Transnational Environmental Law, 6:3 (2017), pp. 401–433 © 2017 Cambridge University Press
doi:10.1017/S2047102517000061

ARTICLE

Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador

Louis J. Kotzé* and Paola Villavicencio Calzadilla**

First published online 23 March 2017

Abstract
Today, numerous constitutions provide for a rights-based approach to environmental protection. Based as they are on an instrumentalist rationality that seeks to promote human entitlements to nature, the majority of these rights remain anthropocentric. Although there are growing calls within academic and activist circles to reorient rights alongside an ecocentric ontology, only one country to date has taken the bold step to bestow rights on nature in its constitution. The Ecuadorian Constitution of 2008 announces the transition from a juridical anthropocentric orientation to an ecocentric position by recognizing enforceable rights of nature. This article critically reflects on the legal significance of granting rights to nature, with specific reference to Ecuador's constitutional experiment. It first provides a contextual description of rights in an attempt to illustrate their anthropogenic genesis, and then explores the notion of environmental rights. The following part traces the discourse that has developed over the years in relation to the rights of nature by revealing aspects of an ecocentric counter-narrative. The final part focuses specifically on the Ecuadorian constitutional regime and provides (i) a historical-contextual discussion of the events that led to the adoption of the rights of nature; (ii) an analysis of the constitutional provisions directly and indirectly related to the rights of nature; and (iii) a critical appraisal of whether those provisions, so far, measure up to the rhetoric of constitutional ecocentric rights of nature in that country.

Keywords: Anthropocentrism, Ecocentrism, Rights of nature, Constitution of Ecuador, Ecological constitutional state, Environmental constitutionalism

* Faculty of Law, North-West University, Potchefstroom (South Africa), and University of Lincoln (United Kingdom).
Email: Louis.Kotze@nwu.ac.za.

** North-West University, Potchefstroom (South Africa).
Email: p_villavicencio@hotmail.com.

The generous financial assistance of the North-West University and the National Research Foundation that made this research possible is gratefully acknowledged. We also wish to thank (in no particular order) Klaus Bosselmann, Linda Sheehan, Sam Adelman, David Boyd, Lynda Collins, Erin Daly, Josh Gellers, Peter Burdon, Anna Grear, Francois Venter, and Vito De Lucia for their very useful comments on an earlier version of this article. All views and errors are our own.

1. INTRODUCTION

Over the years, many domestic constitutions have elevated environmental protection from the statutory level to the superior, constitutional level.[1] While the absence of constitutional provisions in any given legal order by no means implies the absence of environmental protection,[2] the gradual constitutionalization of environmental law has become a popular strategy to augment environmental care through the perceived power of constitutionalism.[3] This is premised on the belief that a constitutional approach to environmental protection (or environmental constitutionalism) – of which there are ample examples – has improved a number of domestic environmental governance regimes and has made a positive contribution to the outcomes that environmental law and governance seek to achieve.[4]

With the consistent growth of constitutional regimes and a concomitant increase in sensitization towards environmental protection, it hardly comes as a surprise that the rights-based approach to environmental protection has gained traction in recent years. As the predominant focus of environmental constitutionalism, the environmental rights paradigm has grown impressively, both as a field of analytical enquiry and as a normative project of environmental constitutionalism. Today, approximately three quarters of the world's constitutions contain references to environmental rights and responsibilities;[5] and various scholars have made important contributions to the analytical development of the environmental rights paradigm.[6] While the jury is still out on the actual impact that environmental rights achieve in practice, there is a general view that:

> … constitutionalization of environmental protection as a fundamental right remains attractive. People generally assume that rights, especially those enshrined in the constitution, embody values that cannot easily be compromised. The environmental cause might benefit were people to regard environmental protection as the substance of a constitutional right.[7]

An important consideration for our present purposes is that throughout these developments, and despite sustained critique, environmental rights have remained resolutely anthropocentric.[8] Anthropocentrism describes the centrality and privileged

---

1 D. Boyd, 'Constitutions, Human Rights, and the Environment: National Approaches', in A. Grear & L. Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015), pp. 170–99.

2 J. May & E. Daly, *Global Environmental Constitutionalism* (Cambridge University Press, 2015), p. 36.

3 For a general discussion see L. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart, 2016).

4 For a detailed account see Boyd, n. 1 above.

5 D Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (University of British Columbia Press, 2012), p. 47.

6 E.g., T. Hayward, *Constitutional Environmental Rights* (Oxford University Press, 2005); S. Turner, *A Global Environmental Right* (Routledge, 2014); D. Shelton (ed.), *Human Rights and the Environment, Volumes I and II* (Edward Elgar, 2011).

7 H.S. Cho & O. Pedersen, 'Environmental Rights and Future Generations', in M. Tushnet, T. Fleiner & C. Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge, 2013), pp. 401–12, at 404.

8 L. Kotzé, 'Human Rights and the Environment in the Anthropocene' (2014) 1(3) *Anthropocene Review*, pp. 252–75.

position of humanity vis-à-vis the rest of the world; it 'has fundamentally informed not only the way modern law constructs, categorizes and orders nature, but also the manner in which law *protects* nature'[9] primarily for the benefit of people and not for the sake of nature itself. Thus, anthropocentric law and its embedded juridical constructs of rights, based mostly on the notions of instrumentalist rationality and the property-owning human being, have become tools that legally create human entitlements to the environment, that justify and legitimize these entitlements, and that strengthen them through laying (in most instances *constitutional*) claims to the environment and its benefits to human development as of right. Indeed, in the context of many anthropocentric rights, '[t]he image of nature that emerges … is that of a lifeless, inert machine that exists to satisfy the needs, desires (and greed) of human beings'.[10]

Such a resolutely anthropocentric ideological orientation of rights is seen to allow, legitimize and reinforce the type of unrestricted anthropocentric behaviour that many now believe is pushing Earth into a new geological epoch known as the Anthropocene.[11] In the Anthropocene, the anthropocentrism of environmental law more generally, and rights specifically, is considered to justify and promote ecological ravaging; aggravate the enclosure of the commons; justify and increase the dispossession of indigenous peoples; perpetuate corporate neoliberalism and neo-colonialism; and intensify asymmetrically distributed patterns of advantage and disadvantage that prevail in society, while deepening inter- and intra-species hierarchies.[12] Essentially these hierarchies are systems of obedience and command, including 'domination of the young by the old, of women by men, of one ethnic group by another, of the wealthy over the poor … of human beings over nature';[13] and of the present generation over the future generation. At the same time, however, the Anthropocene is being deployed as a powerful trope that conveys human responsibility to counter an escalating human-induced global socio-ecological crisis. Following Thomas Berry's Earth Jurisprudence,[14] Burdon says that, amidst this crisis, '[t]he challenge is to place the meta context of the whole planet and its ecological correlations at the centre of our ethical thinking, rather than humanity alone'.[15] This is essentially an ethical-moral responsibility that could find tangible expression through, among other ideas, non-anthropocentric, or ecocentric conceptions of rights (also expressed as 'rights of nature').[16]

---

9 V. De Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27(1) *Journal of Environmental Law*, pp. 91–117, at 95.

10 P. Burdon, 'The Earth Community and Ecological Jurisprudence' (2013) 3(5) *Oñati Socio-Legal Series*, pp. 815–37, at 818.

11 L. Kotzé, 'Rethinking Global Environmental Law and Governance in the Anthropocene' (2014) 32(2) *Journal of Energy and Natural Resources Law*, pp. 121–56.

12 A. Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on "Anthropocentric" Law and Anthropocene "Humanity"' (2015) 26(3) *Law and Critique*, pp. 225–49.

13 P. Burdon, 'Earth Jurisprudence and the Project of Earth Democracy', in M. Maloney & P. Burdon (eds), *Wild Law: In Practice* (Routledge, 2014), pp. 19–30, at 20.

14 T. Berry, *The Great Work: Our Way into the Future* (Bell Tower, 1999).

15 Burdon, n. 10 above, p. 823.

16 Grear, n. 12 above, p. 227.

Among a growing – if still fledgling – narrative driven by several visionaries,[17] one country offers a notable exception to anthropocentric environmental rights. Ecuador has recently bestowed rights on nature through its constitution. The Ecuadorian Constitution of 2008[18] announces the transition from a juridical anthropocentric orientation to an ecocentric position. It is the first, and remains the only, constitution in the world to recognize enforceable rights of nature (*Pachamama* or the Incan mother-goddess). Rühs and Jones believe that '[f]inding nature's rights acknowledged legally is quite different from claiming such rights on the basis of ethical considerations'.[19] The Constitution of Ecuador provides an example of how an abstract ethical acknowledgement of nature's rights could manifest concretely in the legal sphere. On paper at least, such a groundbreaking constitutional construction is a historical and potentially transcendent step towards recognizing the inherent ecological integrity and value of nature as a subject of law and a bearer of rights, instead of nature simply being relegated to an object of protection for the instrumentalist benefit of 'man', who is (still) the only legitimate subject of law, bearer of rights and recipient of the objectifying regulatory protection and benefits of law.[20] The constitutional rights of nature in Ecuador are a clear expression of an ecocentrist rights orientation, contrasting starkly with the anthropocentric ontology of rights that justifies, enables and intensifies human entitlements to a Cartesian-like mastery of nature.

As an addition to the recent assessment by Borràs of the development of ecocentric rights of nature in this journal,[21] we critically reflect here on the legal significance of granting nature rights, with specific reference to Ecuador's constitutional experiment. We do so within the broader context of an ecocentric narrative as our ideological point of departure. There are other examples of legal systems that have granted rights to nature,[22] such as Bolivia's statutory Law of the Rights of Mother Earth of 2010 and the Framework Law of Mother Earth and Integral Development for Living Well of 2012;[23] several local laws in some states in the United States;[24] New Zealand's 2014 deed of settlement to grant legal personhood to its Whanganui River;[25] and its

17 See the authorities cited throughout this article.

18 Constitution of the Republic of Ecuador, Official Registry No. 449, 20 Oct. 2008.

19 N. Rhüs & A. Jones, 'The Implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature' (2016) 8(174) *Sustainability*, pp. 1–19, at 2.

20 Ecuador's constitutional innovation has even recently been recognized by the United Nations General Assembly (UNGA) in a Draft Resolution: UNGA, 'Sustainable Development: Harmony with Nature', UN Doc. A/70/472/Add.7, 14 Dec. 2015, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/70/472/Add.7.

21 S. Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) *Transnational Environmental Law*, pp. 113–43.

22 E.g., indigenous people in Canada have provided for the rights of nature in their indigenous legal systems for many years; for a comprehensive discussion, see J. Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, 2010).

23 Bolivia, Plurinational Legislative Assembly, Law 071 of the Plurinational State of 21 Dec. 2010, and Law 300 of the Plurinational State of 15 Oct. 2012.

24 M. Margil, 'Building an International Movement for Rights of Nature', in Maloney & Burdon, n. 13 above, pp. 149–60, at 153–6.

25 Whanganui River Deed of Settlement, 5 Aug. 2014, available at: https://www.govt.nz/treaty-settlement-documents/whanganui-iwi. For a discussion see C.I. Magallanes, 'Reflecting on Cosmology and Environmental Protection: Maori Cultural Rights in Aotearoa New Zealand', in Grear & Kotzé, n. 1 above, pp. 274–308.

recent Te Urewera Act of 2014, which aims to 'establish and preserve in perpetuity a legal identity and protected status for Te Urewera [an area on the North Island of New Zealand] for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance'.[26] For our present purposes, however, the discussion traces its argument within the environmental constitutionalism paradigm and focuses on Ecuador as the only country to date to have constitutionally entrenched the rights of nature. While other commentators have written on ecocentrism, the rights of nature, and even the rights of nature in Ecuador,[27] we aim to offer here a particularly deep critique of the anthropocentrism of constitutionalism and of rights; a systematic motivation for opening epistemological closures that are shutting out alternative ontological orientations of rights (such as ecocentric rights of nature); and, measured against the foregoing, a critical appraisal of how constitutional ecocentric rights of nature are playing out in practice.

We commence in Section 2 with a brief general contextual description of rights as a background to the main discussion, attempting specifically to illustrate the anthropogenic genesis of rights. Section 3 explores environmental rights and highlights that the majority of these rights remain resolutely anthropocentric. Section 4 traces the discourse that has developed over the years in relation to the rights of nature by revealing aspects of the ecocentric counter-narrative that confronts head-on the prevailing anthropocentric ontology of environmental rights. In Section 5 we focus on the Ecuadorian constitutional regime and provide (i) a historical-contextual discussion of the events that led to the adoption of the rights of nature; (ii) an analysis of the constitutional provisions directly and indirectly related to the rights of nature; and (iii) a critical appraisal of whether or not those provisions, to date, have measured up to the rhetoric of constitutional ecocentric rights of nature in that country. We conclude that while the constitutionalization of rights of nature in Ecuador has not yet led to better environmental outcomes generally in that country, it is a positive step towards rethinking the central dominance of people in the Earth system – a dominance that will also have to be challenged through constitutions. We also believe that indigenous cosmovisions, such as those in Ecuador's Constitution, may have the potential to infiltrate Western liberal constitutional notions and to change the ontology of environmental constitutionalism and of rights at their core.

2. SOME THOUGHTS ON RIGHTS

Henkin famously suggested that:

> [o]urs is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance … It is significant that all states and societies have been prepared to accept human rights as the norm, rendering deviations abnormal, and requiring governments to conceal and deny, or show cause, lest they stand condemned … the suspension of rights is the touchstone and measure of abnormality.[28]

[26] Public Act 2014 No. 51, Art. 4, available at: http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183601.html.

[27] See, among others, the various authorities cited throughout this article.

[28] L. Henkin, *The Age of Rights* (Columbia University Press, 1990), pp. vii–x.

https://doi.org/10.1017/S2047102517000061 Published online by Cambridge University Press

What are rights, those amorphous (yet powerful, normatively superior) legal abstractions or 'ideas' that are the main referent of the present enquiry? More than any other juridical construct, rights (most often expressed as *human* rights as a result of their historical international law roots)[29] postulate the idea that people have certain universal (belonging to everyone everywhere), inborn (the fact of being *human* bestows a right), inalienable and imprescriptible claims (rights cannot be transferred, forfeited, waived or lost through their not being claimed), which may not be infringed by governments or by other persons.[30]

Deriving historically from early natural law theories, the claims of rights relate to benefits essential for freedom, liberty, well-being and human dignity, thus epitomizing the central ideology and anthropocentric ontology of constitutionalism itself – namely, the protection of the human individual from abuses of power and the full realization of being human. Rights derive their special, elevated status from the dignity that is inherent in every human being (*dignitas humana*) and are considered to be the foundation of every society, the source of regime legitimization, and the point of departure for social ordering.[31] Claims 'as of right', and indeed the idea of rights, have been fashioned around the achievement of the ideals of equality, humanism, abstracted individualism, and liberalism. This reflects the core human concern of rights within the anthropocentrically preoccupied constitutionalism paradigm. As testimony to their prominence, rights have become a central existential justification of a new world order made possible in large part by the United Nations (UN) and the Universal Declaration of Human Rights in 1948, which resulted in what Loughlin refers to as a post-Second World War 'rights revolution'.[32] The overwhelming majority of domestic constitutions provides for basic rights, and the bulk of constitutional theory and critique is dedicated to the issue of rights.

The foregoing reflects mostly on the positive attributes and virtuous perceptions associated with rights in the constitutionalism paradigm, but considerable criticism has been levelled against rights, which is also broadly suggestive of the anthropocentric constitutional mould within which rights are cast. For example, the idea of rights is often criticized because of its predominantly liberal Western characteristics, which fail to account for indigenous non-Western cultures, concerns and alternative modes of care.[33] The promotion and protection of human dignity through claims to material well-being are seen to lie at the core of rights with well-being achieved mostly through increased economic security and proprietary claims, which increases consumption activities.[34] Rights accordingly provide the justificatory basis for human mastery over a world that is

29 See, e.g., the language of the UN Universal Declaration of Human Rights, Paris (France), 10 Dec. 1948, available at: http://www.un.org/en/universal-declaration-human-rights.

30 F. Venter, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (Juta, 2000), p. 127.

31 U. di Fabio, 'Verfassungsstaat und Weltrecht' (2008) 39(2–3) *Rechtstheorie*, pp. 399–418, at 408.

32 M. Loughlin, 'What is Constitutionalisation?', in P. Dobner & M. Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press, 2010), p. 62.

33 S. Petersen, 'Whose Rights? A Critique of the "Givens" in Human Rights Discourse' (1990) XV *Alternatives*, pp. 303–44, at 305, 308.

34 Ibid., p. 310.

https://doi.org/10.1017/S2047102517000061 Published online by Cambridge University Press

seen as external to and removed from the human being. This creates unbridled and constitutionally sanctioned possibilities for certain privileged people to exploit everything that is not human.[35] Because rights protect individual autonomy (an idea firmly established by earlier theorists such as Descartes, Locke, and Rousseau),[36] they may counter efforts that seek to foster harmonious interdependence not only between people, but also between human and non-human entities.[37] Sometimes, the origin of rights is understood to have religious roots, in which case they may be exercised perversely to justify unjustifiable but religiously sanctioned encroachments on the rights and interests of others.[38] Because the socio-economic, political and legal change that rights seek to achieve in constitutional orders is not always immediately apparent, rights have understandably been described as 'all rhetoric and exhortation',[39] often leading to insignificant concrete improvements to the many vulnerabilities they were designed to address in the first place. It is also true that some countries enshrine rights in their constitutions, but do so merely to window-dress and to conceal rights abuses from the outside world.[40] Their commitment to rights protection is decidedly 'less than authentic and whole hearted'.[41]

The almost universal appeal of rights nevertheless remains intact, even in the face of criticism. Ignatieff correctly suggests that the problems with rights 'as a language of the good are well known, but no better language is likely to be found'.[42] Despite their many limitations as well as legitimate criticism, rights remain enduringly valuable juridical constructs in a normative sense, and will continue to form crucial elements of domestic constitutional systems more generally, of the idea of constitutionalism itself, and of the law.

3. ANTHROPOCENTRIC ENVIRONMENTAL HUMAN RIGHTS

The mushrooming of rights in domestic legal orders is particularly apparent in the environmental law and governance domain, as rights are increasingly seen as useful, and potentially more effective, juridical constructs to ensure environmental protection. To this end, as premier mechanisms possessing unique juridical, ethical and moral characteristics, rights are elevated within the legal order as protective

35 The idea of mastery over nature is said to have its roots in the work of Francis Bacon, who professed the need to change nature and to make it subservient to the needs, desires and benefit of man: A. Gillespie, *International Environmental Law, Policy and Ethics* (Oxford University Press, 1997), Pt II 'Anthropocentrism', pp. 4–13.

36 Ibid., p. 7.

37 C. Gearty, 'Do Human Rights Help or Hinder Environmental Protection?' (2010) 1(1) *Journal of Human Rights and the Environment*, pp. 7–22, at 8.

38 S. Jerome, 'The Philosophical Foundations of Human Rights' (1998) 20(2) *Human Rights Quarterly*, pp. 201–34, at 205–6.

39 Henkin, n. 28 above, p. 27.

40 P. Häberle, 'The Constitutional State and its Reform Requirements' (2000) 13(1) *Ratio Juris*, pp. 77–94, at 86.

41 Henkin, n. 28 above, p. 28.

42 M. Ignatieff, 'Reimagining a Global Ethic' (2012) 26(1) *Ethics and International Affairs*, pp. 7–19, at 7.

meta-values, and are thus able to perform a singular, and potentially powerful mediating role in the human/environment interface.[43]

The increased popularity of rights as means to augment environmental protection is evident from the fact that the environment was not a regulatory concern during the first significant global constitutional moment that saw the almost universal endorsement, if not blanket global adoption, of an impressive catalogue of human rights following the 1948 Universal Declaration of Human Rights.[44] Environmental rights only really began to feature in domestic constitutional orders following the UN Conference on the Human Environment in 1972, which provided the impetus for couching environmental concerns in rights terms through Principle 1 of the Stockholm Declaration on the Human Environment.[45] The anthropocentrism of environmental rights was already evident from the Conference's emphasis on the *human* environment, and from several provisions in the Declaration stating, for example, 'of all things in the world, people are the most precious'.[46] Building on this important historical marker in global environmental law, politics and diplomacy, it took only a relatively short period of time for anthropocentric modes of environmental 'protection' to emerge.

Most human rights and the constitutions in which they are entrenched have not embraced the notion of ecocentrism (also expressed as 'rights of nature') in any meaningful way. One reason for this is because of the majority of legal systems' deep anthropocentric ideological commitments and ontological grounding that are being reinforced by a neoliberal growth-without-limits agenda and that steadfastedly shut out alterative ecocentric potentialities for law.[47]

Another reason for the anthropocentrism of environmental rights could be attributed to the tenuous relationship between law (*nomos*) and the environment (*physis)*:

> It is … difficult to discern in this reflection [on the link between *nomos* and *physis*] a real interest in external nature; the proper domain of law is indicated in the social nature of man – 'ubi societas ibi ius' – and the nature from which natural law has drafted its own directions is not external nature, but human nature … the extraneousness of nature to law, far from being translated into neutrality, has been the powerful vehicle of an attitude of dominion and reification.[48]

---

43 L. Kotzé, 'Human Rights and the Environment through an Environmental Constitutionalism Lens', in Grear & Kotzé, n. 1 above, pp. 145–69.

44 N. 29 above. L. Kotzé, 'The Anthropocene's Global Environmental Constitutional Moment' (2014) 25(1) *Yearbook of International Environmental Law*, pp. 24–60.

45 Stockholm (Sweden), 5–16 June 1972 (Stockholm Declaration), available at: http://www.unep.org/documents.multilingual/default.asp?documentid=97&articleid=1503.

46 The Stockholm Declaration (ibid.) continues its anthropocentric narrative in optimistic terms of unbridled hubris in para 5: 'It is the people that propel social progress, create social wealth, develop science and technology and, through their hard work, continuously transform the human environment. Along with social progress and the advance of production, science and technology, the capability of man to improve the environment increases with each passing day'.

47 A. Grear, 'Challenging Corporate "Humanity": Legal Disembodiment, Embodiment and Human Rights' (2007) 7(3) *Human Rights Law Review*, pp. 511–43.

48 M. Tallacchini, 'Human Right to the Environment or Rights of Nature?', in R. Martin & G. Sprenger (eds), *Rights: Proceedings of the 17th World Congress of the International Association for Philosophy of Law and Social Philosophy, Volume I* (Franz Steiner Verlag, 1997), pp. 125–33, at 126.

Any such closed epistemologies and exclusionary, objectifying ontologies of law mean that law, and by implication rights, are concerned predominantly with relations between individuals, between communities, between states, and between elementary groupings of these categories.[49] Law focuses mostly on the relationship between human and non-human entities as far as non-humans could be owned as objects and used to advance the human project; law does not concern itself with the protection of non-human entities in their own right. Inevitably, then, because non-human entities as a general rule are not granted independent and intrinsic worth, they are wide open to exploitation and destruction. Because they are often granted economic worth in which claims of property vest, their exploitation is sanctioned, legitimized and actively promoted through law and its construct of rights.[50] As Tallacchini suggests:

> The intimately predatory attitude of law concerning nature – an attitude of which even subjective rights bear a reflection, since they have their own paradigm in property – is certainly not a reassuring premise for the defense of the environment: the epistemological assumptions of law seem too compromised with anthropocentrism.[51]

One of many examples of a classic anthropocentric environmental human right is Section 24 of the Constitution of the Republic of South Africa, 1996, which states:

> 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.[52]

This provision constitutionally entrenches, at the highest juridical level, the right of human beings (aptly captured in the term 'everyone') to the benefit of an objectified environment that is removed from them and that, in an instrumental way, must promote human health and well-being for those alive today and for those who are assumed to come tomorrow (even though the exact parameters of the latter category are not known and arguably can never be known). The inclusion of the terms 'health' and 'well-being', which also feature prominently in international documents and other environmental rights around the world,[53] in particular points to the obsession of

---

49 Burdon, n. 10 above, p. 818.

50 The burgeoning debate on ecosystem services and efforts to quantify the benefits or use of an ecosystem that provides services to people is an example.

51 Tallacchini, n. 48 above, p. 127.

52 This right, as the analysis in this part shows, is anthropocentric and it does not suggest a 'remarkable transition from a human right to the environment, to the rights of nature', as Borràs suggests it does: Borràs, n. 21 above, p. 125.

53 E.g., the first principle of the Brundtland Report of the Commission on Environment and Development (World Commission on Environment and Development, *Our Common Future* (Oxford University

environmental rights with *human* 'healthiness' and the human sense of well-being. The inclusion is of necessity: 'Healthiness … represents, from an individualistic point of view, the only well-defined, in some way materially possessed and quantified environmental value – differently from aesthetic, cognitive or existence values'.[54] However, it leads to an exclusive (as opposed to inclusive) vision of ecological questions that is incompatible with the high complexity of ecological systems and their state of health, of which human health is, and can only ever be, one of many considerations.

While Section 24 provides for 'ecological sustainable development' as an ecocentric objective to be achieved, this objective must be balanced with laws and other measures that actually promote *justifiable* anthropocentric economic and social development. In a neoliberal human development and growth-without-limits paradigm, and moreover within the context of a developing country, socio-economic development arguably will always be justifiable and will actively be promoted to advance the economic growth agenda at the cost of ecological sustainable development. Anthropocentric rights do not recognize the intrinsic value and interests of the environment, while the regulatory reluctance to embrace more ecocentric orientations serves only to deepen the tensions between people and the external environment within the environmental rights domain. In this manner, the South African Section 24 reinforces, preserves and even legitimizes approaches to human rights fulfilment that tend to be utilitarian in focus, and that ground attempts to improve access to and expand human claims to resources, with a view to ensuring socio-economic development.[55] As far as its protective reach is concerned, therefore, all that the right accomplishes is to legally elevate, to the highest possible juridical level, the environment as an external object of protection, expressing, as it clearly does, the instrumentalist function of the environment and its potential to be owned, controlled and exploited to keep human beings healthy and happy. It evinces the 'essentiality of nature to the humanity of man'.[56]

If we accept that many of the subjects of environmental law are not politically represented in the usual liberal fashion,[57] and consider the deeply entrenched self-serving anthropocentrism of law and human rights, one could reasonably expect the environmental rights discourse to turn inwards and question its own long-held anthropocentric traditions and assumptions. Such introspection could steer the broadening of environmental rights beyond their axiomatic confines now and in the future, and act as a point of departure from which to contemplate a fundamental reordering of rights' construction of legal subjectivity, the relationship between non-human entities and humans and, ultimately, the possible extension of

Press, 1987)) states: '[a]ll human beings have the fundamental right to an environment adequate for their health and well being'.

54 Tallacchini, n. 48 above, p. 130.

55 K. Bosselmann, 'Human Rights and the Environment: Redefining Fundamental Principles?' (2005), available at: http://www.ais.up.ac.za/health/blocks/HET870/Fundamentalprinciples.pdf.

56 Tallacchini, n. 48 above, p. 129.

57 D. Kysar, 'Global Environmental Constitutionalism: Getting There from Here' (2012) 1(1) *Transnational Environmental Law*, pp. 83–94, at 89.

rights to living and non-living human and non-human entities in an effort to dissolve interspecies hierarchies. Failure to do so will, in the words of Grear, only further entrench and strengthen the 'pernicious resilience of old structures of mastery and the resistive capacity of the settled practices and patterns of power and subjectivity constructed in its service'.[58]

4. FROM HUMANS' RIGHT TO NATURE TO THE RIGHTS OF NATURE

While this limited space does not accommodate a detailed exploration of the philosophical, ideological and scholarly development of the ecocentric rights paradigm, we offer a brief synopsis of some views that continue to pry open the epistemological boundaries discussed above. These views seek to forge alternative ways of conceptualizing and framing the relationship between human rights and the environment. It is within this liberated epistemological space that concrete constitutional law reforms related to human rights and the environment, such as those in Ecuador, are possible.

4.1. *Should Trees Have Standing?*

The emergence of environmental rights in the early 1970s coincided with one of the earliest and most influential scholarly reflections on the potential of constitutions to afford rights to nature. Published in 1972, Stone's iconic 'Should Trees have Standing?' proffered a re-envisioned possibility for rights, as constitutionalism's most representative and arguably most sacred elements, to extend their application to non-human living entities.[59] Stone believed that:

> [i]t is not inevitable, nor is it wise, that natural objects should have no rights to seek redress in their own behalf. It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can states, estates, infants, incompetents, municipalities or universities. Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems.[60]

This view was then, and remains to this day, a daring and controversial, paradigm-shifting proposition. While it did not move governments to suddenly rewrite Bills of Rights, as a minimum Stone's proposition managed to pry open the steadfast conventions that had been working effortlessly, and successfully, to safeguard the anthropocentric individualism of rights and the selective, limited and limiting

[58] A. Grear, 'Human Rights and the Environment: In Search of a New Relationship: Editor's Introduction' (2013) 3(5) *Oñati Socio-Legal Series*, pp. 796–814, at 801.

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

[60] Ibid., p. 464. Stone clearly fashions these thoughts around the idea that human beings must act as moral agents on behalf of nature, an idea which Nash expresses as follows: 'Human beings are the moral agents who have the responsibility to articulate and defend the rights of the other occupants of the planet. Such a conception of rights means that humans have duties or obligations toward nature': R. Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press, 1989), p. 10.

focus of their claims.[61] Stone's provocative thesis managed to lay the foundation for the current debate on ecocentric rights by aligning conventional constitutional discourse on rights with not-so-conventional ecological concerns, which then and now remain well outside the parameters of what is considered acceptable or comfortable in law and constitutional conversations.

4.2. *The Ecological* Rechtsstaat

Departing from Stone's earlier thesis, in 1992 Bosselmann made a case for the creation of an *ökologische Rechtsstaat* (or ecological constitutional state) as a counter-measure to the anthropocentrism that pervades our interconnected legal, economic, social, political and ethical systems.[62] He argued that the design and orientation of the state – including its constitution, laws and rights – have always been geared towards promoting unlimited human development with little respect for ecological integrity or limits. The constitutional significance of this fact is that state and legal traditions indicate the closely intertwined relationship between environmental destruction and the extent to which the state (in part driven by corporate interests)[63] has been willing and able to secure and expand the neoliberal exploitation of Earth and its resources through the best-known regulatory instruments at its disposal: the constitution and the broader legal system. He contended that, from the earliest feudal systems through to the present territorial state model, constitutions and the type of state organization and societal order they sought to imbue have never been neutral: they have been used as regulatory instruments to promote anthropocentric individualism and materialism, with predictably dire ecological consequences.[64] Examples are property rights and classic individualistic political rights (such as the rights to life, personal freedom, and equality), which have historically been, and continue to be, the backbone of many constitutions and which are invoked as legitimation for human development without limits.[65]

Bosselmann accordingly pleaded for an ecologically centred regulatory reality alongside the principle of the ecological constitutional state. The ecological constitutional state is one in which, among others:

- human rights and the rights of nature are equal;
- any assessment of potential conflict between these rights must consider that people and nature are a dialectical unit where one is part of the other;
- the inherent worth of nature demands that ecological interests be represented by people in all decision making in the same way that human interests would be; and

---

61 P. Sands, 'On Being 40: A Celebration of "Should Trees have Standing?"' (2012) 3 *Journal of Human Rights and the Environment*, pp. 2–3, at 3.

62 K. Bosselmann, *Im Namen der Natur: Der Weg zum ökologischen Rechtsstaat* (Scherz, 1992).

63 Grear, n. 47 above.

64 Bosselmann, n. 62 above, p. 115.

65 See generally D. Grinlinton & P. Taylor (eds), *Property Rights and Sustainability: The Evolution of Property Rights to meet Ecological Challenges* (Brill, 2011).

- the inherent value of nature depends on knowledge about the interaction between ecosystems and their relationship with socio-human systems, while legal norms such as rights must fortify such interaction.[66]

4.3. *Epistemologies of Mastery, the Construction of Hierarchies and the 'Othering' of Nature*

De Lucia suggests that the hierarchical Cartesian separation between mind and matter, upon which anthropocentrism is fundamentally based, 'gave rise to the modern epistemology of mastery, according to which humankind, through the development of science and technology, can dominate and exploit an objectified nature, devoid of reason and only capable of responding to mechanistic natural laws'.[67] Through rights, anthropocentrism works very effectively to satisfy the needs of particular preferred groups of entitled human beings. As De Lucia points out, anthropocentrism does not benefit all people equally, but only certain privileged categories of people – namely 'those best approximating to the abstract model of the possessive, rational subject [qualify] as the beneficiaries of current regimes of ecological accumulation, [which exclude] those not conforming to such a model'.[68] Notwithstanding rights being designed to dissolve exactly this type of hierarchy, anthropocentric environmental rights could be deployed to create and exacerbate intra- and inter-human species hierarchies. Ecocentrism, on the other hand, provides a more radical expression of a re-evaluated, re-envisioned relationship between human beings and nature; one that recognizes, among other things, material agency and the legal subjectivity of natural entities, ecological integrity and the inherent value of nature, and the sufficient (as opposed to optimal) accommodation of human use and occupancy within ecological constraints.[69] According to De Lucia, ecocentric juridical articulations:

> offer a good theoretical critique of the liberal model of law and legal subjectivity, with all its exclusions; they offer to include material, embodied agency under the conceptual and legal rubric of subjectivity; they offer to dissolve the binary subject/object and replace it with a broader space of plural subjectivities, each with its own peculiar mode of being and of agency, to which the law ought to afford materially commensurate – rather than abstractly equal – possibilities.[70]

Although De Lucia specifically elaborates an ecocentric vision of the ecosystem approach, his vision is easily transferable to environmental rights, especially to the extent that ecocentrism could offer anthropocentric rights that are couched in modernity 'an opportunity to internalize a different view of the world, where there is no abstract, rational agent (the paradigmatic modern legal subject) at the centre,

66 Bosselmann, n. 62 above, p. 373–4.
67 De Lucia, n. 9 above, p. 95.
68 Ibid., p. 95.
69 Ibid., pp. 103–6.
70 Ibid., pp. 114–5.

https://doi.org/10.1017/S2047102517000061 Published online by Cambridge University Press

functioning as an exclusionary frame of reference, as the pivot of the entire system'.[71] Such an approach invites the possibility of denoting non-humans as law's referents and beneficiaries and as the referents and beneficiaries of rights, alongside humans, who act as caretakers of nature, in a non-hierarchical setting.

Like De Lucia, Grear argues that the anthropocentrism of law and rights essentially represents a crisis of inter- and intragenerational, interhuman and intraspecies hierarchies. She believes that:

> … such hierarchies implicate a systemically privileged juridical 'human' subject whose persistence subtends – to a significant and continuing extent – the neoliberal global juridical order as a whole, and that these hierarchical commitments also significantly undermine the ability of the international legal order to respond to [the] climate crisis, environmental degradation and the intensifying imposition of structural disempowerment on vast and growing numbers of human beings.[72]

It is precisely the deeply entrenched and highly effective ability of law to separate, to exclude and to distance marginalized people (usually minorities) based on, among other things, gender, sexual orientation and race – which casts marginalized groups as 'the others' – that creates these 'othering' hierarchies. It is also presumably the ability of law and rights to enable ownership, enable possession, and legitimize proprietary entitlements over non-humans and over certain humans, which reinforces its 'othering' and hierarchy-inducing qualities. This unsettling realization is vividly explicated by human slavery, which was in every way legal and enabled by law and property-vesting rights until slavery was eventually abolished in the 1800s. Like women, homosexuals and non-whites, nature is 'othered' by people through privileging law and rights that distinguish between subject and object. Ironically, law and rights should instead provide an inclusive paradigm and foster the demolition of hierarchies.[73] An 'othered' nature consequently remains a peripheral concern, which ranks at the bottom of powerful juridically constructed, reinforced and legitimized hierarchies; nature continues to struggle for full recognition against the pervasive entitled and dominating force of individual liberty and property rights that continue to elevate some privileged people of the present generation as the central concern of rights.

The foregoing views suggest that, despite the anthropocentric orientation of law and rights and partly because of this orientation, more radical epistemologies are emerging in the discourse, and they are seeking to counter the overbearing human privilege that anthropocentric human rights strive to entrench for certain privileged human beings. While we cannot state this in absolute terms, it is clear that 'the old boundaries that limited liberalism to *human* freedom are breaking down'.[74]

---

71 Ibid., p. 116.

72 Grear, n. 12 above, p. 227.

73 Burdon argues that law emerges from a social context and it is 'animated by the worldview and moral horizon of the political class of a given society … This class has historically been closed on the basis of race and gender and continues to [be] represented predominately by the wealthy': Burdon, n. 10 above, p. 818.

74 Nash, n. 60 above, p. 6.

5. THE CONSTITUTIONAL RIGHTS OF NATURE IN ECUADOR

Environmental protection has become a central concern for many constitutions around the world. Within the environmental constitutionalism paradigm, environmental protection is expressed mostly through rights that have remained resolutely anthropocentric in tandem with the historical and deeply entrenched people-centred orientation of liberal Western conceptions of individual rights, of law, and of constitutionalism. An ecocentric orientation would require a fundamental transformation of law and its constitutional foundations, of politics and of the social order as we know it. The idea of change is gaining increased traction in scholarly debates, but public and private regulatory powers and stakeholders do not yet seem willing to embrace the idea in any meaningful way.

However, in one exceptional case radical ecocentric epistemologies have recently found more concrete expression. In the Ecuadorian Constitution, the theoretical notion of rights of nature and indigenous 'cosmovisions',[75] which recognize the inextricable links between human beings and nature, converge in a constitutional text. Drawing on the ideas developed in the preceding sections, the final part of this article critically evaluates the rights of nature in Ecuador's Constitution by providing (i) a historical-contextual discussion of events that led to the adoption of the rights of nature; (ii) an analysis of the actual constitutional provisions granting rights to nature and of other incidental constitutional provisions; and (iii) an appraisal of whether the practical implementation of the rights of nature measures up to the lofty rhetoric. The analysis is conducted alongside a literal interpretation of various constitutional provisions in the context of the Constitution as a whole – an approach that accords with the Constitution's own requirements pertaining to the interpretation of its provisions.[76]

5.1. *Background*[77]

The advent of Rafael Correa to the presidency of Ecuador in 2006 signalled the beginning of a transformative process in a country that was characterized at the time by a collapsed economy, a failing state and a decaying political system.[78] This process of transformation was driven through a 'Citizens' Revolution', aimed at building a new country in which participatory democracy reigns supreme, human rights and cultural diversity are respected, and people live together peacefully.[79] Part of Correa's

---

75 See generally, E. Fitz-Henry, 'Decolonizing Personhood', in Maloney & Burdon, n. 13 above, pp. 133–48.

76 Art. 427 of the Ecuadorian Constitution (n. 18 above) states: 'Constitutional provisions shall be interpreted by the literal meaning of its wording that is mostly [sic] closely in line with the Constitution as a whole'.

77 See also Rhüs & Jones, n. 19 above, pp. 9–11.

78 A. País, *Plan de Gobierno 2007–2011: Un Primer Gran Paso para la Transformación Radical del Ecuador* (2006), available at: https://www.ucm.es/data/cont/media/www/17360/Texto%201%20-%20Plan_de_Gobierno_Alianza_PAIS.pdf.

79 Ibid., pp. 8–12.

https://doi.org/10.1017/S2047102517000061 Published online by Cambridge University Press

new vision for Ecuador involved 'anti-neoliberalism in the service of enhanced equity',[80] essentially in tandem with a re-imagined coexistence with nature:

> … where human beings live side by side in harmony with nature, its plants, its animals, its rivers and lakes, its sea, its air, its soils, and all these elements and spirits which make life possible and beautiful. [It is a] country where the predatory commodification of nature is not possible, in which the human being is part of it and not its destructive master.[81]

Not surprisingly, Correa's new Ecuador would be created by a new constitution to unify a deeply polarized society and drive initiatives to redefine and harmonize the fractured relationships between the state, society, the economy, and the resources on which people depend.[82] In April 2007, Correa called for the establishment of a Constituent Assembly to draft a new constitution. Approved by 63% of the voters during a referendum in September 2008, the Constitution of Ecuador came into force in October 2008.[83]

The new constitutional dispensation is aligned with the 'new constitutionalism in Latin America' paradigm, which recognizes the plurinational state as a model of 'legal equalitarian pluralism'.[84] It reconstitutes the political, economic, social and ecological foundations of Ecuadorian society by prioritizing and constitutionally solidifying key concerns of solidarity and equity between humans and between humans and nature, as well as propagating a new understanding of nature as a legal subject.[85] Ultimately, the new constitutional dispensation was meant to confront, among other things, the prevailing anthropocentric socio-politico-economic order in Ecuador, which was characterized for many years by the unbridled (historically colonial) exploitation of natural resources, especially oil, which caused vast environmental destruction.[86] Through the constitutional entrenchment of the rights of nature, the new order 'not only intends to mitigate the consequences of the anthropocentric predatory system, but also lays the foundation for a radical change of the current development and well-being paradigm that is solely based on production

---

80 Fitz-Henry, n. 75 above, p. 139. However, some have criticized Correa's apparent disdain for the rights of nature and indigenous cosmovisions: M. de la Cadena, 'Indigenous Cosmopolitics in the Andes: Conceptual Reflections beyond "Politics"' (2010) 25(2) *Cultural Anthropology*, pp. 334–70.

81 País, n. 78 above, p. 8.

82 O.C. Santiago, 'El Contexto Político de la Asamblea Constituyente en Ecuador', Mar. 2008, available at: http://www.institut-gouvernance.org/es/analyse/fiche-analyse-450.html.

83 J. Colón-Ríos, 'Constituent Power, the Rights of Nature, and Universal Jurisdiction' (2014) 60(1) *McGill Law Journal*, pp. 128–72.

84 J. Shiraishi Neto & R. Martins Lima, 'Rights of Nature: The "Biocentric Spin" in the 2008 Constitution of Ecuador' (2016) 13(25) *Veredas do Direito, Belo Horizonte*, pp. 111–31, at 114–9.

85 P.C. Benalcázar, 'El Buen Vivir, Más Allá del Desarrollo: La Nueva Perspectiva Constitucional en Ecuador', in A. Acosta & E. Martínez (eds), *El Buen Vivir: Una Vía para el Desarrollo* (Abya-Yala, 2009), pp. 115–47, at 133.

86 An example is the environmental damage caused by Chevron-Texaco in the Ecuadorian Amazonia from 1964 to 1990 as a result of oil extraction: F. Lu & N. Silva, 'Imagined Borders: (Un)Bounded Spaces of Oil Extraction and Indigenous Sociality in "Post-Neoliberal" Ecuador' (2015) 2(2) *Social Sciences*, pp. 434–58; L. Greyl & G.U. Ojo (coord.), 'Digging Deep Corporate Liability. Environmental Justice Strategies in the World of Oil', EJOLT Report No. 09, Oct. 2013, pp. 51–4, available at: http://www.ejolt.org/wordpress/wp-content/uploads/2013/10/131007_EJOLT09-final-Low-resolution.pdf.

and consumption'.[87] The latter idea is evident in the main in constitutional provisions such as those related to economic sovereignty, which state:

> The economic system is socially oriented and mutually supportive; it recognizes the human being as a subject and an end; it tends towards a dynamic, *balanced relationship among society, State and the market, in harmony with nature*; and its objective is to ensure the production and reproduction of the material and immaterial conditions that can bring about the good way of living.[88]

While the proposal for the inclusion of the rights of nature in the Constitution fits into a Western liberal constitutionalism paradigm and was advocated mostly in mainstream political, academic and civil society circles, indigenous peoples managed to successfully introduce into the debate the notion of *Buen Vivir* (or *Sumak Kawsay* in the indigenous Andean *Kichwa* language), which means 'living well'.[89] Deeply embedded in Andean thought and the decolonization paradigm, which seeks to dissolve the Western neoliberal human-nature binary, *Buen Vivir* suggests that people should live well and always in harmony with nature: 'The good way of living shall require persons, communities, peoples and nationalities to effectively exercise their rights and fulfil their responsibilities within the framework of interculturalism, respect for their diversity, and harmonious coexistence with nature'.[90] As a worldview that demolishes hierarchies constructed by colonial Western scientific knowledge, *Buen Vivir* starkly contrasts with the deep anthropocentric conflict arising between privileged human masters and an external, 'othered' nature: 'In Andean spiritual worldviews, human well-being is possible only within a community in harmony with nature, according to principles of reciprocity, complementarity, and relationality rather than a nature/society dualism'.[91]

The importance and constitutional significance of indigenous worldviews, and the need for them to coexist with prevailing non-indigenous worldviews, are reinforced in subsequent constitutional provisions, such as Article 25, which provides: 'Persons have the right to enjoy the benefits and applications of scientific progress and ancestral wisdom'.[92] Article 171 provides additional recognition for indigenous people, including the centrality of their 'ancestral traditions and their own systems of law', by affording them the power to apply their own standards and procedures for the settlement of internal disputes. In sum, under *Buen Vivir* people have to act as part of nature without dominating it. Beyond a form of perceived 'romanticism', which is how some have characterized this notion, Gudynas points out that it could

---

87 A.B. Ortiz, 'Derechos de la Naturaleza', in L.Á. Saavedra, *Nuevas Instituciones del Derecho Constitucional Ecuatoriano* (INREDH, 2009), pp. 125–39, at 130.

88 Art. 283 of the Constitution (emphasis added); see also Art. 284(4).

89 E.g., since 2007 the Pachamama Alliance has initiated diverse dialogues with the government of Ecuador, emphasizing the importance of incorporating provisions to ensure better environmental protection in the new Constitution. The Foundation submitted to the Constituent Assembly a draft concerning the rights of nature, which was subsequently recognized and relied upon by the Assembly.

90 Art. 275.

91 S. Adelman, 'Human Rights and Climate Change', in G. DiGiacomo, *Human Rights, Current Issues and Controversies* (University of Toronto Press, 2016), pp. 411–35, at 425.

92 See also Arts 56–60.

present concrete proposals and strategies 'for reforms to the law, environmental accounting, tax reforms, as well as the dematerialization of economies and alternative regional integration within South America'.[93]

5.2. *The Preamble*

Turning now to an analysis of the relevant provisions in the Constitution, the Preamble declares at the outset:

> Recognizing our age-old roots, wrought by women and men from various peoples, celebrating nature, the Pacha Mama (Mother Earth), of which we are part and which is vital to our existence … [and] calling up the wisdom of all the cultures that enrich us as a society … [We] [h]ereby decide to build a new form of public coexistence, in diversity and in harmony with nature, to achieve the *Buen Vivir*, the *sumak kawsay*.

This preambular provision serves as a backdrop to the rest of the Constitution and provides a contextual and interpretive background and motivation for the rest of the Constitution's provisions. Like other constitutional preambles, it is an interpretive waymark and acts as a guide to [constitutional] travellers.[94] The Preamble introduces, affirms and, as the critical foundation and context for the rest of the Constitution's provisions, provides a significant adjustment of the current anthropocentric worldview. The 'new form of public coexistence' envisaged in the Preamble is one that shuns the anthropocentric, individualistic, and instrumentalist outlook upon which liberal ordering depends. Instead, the Preamble seemingly invites, constitutes, and constitutionally legitimizes as the *Grundnorm* of Ecuadorian society the idea that the relationship between people and nature is ancient and that this relationship needs to be celebrated instead of being mired in perpetual conflict, that people and nature are one, and that they need to coexist as diverse entities by living well and in collective harmony.

5.3. *State Duties*

Despite this ecocentrically oriented introductory statement which undergirds the rights of nature, clearly not all environment-related constitutional provisions are ecocentric, which arguably creates potential tensions. For example, after the Preamble the Constitution details in comprehensive terms and in a predominantly anthropocentric narrative several 'prime duties' of the state, including promoting sustainable development and the equitable redistribution of resources and wealth to enable access to the good way of living (which is premised on resource exploitation),[95] while protecting the country's natural and cultural assets.[96] These 'prime duties' are inevitably linked to achieving several 'strategic objectives' of the state, which require its

[93] E. Gudynas, 'Buen Vivir: Today's Tomorrow' (2011) 54(4) *Development*, pp. 441–7, at 446.

[94] L. du Plessis, 'Interpretation', in S. Woolman & M. Bishop (eds), *Constitutional Law of South Africa*, 2nd edn (Juta, 2008), Vol. 2, Pt II 'The Bill of Rights', pp. 32.1–32.193, at 32.116.

[95] See Arts 12–34 and the discussion below.

[96] Arts 3(5) and 3(7).

https://doi.org/10.1017/S2047102517000061 Published online by Cambridge University Press

special attention as outlined in the National Development Plan (2007–2010), and include, among others, mining and the exploitation of hydrocarbons.[97]

5.4. *Application of Rights*

Beyond the Constitution's trite recognition that '[p]ersons, communities, peoples, nations and communities are bearers of rights and shall enjoy the rights guaranteed to them in the Constitution', it emphatically provides that '[n]ature shall be the subject of those rights that the Constitution recognizes for it'.[98] This is the first and clearest articulation of the rights of nature in the text of the Constitution. Article 11(3) states in no uncertain terms that '[r]ights shall be fully actionable. Absence of a legal regulatory framework cannot be alleged to justify their infringement or ignorance thereof, to dismiss proceedings filed as a result of these actions or to deny their recognition'. Constitutional provisions, including those regarding rights, are directly applicable, actionable and justiciable, and require no subsequent legislation for their enforcement. In a possible effort to entrench the separation of powers doctrine and to reinforce constitutional supremacy,[99] rights exist independently of statutory law and are therefore not dependent on political and legislative processes for the effectiveness and enforcement of the guarantees they provide. The existence of the rights of nature in the Constitution is sufficient to legitimize and to operationalize those rights. Accordingly, in the absence of a statute that protects the rights of nature (to date, Ecuador has not enacted such a statute), nature derives full protection from the Constitution and claimants can revert directly to the Constitution to invoke protection on behalf of nature, notably through the constitutional protection proceeding (*Acción de Protección*) provided in the Constitution.[100]

Also, unlike other jurisdictions, such as South Africa, which permit constitutional rights to be limited subject to strict criteria,[101] Article 11(4) provides that '[n]o legal regulation can restrict the contents of rights or constitutional guarantees'. This blanket prohibition does, however, seem to be qualified by the provision that '[a]ny deed or omission of a regressive nature that diminishes, undermines or annuls *without justification* the exercise of rights shall be deemed unconstitutional'.[102] It therefore appears possible to limit rights as long as the limitation is justified. Worryingly, the Constitution is silent on the criteria for justification, which leaves wide open the question of justifiable limitation.[103]

97 Fitz-Henry, n. 75 above, p. 142.

98 Art. 10.

99 For a discussion see R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge University Press, 2011); J. Limbach, 'The Concept of the Supremacy of the Constitution' (2001) 64(1) *The Modern Law Review*, pp. 1–10.

100 Art. 88. The *Acción de Protección* is a form of constitutional action which aims to ensure direct and efficient protection of the rights enshrined in the Constitution. It seeks to remove procedural barriers such as the traditional qualifications for standing and pleading formalities: E. Daly, 'The Ecuadorian Exemplar: The First Ever Vindications of the Constitutional Rights of Nature' (2012) 21(1) *Review of European Comparative and International Environmental Law*, pp. 63–6, at 63.

101 See s. 36 of the Constitution of the Republic of South Africa, 1996.

102 Art. 11(8) (emphasis added).

103 S. 36 of the Constitution of the Republic of South Africa, 1996, provides an example of criteria in terms of which rights 'may be limited only in terms of law of general application to the extent that the

5.5. *The Environmental Right*

Title II, Chapter Two of the Constitution concerns itself with 'rights of the good way of living' (*Derechos del Buen Vivir*). Deriving from indigenous knowledge and cultural systems, the requirement to live in harmony with nature implicitly places limitations on any anthropocentric claim to which rights to 'the good way of living' may lead.

The provisions related to water and to a healthy environment are listed under this title and chapter of the Constitution. Article 12 provides: 'The human right to water is essential and cannot be waived. Water constitutes a national strategic asset for use by the public and it is inalienable'. The focus of this right is clearly on water as a resource to be used by people and over which people have a right. Surprisingly, it says nothing about the intrinsic right, value or integrity of water to be protected against over-use and depletion. A clearer reference (in non-rights terms) to the broader ecological necessity of water is found only much later in Article 318 of the Constitution, which provides: 'Water is part of the country's strategic heritage for public use … *It is a vital element for nature and human existence*'.[104] Yet, in seemingly contradictory terms, the ecological significance of this statement is then considerably diluted by the provision that '[t]he State … shall be directly responsible for planning and managing water resources for human consumption, irrigation to guarantee food sovereignty, ecological wealth and productive activities, *in this order of priority*'.[105] The ecological integrity of water clearly ranks as the least important priority and is subservient to human needs.

Not to be confused with the rights of nature, Article 14 sets out the environmental right in the following terms:

> The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living … is recognized. Environmental conservation, the protection of ecosystems, biodiversity and the integrity of the country's genetic assets, the prevention of environmental damage, and the recovery of degraded natural spaces are declared matters of public interest.[106]

Intriguingly, the affirmation of the environmental right is repeated in somewhat different terms in Article 66(27) in Chapter Six ('Rights to freedom'). In terms of this provision, people have '[t]he right to live in a healthy environment that is ecologically balanced, pollution-free and in harmony with nature'. The elaborately detailed 'Rights to freedom' clause makes no provision for nature's right to freedom, suggesting that this provision seeks only to guarantee human freedom.

---

limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors'.

104 Emphasis added.

105 Art. 318 (emphasis added); see also Arts 411–2.

106 The 'health' aspect of the environmental right, and thus its *human* health focus, is reinforced by subsequent rights which provide that '[p]ersons have the right to a safe and healthy habitat and adequate and decent housing, regardless of their social and economic status' (Art. 30); and '[h]ealth is a right guaranteed by the State and whose fulfillment is linked to the exercise of other rights, among which [are] the right to water, food, education, sports, work, social security, healthy environments and others that support the good way of living' (Art. 32).

Quite evidently, the environmental right, in both formulations, mandates safeguarding the environment as a resource to enable human health, well-being and freedom.[107] However, the emphasis on human needs seems to be tempered somewhat, thus revealing potential tensions in the environmental right between human and ecological interests. The tentative ecocentric orientation of the right is evident from the importation of the notion of 'living well' and its implicit reference to living in harmony with nature in the first formulation, which moreover is explicit in the second formulation. Ecocentric concerns are also evident in the requirement that the environment be *ecologically* balanced, coupled with the notion of strong 'sustainability', as opposed to there having to be a balance between social, economic and environmental concerns.[108] The notion of strong sustainability is underscored by the right to live in a 'pollution-free' environment which, quite evidently, would see economic activities severely limited in order to maintain a pollution-free environment. Whether it was the intention of the Constitutional Assembly to include a blanket restriction on human activities is not clear, but it seems unlikely.

Another, related ecocentric-oriented provision is found under Title VII, 'The Good Way of Living System', which could apply in the interpretation of the environmental right and the rights of nature discussed below. It states that '[i]n the event of doubt about the scope of legal provisions for *environmental* issues, it is the most favorable interpretation of their effective force for the protection of nature that shall prevail'.[109] This provision clearly prioritizes the highest possible level of care that *environmental* law can provide. While laudable, it does not address the appropriate level of environmental care that other, non-environmental (notably socio-economic) laws should provide. The provision therefore arguably states the obvious, but does not address a more critical concern – namely, the extent to which environmental care should be prioritized in the application of commercial, agricultural, building and other non-environmental laws.

While the term 'public interest' in Article 14 suggests a laudable attempt to extend the environmental right's guarantees as widely as possible to the public (potentially as a way to liberate *locus standi* provisions and to enable public interest environmental litigation),[110] its protective guarantees concern only the public (people) and not environmental interests *per se*. In sum, this environmental right is no different from many other typical environmental rights formulations, such as the South African example. It mostly addresses and guarantees the usual human-centred issues and provides little, if any, foundation or support for the rights of nature. Where such

[107] An idea that is underscored by the lengthy provisions of Arts 281–2, aimed at promoting food security through resource use and exploitation, and provisions in Art. 408, which stipulate: 'The State shall participate in profits earned from the tapping of these [non-renewable] resources, in an amount that is no less than the profits earned by the company producing them'.

[108] See generally K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, 2013).

[109] Art. 395(4) (emphasis added).

[110] Art. 61(2) confirms this intention by stating that 'Ecuadorians benefit from the following rights: … To participate in affairs of public interest'.

https://doi.org/10.1017/S2047102517000061 Published online by Cambridge University Press

protection is implied, there are clear indications of contrary provisions that seek to promote human development.

Intrinsically related to the environmental right, the Amazon territory in Ecuador is afforded special recognition under the constitutional provisions that determine the territorial organization of the state:

> The territory of the Amazon provinces is part of an ecosystem that is necessary for the environmental balance of the planet. This territory shall constitute a special territorial district, for which there will be integrated planning embodied in a law … that ensures the conservation and protection of its ecosystems and the principle of *sumak kawsay*.[111]

In significantly strict terms, the Constitution subsequently states that '[a]ctivities for the extraction of non-renewable natural resources are forbidden in protected areas and in areas declared intangible assets, including forestry production'.[112] This far-reaching provision, however, is qualified through the provision that allows these resources to be exploited 'at the substantiated request of the President of the Republic and after a declaration of national interest issued by the National Assembly',[113] revealing again the tenuous and potentially contradictory relationship between resource conservation and exploitation in the Constitution.

5.6. *The Rights of Nature*

Title II, Chapter Seven of the Constitution is exclusively dedicated to the rights of nature and is worth quoting at length:

> Article 71. Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature …
>
> Article 72. Nature has the right to be restored … In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.
>
> Article 73. The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles …
>
> Article 74. Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living …

As a first general observation, the rights of nature are not superior to any other rights, because the Ecuadorian Constitution does not introduce a hierarchy of rights. The rights of nature, as the source where 'life is reproduced and occurs', could therefore not be said to take precedence over other rights in the sense that it acts as a

111 Arts 250 and 259.

112 Art. 407.

113 Ibid.

constitutional *Grundnorm* around which the entire Constitution and all other rights revolve. In fact, the Constitution requires in clear terms a non-hierarchical setting for all rights, in that '[a]ll principles and rights are unalienable, obligatory, indivisible, interdependent, and of equal importance'.[114] The absence of a normative hierarchy within the Constitution itself is further supported by the Constitution's provisions on the national 'development structure', which sets out the framework within which development must occur in Ecuador. In particular, '[t]he development structure is the organized, sustainable and dynamic group of *economic, political, socio-cultural and environmental systems* which underpin the achievement of the good way of living'.[115] That said, the Constitution is recognized as the supreme law of the country,[116] which means that even though the Constitution recognizes no internal hierarchy of norms, its norms collectively are supreme vis-à-vis non-constitutional norms. The rights of nature, because they are part of the supreme Constitution, therefore trump 'international treaties and conventions; organic laws; regular laws; regional regulations and district ordinances; decrees and regulations; ordinances; agreements and resolutions; and the other actions and decisions taken by public authorities'.[117]

In line with Stone's proposition, nature is now a rights holder. The responsible subjects in this moral and juridical relationship are people, who have a duty to treat nature in such a way that it can exist, maintain itself and regenerate to the fullest extent possible.[118] This duty is reinforced by Articles 83(6) and 83(13), which state respectively that Ecuadorians have the duty to 'respect the rights of nature, preserve a healthy environment and use natural resources rationally, sustainably and durably', and the duty '[t]o preserve the country's cultural and natural heritage and to take care of and uphold public assets'. Article 399 provides that the state has '*guardianship* over the environment' in tandem with a 'joint responsibility of the citizenry' to ensure environmental conservation through a 'decentralized national environmental management system, which shall be in charge of defending the environment and nature'.[119] As part of its duties vis-à-vis the environment, of further interest is Article 403, which prohibits the state from entering into 'agreements or accords that … undermine the conservation and sustainable management of biodiversity, human health, collective rights and rights of nature'. It is not clear whether these 'agreements or accords' are domestic, regional or international, but presumably they would include all three categories. While not specified, contractual agreements with petroleum companies might presumably also be included in this prohibition.

---

114 Art. 11(6).

115 Art. 275 (emphasis added). One of the explicit environment-related objectives of the development structure that is also cast in anthropocentric terms is '[t]o restore and conserve nature and maintain a healthy and sustainable environment ensuring for persons and communities equitable, permanent and quality access to water, air and land, and to the benefits of ground resources and natural assets': Art. 276(4).

116 Title IX.

117 Art. 425.

118 J.P. Méndez, *Derechos de la Naturaleza: Fundamentos, Contenido y Exigibilidad Jurisprudencial* (Corte Constitucional del Ecuador, 2013), pp. 116–8.

119 Emphasis added.

https://doi.org/10.1017/S2047102517000061 Published online by Cambridge University Press

Article 71 provides wide *locus standi* to enforce the rights of nature, regardless of whether a direct interest exists in invoking and protecting these rights.[120] The liberal *locus standi* provisions are supported by Article 75, which grants everyone the right 'to free access to justice and the effective, impartial and expeditious protection of their rights and interests, subject to the principles of immediate and swift enforcement'. Yet nature is not recognized as an entity with 'special characteristics' that 'require[s] greater protection' in terms of Article 81, and therefore it does not qualify for 'special and expeditious [trial] procedures'.[121]

Article 72 goes well beyond any statutory measures that provide duties to compensate people for environmental damage or to remediate a damaged environment. Nature actually has an explicit, independent and inherent right to be restored, which in turn creates duties with respect to that restoration.[122] The threshold or level of restoration is not clear, but could be the extent to which nature is able to exist and to maintain and regenerate 'its life cycles, structure, functions and evolutionary processes', which relies on a scientific rather than a juridical determination. Restoration is not exclusively limited to monetary compensation, although it can include monetary compensation if necessary to pay for restoration. The 'right to be restored', furthermore, places positive obligations on the state to establish the most effective mechanisms to achieve this restoration. The Constitution does not provide any further guidance; the only requirement is that the restoration measures must be 'adequate' and able 'to eliminate or mitigate harmful environmental consequences'. The wording suggests that it is left entirely to the state's discretion to decide on the adequacy of these measures, which is a potentially significant concern considering that the state cannot be held constitutionally accountable for inadequate restoration measures.

Article 73 imports the well-known prevention principle and obliges the state to restrict activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles. In the spirit of prevention, the word 'might' arguably indicates that indications of a risk of extinction, destruction or permanent alteration suffice for this duty on the state to become operative. It imports a forward-looking view in addition to an expectation of an *ex post facto* evaluation of harm in Article 73, which requires the state to determine in advance (possibly through environmental impact assessment measures, although

120 See also Arts 10, 11, 86–94 and 396–7. After the adoption of the Constitution in 2008, a debate developed about who might have the right to appear in court to sue on behalf of nature. Art. 38 of the Código Orgánico General de Procesos (Official Registry No. 506, 22 May 2015) eventually established that any natural or legal person, group or collective, or the Ombudsman, could call upon public authorities to enforce the rights of nature. The Office of the Ombudsman must carry out the protection of nature's rights *ex officio*.

121 Human claims arising from the environmental right, in addition to those affecting the judicial system more generally, are dealt with by the Office of the Human Rights Ombudsman, which focuses on the 'protection and guardianship of the rights of the inhabitants of Ecuador': Art. 215. While the establishment of an 'environment defender' (*Defensoría del ambiente y la naturaleza*) has been discussed, this institution still does not exist.

122 Art. 396 further provides: 'All damage to the environment, in addition to the respective penalties, shall also entail the obligation of integrally restoring the ecosystems and compensating the affected persons and communities'.

this is not explicitly stated) any potential impact that might occur and then to act to restrict or prevent such impact.

Finally, Article 74 uses terms similar to those in the environmental right provisions and confirms people's 'right to benefit from the environment and the natural wealth', which enables 'living well'. While this provision could be seen as enabling human claims which undermine the rights of nature, it might be argued that such claims are limited to the extent that they do not unsettle the implicitly recognized harmonious relationship between humans and nature that is captured in the notion of *Buen Vivir*. Regardless of whether such an interpretation is accepted, what is clear is that even the rights of nature clause recognizes humans as beneficiaries and entitled entities in the human–nature relationship.

6. A CRITICAL APPRAISAL

On the face of it, the Constitution of Ecuador is a ground-breaking document, which provides elaborate constitutional rights of nature in addition to a traditional environmental right. It is the first and still the only constitutional text in the world to do so. However, there are several concerns which serve to deepen the divide between constitutional rhetoric and reality as far as the rights of nature are concerned.

6.1. *Normative Conflict and Ambiguity*

Our main criticism is that the Constitution is a conflicted text that seems to be at odds with itself in a struggle between ecocentric rights of nature and directly opposing anthropocentric claims that are similarly constitutionally entrenched and legitimized. This conflict has been highlighted throughout the foregoing discussion. It not only features in the environmental domain, but also in other fields such as in provisions on non-discrimination in terms of sexual orientation. The Constitution recognizes the right 'to promote mechanisms that express, preserve, and protect the diverse character of their societies and rejects racism, xenophobia and all forms of discrimination'.[123] Yet, at the same time, it actively discriminates against homosexuals by denying them the right to marriage and adoption of children: '[m]arriage is the union of man and woman' (Article 67) and '[a]doption shall only be permitted for different-gender couples' (Article 68). It is unclear whether such irreconcilable contradictions are deliberate or accidental. What is clear, however, is that by allowing contradictions in the environmental context, the Constitution entrenches and exacerbates both a normative and an ethical conflict between anthropocentrism and ecocentrism at the highest possible juridical level. It confuses any sense of priority or hierarchy in relation to the rights of nature. This conflict also materializes in practice, when the rights of nature are threatened by government-sanctioned economic development endeavours.

[123] Art. 416(5); see also Art. 11(2), which provides in no uncertain terms that '[a]ll persons are equal and shall enjoy the same rights, duties and opportunities. No one shall be discriminated against for reasons of … sexual orientation'.

https://doi.org/10.1017/S2047102517000061 Published online by Cambridge University Press

6.2. *Lack of Constitutional Normative Hierarchy*

Normative conflicts such as these call into question the sincerity of the inclusion of the rights of nature in the Ecuadorian Constitution. Was it done merely to accommodate the animistic cultural worldviews of Ecuador's indigenous peoples in the hope of strengthening political support? Or was it done intentionally, to revolutionize and reform the foundations of Ecuadorian society, and shift it from a conflicted, consumerist society to one that fosters harmonious coexistence and interdependence, as the Preamble suggests? If this were the case, one would expect the rights of nature to have supreme status over all other rights in the Constitution, thereby constituting a form of ecological *Grundnorm*.[124] An example of a constitution which provides such an internal constitutional hierarchy (in addition to an external hierarchy in terms of which the constitution is the supreme law) is the Basic Law of the Federal Republic of Germany of 1949 (the German Constitution), which states in Article 1: '[Human] dignity shall be inviolable. To respect and protect it shall be the duty of all state authority'. Human dignity is the 'crowning principle' of the Constitution; it is 'the highest value of the Basic Law, the ultimate basis of the constitutional order, and the foundation of guaranteed rights'.[125] There is no evidence that the rights of nature enjoy any such supremacy as an ecological *Grundnorm* in the Ecuadorian Constitution. The Constitution instead explicitly states that there is no hierarchy between rights and that all rights compete on an equal footing.[126] It is clear, therefore, that the Constitution of Ecuador is not a 'Constitution for Nature'; nor does it create an ecological constitutional state in Bosselmann's terms, although it presumably creates an expectation to do just that.

When read in the broader context of the Ecuadorian Constitution, the environment and the rights of nature are in some instances subordinate to other concerns. As much is evident from the preceding discussion, as well as from the fact that nature does not feature as a right bearer in the transitional provisions of the Constitution. These omissions might have been unintentional, but are nevertheless indicative of the lower priority that is afforded to nature in comparison with communication, education, culture and sports, among others.[127]

These circumstances call into question the genuineness of the political commitment to the rights of nature, and suggest that their inclusion in the Ecuadorian Constitution might be a window-dressing exercise. Reflecting on an altogether more sinister political possibility, some commentators caution that the rights of nature provisions could simply be 'beautiful rhetoric used to entice support for Ecuador from the international community',[128] and that these provisions effectively green-wash a government's efforts 'to prevent any real implementation of the Rights of Nature as it

---

124 R. Kim & K. Bosselmann, 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements' (2013) 2(2) *Transnational Environmental Law*, pp. 285–309.

125 D. Kommers, 'German Constitutionalism: A Prolegomenon' (1991) 40 *Emory Law Journal*, pp. 837–73, at 855.

126 Art. 11(6).

127 See 'Transitory Provisions One' of the Constitution.

128 Fitz-Henry, n. 75 above, p. 142.

seeks to expand extractive and other industrial development'.[129] If this is true, the Correa government is possibly manipulating constitutional ecocentric language as a smokescreen to legitimize its efforts to pursue and expand an extraction-based economic development model.

6.3. *The Pitfalls of Detailed Constitutional Regulation*

In the case of the Ecuadorian Constitution, less could have been more. It contains elaborate, often repetitive, formulations of rights and provisions on an incredibly wide scope of issues that are regulated in considerable detail. The latter feature, moreover, exacerbates the risk of conflict between its various provisions. Fitz-Henry argues that one reason for this sprawling text is the tension between state-led 'alternative modernization' on the one hand, which is a contestation of the neoliberal economic development model, and aspirations of decolonization on the other, which reflect a contestation of dualist and hierarchical Western ontologies of subjugation, also in relation to nature: 'It is this tension that both runs through the Ecuadorian constitution – rendering it, at times, so laden with "rights" that it is practically incoherent – and that makes ongoing responses to the rights of nature so multi-layered and often conflicted'.[130] While there is no generally accepted or evident trend, it is arguably more common for constitutions to provide condensed but broadly formulated provisions of a more general and abstract nature that are then subsequently refined through detailed statutory provisions.[131] This is not the case with the Ecuadorian Constitution, which states its environmental right twice and in different terms. Such repetition can cause significant interpretative and normative tensions which could undermine the purpose of the provisions. It is also likely that such an elaborate constitutional text would evade critical issues in its pursuit of comprehensiveness – an unfortunate eventuality that generality and brevity might have avoided.

6.4. *A Rudderless Judiciary Out at Sea?*

One might expect that the Ecuadorian courts will be called upon to clarify constitutional tensions and ambiguities; yet its jurisprudence to date suggests that the judiciary has been unable to fully develop and enforce the rights of nature.[132] In March 2011, the Provincial Court of Loja settled a constitutional protection procedure which had been lodged against the provincial government of Loja on behalf of nature, and more specifically on behalf of the Vilcabamba River.[133]

129 Margil, n. 24 above, pp. 149–50.

130 Fitz-Henry, n. 75 above, p. 139.

131 Human rights guarantees are usually deliberately drafted in general terms and they feature a 'good deal of indeterminacy': J. Merrills, 'Environmental Rights', in D. Bodansky, J. Brunnée & E. Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), pp. 663–80, at 674. Burdon says that '[t]he use of general language is common in constitutional drafting and allows for words to have broad interpretation and remain relevant over time': P. Burdon, 'The Right of Nature: Reconsidered' (2010) 49 *Australian Humanities Review*, pp. 69–89, at 75.

132 For an analysis of additional cases relating to the Ecuadorian rights of nature, see Borràs, n. 21 above, pp. 138–42.

133 Arts 71 and 88.

Using the rights of nature provision as the basis for the constitutional protection action, the plaintiffs argued that the widening of an existing road next to the river, under the supervision of the provincial government, violated the rights of nature. The government had not conducted an environment impact assessment, and the plaintiffs claimed that the various excavation materials from the construction site had been dumped into the river, altering its natural flows and causing significant damage to nature. The Court accepted these arguments and settled in favour of the plaintiffs.[134] Based on what it interpreted as a violation of the rights of nature, the Court ordered the provincial government to comply with all its environmental obligations, including offering public apologies for executing the project without the necessary environmental authorization.[135] To date, the government has been slow to abide by the decision.

Several issues arise from this judgment, which was the first successful lawsuit worldwide based on the rights of nature. Firstly, on a positive note, it clarifies governmental responsibility for the violation of the rights of nature as a result of the implementation of the project without the required environmental authorization. The Court recognizes the constitutional rights of nature, pointing out that the types of harm caused to nature often have a temporal dimension and could affect present and future generations. The decision also acknowledges that the constitutional protection procedure is a suitable and effective way to stop and remedy environmental harm. It emphasizes the obligation of judges to apply the prevention principle and to actually give effect to judicial protection of the rights of nature 'until it is objectively demonstrated that there is no more probability or clear risk that the … project activities in an established area will produce pollution or involve environmental harm'.[136] To this end, the Court indicated that protection of the rights of nature does not necessarily imply the unconditional sacrifice of other constitutional rights, but '[e]ven in the case of a conflict between two collective interests, the environment is of greater importance'.[137] Unfortunately, the decision does not entirely prohibit the road works. Instead, it affirms that the project can proceed, but only while respecting the rights of nature.

Curiously, in its judgment the Court uses the environmental right and the rights of nature interchangeably without any clear distinction as to their respective application. For example, the Court opines that 'concerning the allegation of the provincial government, that the population … needs roads, it has to be indicated that … the interest of those communities in a road is reduced in comparison with the interest for a *healthy environment* including a larger number of people'.[138] While the Court seems to muddle the two rights, it also does not explicitly identify the actions enabling

134 *Wheeler* v. *Director de la Procuraduría General del Estado en Loja*, Judgment, Provincial Court of Loja, Case No. 11121-2011-0010, available at: http://consultas.funcionjudicial.gob.ec:8080/informacionjudicial/public/informacion.jsf.

135 Ibid., paras 1, 2 and 4 of the execution order.

136 Ground 5.

137 Ground 8.

138 Ibid. (emphasis added).

respect for the rights of nature, such as the right to restoration. The relief granted by the Court is confined mostly to the observance of routine statutory requirements and remedies, such as issuing environmental authorizations, construction of storage sites, and soil remediation.[139] While such measures contribute to protecting nature, they do not necessarily remove or stop the conditions that jeopardize nature's right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. The Court says nothing new about the rights of nature and does not design or order any novel remedies to protect such rights. Arguably, it could have merely relied on the environmental right in the Constitution to reach the same conclusion.

Future challenges for the courts perhaps will be to reconcile the conflicting environmental provisions in the Constitution, to clarify the relationship between the environmental right and the rights of nature, and to give greater recognition to the novelty of the rights of nature through a jurisprudential paradigm shift which conveys the importance, scope and autonomous basis of nature's rights. Kauffman and Martin have argued in this respect that 'most [Ecuadorian] lawyers and judges simply lacked knowledge of RoN [rights of nature] and how to interpret it. The idea that individual and corporate property rights must be curtailed in some cases to uphold Nature's rights was not only foreign to most judges, but ran counter to their legal training'.[140] These challenges are compounded by the need for the judiciary to successfully navigate the highly politicized conflicting relationship between rights of nature activists and the government, to interpret and apply the specific provisions of the Constitution creatively, and to ensure that the rule of law prevails.[141]

6.5. *Apathy for the Rule of Law and the Promotion of Ecologically Damaging Development*

The conflict that the Constitution creates between anthropocentrism and ecocentrism, and the hitherto inability of the courts to mediate this conflict, plays out starkly in practice. As do several other Latin American countries, Ecuador still maintains the anthropocentric and neoliberal logic of development based on the exploitation of natural resources, notably by actively promoting mining and oil exploitation activities.[142] That the extraction of natural resources is a crucial aspect of the

[139] Failure to comply with such formal requirements was also alleged in *Aguirre y otros* v. *Gobierno Autónomo Descentralizado Municipal de Santa Cruz*, Judgment, Second Civil and Commercial Court of Galapagos, Case No. 269-2012. The plaintiffs requested the application of a precautionary measure to suspend the construction of a road in the Province of Galapagos, alleging that the project did not have an environmental licence and that its development infringed the rights of nature. The Court granted the precautionary measure until the developers obtained the relevant environmental licence.

[140] C. Kauffman & P. Martin, 'Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail', paper presented at the International Studies Association Annual Convention, Atlanta, GA (US), 18 Mar. 2016, p. 9, available at: http://www.harmonywithnatureun.org/wordpress/wp-content/uploads/Papers/Testing%20Ecuador%E2%80%99s%20RoN_16_04_20.pdf.

[141] Ibid.

[142] P. Andrade, 'The Government of Nature: Post-Neoliberal Environmental Governance in Bolivia and Ecuador', in F. de Castro, B. Hogenboom & M. Baud (eds), *Environmental Governance in Latin America* (Palgrave Macmillan, 2016), pp. 113–36, at 121–5.

development strategies of the country has been justified by the government's emphasis on the necessity to achieve social justice and, especially, poverty alleviation.[143] Thus, the ravaging of nature continues, a reality which flies in the face of Correa's initial political commitment to create a new Ecuador 'where human beings live side by side in harmony with nature … where the predatory commodification of nature is not possible'.[144] The government's economic and political agenda to expand the extraction-based model has led to adopting laws that actively promote the exploitation of natural resources.[145] In January 2009, for example, the new Mining Law (*Ley de Minería*)[146] was adopted, and its creation was justified through the exception clause, which merely requires a 'substantiated request of the President of the Republic'.[147] The Mining Law authorizes the extraction of non-renewable natural resources in protected areas, and allows intensive industrial activities focused on large-scale and open-pit mining operations.[148] These activities, labelled 'large-scale delusions'[149] on account of the magnitude of their social and environmental impacts, infringe the rights of nature in indigenous territories with sensitive biodiversity and fragile water resources.[150] In the absence of consultation during the approval process of the Mining Law, affected indigenous people in these areas have actively opposed mining since 2008, an opposition which has been met with strong government-led repression, illegal detentions and even criminalization of the right to protest.[151] The success of its oppression led the government, in March 2012, to sign the first large-scale open-pit mining contract in the country's history, the so-called Mirador project, which is located in an indigenous territory that is also rich in biodiversity.[152] There is evidence to suggest that some opponents of this project have been killed.[153] In 2013, indigenous and non-governmental organizations filed a

143 E. Gudynas, 'Estado Compensador y Nuevos Extractivismos: Las Ambivalencias del Progresismo Sudamericano' (2012) 237 *Nueva Sociedad*, pp. 128–46, at 134.

144 País, n. 78 above, p. 8.

145 In one of his statements Correa highlighted that 'we [the Ecuadorians] cannot be beggars sitting on a chest of gold': 'One Square Mile of Ecuador: Zaruma's Gold', *BBC News*, 1 June 2013, available at: http://www.bbc.com/news/world-radio-and-tv-22718928.

146 Mining Law, Official Registry No. 517, 29 Jan. 2009.

147 Art. 407 of the Constitution.

148 Mining Law, n. 146 above, Art. 25.

149 A. Acosta, 'Delirios a Gran Escala: Correa en los Laberintos de la Megamineria', Agencia Latino-america de Informacion (ALAI), 9 Jan. 2012, available at: http://www.alainet.org/es/active/52001.

150 Ibid.

151 Amnesty International, '"So That No One Can Demand Anything": Criminalizing the Right to Protest in Ecuador?', AMR 28/002/2012, July 2012, pp. 17–20, available at: https://www.amnesty.org.uk/sites/default/files/ecuador_report_-_report_eng.pdf. Indigenous and community organizations filed an action of unconstitutionality against the adoption of the law, but the Constitutional Court dismissed the application: Constitutional Court, Judgment No. 001-10-SIN-CC, 18 Mar. 2010, available at: https://inredh.org/index.php?option=com_content&view=article&id=207:demanda-ley-de-mineria&catid=76:inconstitucionalidad&Itemid=150.

152 V.H. Jijon, 'The Ecuadorian Indigenous Movement and the Challenges of Plurinational State Construction', in M. Becker (ed.), *Indigenous and Afro-Ecuadorians Facing the Twenty-First Century* (Cambridge Scholars, 2013), pp. 34–70, at 63–4.

153 D. Collyns, 'Was This Indigenous Leader Killed Because He Fought to Save Ecuador's Land?', *The Guardian*, 2 June 2015, available at: https://www.theguardian.com/world/2015/jun/02/ecuador-murder-jose-tendetza-el-mirador-mine-project.

constitutional lawsuit against the developer and the Ecuadorian government to request the suspension of the project, arguing that it would cause serious environmental damage and, therefore, constituted an infringement of the rights of nature.[154] The Court of First Instance ruled against the plaintiffs, on the argument that the project would not affect a protected area and that the environmental damage would not violate the rights of nature.[155] The Court argued that, reaching far beyond the private interest of the plaintiffs, the development of the project represented the public interest in that it was necessary to achieve the state's sustainable economic development and to enable the state to achieve its social development aims.[156] The plaintiffs appealed against the decision, but the Appellate Court confirmed the decision at first instance.[157]

In addition to mining, the oil sector remains an important part of Ecuador's economic expansion.[158] In July 2010, the government endorsed the last major reform of the Hydrocarbons Law (*Ley Reformatoria a la Ley de Hidrocarburos y a la Ley de Régimen Tributario Interno*).[159] The main goal of this reform was to increase the state's participation in oil profits. Its detractors alleged that the reform is unable to provide a new oil extraction policy that corresponds with the Constitution's environmental and rights of nature provisions; it essentially continues to promote the expansion of the oil industry without creating a path to renewable energy alternatives.[160] As Jijon indicates:

> [T]he main demand of the social sectors has been the institutional strengthening of Petroecuador [the national oil company of Ecuador] and an increase in investment to step up production in the fields already in operation … [T]he government carried out a renegotiation of contracts with private companies and calls for new bids for exploration in still virgin areas of the rainforest.[161]

Under the Yasuni-Ishpingo Tambococha Tiputini Initiative (ITT), launched in 2007, Ecuador proposed to the international community that it would not extract the untapped oil reserves located in the Yasuni National Park (a UNESCO biosphere reserve) in exchange for financial contributions amounting to at least half of the revenue that the state would otherwise have received if it were to proceed with

154 *Viteri y otros* v. *Ecuacorriete S.A., Ministerio de Recursos Naturales, Procurador General del Estado*, Judgment, 25th Civil Court of Pichincha, Case No. 17325-2013-0038, available at: http://consultas.funcionjudicial.gob.ec/informacionjudicial/public/informacion.jsf.

155 Grounds 6 and 9.

156 Ground 7.

157 *Viteri y otros* v. *Ecuacorriete S.A., Ministerio de Recursos Naturales, Procurador General del Estado*, Judgment, Provincial Court of Pichincha, Case No. 17111-2013-0317, available at: http://consultas.funcionjudicial.gob.ec/informacionjudicial/public/informacion.jsf. The plaintiffs decided not to appeal but presented their case to the Inter-American Commission on Human Rights (IACHR): IACHR, Report of the 154th Session, Washington, DC (US), 13–27 Mar. 2015, available at: http://www.oas.org/en/iachr/media_center/PReleases/2015/037A.asp.

158 M. Varela, 'Las Actividades Extractivas en Ecuador' (2010) 79 *Ecuador Debate*, pp. 127–50.

159 Reform of the Hydrocarbons Law, Official Registry No. 244, 27 July 2010.

160 A. Acosta, 'Ecuador: Unas Reformas Petroleras con Muy Poca Reforma' (2011) 82 *Ecuador Debate*, pp. 45–60, at 47–52.

161 Jijon, n. 152 above, p. 64.

extraction (approximately US$3.6 billion).[162] The initiative stipulated that the monetary donations would accrue in a trust fund administered by the UN Development Programme and would be invested in renewable energy and sustainable development projects. Apparently, as Adelman says, 'Ecuador was prepared to sacrifice the market value of the oil despite the large contribution of the natural resources to its GDP [gross domestic product]'.[163] Pleading a lack of economic support from the international community, in August 2013 Correa announced Ecuador's withdrawal from the agreement and the commencement of oil extraction. As recently as March 2016, the government officially announced the commencement of oil extraction in the area.[164]

The undesirability of such unilateral presidential action, which is in direct contravention of the rights of nature, and the disregard for the rule of law thereby implied, are reinforced by the constitutional reform of December 2015, which abolished the constitutional prohibition of indefinite re-election. The new constitutional provisions allow the President and other elected officials to run for office indefinitely.[165] More recently, Correa's supporters agitated for a national referendum to allow him to seek a fourth consecutive term in office in 2017.[166] Laws, policies and practices such as these not only fly in the face of protective constitutional measures directly focusing on the Amazon, but also evidently contradict the spirit and purpose of the rights of nature. More worryingly, they suggest a general disregard for the rule of constitutional law in Ecuador, which remains a crucial imperative to fulfil the objectives of the Constitution and its rights-based provisions.

7. CONCLUSION

The assessment that we have presented here suggests that, currently, the divide between rhetoric and reality runs deep as far as the practical significance of Ecuador's rights of nature are concerned. It is clear that the constitutionalization of the rights of nature in Ecuador does not necessarily mean that more ecocentric laws, policies and governance practices will immediately come about.[167] In essence, the Ecuadorian environment, protected as it is on paper by elaborate constitutional rights of nature, is currently no better off than elsewhere in the world. Yet, despite its flaws and its vulnerability to obstinate neoliberal counterforces that oppress the change it seeks to achieve, the Ecuadorian Constitution remains a revolutionary positive step towards rethinking the central dominance of people in the Earth system. It is evident that this

162 C. Larrea & L. Warnars, 'Ecuador's Yasuni-ITT Initiative: Avoiding Emissions by Keeping Petroleum Underground' (2009) 13(3) *Energy for Sustainable Development*, pp. 219–23.

163 Adelman, n. 91 above, pp. 426–7.

164 A. Araujo, 'Petroamazonas Perforó el Primer Pozo para Extraer Crudo del ITT', *El Comercio*, 29 Mar. 2016, available at: http://www.elcomercio.com/actualidad/petroamazonas-perforacion-crudo-yasuniitt.html.

165 Constitutional amendment, Art. 144, Official Registry No. 653, 21 Dec. 2015.

166 This initiative is led by Correa's supporters through the Rafael Contigo Siempre campaign, which seeks a referendum to repeal the constitutional provision and, more concretely, the transitional provision adopted in Dec. 2015.

167 Adelman, n. 91 above, p. 426.

dominance can, and in future will have to, be challenged through a constitution – that apex of juridical norms in all legal systems.

Moreover, indigenous cosmovisions, as reflected in Ecuador's rights of nature, may have the potential to infiltrate Western liberal constitutional notions and to change the ontology of environmental constitutionalism and of rights at their core. Even if the rights of nature have not managed to redirect Ecuador's economic development path for now, at least they move the dialogue forward, which in turn could spark further juridical and political reforms. As Burdon and Williams observe:

> [R]ights of nature arguments are not a substantive or transformative alternative. They are not about displacing growth economics or democratising power in a way that empowers communities or builds resilience. Rather, a right of nature represents a minimalist alternative and seeks to mitigate environmental damage from firmly within the co-ordinates of the current system. This protection is important if that is all that is available.[168]

Evidently, rights of nature are in their infancy and will not trigger sudden, sweeping changes. Major new legal and policy reforms tend not to leap forward; they move gradually, with each step building on, and occasionally sliding back from the step before. The Ecuadorian Constitution is a step in rethinking the dominance of human beings in the Earth system and, although it must be judged on whether it meets its end goal, it should also be critically assessed for its contribution in forging a path towards that goal.[169] We believe that, all things considered, it succeeds in providing a very useful starting point on the journey towards an ecological constitutional state.

[168] P. Burdon & C. Williams, 'Rights of Nature: A Constructive Analysis', in D. Fisher (ed.), *Research Handbook on Fundamental Concepts in Environmental Law* (Edward Elgar, 2016), pp. 196–220, at 210–11.

[169] See, further, L. Sheehan, 'Implementing Rights of Nature through Sustainability Bills of Rights' (2015) 13(1) *New Zealand Journal of Public and International Law*, pp. 89–106.