

RIGHTS OF NATURE: THE ECUADORIAN CASE¹

DIREITOS DA NATUREZA: O CASO EQUATORIANO

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ABSTRACT

The recognition of rights to nature by the Constitution of Ecuador sets a new normative scenario for analysis of the role of law in human-nature interactions. Given the scope of such a recognition, one relying on unorthodox biocentric views, these rights raise controversy. To some, nature rights are rather symbolic; to others, these rights are not only real but fundamental to effectively address the ever-growing degradation of nature. Yet, others focus on enforcement and juridical interpretation of their normative content as to determine whether recognition of constitutional rights to nature provide the foundations for a more effective role of the law in this field.

KEYWORDS: Constitution; Nature; Rights; Pachamama.

RESUMO

O reconhecimento dos direitos à natureza pela Constituição do Equador estabelece um novo cenário normativo para análise do papel do direito nas interações "humano-natureza". Dado o escopo de tal reconhecimento, baseando-se em visões biocêntricas não ortodoxas, esses direitos levam a controvérsia. Para alguns, direitos da natureza são bastante simbólicos; para outros, esses direitos são não apenas reais, mas fundamentais para enfrentar efetivamente a degradação cada vez maior da natureza. No entanto, outros se concentram na aplicação e na interpretação jurídica de seus conteúdos

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normativos para determinar se o reconhecimento de direitos constitucionais à natureza fornecem as bases para um papel mais efetivo da lei neste campo.

PALAVRAS-CHAVE: Constituição; Natureza; Direitos; Pachamama.

INTRODUCTION

In 2008, Ecuador became the first State to recognize constitutional rights to nature. This recognition, which acknowledges the intrinsic value of nature, goes beyond the approach of protecting the environment, as it aims at respecting nature.

What effects would this recognition bring to Ecuador and, perhaps, comparative constitutional environmental law? Would this recognition be symbolic or would it be of real significance? This article will address these issues. It will present the background as well as the normative dimension of nature rights on the Ecuadorian Constitution.

The article will also examine doctrinarian perspectives while focusing on constitutional jurisprudence, to conclude that the Ecuadorian experience has provided a new scenario for analysis of the human-nature interactions from a biocentric perspective that coexists with a dominating anthropocentric perspective.

FOUNDATIONS

Pachamama or mother earth

There is no discussion about the recognition of rights to nature being a fundamental contribution of indigenous legal system to contemporary constitutionalism in Ecuador (Molina, 2014, p.104). The Constitution refers to nature as *Pachamama*, or mother earth in the *Kichwa* language of the Andean region. While this reflects articulation between legal systems that coexist in the intercultural and plurinational Ecuadorian society (Ávila, 2011, p.193), I argue that nature rights recognition should also be founded upon other pillars, namely:

- a) Development of *Ecuadorian Environmental Constitutionalism* and,
- b) Development of international environmental law, particularly in the field of biodiversity conservation.

Ecuadorian environmental constitutionalism

Ecuador was one of the first countries in its region to recognize environmental rights: A constitutional reform of 1983 recognized the individual the right to live in an environment *free of contamination* (Echeverría, 2013, p.96).

This reform also set a specific duty to the State on nature preservation; a notion that resembles the content of the 1982 UN World Charter for Nature.

In 1996, a new constitutional reform introduced an ecological perspective to environmental rights, by recognizing the collective and diffuse right to live in an *ecologically sound environment*. To some authors, this was a first attempt to revise the anthropocentric approach of environmental rights in the Ecuadorian Constitution (Hernández, 2005, p.154).

The 1996 constitutional reform, as well as the 1998 constitutional codification integrated some principles and rules inspired by the Convention on Biological Diversity, such as the duty to recuperate degraded natural spaces. The 1996 constitutional reform also incorporated some of the principles of the Rio Declaration, including Principle 10 on access to justice (Echeverría, 2013, p.99).

The new Constitution

In 2007, Ecuador drafted a new Constitution, which was approved by referendum and entered force in 2008. Nature was one of the main issues at the Constitutional Assembly. There, it became prevalent that environmental rules and institutions had not fully achieved the goal of environmental protection. To set highest possible standards, constituents debated about whether adopting a new paradigm of nature rights, or strengthening the existing concept of environmental protection (Gudynas, 2011, p. 243). They chose nature rights.

International environmental law

In examining the background of nature rights recognition, we must also focus on the important role of principles and rules of international environmental law in shaping national legislation.

This should not be surprising as Ecuador, like many other countries, has ratified or adhered to some of the most important treaties, including the Convention on Biological Diversity, whose concepts notably inspired the 1996 constitutional reform.

Ecuador also proclaimed the 1982 World Charter for Nature, a United Nations General Assembly Resolution that champions the principle of respect to nature; a principle that prevails when granting constitutional rights to nature (Grijalva, 2010, p.29). This has already been highlighted by the Constitutional Court of Ecuador, in a 2009 case that will be referred to in this article.

To summarize, the contribution of indigenous legal principles -while fundamental to the recognition of rights to nature in Ecuador- should not be regarded as the only one. Recognition of rights to nature or Pachamama is founded upon a broader and universal scenario. This approach may be interpreted as the outcome of decades of pluralistic normative development aiming at building a best-possible constitutional scenario to address ever growing and complex issues related to nature.

NORMATIVE DIMENSIONS

There are several references to nature in the Constitution of Ecuador. The preamble celebrates nature, or Pachamama. Article 10 sets what, perhaps, could be the most progressive constitutional text in the world: "Nature shall be the subject of those rights recognized by the Constitution".

The specific constitutional rights are described in a section expressly titled as rights to nature. Article 71 recognizes: "the right to integral respect for her existence and for the maintenance and regeneration of her life cycles, structure, functions and evolutionary processes".

This provision clearly resembles the Principle of the World Charter for Nature on nature's essential processes not be impaired.

Article 72 recognizes nature "the right to be restored". The Constitution expressly differentiates restoration to nature from compensation to individuals or communities depending upon affected natural systems.

There are other constitutional provisions, including those setting duties to both, the state and citizens. These are part of an approach known as *sumak kawsay*, another contribution of the indigenous legal system, roughly translated as well-being; a notion substantively different than sustainable development and quality of life.

Moving on to the next section, it is important to say that the recognition of rights to nature generated much expectation in Ecuador. Although accepted by the people in a referendum, nature rights are a controversial issue, and debate is ongoing.

PERSPECTIVES

There are at least three views to this issue: one neglecting the recognition of rights to nature; another in favor; and a third, emphasizing on application of nature rights.

Symbol rather than reality

Adherents of this view argue:

- a) Nature is a juridical object: All legal systems categorize nature as an object to the law; a resource for human use. Hence, recognition of nature rights is inconsistent with legal institutions (Larrea, 2008, p.55).
- b) Nature rights may debilitate human rights: Recognition of nature rights disregard the anthropocentric foundation of the law, which is a pillar to all legal systems. Law is a human creation and regulates human interaction. There is a possibility to debilitate the protection of human rights (Simon, 2013, p.29).
- c) Nature rights are not necessary: Integrity of nature as well as restoration of affected natural systems could be achieved by adequate application of existing environmental laws and institutions (Serrano, 2015, p.32).

Reality rather than symbol

Advocates of this view argue:

- a) Nature can be a juridical subject: Melo eloquently illustrates this view by noting that nature is "more real and tangible" than corporations (2014, p.53). If rights are granted to legal fictions, then why not recognizing rights to nature?
- b) Nature rights do not debilitate human rights: On the contrary, rights of nature reinforce human rights because humans are part of nature. Nature rights do not exclude but complement human rights. Nature rights do not imply renunciation to human rights but aim at a quality of life in harmony with nature (Zaffaroni, 2011, p.117). A biocentric approach, at least in the Ecuadorian constitutional view, put humans as a part of nature; not against or outside nature.
- c) Nature rights are necessary: Existing environmental law and institutions, while important, have not prevented the growth of environmental harm (Molina, 2014, p.198). Environmental law tends to focus on compensation rather than restoration or *protection of an object* rather than on *respect to a subject*. A new approach is, thus, needed.

Undergoing debate has provided additional elements. Advocates have turned to historic processes - such as abolition of slavery - to illustrate "paradigmatic dimensions" of nature rights (Melo, 2009). They have also set parallels to the normative evolution of human rights, specifically in the progressive recognition of rights occurred in the twentieth century. Other authors, in turn, argue that such recognition could prompt juridical, political, sociological and other scenarios of unforeseen outcomes. Yet, others have given little importance to this subject matter, categorizing it as experimental; or else, characterizing it in frivolous terms.

A third perspective

A third perspective focuses on application of these rights (Zaffaroni, 2011, P.133). After nearly a decade, individuals, organizations and state institutions have begun applying the Constitution, and constitutional judges in Ecuador have already ruled cases that will be presented in the following section. The cases had been processed under different actions that, in general, aim at enforcing constitutional law and rights, including environmental rights as well as rights of nature. The following decisions have been issued by the Constitutional Court of Ecuador, the top authority on constitutional control.

JURISPRUDENCE

Biodigester case (2009)

This case examined a petition to suspend the construction of a biodigester at a swine farm, processing over 7000 animals.

In their application actors, who lived in a nearby community, referred to the

environmental record of the farm, particularly alleging air and water pollution of surrounding rivers. A first-level judge denied the petition on procedural grounds. The case went on appeal to the Constitutional Court of Ecuador. The Court studied the merits of the case and concluded that the construction of a biodigester could not in itself affect environmental rights of the population.

The Court, therefore, confirmed the *a-quo* decision. The Court, however, ordered the integration of a multi-party commission to monitor the operation of biodigester, as well as to monitor environmental management of the farm, especially on water and waste disposal operations.

It is important to note that this decision was adopted even though the defendant argued that the case should only focus on the construction of the biodigester. The Court, invoked constitutional principles of integrality, autonomy and *iura novit curia*, reasoned it had to address all elements of the case, including the referential allegations to contamination, as to whether contamination may be affecting nature. To that end, judges argued their role was to enforce rights of all parties to the case, nature included.

This, arguably, was the first time that an Ecuadorian Court had ever acknowledged nature as party to a case, therefore putting in practice article 10 of the Constitution, which states that nature shall be a subject of constitutional rights.

The Court argued that, to deliver justice “it had to guarantee respect and protection of human rights and nature rights”. The Court added that the case was about water, an element of nature that is also fundamental to human life.

In a declaration that reflects the role of international environmental law in the recognition of rights to nature in Ecuador, the Court referred to the 1982 World Charter for Nature and other international instruments, to build up an argument about the role of the State in protecting nature.

The Court also provided a fundamental argument about the role of judges in applying nature rights: “It is an obligation to this Court as guardian of the enforcement of constitutional mandates, to materialize the will of the constituent in granting rights to nature...”.

Furthermore, the Court acknowledging the biocentric philosophy behind the recognition of nature rights accepted the following constitutional standard of interpretation: “whereas in case of doubt about its scope, legal principles and rules shall be applied in the meaning most favorable to the protection of nature...”.

Ecological reserve case (2012)

This case examined a petition to review a judicial decision relating to a shrimp farm located within a natural protected area. The contentious issue referred to the occupation of a State ecological reserve, by a private enterprise of high environmental

impact.

In the application, the environmental authority argued that the judicial decision only focused on property and labor rights of the owner of the shrimp farm, ignoring the legal declaration of the area as an ecological reserve, as well as the recognition of rights to nature.

The Court studied the merits of the case and concluded that the judicial decision did not integrate rights of nature in the analysis of the case. It reasoned that:

This Constitutional Court has been emphatic in pointing out the importance of the rights of nature; rights derived from the obligation of the State and its officials to encourage and promote respect for all the elements that are part of a system (...) This aspect has obviously not been observed by the judges (...) who did not analyze the existence or non-existence of violations of the rights of nature despite their obvious relevance. The central issue was a shrimp farm operating within the Cayapas-Mataje Ecological Reserve, an area that possesses a mangrove system with great diversity of fauna and flora.

The Court further argued:

(...) the judicial authority in this case did not at any time examine the existence or not of a violation of the constitutional rights of nature, nor is there any effort to verify whether the rights allegedly violated [property and labor] were in contrary of the constitutionally recognized rights to nature. On the contrary, the absence of analysis, even of enunciation, regarding the rights that the Constitution enshrines in favor of nature, in a process that essentially involves the protection and preservation of an ecological reserve, reveals an absolute denial of recognition of this area as a protected area and simultaneously, a denial of recognition of the right of people to live in a healthy and ecologically balanced environment.

Furthermore, the Court acknowledged the biocentric philosophy behind the recognition of nature rights applied the following constitutional standard of interpretation: "(...) within the nature-humanity legal relationship, a biocentric vision is to be prioritized, as opposed to the classic anthropocentric conception in which the human being is the center and the measure of all things where nature was considered a mere supplier of resources".

Artisanal mining case (2012)

This case examined a petition to review a judicial decision relating to the

performance of mining activities beyond the parameters authorized by the State. The contentious issue referred to the activities conducted by a holder of an artisanal mining permit, which were performed with equipment that was not classified as artisanal. In the application, the mining authority argued that illegal mining activities infringed on rights of nature. The Court studied the merits of the case and concluded that the judicial decision did not interpret the Constitution systematically, that is, examining human rights (labor rights) as well as nature rights. The Court reasoned that:

The suspension of the work of exploitation (...) does not imply an unconstitutional, illegal and illegitimate interference in the right to work (...) but its limitation is constituted by a constitutional and legal intervention in compliance with the current legal system, specifically regarding the rights of nature.

While acknowledging a biocentric approach to the “nature-society” relationship (Bustamante, 2016), the Court moved forward and set parameters to weigh conflict in interests:

If we take as reference the articles of the Constitution dealing with the rights of nature as well as those that regulate economic, sociocultural and environmental systems, it is evident that the allusion of nature and of each of its elements in the Constitution corresponds to a holder of rights whose respect must precede any individual economic interest.

CONCLUSIONS

Although it is still early to determine final conclusions on such a novel issue, preliminary conclusions are possible to draft upon emerging doctrine and jurisprudence.

In Ecuador, nature is going to court. Rights of nature are actionable. Ecuadorian courts have already produced jurisprudence, which demonstrates that nature rights are not symbolic but of practical application.

While incipient, there is much that we can learn from early jurisprudence: the role of individuals, civil society and the State in enforcing rights of nature; the role of judges in interpreting these rights; and, most importantly, the interaction between human rights and nature rights.

Some scholars have suggested that early cases and jurisprudence did not need nature rights advocacy, and could have been prosecuted in the context of environmental rights. Perhaps. But the substantive issue is: had nature been valued similarly by the Courts if these cases had aimed at protecting human rights? Whatever answer to this question, early jurisprudence shows courts taking nature consistently, perhaps more than ever.

Judgments also show a true effort to integrate human rights and nature rights, a complex task but an important one if we are to meet ever growing nature issues that are

now of global scope.

From an international perspective, Ecuador is not the only country where rights of nature are being included in the normative agenda. Global initiatives aiming at a Universal Declaration on the Rights of nature at the United Nations, are also taking part of the academic debate.

Perhaps Ecuador took the lead in what may be a new legal paradigm.

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