environment in Latin America and the Caribbean: Environmental Human Rights under the American Convention on Human Rights and the Escazú Agreement on Access Rights*, 159 (2021) (Ph.D. Dissertation, Georg-August Universität Göttingen); De Sousa Santos, Boaventura. *La Difícil Construcción de la Plurinacionalidad*, in LOS NUEVOS RETOS DE AMÉRICA LATINA: SOCIALISMO Y SUMAK KAWSAY (2010).

⁴⁶CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, *supra* note 40, at Art. 3.5 (detailing that the state’s prime duties include “planning national development, eliminating poverty, and promoting sustainable development and the equitable redistribution of resources and wealth to enable access to the good way of living.”); see also the Second Chapter “Biodiversity and Natural Resources” of Title VII in the Ecuadorian Constitution, in particular the article 408 in reference to non-renewable natural resources, as goods that can be exploited CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, *supra* note 40. On the “moral ambivalence of ecology,” see DONALD WORSTER, *NATURE’S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS* 256–57 (1992); Vito de Lucia, *Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law*, 27 J. OF ENV’T LAW 99 (2015).

⁴⁷In fact, some commentators perceive the recognition of Indigenous legal conceptions in the constitutional framework as an act of mere window dressing. See Erin Fitz-Henry, *Decolonizing Personhood*, in WILD LAW – IN PRACTICE 142, (Michelle Maloney & Peter Burdon eds., 2014); Mari Margil, *Building an International Movement for Rights of Nature*, in WILD LAW – IN PRACTICE 1429–50, (Michelle Maloney & Peter Burdon eds., 2014); and Louis J. Kotzé and P. Villavicencio Calzadilla, *Somewhere Between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador*, 6 TRANSNAT’L ENV’T L. 401, 426–27 (2017).

⁴⁸Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgment 1149-19-JP/21 of 10 Nov. 2021, =<https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=1149-19-JP/21> (2021); see also Craig M. Kauffman & Pamela Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future*, 79–116 (2021).

⁴⁹Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgment 1149-19-JP/21 of 10 Nov. 2021, ¶¶ 33–34, 58, 145 (2021) =<https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=1149-19-JP/21>.

⁵⁰*Id.* ¶¶ 31, 35.

⁵¹*Id.* ¶¶ 29.

⁵²*Id.* ¶ 42.

knowledge on such processes and systems, especially Indigenous knowledge, due to Indigenous peoples' relationship with nature."⁵³

Despite acknowledging the epistemic authority of Indigenous knowledge, the Court refrained from examining the role that community knowledge holders might have in cases related to the rights of nature. It also failed to consider a right to intercultural dialogue in the context of environmental public participation processes when examining this procedural safeguard within the specific local space.⁵⁴ To declare that the rights of Los Cedros Reserve had been violated by the issuing of mining permits, the Court relied exclusively on "modern scientific evidence," thereby trapping itself in the dominant Western legal understanding of the environment and the narratives on its intrinsic value.⁵⁵ Finally, in the Court's view, human rights and the rights of nature converge in the right to a healthy environment.⁵⁶ As a result, a right to a healthy environment "not only focuses on ensuring adequate environmental conditions for human life, but also protect the components of nature from a biocentric approach."⁵⁷

These conclusions imply that where there are violations of the right to a healthy environment, there will always be violations of the rights of nature, and considering the collective dimension of the right to a healthy environment, they would also imply that where there are violations of the rights of nature, there will also be violations of the former right. As a result, the Court unwittingly drew up an overlapping conceptual similarity between the two categories, which leads to two fundamental questions: What is the added value of the rights of nature when a right to a healthy environment already includes a bio-legal orientation? And what rights should be implemented in a public interest litigation case and why?

The practical consequences of attempting to enshrine Indigenous conceptions of law in a national constitution should not be underestimated. This not only highlights the ethno-cultural diversity of Ecuador and gives concrete expression to legal pluralism—as has also been recognized

⁵³Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgment 1149-19-JP/21 of 10 Nov. 2021, ¶ 52 (2021) = <https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=1149-19-JP/21>; see also Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgment 253-20-JH/22 of Jan. 27, 2022, ¶ 56 (2022).

⁵⁴Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgment 1149-19-JP/21 of 10 Nov. 2021, ¶¶ 253–336 (2021) = <https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=1149-19-JP/21>. For an overview of the recognition of local knowledge, a right to intercultural dialogue, and the potential role of Indigenous and local knowledge holders as experts witnesses under the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean see Mario G. Aguilera Bravo, *Human Rights and the Environment in Latin America and the Caribbean: Environmental Human Rights under the American Convention on Human Rights and the Escazú Agreement on Access Rights*, 186–88 (2021) (Ph.D. dissertation, Georg-August Universität Göttingen).

⁵⁵Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgment 1149-19-JP/21 of 10 Nov. 2021, ¶¶ 55–164, 251 (2021) = <https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=1149-19-JP/21>. In more recent decisions regarding the rights of a river and a monkey, the Court also refrained from referring to Indigenous normativities, following the same Western scientific line of reasoning, according to which nature is a subject of rights in itself, and this quality is shared with all its members, elements, and factors. In this sense, the intrinsic value of nature seen as a whole is projected onto the individual entities that compose it, whose rights depend on the function and role of each of the ecosystems and elements that comprise it. See Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgment 2167-21-EP/22 of Jan. 19, 2022, ¶¶ 118, 121, 127, 134 (2022); Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgment 253-20-JH/ of 27 Jan. 2022, ¶¶ 57, 66, 70.

⁵⁶Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgment 1149-19-JP/21 of 10 Nov. 2021, ¶ 242 (2021) = <https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=1149-19-JP/21>.

⁵⁷*Id.* ¶¶ 51, 242, 339. The Court's reasoning is based particularly on Advisory Opinion 23/17 of the Inter-American Court, according to which the autonomous dimension of the right to a healthy environment protects the components of nature, such as forests, rivers, and seas, as juridical interests in themselves, even in the absence of certainty or evidence of risk to individual persons. See *The Environment and Human Rights*, Advisory Opinion, OC-23/17, Inter-Am. Ct. H.R. (ser. A), ¶ 62 (Nov. 15, 2017); *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, Merits, Reparations, and Costs Judgement, Inter-Am. Ct. H.R. (ser. C), No. 420, ¶ 203 (Feb. 6, 2020); Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgment 253-20-JH/ of January 27, 2022, ¶ 69 (2022) (following the same approach).

in the Constitution⁵⁸—but also confirms the state’s obligations to address Indigenous peoples’ and other local communities’ specific concerns based on their cultural identity and to guarantee consideration of local knowledge and intercultural dialogue. In that regard, it implies a rejection of a uniform legality in Ecuador, the homogenization of its society, and the instrumentalization of culture and custom, which are considered the results of colonialism and capitalist globalization.⁵⁹

In this context, anthropological theories are at hand to challenge the Constitutional Court’s case law and the national legal framework it applies. Without ignoring the important advances made by the Court to protect the environment by implementing an ecosystem approach,⁶⁰ such theories shed light on the fact that, instead of transforming the state law, the Indigenous concepts constitutionally “appropriated” are themselves transformed in order to be more palatable to the state.⁶¹

Therefore, the actual content of the rights of nature in the Ecuadorian case is still contested. While being deployed by the Constitutional Court as an effective mechanism for protecting the environment in recent cases, the rights of nature start to lose relevance when a bio-dimension of the right to a healthy environment is recognized. On the one hand, from a doctrinal perspective, the conceptual overlap between the rights of nature and the right to a healthy environment impedes their implementation in a predictable and uniform way. On the other hand, when considering the second strand of the emergence of the rights of nature, namely recognition of the influence of Indigenous knowledge, it is critical to be open to a multi-layered ethnographic landscape with contrasting and diverging ontologies that are not only related to the protection of the environment, but also to the defense of Indigenous peoples’ legitimate interests, such as the concept of free, prior, and informed consent (FPIC) as a mechanism to guarantee their autonomy or even their sovereignty.⁶²

As long as there is not a deeper understanding and evaluation of the notion of *Pacha Mama* and an openness to the possibility that it is not the *only* embodiment of Indigenous environmental justice notions, the state law remains under-complex. It is here that anthropology can be of great value. In addition to an enormous body of existing literature with “thick” descriptions of the lives, normative systems, and societies of Indigenous peoples the world over, anthropologists have developed sophisticated theoretical and methodological frameworks for investigating Indigenous peoples’ understandings of the human–nature interface and for recognizing the possibility of alternative ontologies among Indigenous peoples. Critical dialogue and translation require acknowledging two important lessons: (i) while the new Ecuadorian constitutionalism must evolve on the basis of some Indigenous legal ontologies, Indigenous normative conceptions are themselves evolving due to their dynamic nature;⁶³ and (ii) that, from a legal pluralism

⁵⁸See CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, *supra* note 40, at art. 57.10 (enshrining the collective right of Indigenous communes, communities, peoples, and nations “[t]o create, develop, apply and practice their own legal system or common law . . .”).

⁵⁹See Peter Fitzpatrick, *Custom as Imperialism*, in *LAW, SOCIETY AND NATIONAL IDENTITY IN AFRICA*. 20–22, (Abun-Nasr, Jamil et al. eds., 1990); Sally Engle Merry, *Law and Colonialism*, 28.2 L. & SOC. REV. 889, 911 (1991).

⁶⁰See Vito de Lucia, *The “Ecosystem Approach” in International Environmental Law: Genealogy and Biopolitics*, 1 ROUTLEDGE L., JUST., & ECOLOGY (2019).

⁶¹On legal transplants, see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW*, (1993); Lena Foljanty, *Legal Transfers as Processes of Cultural Translation: on the Consequences of a Metaphor*, MAX PLANCK INSTIT. FOR EUR. LEGAL HISTORY RSCH. PAPER SERIES (2015).

⁶²In contrast to the failure of state actors to take Indigenous knowledge and ontologies seriously when clarifying the rights of nature, some Indigenous peoples in Ecuador mobilize alternative bio-cultural legal conceptions related to the rights of nature to frame their political interests, as shown by the paradigmatic case of the Sarayaku Indigenous people. For an interdisciplinary analysis of the Sarayaku people’s legal mobilization to protect their right to self-determination, see César Rodríguez-Garavito, & Carlos Baquero-Díaz, *Reframing Indigenous Rights: The Right to Consultation and the Rights of Nature and Future Generations in the Sarayaku Legal Mobilization* (2021), in G. de Burca, ed. *Legal Mobilization for Human Rights*, OXFORD UNIV. PRESS (forthcoming) NYU SCH. L., PUB. L. RSCH. PAPER NO. 22-20, =<https://ssrn.com/abstract=4049329>.

⁶³Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, Merits, Reparations, and Costs Judgement, Inter-Am. Ct. H.R. (ser. C), No. 420, ¶ 240 (Feb. 6, 2020); Corte Constitucional del Ecuador, [Constitutional Court of Ecuador], Judgement No. 1-15-EI/21, Oct. 13, 2021, ¶ 51 (2021).

perspective, there might be non-state normative orderings that can never be fully addressed by state law. All these observations might imply that the legal developments that have followed the 2008 Constitution encapsulate an authority which does not fully come to grips with the full variety of circumstances related to time and space, where many different notions of the relationship between human beings and nature exist.

As a result, further critical empirical field research is required to disentangle the currently prevailing conceptions of the Ecuadorian law aimed at guaranteeing human–nature relationships and other fundamental collective interests and the diverse legal ontologies that, on the ground, mingle in pursuit of these objectives.⁶⁴ Alongside the data collected previously, future outcomes derived from the application of participatory action research (PAR) methodologies in the field⁶⁵ should enable us to focus on interlegal translatability—namely, reformulating the interrelated existing legal concepts based on a process of cross-cultural translation—and on identifying new categories that should be inscribed into the Ecuadorian national legal cartography. This process should be based on a principle of radical interdependence with a view to guaranteeing the shift toward bio-intercultural understandings of the Constitution’s foundational legal concepts.⁶⁶ To what extent these can actually be encapsulated in the law and the national jurisprudence depends on what the Ecuadorian society considers to be fundamental values worth recognizing in state law, which is an ongoing debate.

E. Conclusions: Zooming in on a Moving Target

The three case studies show, each in its own way, that environmental rights are an oscillating concept and a moving target that is difficult to capture with a purely doctrinal approach to law. We witnessed fuzzy and variegated manifestations of rights in some places, and lacunae in other places where we would have expected to find them the most. Translation between local concepts of environmental (in)justice and constitutional law is challenging, and important aspects get lost in the process.

Within local communities that are being exposed to large-scale hydroelectric dams in the South Omo region of Ethiopia and to mining in Mongolia’s Gobi Desert, many different issues are raised. As our research shows, local understandings of fairness and justice depend on the particular situation and on the specific constellations of values, traditions, customs, norms, and forms of political organization. Often the divergence between available environmental rights and the concerns expressed appears to be primarily due to serious institutional or rule-of-law deficiencies that frustrate or even deter efforts to engage with such rights against states. Sometimes this is due to lack of effectiveness, sometimes it is out of fear of retaliation and personal consequences, such as persecution. As in the case of Ethiopia, there may not be adequate democratic space to allow the operation of environmental NGOs, which typically initiate litigations. Occasionally, there is simply a lack of knowledge of available constitutional guarantees.

⁶⁴Many studies show that the investigation of law in the post-colonial world requires exploring how Western legal systems interact with existing systems and the new forms of law that emerge. See Sally Merry, *Law and Colonialism*, *supra* note 59, at 918. Relevant references regarding scholarship in this area include: Larissa Vetter and Marie-Claire Foblets, *Culture All Around? Contextualising Anthropological Expertise in European Courtroom Settings*, 12 INT’L J. L. CONTEXT 272–292 (2016); Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 L. & SOC’Y REV. 389 (2004); and B. Berg & H. Lune, *QUALITATIVE RESEARCH METHODS FOR THE SOCIAL SCIENCES* (9th ed., 2017); Rachel L. Ellett, Jennifer Esperanza & Diep Phan, *Fostering Interdisciplinary Thinking Through an International Development Case Study*, 12 J. POL. SCI. EDUC. 128–40 (2016).

⁶⁵See Lieselotte Viaene, *Indigenous Water Ontologies, Hydro-Development and the Human/ More-Than-Human Right to Water: A Call for Critical Engagement with Plurilegal Water Realities*, 13 WATER 1660 (2021), <https://doi.org/10.3390/w13121660>.

⁶⁶On the principle of radical interdependence, see Iván Darías Vargas Roncancio, *Conjuring Sentient Being and Relations in the Law: Rights of Nature and a Comparative Praxis of Legal Cosmologies in Latin America*, in FROM ENVIRONMENTAL TO ECOLOGICAL LAW, (Kirsten Anker, Peter D. Burdon, Geoffrey Garver, Michelle Maloney & Carla Sbert eds., 2020).

In other cases, the perceived economic benefits seem to outweigh the environmental burden of industrial activities—as with, for example, mining activities in South Gobi—and there is a fear of losing an economically powerful company as an employer that can generate benefits for the community. Material living conditions matter substantially and may in the concrete case override environmental concerns that are projected onto communities by outside environmentalists. Concerns may then be related rather to other fundamental needs, such as access to work, food, water, electricity, health care, education, etc., many of which are—allegedly or in fact—being provided through the company. In some instances, as we observed around mines in Mongolia’s South Gobi province, people operationalize the right to a sound environment in a way that is contrary to the spirit of the idea, that is, they instrumentalize the right to claim compensation for damage from the company.

Sometimes, the causes run even deeper, having to do with the way communities understand their relationship to nature. For instance, they may, as in the Mongolian context, employ custodian ideas, meaning that people leading nomadic lives do not claim environmental protection from the government, but rather feel a personal sense of responsibility vis-à-vis nature that can no longer be fulfilled where big companies step in and heavily affect the environment and the living conditions. International NGOs may invoke environmental rights to make model claims that they use to push the agenda toward global environmental governance. They can rely on guarantees in the constitution that are the result of the translation and importation of norms from a completely different context. Such transplants are intended to express a high degree of domestic observance of international standards, but may well not resonate with the constitutional structure and other norms entailed in it, let alone with local perceptions of environmental justice and injustice. Adopting environmental norms in the constitution might sometimes be more geared toward accommodating actual or presumed expectations of the international community—for example, investors and potentially donors—than toward actually alleviating the environmental stress experienced by the most vulnerable parts of the population. By contrast, countries with a strong rule of law are often the most cautious when adopting environmental rights, even where there is high acceptance of environmental protection in the society, because they know that the rights could be effectively used against the state in courts of law.

But there are also narratives about strong reliance on environmental rights, even rights of nature, both in the drafting of a constitution and its subsequent application by the courts. Indigenous communities in Ecuador have actively influenced the process whereby the rights of nature have been recognized in the constitution. They exist in parallel to the “right of the population to live in a healthy and ecologically balanced environment.”⁶⁷ However, the government has not been able to fully come to grips with differing legalities related to these rights. State law finds it difficult to capture them and to make them commensurate with its own system. This is partially due to the fact that there are so many notions related to the protection of rights of nature within Indigenous communities, and the concept of *Pacha Mama* is merely one of them. Moreover, the government and the Constitutional Court have had difficulties in their efforts to operationalize the rights of nature and to distinguish them from the right to a sound environment. Taking Indigenous knowledge seriously implies embarking on an interlegal translation process grounded in a bottom-up co-theorization of the ontological legalities revolving around human relations to nature.⁶⁸

A proper dialogue and interaction of different views and knowledges would mean identifying normative arguments not only for differentiating the rights of nature from a right to a healthy environment and other environmental human rights, but also for potentially shifting from an anthropocentric approach toward an anthropologically informed biocultural conception of the law—with all the difficulties that this would entail. In this regard, the Ecuadorian case might serve

⁶⁷CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, *supra* note 40, at art. 14.

⁶⁸See Viaene, *supra* note 65, at 15–19.

to illustrate that the comparative understanding of diverse legal ontologies leads to fundamental changes in the way society is regulated, and hence how the law is seen.⁶⁹ Forcing a confrontation between such competing ontologies may even expose some inconvenient truths about the rights discourse, such as that it is ill-suited to encapsulating holistic notions of human unity with nature or that it creates political rather than legal challenges.⁷⁰

The ethnographic research thus emerges not only as a possibility for investigation, but as the apposite provider of methodological tools to answer whether Indigenous legal ontologies converge or conflict with rights of nature and whether accommodating them in the law presents any added value to the other fundamental environmental rights that already exist—including the right to a healthy environment.⁷¹ At the same time, one should not forget that, sometimes, the agenda—hidden or not—behind claiming rights of nature might be to assert Indigenous claims to autonomy, or even sovereignty, over a specific territory. This may be completely legitimate, but it would be a politically strategic use of a concept that has gained a lot of traction internationally.

Pointing out the variety of environmental justice conceptions found in the field and the fact that they frequently do not correspond to constitutional environmental rights is not at all tantamount to saying that environmental rights as promoted within the United Nations—through the General Assembly, the Human Rights Council or the Special Rapporteur on Human Rights and the Environment⁷²—and within the international NGO community are ineffective or a bad idea *per se*. They enjoy increasingly strong international support and may very well become an important part of a more coherent and comprehensive global answer to environmental degradation, particularly in times of increasing challenges to the atmosphere, air, soil, water, forests, biodiversity, and so forth. However, we need to distinguish between global environmental governance and local specifics, particularly when we express global governance issues as individual or collective rights claims. Unless we consider human rights as a mere political battle cry, we cannot simply assume that environmental stress is aptly articulated through a new human right—or even the rights of nature—or that environmental rights aptly encapsulate fundamental experiences of injustice in the best possible way.

Obviously, there are other reasons why a human right may be very useful, the protective dimension of what the state must do in order to actively avoid and combat environmental degradation resulting from private sources being just one of them. In addition to obliging states to protect nature, human rights empower individuals and groups to hold public actors accountable for this obligation and to participate in environmental decision-making. Furthermore, there may well be a learning effect in the sense that new rights need some time to gain the necessary traction on the ground. Finally, the case studies that we have undertaken are by no means comprehensive, and there may be many scenarios where environmental rights will prove to be of the utmost importance. Catering to rule-of-law deficiencies is certainly one important step to make reliance on environmental rights more likely.

⁶⁹On the notion of “fabrication” understood as the process of creating and giving content to new legal categories, see LAW, ANTHROPOLOGY AND THE CONSTITUTION OF THE SOCIAL (Alain Pottage & Martha Mundy eds., 2004).

⁷⁰For an overview of the difficulties international human rights theory poses for the introduction of ecological limitations into international human rights law, see Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law*, 10 GEO INT’L ENV’T L. REV. 309 (1998).

⁷¹On the current trend toward “the empirical turn in international legal scholarship,” see Viaene, *supra* note 65, at 18–19.

⁷²United Nations General Assembly (UNGA), The human right to a clean, healthy, and sustainable environment (26 July 2022), A/76/L.75. See also the press release of UN on the GA Resolution Press Release, General Assembly, With 161 Votes in Favour, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right, U.N. Press Release GA/12437 (July 28, 2022) <https://press.un.org/en/2022/ga12437.doc.htm>; G.A. Res., 48/13, *The Human Right to a Clean, Healthy and Sustainable Environment* (18 Oct. 2021); see also the remarks by David Boyds, the UN Special Rapporteur on human rights and the environment, on the UNGA and the HRC Resolutions: <https://www.ohchr.org/en/press-releases/2022/07/historic-day-human-rights-and-healthy-planet-un-expert>; <https://www.ohchr.org/en/press-releases/2021/10/un-recognition-human-right-healthy-environment-gives-hope-planets-future>.

Nevertheless, the onus of generating new human rights or even rights of nature, with the added difficulty of determining what precisely in nature is protected and who can make claims on behalf of nature, is very heavy indeed. Therefore, in order to avoid a fundamental rights inflation, we have to show what concrete value they add to well-established, yet often poorly implemented rights, such as the rights to life, food, water, work, health care, etc. There may well be a case for it, but that needs to be shown further in practice. Combining the methods of law and anthropology to examine local contexts and the multiple direct or indirect manifestations of environmental justice traveling between local views and state law is one valuable, perhaps even indispensable, way to contribute to that endeavor.