Ecuador's Constitutional Rights of Nature:

Implementation, Impacts, and Lessons Learned

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INTRODUCTION

In 2008, Ecuador became the first nation to grant constitutional rights to nature, or *pachamama* (Mother Earth to many indigenous Ecuadorians). The prevalence of laws granting rights to nature has dramatically increased in recent years at local, state, and national levels. In the United States, approximately 200 municipalities have passed ordinances that grant rights to nature in some manner. This movement was substantially catalyzed by Ecuador's 2008 Constitution.

Granting rights to nature shows a fundamental rethinking of the purpose of law. Nearly all legal systems were designed only for the benefit of people. Property law, in particular, was built on the premise that the modification of the natural environment for human benefit should not only be acceptable, but incentivized. John Locke's *Second Treatise on Government* provided the foundation for the labor theory of property, which establishes that in a world given by God to all of humanity in common, individual property ownership of any specific aspect of that world should be based on the labor that the individual puts into utilization of natural resources for human benefit.[1] Similarly, traditional environmental law is largely based on protecting the rights of people to have the benefits of a healthy environment and the resources it provides. Even the Endangered Species Act, which was enacted for the sake of protecting species, states in its text under the section, "Findings, Purposes, and Policy," that endangered species are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people," highlighting that its purpose is, at least officially, anthropocentric.[2] Granting rights to nature is a new approach to environmental law that conceptualizes the natural, non-human world as something worthy of protection for its own sake, and not just as something to be used for the benefit of people.

While a great deal has been written by scholars theorizing about what the effects of granting rights to nature might be, it is difficult to find information about how

[1] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690).
[2] 16 U.S.C. § 1531(a)(3) (1988).

Ecuador's law has actually been used in legal practice. To help fill this gap, the emphasis of this Article is on analyzing how nature's rights have been utilized and implemented in Ecuador, and what effects they have had. A final summary of key takeaways and lessons learned, that might be relevant for other rights of nature jurisdictions, is provided.

I. ECUADOR'S CONSTITUTIONAL RIGHTS OF NATURE

This section will provide: an introduction of Ecuador's constitutional rights of nature; an analysis of the relevant constitutional text; and an overview, with a variety of examples, of how nature's rights have functioned in legal practice. The section will also discuss the reasons, hopes, and expectations for Ecuador's granting rights to nature and the interplay between the rights of nature law and public perceptions.

A. Introduction to Ecuador's Constitutional Rights of Nature

A thorough understanding of Ecuador's rights of nature law requires insight into the political and social context in which the law was adopted and operates. The following Letter To the Editor, published recently in *El Comercio*, one of Ecuador's most-read periodicals, concisely highlights several points that are key to understanding Ecuador's rights of nature law: the acceptance of "mother nature rhetoric;" the influence of indigenous religion and culture; the referencing of nature's constitutional rights as evidence of a general responsibility to protect nature, but not as a legal imperative; and the contrasting of the protections of Ecuador's socialist society with taking real pro-environment action. It might be the case that the letter itself is an anomaly, written by someone with little knowledge about the law, whose views are not aligned with general public perceptions. Nevertheless, it is a useful illustration:

> Volcanic activity is not leaving us in peace, earthquakes are devastating nearby countries, the lack of rain destroys our crops, El Niño is around the corner. Is it not that Pachamama is angry with the residents of this side of the world? It would be worth the effort to calm her in some manner. In the pre-Hispanic era, the indigenous people offered human sacrifices to calm the fury of the colossus, and according to ancestral wisdom, sometimes it worked. As our Constitution is

> advanced and grants rights to Pachamama, the moment has arrived to respond to her demands. A progressive society like that of Ecuador, sheltered by the royal protectorate of socialism of the 21st century, cannot remain indifferent to the call of Mother Nature. Given how much our politicians and leaders preach about the enormous sacrifice they make for the homeland, which is a subjective premise, with little evidence to show for what they preach, this would be a great opportunity for them to take actions to show their love for the homeland, after years of enjoying *buen vivir*.[3]

First, this letter employs what the author of this Article has chosen to refer to as "mother nature rhetoric"—language such as blatant references to "Pachamama," "Mother Nature," or nature as a sentient being. This kind of rhetoric exists in other countries, such as the U.S., but is generally outside the mainstream political discourse. However, this letter exclusively uses mother nature rhetoric to justify why the nation's leaders and politicians should take action to protect the environment. Its selection for publication in *El Comercio* reflects how mother nature rhetoric has traction in Ecuadorian culture and discourse. This point is supported by the fact that *El Comercio* even has a subject matter tag titled "Pachamama," which one can click to find this letter and other articles about the topic.[4]

Second, this letter invokes pre-Columbian indigenous religious practices. It integrates discussion of ritual human sacrifices into talk of how Ecuador's Constitution grants rights to Pachamama, which highlights how indigenous beliefs were a central influence in the inclusion of these rights in the 2008 Constitution. This, in turn, highlights how indigenous religion and culture remain powerful influences in modern day Ecuadorian culture, politics, and law.

Third, nature's constitutional rights are referenced as evidence of a general responsibility to protect nature, but not as a legal imperative. Whether or not the author of

[3] Hugo Romo Castillo, *Pachamama*, EL COMERCIO (September 24, 2015), *translated by* the author of this Article, http://www.elcomercio.com/cartas/pachamama-hugo-romo-castillo-cartas.html.

[4] As a side note, though this is of little or no scientific value due to the self-selecting nature of poll participants, as of January 11, 2016, of the 25 readers who participated in *El Comercio*'s online poll of reader feelings about the article, the five categories received the following numbers of votes: 1 indignant, 1 sad, 0 indifferent, 0 surprised, 23 happy.

the letter understands constitutional law, in practice, nature's constitutional rights are more of a statement of belief that nature should be valued than a specific rule of law whose upholding is at the highest level in the hierarchy of the government's legal duties, which is how constitutional rights are often viewed in the U.S. This letter does not raise the idea that violating nature's constitutional rights is illegal, or that use of the court system would be an appropriate venue for achieving environmental protections.

Fourth, the letter contrasts the protections of Ecuador's socialist society with real action to protect the environment. Conceptualizing the significance of Ecuador's rights of nature law requires thinking about tensions and contradictions. The principle tension is between the goal of providing social services to help the people of a relatively poor country achieve *buen vivir* ("good living") and that of halting environmental degradation. The problem is that some degree of environmental degradation is frequently viewed as necessary to enact the government's goals of ensuring *buen vivir* for Ecuador's citizens. The principle contradiction is between the lofty rights of nature rhetoric, which includes mother nature rhetoric and is often verbally associated with the phrase *buen vivir*, and what actually happens in practice, which is that environmentally harmful practices continue despite the adoption of a rights of nature law. The very text of the Constitution includes provisions that are in tension with and contradictory to one another.

B. Analysis of the Text of Ecuador's Constitutional Rights of Nature

This section will list the relevant provisions of the Constitution and provide an analysis of the text. The text of the relevant constitutional provisions was written to provide extremely strong and expansive environmental protections. Lawyers in the U.S. with the Community Environmental Legal Defense Fund (CELDF) assisted Ecuadorian rights of nature activists with drafting the constitutional text.[5] As a side note, CELDF promotes the adoption of rights of nature ordinances in municipalities throughout the

[5] Craig Kauffman and Pamela Martin, *Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail,* App., Paper Presented at the International Studies Association Annual Convention Atlanta, GA, (Mar. 18, 2016), http://www.harmonywithnatureun.org/wordpress/wp-content/uploads/Papers/Testing%20Ecuador's%20RoN_16_04_20.pdf.

U.S., and helped Tamaqua, Pennsylvania, draft and adopt the world's first local rights of nature ordinance in 2006.[6]

In summary, the text of the Constitution: states up-front that societal harmony with nature is a priority for the nation; employs mother nature rhetoric; grants three distinct rights to nature, which are the right to integral respect, the right to maintenance and regeneration, and the right of restoration; grants authority to virtually all legal persons of all jurisdictions to call upon public authorities to enforce nature's rights; places general and specific affirmative duties on the State to prevent environmentally harmful conduct and regulate environmental services; gives people the right to benefit from the environment; prohibits appropriation of environmental services; places affirmative duties on all Ecuadorians to act in environmentally responsible ways; establishes that all laws implicating environmental issues should be interpreted to favor nature's protection when there is ambiguity; and establishes liability for virtually all parties involved when a good or service implicates environmental harm, with no statute of limitations. The remaining paragraphs in this section will elaborate on these points.

The starting point for analyzing the text is the preamble to the Constitution. The preamble of the foremost English translation of the Constitution contains 186 words, one third of which are the following:

> We women and men, the sovereign people of Ecuador . . . CELEBRATING nature, the Pacha Mama (Mother Earth), of which we are a part and which is vital to our existence . . . Hereby decide to build A new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the sumak kawsay.[7]

Ecuador's Constitution is very long and detailed compared to that of the U.S. For example, Ecuador's Constitution contains almost 4,000 words in the provisions that establish its judicial branch, compared to the U.S. Constitution's mere 291 words written

[6] *Id.* at 3.
[7] REPUBLICA DEL ECUADOR, CONSTITUCIONES DE 2008 [REPUBLIC OF ECUADOR CONSTITUTION OF 2008], Oct. 20, 2008 Political Database of the Americas, http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html [hereinafter CONST. OF ECUADOR].

for the same purpose.[8] And, although most of its text does not contain language discussing the relationship between humans and nature, based on a reading of the preamble, building a society in ecological balance with nature is clearly one of the foremost goals of Ecuador's Constitution. Although the text of the relevant articles of the Constitution generally employs what could be thought of as more standard language to discuss environmentalism, using scientific terms such as "evolutionary processes," "natural systems," "harmful environmental consequences," and "genetic assets," mother nature rhetoric is employed in the preamble through the use of the language "the Pacha Mama, of which we are a part" and "harmony with nature."

The next section of relevant text is Article 10, "Rights." Article 10 states: "Persons, communities, peoples, nations and communities are bearers of rights and shall enjoy the rights guaranteed to them in the Constitution and in international instruments. Nature shall be the subject of those rights that the Constitution recognizes for it."[9] Chapter Seven, "Rights of nature," via Articles 71–74, specifies the three rights that are recognized for nature: 1) "the right to integral respect for its existence;" 2) the right to "the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes;" and 3) "the right to be restored."[10]

The first two of nature's rights, the right to integral respect for its existence and the right to maintenance and regeneration, are enshrined in Article 71, along with an extremely broad grant of authority to "[a]ll persons, communities, peoples and nations" to "call upon public authorities to enforce the rights of nature."[11] Article 71 additionally places an affirmative duty upon the State to "give incentives . . . to protect nature and to promote respect for all the elements comprising an ecosystem." It is unclear purely from the text what the first right—the right to integral respect—actually entails. When asked about this, an Ecuadorian environmental attorney explained that this right clearly

[8] Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1663-64 (2014).
[9] CONST. OF ECUADOR, *supra* note 7, at art. 10.
[10] *Id.* at art. 71–72.
[11] *Id.* at art. 71.

embodies indigenous Ecuadorian views towards how humans should treat nature, and though it sounds vague, it covers a broad range of tangible actions.[12] Taking this perspective, nature's right to integral respect arguably encompasses such specific rights as the right to not have various types of pollution enter the environment. For example, tossing litter into the forest would violate this right. This is consistent with a textual reading of the three rights, as it implies that the right to integral respect fills in the theoretical gaps in coverage of environmental harms that appear to be left open by the other two of nature's rights. Further support for the notion that pollution constitutes a violation of nature's right to integral respect can be inferred from a report by the Inter-American Court and Commission, which stated that "[c]onditions of severe environmental pollution . . . are inconsistent with the right to be respected as a human being," thus constituting a violation of the American Declaration of the Rights of Man and the American Convention on Human Rights.[13]

Article 71's grant of authority to "call upon public authorities," which extends to extra-jurisdictional legal entities, sounds like a grant of standing to sue on behalf of nature, but is not explicitly stated as such. However, the standing question is clarified in Article 397, which grants virtually all legal entities in the world standing to demand enforcement of nature's rights in Ecuador.[14] This principle, based in Article 71 and clarified in Article 397, is sometimes called "universal jurisdiction."[15]

The third right, the right of restoration, codified in Article 72, "shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems."[16] Ecuador's rights of nature law presupposes that there will be compensation to "individuals and communities that depend on affected natural systems," and the law requires that the affected systems be

[12] Interview with a private environmental attorney with over twenty years of experience (Jan. 13-21, 2016).
[13] Rebecca Bratspies, *Do We Need A Human Right to A Healthy Environment?*, 13 SANTA CLARA J. INT'L L. 31, 36-37 (2015).
[14] CONST. OF ECUADOR, *supra* note 7, at art. 397.
[15] Joel Colón-Ríos, *Constituent Power, the Rights of Nature, and Universal Jurisdiction*, 60 MCGILL L.J. 127, 129 (2014).
[16] CONST. OF ECUADOR, *supra* note 7, at art. 72.

allowed restoration.[17] Article 72 further requires that when there is "severe or permanent environmental impact . . . the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences," meaning the government has an affirmative duty to enforce the right to restoration when the degree of degradation meets a certain threshold.[18]

The two remaining articles under Chapter 7, "Rights of nature," are Articles 73 and 74. Article 73 places affirmative duties on the State to limit any activities "that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles," and to forbid any "introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets."[19] Article 74 grants more traditional legal entities—specifically, "[p]ersons, communities, peoples, and nations"—"the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living."[20] It also specifies that "[e]nvironmental services . . . shall be regulated by the State" and "shall not be subject to appropriation."[21] This final provision, the prohibition on appropriation of environmental services, prevents people from profiting from the benefits and natural wealth that stem from nature. An example of how this could paradoxically disincentivize conservation is discussed infra in Section II.B.4.

After the elaboration of nature's rights in Chapter Seven, the next relevant chapter is Chapter Nine, "Responsibilities." Article 83.6 establishes that Ecuadorians have the duty and obligation to "respect the rights of nature, preserve a healthy environment and use natural resources rationally, sustainably and durably."[22] As with nature's right to integral respect, what is actually required under the duty to "respect" the rights of nature is ambiguous based solely on the text. This duty of respect probably means that violating

[17] *Id.*
[18] *Id.*
[19] *Id.* at art. 73.
[20] *Id.* at art. 74.
[21] *Id.*
[22] CONST. OF ECUADOR, *supra* note 7, at art. 83.6.

nature's rights, including nature's right to integral respect, is a violation of the Constitution. The duties to "preserve a healthy environment" and "use natural resources rationally, sustainably and durably," on the other hand, present more concrete, yet still vague, requirements that Ecuadorians act in certain ways.

The Constitution has about twenty other provisions that refer to nature, some of which are directly relevant to a general legal analysis of nature's rights and their enforcement.[23] Article 395, which specifies "environmental principles," establishes 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."[24] Since nature's rights undoubtedly qualify as "legal provisions for environmental issues," this provision could be read to establish that nature's rights, if they relate to "protection of nature," shall be placed at the highest level in a hierarchy of constitutional rights if such a "favorable interpretation of their effective force" can be made. When considered alongside the broad scope of nature's rights, the textual implication would be that the Constitution should be interpreted to prevent nearly any environmental harm, even when doing so necessitates the forfeiture of other constitutional rights. Additionally, the constitutional mandate is that "legal provisions for environmental issues" be interpreted to favor nature, meaning this interpretive rule shall apply to all laws implicating environmental issues, including those that exist outside the text of the Constitution, such as statutes and regulations. However, this raises the following question: what if there is no textually reasonable interpretation that would require protecting nature's rights at the expense of upholding other rights? The text does not indicate that reasonability even matters. It only requires that an interpretation favoring protection of nature's rights be "the most favorable." Therefore, Article 395 seems to require that courts be willing to interpret an environmental legal provision in a textually unreasonable way if it is favorable to the protection of nature.

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[23] *See* Farith Simon Campaña, *Derechos de la naturaliza: ¿innovación transcendental, retórica jurídica o proyecto político? (The rights of nature: transcendent innovation legal rhetoric or political project?)*, 15 JURIS DICTIO, Año 13 (2013).
[24] CONST. OF ECUADOR, supra note 7, at art. 395.4.

Article 396, among other things, clarifies who shall be responsible for ensuring nature's right to restoration. The list is expansive. "Each one of the players in the processes of production, distribution, marketing and use of goods or services shall accept direct responsibility for preventing any environmental impact, for mitigating and repairing the damages caused, and for maintaining an ongoing environmental monitoring system."[25] Thus, liability can be established for someone who merely marketed or used a good or service whose provision generated an environmental harm somewhere along the chain of production, regardless of knowledge about or relative degree of culpability for the harm. Finally, Article 396 establishes that "legal proceedings to prosecute and punish those responsible for environmental damages shall not be subject to any statute of limitations," further expanding potential lists of parties liable for environmental harms.[26]

C. Reasons, Hopes, and Expectations for Ecuador's Granting Rights to Nature

This section will focus on perspectives from the time period near when Ecuador adopted rights of nature. A complete analysis of the circumstances surrounding Ecuador's inclusion of rights of nature in its 2008 Constitution would require, at the least, a thorough understanding of Ecuadorian politics, many of the diverse cultures that thrive within Ecuador, and indigenous Ecuadorian religion. Such an analysis is not possible here, though a general overview follows.

1. Political Reasons for Granting Rights to Nature

The adoption of Ecuador's 2008 Constitution coincided with the ascendency of Ecuador's President Rafael Correa, who took office in 2007.[27] While this Article deliberately minimizes discussion of the President Correa administration, the story of Ecuador's granting rights to nature and how they work in practice is substantially a story

[25] *Id.*, at art. 396.
[26] *Id.*
[27] Stephen Küffner and Joshua Partlow, *Voters in Ecuador Approve Constitution*, THE WASHINGTON POST (Sep. 29, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/09/28/AR2008092802644.html.

of politics. President Correa is the dominant figure in Ecuadorian political discourse. Thus, some discussion of politics and President Correa is necessary.

President Correa was elected in late 2006. The Correa era has been a period of significant political stability compared to the period from 1996 to 2006, during which Ecuador had nine different presidents leave office.[28] As part of his populist agenda, President Correa led the movement for the creation of a new constitution, which was ultimately adopted in 2008. This Article will not guess as to what extent politics played a role in the inclusion of rights of nature in the Constitution, but it is clear that politics mattered. First, Ecuador's indigenous population has political influence. Most Ecuadorians have indigenous ancestry, and there are a great many culturally indigenous communities in Ecuador today. The concept of treating nature, or pachamama, as an entity worthy of rights and respect comes from Ecuador's indigenous cultures. The Correa administration successfully garnered enough public support to convoke a constituent assembly to write a new constitution due in substantial part to approval and support from indigenous communities.[29] The inclusion of principles in the Constitution based on *sumak kawsay*, including rights of nature, was viewed as a victory amongst indigenous movement activists.[30]

Second, regardless of whether President Correa was a strong advocate or supporter of the inclusion of rights of nature in the Constitution, he did want to demonstrate support for a progressive agenda.[31] This speaks to the third point, which is that there is little dispute that President Correa's administration has much influence over how the nation's laws are implemented. In conclusion, hopes for what could be accomplished by granting rights to nature have always been tempered in the minds of those who considered the reality that the Correa administration may have approved their inclusion in the constitution largely for political reasons, while knowing that their

[28] RULERS, *List of heads of state of Ecuador*, http://www.rulers.org/rule.html#ecuador/.
[29] Marc Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, 176 LATIN AMERICAN PERSPECTIVES 47, 47–62, (2011).
[30] *Id.* at 59–60.
[31] *See id.* at 49.

inclusion probably would not significantly constrain its ability to pursue its agenda. Indeed, although the first years of the Correa administration have often been described as "euphoric" compared to the previous decade of instability, Ecuadorians understandably had previously learned to view major changes on paper as not necessarily meaning that there would be major changes in practice.

The Constitution not only grants nature sweeping rights, but it also grants a very wide range of other sweeping rights. The question of whether those writing the Constitution actually believed that all of these rights would or could be enforced has been asked many times. A common answer is that strict enforcement was not the top priority at the time of the Constitution's writing—a top priority was unifying the nation around a common cause that differing political constituencies could support. The Constitution arguably accomplished this.

2. Environmentalists' Hope and Expectations for the Rights of Nature Law

The following four quotes are from Alberto Acosta, who was President of Ecuador's Constituent Assembly and a lead architect of the 2008 Constitution: "We receive an impoverished country . . . we are poor because we are rich in natural resources, because we are unable to control our immeasurable natural riches."[32] "Nature is not considered as an everything, it is recognized for its elements as much as they have an immediate utility . . . they are natural resources for exploitation, buying and selling. Not long ago, a similar vision prevailed in relation to slaves."[33] "To abolish slavery it was required that people recognized 'the right to have rights' and it was also required that there was a political force to change all of the laws that negated those rights."[34] "Above all it will pave the way for the construction of other types of relationships with Nature that, as a society, we have to relearn."[35]

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[32] ALBERTO ACOSTA, *Los grandes cambios requieren de esfuerzos audaces*, DERECHOS DE LA NATURALEZA: EL FUTURO ES AHORA, 16, Impresión: Ediciones Abya-Yala,(Febrero del 2009) (*translated by* the author of this Article).
[33] *Id.* at 19
[34] *Id.*
[35] *Id.* at 22.

Acosta, and many other environmentalists, saw dramatic environmental harm occur in their country due to natural resource extraction activities that continuously failed to alleviate the problems of poverty. Acosta wanted big changes enacted in Ecuador's new constitution. Analogizing granting nature rights, and the change in perspectives that it could help bring, to the abolition of slavery, Acosta viewed granting nature rights as a watershed event that could help society relearn how to live in harmony with nature.

Ecuador's environmental community saw itself as a test case. It was hoped that Ecuador's granting of rights to nature would add something of value to the global debate about what legal and political mechanisms could be used to combat climate change.[36] Nature's rights were also viewed as a potential mechanism for stimulating sustainable development and helping Ecuador break its economic dependence on its oil industry.[37] It was hoped that granting nature rights would be a move towards "deep ecology,"[38] a type of environmentalism in which human lifestyles are in harmony with nature. Some believe this exists amongst indigenous people whose cultures have established rituals, taboos, rules, and restrictions that require them to live in harmony with nature.[39] Granting nature rights was viewed as a way to escape the European legal tradition that was based on a conception of humans as dominators of nature. Instead they wanted to make a shift toward a more traditionally indigenous Ecuadorian legal tradition.[40] These perspectives echoed the resentment felt towards European imperial conquerors who devastated indigenous cultures in Latin America and imposed European language and culture on the indigenous people.

These aspirational goals were more than hopes about the impacts of the law as they were believed to be possible in the near-term. Environmentalists were extraordinarily excited when the Constitution was being drafted and adopted it because of

[36] MARIO MELO, *Los Derechos de la Naturaleza en la nueva Constitución ecuatoriana*, DERECHOS DE LA NATURALEZA: EL FUTURO ES AHORA, 60, Impresión: Ediciones Abya-Yala (Febrero del 2009).
[37] CARLOS LARREA, *Naturaleza, sustentabilidad y desarrollo en el Ecuador*, DERECHOS DE LA NATURALEZA: EL FUTURO ES AHORA, 60, Impresión: Ediciones Abya-Yala, (Febrero del 2009).
[38] ESPERANZA MARTÍNEZ, *Lose Derechos de la Naturaleza en los países amazónicos*, DERECHOS DE LA NATURALEZA: EL FUTURO ES AHORA, 91, Impresión: Ediciones Abya-Yala, (Febrero del 2009).
[39] *Id.* at 91.
[40] *Id.* at 86.

the scope of change that was discussed in association with Ecuador's rights of nature law. Some environmentalists, who followed the constitutional assembly process, felt that when nature's rights were included in the text, "anything was possible" for the future of environmentalism in Ecuador.[41]

Along with the excitement was skepticism. In 2016, two environmental law practitioners in Quito said that they did not expect the rights of nature law to have a major impact on legal practice, but saw it as a positive development for Ecuador's environmental movement in general.[42] In the period between the adoption of Ecuador's 1998 Constitution and the adoption of the 2008 Constitution, Ecuador's Supreme Court only gave one environmental ruling.[43] Environmental law practitioners would thus have been understandably hesitant to believe the adoption of a new constitution would quickly transition their judiciary from giving relatively minimal priority to environmental law to enforcing unprecedentedly strong and sweeping environmental provisions. Indeed, another environmental law practitioner stated the opinion that a lack of "institutional strength" and preexisting "legal framework" to implement and enforce nature's rights meant that they were likely to be minimally effective in legal practice, and would get "pushed under the rug."[44] This practitioner stated that it would be worth experimenting with rights of nature laws in a different country, such as Sweden, "where the rule of law is bulletproof,"[45] or in an international jurisdiction such as the high seas where recurring problems such as overfishing suggest a need for stronger environmental laws, yet there is less of an accumulation of legal tradition that the new law would need to be compatible with.[46]

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[41] Interview, *supra* note 12.
[42] *Id.*
[43] MARÍA AMPARO ALBÁN, LOS RETOS DE APLICACIÓN DEL DERECHO AMBIENTAL: EL CASO DE ECUADOR Y LOS DERECHOS DE LA NATURALEZA, Congreso Interamericano sobre el Estado de Derecho en Materia Ambiental, Ensayos Seleccionados, 184 [Inter-American Congress on the Environmental Rule of Law] (2015).
[44] Interview with a private environmental attorney and law professor with over ten years of experience, (Jan. 13–21, 2016).
[45] *Id.*
[46] *Id.*

D. Ecuador's Constitutional Rights of Nature in Legal Practice

Finding evidence of the practical effects of Ecuador's constitutional rights of nature is difficult. The first takeaway is that the *practical* legal significance has thus far been minimal in comparison with the amount of theorizing about the *potential* legal significance that would occur. However, some examples of their implementation and effects can be found. Rights of nature have appeared in high-profile environmental litigation within Ecuador. They were the basis of a suit brought against British Petroleum for its 2010 oil spill. Rights of nature are an important legal aspect of the General Assembly's newly written Environmental Code and were frequently highlighted to garner public approval for the passage of the Code. They are regularly cited in Ministry of Environment administrative dispositions. Rights of nature have altered Executive Branch conduct so that compliance with nature's rights will be maintained, as illustrated by the creation and management of the Socio Bosque forest conservation program. They provided a basis for the executive branch to propose and pass a ban on bullfighting by popular consultation. Finally, rights of nature were used as bases for non-binding rulings by the citizens' Tribunal for the Rights of Nature.[47]

1. Rights of Nature Cases Before Ecuador's Courts

As of March 2016, there have been at least ten cases in which an Ecuadorian court reached a judgment that applied the rights of nature.[48] At least two are still active.[49] Craig Kauffman and Pamela Martin presented a paper in March 2016 that provides a clear overview of thirteen rights of nature cases.[50] This Article will summarize the major takeaways from some of these cases. Applying some of the conceptual framework from Kauffman and Martin's paper, this Article organizes cases under the following topics: the impact of judicial familiarity with rights of nature law; government actions driving the development of rights of nature jurisprudence; the Constitutional Court establishes that

[47] *Id.*
[48] Kauffman, *supra* note 5.
[49] *Id.*
[50] *Id.*

nature's rights affect all other rights and must be considered by lower courts; and judges unilaterally applying rights of nature. Finally, this section will also discuss the BP oil spill case that was filed in Ecuador.

a. The Impact of Judicial Familiarity with Rights of Nature Law

Kauffman and Martin present evidence suggesting that judicial familiarity with rights of nature provisions, legal theory, and precedential applications may affect the outcome of rights of nature cases. The first example was celebrated internationally as the world's first successful lawsuit vindicating the rights of nature.[51] In 2011, overturning the municipal court's decision, the Provincial Court of Loja issued an appellate ruling in favor of the Vilcabamba River. Two North Americans who owned land near the river filed the suit against the Provincial Government of Loja province. They claimed that harm to the river from road construction had violated nature's rights.[52] They sought restoration of the river system, but did not seek relief for themselves.[53] Rights of nature activists have stated that the appellate judge was a friend of claimants' lawyer, and was receptive to the lawyer's providing background and guidance in interpreting the Constitution's rights of nature provisions.[54] This, plus the fact that the claimants were North Americans, as well as other political influences, may have substantially influenced the outcome, making the first successful rights of nature case possible.

Kauffman and Martin further state: "[M]ost lawyers and judges simply lacked knowledge of 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."[55] To illustrate that, as they heard from Ecuadorian environmental lawyers, "most judges do not understand rights of nature and do not know how to interpret them or balance them

[51] *See* Natalia Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, Global Alliance for the Rights of Nature (Oct. 9, 2016), http://therightsofnature.org/first-ron-case-ecuador/.
[52] Kauffman, *supra* note 5.
[53] *Id.* at 12–13.
[54] *Id.* at 13.
[55] *Id.* at 9.

against other constitutional rights." Judges point to the Tangabana pine tree plantation case filed in 2014. This case was filed by rights of nature activists seeking a protective action against the plantation to prevent harm to the area's watershed.[56] The judge ruled against the claimants, stating that they had not proved damage needing repair, and were not owners of affected land. Therefore, the activists could not prove that they were harmed.[57] Supporting this rationale, the judge rejected evidence demonstrating environmental harm on procedural grounds. However, this specific procedural requirement is only a requirement in criminal cases. The claimants' lawyer stated that the judge's ignorance of the different procedural requirements in different types of cases is common in small municipalities, such as the one where this case was tried.[58] The appellate judge refused to consider new evidence, and therefore found the claim deficient and denied the appeal.[59] A second appeal to the Constitutional Court, alleging violation of due process, is awaiting consideration.[60]

As will be explained in the next subsections of this Article, as the number of successful rights of nature cases increases, judicial support for enforcing and giving strength to the rights of nature provisions might be reasonably expected to increase. These cases are often brought by the government, and are strengthened by rulings from the Constitutional Court, whose interpretations create binding legal rules in favor of nature's rights.

b. Government Actions Driving the Development of Rights of Nature Jurisprudence

Kauffman and Martin argue that policy-driven government action is a primary reason why rights of nature cases are being tried, and that the government is, though possibly unintentionally, strengthening nature's rights by establishing legal precedents.[61] "Six of the 13 RoN applications were initiated by the State, all successfully. Moreover,

[56] *See id.* at 11–12.
[57] *Id.* at 12.
[58] Kauffman, *supra* note 5.
[59] *Id.* at 12.
[60] *Id.*
[61] *Id.* at 14.

the State employed the full array of legal tools: constitutional lawsuits for protective action, criminal lawsuits, and administrative action."[62]

The State has also used nature's rights to justify more extreme measures. In 2011, after it was apparent that mining operations had polluted water sources, the Ministry of Interior received approval from the 22nd Criminal Court of Pichincha to take the extraordinary measure of using military force to destroy "all items, devices, tools, and other utensils that constitute a serious danger to Nature."[63] The same day the court gave its approval, President Correa issued Executive Decree 783, under which "nearly 600 soldiers seized and destroyed more than 200 pieces of heavy mining equipment, including those that local miners had rented from third parties."[64] Since then, the government has conducted similar operations in four different provinces.[65]

Notably, the aforementioned mining operations that the government used court-sanctioned military force to shut down were unauthorized mining operations.[66] The government's severe responses hint that it may have opposed those operations on policy grounds. However, in the Mirador Mine case, when a mining operation that will cause environmental degradation was a favored part of the government's agenda, the results were different. The Mirador Mine, which will be the first large-scale mine in Ecuador's history after it is built, is currently being opposed by vocal environmental and human rights activists who claim that the government has been "supporting the [mining] company by force, arrests, lawsuits and harassment, and lack of prior informed consent."[67] Significant environmental concerns have been raised about the project, with some being legitimated by the project's own environmental impact assessment.[68] However, unlike in the aforementioned cases implicating unauthorized mining, the

[62] *Id.*
[63] *Id.* at 14 (quoting letter sent by Minister of Interior José Serrano to Judge Juan Pablo Hernández Cárdenas of the 22nd Criminal Court of Pichincha, May 20, 2011).
[64] Kauffman, *supra* note 5.
[65] *Id.* at 14.
[66] *Id.* at 14–15.
[67] Beth Wald, *Large-scale Copper Mine Project in Ecuador Mired in Allegations of Abuse*, MONGABAY (December 21, 2015), https://news.mongabay.com/2015/12/large-scale-copper-mine-project-in-ecuador-mired-in-allegations-of-abuse/.
[68] *Id.*

Ecuadorian government has refused to acknowledge nature's rights in the legal challenges to the Mirador Mine.[69] As occurred in those other cases, the trial court sided with the government.

Claimants opposing the Mirador Mine argued that the project would violate nature's rights in multiple ways, including destroying ecosystems and likely causing at least one specie's extinction.[70] The court ruled that nature's rights were not violated because the project would not impact a protected area, and because the claimants' desire to protect nature is a *private interest*, and so is secondary to the *public interest* of development that the mining company's conduct would benefit.[71] This is despite the Ministry of Environment's environmental impact assessment having shown that the project would, indeed, impact a protected area.[72] Furthermore, even after accepting the questionable logic that a line can be drawn distinguishing protecting nature as a private interest from constructing a large mine in a biodiversity hotspot as an action that benefits the public interest, it is unclear why this would matter in a determination of whether nature's rights were violated. Kauffman and Martin argue that "[p]utting aside the perverse logic of this argument, it contradicts the constitutional principle that Nature's rights are both independent of societal interests and of equal value."[73]

The claimants lost again on appeal before the Provincial Court of Pichincha.[74] Concerned with a lack of independence of the judiciary and fearful of establishing an undesirable binding precedent diminishing the scope of the nature's rights provisions, the claimants chose not to appeal to the Constitutional Court.[75] The ability of judges to exercise independent judicial discretion in this type of case is highly questionable, given that President Correa had a memo circulated among judges stating that any judge who approves a preventive action halting a State project must personally reimburse the State

[69] Kauffman, *supra* note 5, at 15.
[70] *Id.* at Appendix.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 11.
[74] *Id.*
[75] *Id.*

for losses resulting from the preventive action.[76] The Mirador Mine case is currently being reviewed by the Inter-American Court of Human Rights, which is the forum chosen by the plaintiffs for further review of the case.[77]

The implication of the aforementioned mining cases is that the government may be an aggressively strong proponent of nature's rights in some instances regarding mining projects that cause environmental degradation, but appears to aggressively oppose proponents of nature's rights when it supports such mining projects. The judiciary appears inclined to rule in favor of the government.

c. Constitutional Court Establishes that Nature's Rights Affect All Other Rights and Must Be Considered by Lower Courts

In 2011, after the Ministry of Environment took administrative action to prevent shrimp farming in an ecological reserve, one shrimp farmer sued to stop the action.[78] The judge ruled against the government, and agreed that "the economic interest of an individual takes precedence over Nature," citing constitutional articles guaranteeing protection of private property.[79] The ruling was upheld on appeal before a Provincial Court. However, on further appeal to the Constitutional Court, which is the court of final instance regarding interpretations of the Constitution and whose interpretations are binding on lower courts, the outcome was different.

As there have not been many rulings by the Constitutional Court interpreting the rights of nature provisions—this might be the only one—many questions remain regarding the scope of nature's rights and how they interact with other rights. The Ministry of Environment asked the Constitutional Court "to establish a precedent that permits us to exercise fully the respect for Nature and for *buen vivir*, as issues like these concern the whole community and are . . . nationally relevant."[80] The Constitutional Court ruled on May 20, 2015, that nature's rights and *buen vivir* are central to the

[76] *Id.*
[77] *Id.*
[78] *Id.* at 15.
[79] *Id.*
[80] *Id.* at 15–16 (quoting the Corte Constitucional del Ecuador 2015).

Constitution, and that they affect all other rights.[81] The Constitutional Court stated that Ecuador had adopted "a biocentric vision that prioritizes Nature in contrast to the classic anthropocentric conception in which the human being is the center and measure of all things, and where Nature was considered a mere provider of resources."[82] The Court went further, specifying that the lower court denied nature its constitutional right of due process by not considering its rights, and a retrial was ordered.[83]

d. Judges Unilaterally Applying Rights of Nature

In two cases analyzed by Kauffman and Martin, judicial rulings were based on nature's constitutional rights, despite the fact that the claimants did not raise nature's rights to support their claims.[84] Neither case went before the Constitutional Court, so the judges' interpretations are not law. However, given that Kauffman and Martin found a total of only thirteen rights of nature cases, the fact that this has happened twice suggests that it might be a continuing trend.

In the first case, in 2009, community members asked the court to stop installation of equipment at a large pig farm that they claimed was violating their own constitutional rights to health and a safe and clean environment.[85] The judge allowed the installations, but unilaterally established an auditing and monitoring commission to oversee the facility's future operations. The legal bases for the judge's decision was the court's role in protecting people's and communities' rights to a clean environment, as well as the court's role in protecting nature's right to restoration.[86]

The second case involved a challenge to a municipality's plans for road construction. The plaintiffs alleged that there were procedural deficiencies in the municipality's seeking of an environmental license for the project.[87] The judge's decision, however, invoked nature's rights, and noted that construction could impact

[81] *Id.* at 16.
[82] *Id.* at 16 (quoting the Corte Constitucional del Ecuador 2015).
[83] *Id.*
[84] *Id.* at 16–17.
[85] *Id.* at 17.
[86] *Id.*
[87] *Id.*

various species' habitat. The construction was ordered suspended until an environmental license could be attained based on an assessment showing that species' habitat would be protected, especially during the migratory season.[88] The judge, citing precautionary protection measures and the hierarchy of rights provisions of the Constitution, stated that, in Kauffman's and Martin's words, "the court's duty to protect Nature took precedence over its duty to protect governments' ability to carry out public works."[89] The court also cited as precedent the Vilcabamba River case, the first case in which nature's rights were validated.[90]

The jurisprudential significance of these two cases may depend on whether judges continue to unilaterally take action to protect nature's rights in their rulings in the future. That one of these cases involved a citation to a previous rights of nature case suggests that this type of judicial conduct may encourage more of the same.

e. BP Oil Spill Lawsuit

On November 26, 2010, in the wake of the historic British Petroleum ("BP") oil spill in the Gulf of Mexico, citizens of Ecuador, India, Colombia, and Nigeria petitioned Ecuador's Constitutional Court, requesting relief in the form of requiring BP to disclose information pertaining to the incident and take action to correct environmental damage done.[91] Also requested was that "British Petroleum be ordered to commit to leaving untapped an equivalent amount of oil to the oil spilled in the Gulf" and "be ordered to redirect investment earmarked for further exploration towards strategies aimed a[t] [sic] leaving oil underground as a more effective mechanism for compensating nature for the current impact on its climate cycles due to oil production."[92] The plaintiffs asked the court to assert "universal jurisdiction" to protect "the rights of the ocean" under Article

[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] Colón-Ríos, *supra* note 15, at 129.
[92] Oilwatch, *BP Summoned to Answer for Assault on Mother Earth for Gulf of Mexico Spill*, Environmental Justice Organisations, Liabilities and Trade (August 2, 2012), http://www.ejolt.org/2012/08/bp-summoned-to-answer-for-assault-on-mother-earth-for-gulf-of-mexico-spill/.

71 of the Constitution.[93] The oil spill occurred outside of Ecuador's jurisdiction, and none of the plaintiffs claimed to have suffered any harm from it.[94]

The case against BP was admitted as suit No. 0523-2012 under the Juzgando Segundo de Pichincha (Second Labour Court of Pichincha, located in Quito).[95] It was admitted for proceedings on July 26, 2012, and summons to appear for a public hearing on August 3, 2012, were issued to two representatives of BP.[96] Information indicating whether the public hearing occurred is scant, but the court ultimately dismissed the case. In the judge's words, translated to English by the author of this Article, "the Gulf of Mexico and the exact location where this environmental disaster occurred is not protected by our Constitution . . . in consequence . . . this authority is not competent to hear the present lawsuit . . . it is rejected for inadmissibility . . ."[97]

This result shows that Ecuador's constitutional rights of nature probably do not provide standing to sue in Ecuadorian courts for environmental harms that occur outside of Ecuador. Though only the Constitutional Court and the Supreme Court can bind lower courts with their rulings, the fact that no similar cases in which harms that occurred outside of Ecuador have been more successful for the plaintiffs than this one suggests that any case brought on similar legal grounds, invoking universal jurisdiction, would similarly be dismissed.

The suit against BP is an example of what has been called "localismo globalizado," which in English approximates "globalized parochialism."[98] A thorough analysis of this concept is beyond the scope of this Article, but it does raise interesting questions about a law such as Ecuador's as it is written. Should one nation's courts be able to claim jurisdiction over actors with no connection to that nation if profound

[93] Colón-Ríos, *supra*, note 15 at 129.
[94] *Id.*
[95] Oilwatch, *supra* note 92.
[96] *News: BP Summoned in Case Filed by Dr. Vandana Shiva and Others in the Constitutional Court of Ecuador*, NAVDANYA, http://navdanya.org/news/264-newsbp-summoned-in-case-filed-by-dr-vandana-shiva-and-others-in-the-constitutional-court-of-ecuador-).
[97] Farith Simon Campaña, *Derechos de la naturaliza: ¿innovación transcendental, retórica jurídica o proyecto político? (The rights of nature: transcendent innovation legal rethoric or political project?)* at 35, JURIS DICTIO, Año 13. Vol. 15, Enero–Junio 2013 (Year 13, Vol. 15, January–June 2013).
[98] *Id.* at 34.

environmental damage occurs somewhere far away, but could affect ecosystems within that nation? From one perspective, this leads to a familiar problem that has often plagued those wishing to sue for environmental harm: proving causation. Perhaps a rights of nature law could be a useful tool in helping judges, litigants, and others better conceptualize the interjurisdictional effects of environmental damage that are difficult to see, but are nonetheless real, due to the interconnectedness of natural global systems. Taking this perspective, it is easy to see how, for example, carbon pollution emissions in the U.S. are a causal factor in harms resulting from climate change that occur in Ecuador. Similarly, an oil spill that disrupts food chains in the Gulf of Mexico can be a causal factor in harms to ecosystems, which are part of the rights-holding entity "nature," that occur in Ecuador.

2. Rights of Nature and Ecuador's New Environmental Code

As of late January 2016, Ecuador was on the verge of passing broad changes to its body of environmental law by adoption of a new Environmental Code. The National Assembly, which is the legislative branch of Ecuador's national government, appears to be in the process of finalizing the Code at the time of this writing. Nature's constitutional rights are referenced in multiple sections of the Code, and the possibility of the Code impacting people's enjoyment of other constitutional rights triggered a requirement that the General Assembly seek input from the potentially affected people, which included providing input on the statutory text about nature's rights.

Overall, it appears that in this context, nature's constitutional rights function principally as a rhetorical hurdle that the National Assembly is easily able to clear to ensure that the Code is legal under the Constitution. The Assembly clears this hurdle by making general statements about the importance of nature's rights and how they will be upheld under the new law, and by citing the specific constitutional provisions that establish nature's rights without elaborating on how the new law might affect any of those specific rights, other than stating that the Code requires their protection.

It appears that nature's rights are of little practical legal significance under the new code, and were frequently referenced to garner public support for the Code's

passage, rather than to create effective law. But at the same time, though a more thorough analysis of the full text of the Code would need to be made to reach a conclusion, it is plausible that if nature's rights were not recognized in Ecuador's Constitution, the proposed Environmental Code would be more permissive of environmentally harmful activities. At the least, because of the inclusion of nature's rights, virtually any environmentally harmful conduct is *technically* sanctionable under the Code.

a. Nature's Rights as a Basis for the Environmental Code

Nature's rights are first referenced in the Exposition of Reasons for the adoption of the new Code.[99] A sizable percentage of the text in the exposition, which is fourteen paragraphs long, discusses *buen vivir*, the Constitution, and the rights of nature.[100] Included is a statement that under the Constitution, public policies must be oriented towards effecting "Sumak Kawsay / Buen Vivir and the rights of nature."[101] The Exposition of Reasons specifies that recognizing nature as a subject of rights is a very important innovation that was introduced in the Constitution, that this change shows the change in perceptions that people have about nature, and that nature is no longer "conceived as an object and has come to be a subject and holder of rights, consequently, it starts to occupy a new space in Ecuadorian legal legislation."[102] There is also the statement that "to achieve appropriate comprehension of the recognition of rights of nature one has to take into account the concept of Sumak Kawsay / Buen Vivir that comes from the cosmovision of the ancient people, now inserted in the Constitution."[103] Thus, nature's rights are invoked front-and-center to provide justification for the adoption of a new environmental code, and they are directly linked to the concepts of *buen vivir*, "the cosmovision of the ancient people," legal innovation, and a change in public

[99] *Proyecto De Codigo Organico Del Ambiente* Aasamblea Nacional Republica Del Ecuador, 5, (*translated by* the author of this Article) http://www.asambleanacional.gob.ec/sites/default/files/private/asambleanacional/filesasambleanacionalnameuid-29/Leyes%202013-2017/102-ambiente/PP-Codigo-Ambiente-Carlos-Viteri-15-10-2015.pdf.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

perceptions towards nature. The writers of the Code embraced the use of mother nature rhetoric.

Nature's rights are also discussed prominently in the section of the Code elaborating on the legal bases for the enactment of the Code. Here there are explicit references to Articles 10, 71, 72, and 73 of the Constitution, and to the specific rights that those articles grant to nature.[104] Article 83's requirement that people respect the rights of nature is also referenced.[105] The enactment of the Code as a necessary means to achieving *buen vivir*, the realization of which is a constitutional imperative of the State, is also invoked.[106]

b. Nature's Rights in the Substantive Provisions of the Environmental Code

In the more substantive law created by the Code, there are eight other significant references to nature's rights. Those references are:

- Article 269 of the Code, titled "Defense of the rights of nature," which states that anyone can call on public authorities to ensure the observance of nature's rights, and can therefore report violations of the Code without risking civil or criminal liability;[107]
- Article 69, which mentions nature's rights as justification for strict rules regulating modern biotechnology;[108]
- Article 23, which states that the National System of Protected Areas must guarantee the upholding of nature's rights;[109]
- Article 221, which states that environmental or social harms or liabilities must be corrected by responsible parties to protect human health and the rights of nature;[110]

[104] *Id.*
[105] *Id.* at 38.
[106] *Id.* at 5.
[107] *Id.* at 78.
[108] *Id.* at 29.
[109] *Id.* at 23.
[110] *Id.* at 66.

- Article 231, which states that the administration of climate change law will stay within a framework that, among other things, protects the rights of nature;[111]
- Article 242, which states that, under the Code, in the nation's coastal zone, public and private activities of urban development must be regulated in consideration of nature's rights;[112]
- Article 272, which establishes that procedurally, after an environmental harm has been reported to initiate the sanctioning process, the authorities must act to protect nature's rights;[113] and
- Article 280, which states that all actions or omissions that implicate a violation of the environmental rules in the Code or affect the rights of nature shall be considered administrative infractions.[114]

An analysis of these articles of the Code reveals trends in what roles nature's rights play. This Article will now discuss two apparent trends.

First, the statutory language mirrors much of what was written in the Constitution, such as that anyone may call upon public authorities to enforce nature's rights. In this regard, the Code appears to be the legislative branch's implementation and reiteration of constitutional mandates placed upon it. However, the Code is hardly more specific than the Constitution. The Code appears to be a delegation of authority to the executive branch to write more specific regulations, and actually implement and enforce nature's rights as the Constitution requires. An example of this is Article 4 of the proposed Code. The proposed text of Article 4, translated to English by the author of this Article with minor changes made for clarity, reads as follows:

> **Article 4.- Common dispositions for the rights of nature and persons.** The dispositions of the present Code guarantee the effective enjoyment of the rights of nature and the persons, counties, communities, towns, demographic groups, and collectives established in the Constitution and in the international instruments ratified by the State, which are inalienable, irrevocable, indivisible and of equal hierarchy.

[111] *Id.* at 68.
[112] *Id.* at 71.
[113] *Id.* at 79.
[114] *Id.* at 80.

> The exercise of the rights regulated by this rule are interdependent, progressive and not exclusive of the exercise of other rights recognized in the Constitution, international instruments and other laws. Hence they are of obligatory observance.
>
> The respect, guarantee and guardianship of the rights of Nature will be carried out through the guarantee of regulations, institutions and jurisdictions established by the Constitution and the law.[115]

This article and several others fall under "Title II: Of the Rights, Duties, Responsibilities, and Principles" of the "Preliminary" section of the Code.[116] Article 4 appears to constitute the legislative branch's codification of the requirement that nature's constitutional rights and those of persons be protected.

Second, as seen in the articles on regulation of biotechnology, urban development, and land use, nature's rights are invoked to legally legitimize regulation of a wide range of human activities. Because nature's rights are so broad and the language in the Code is so general, this raises the questions of what activities would constitute violations of nature's rights and how often would regulation of the types of activities specified be enforced. Thus, one could view "rights of nature" as a three-word cover for an enormous handing of power to the executive branch, giving it discretion to regulate many industries as it chooses, under the guise of protecting nature's rights.

Theoretically, the judicial branch would check the executive branch's exercise of this power, but many people consider Ecuador's judicial system "vulnerable to political interference" with "[p]ersistent corruption . . . fueled by cronyism."[117] Regardless, eight years after their adoption, nature's rights are still lacking in definition and development by the Constitutional Court. In light of the large delegation of implementation of nature's rights law to the executive branch established by the text of the Environmental Code, it is

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[115] *Id.* at 10.
[116] *Id.*
[117] *2016 Index of Economic Freedom,* The Heritage Foundation, http://www.heritage.org/index/country/ecuador.

logical to assume that the executive branch would have substantial liberty in defining the contours of nature's rights.

c. Nature's Rights in Conflict with Collective Rights and the Pre-Legislative Consultation

The Constitution grants many rights to humans and specific human communities, which might be put at risk of violation by the passage of significant new legislation that limits human freedoms. For example, environmental legislation protecting nature's rights might impede humans' rights to engage in traditional cultural practices if those practices are harmful to nature. Following Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, Ecuador's Constitution created a mechanism called the "pre-legislative consultation."[118] Under Article 57, a pre-legislative consultation that involves the potentially affected people is required when "collective rights" are implicated by new legislation.[119] The consultation must include discussion of plans for exploitation and commercialization of nonrenewable natural resources that are found in the affected people's land that could affect them environmentally or culturally, and how they can participate in and benefit from such activities, as well as receive indemnifications if harms result.[120] Furthermore, Article 398 of the Constitution requires that "[a]ll state decision[s] or authorization[s] that could affect the environment shall be consulted with the community . . . The State shall take into consideration the opinion of the community on the basis of the criteria provided for by law and international human rights instruments." If a majority of the community opposes the project, it may only be implemented by "a resolution that is duly substantiated by the corresponding higher administrative body."[121] Therefore, without majority support from affected communities,

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[118] *Instructivo para la aplicación de la consulta prelegislativa por los derechos colectivos de las comunas, comunidades, pueblos y nacionalidades*, Asamblea Nacional de Ecuador, (*translated by* the author of this Article) http://www.asambleanacional.gob.ec/sites/default/files/private/asambleanacional/filesasambleanacionalnameuid-28/Instructivo-consulta-prelegislativa-codigoambiente.pdf.

[119] CONST. OF ECUADOR, *supra* note 7, at art. 57.

[120] *Id.*

[121] *Id.* at art. 398.

it may still be possible for the Environmental Code to become law, but it would have to be "duly substantiated." It is clear that the National Assembly has put forth effort to garner majority support from affected communities.

In November 2015, the National Assembly had an open period for receiving input about the proposed Environmental Code from potentially impacted groups that hold collective rights. The first question on the consultation form, which could be submitted only by a group whose collective rights might be impacted by the passage of the new Code, listed the current text of Article 4 of the proposed Code, along with space to give a "Yes" or a "No" and write comments.[122] Presumably, the National Assembly was not required to seek input about Articles 1–3 because they do not implicate collective rights. Interestingly, in the text of Article 4, which states a guarantee of protection of nature's rights, the National Assembly chose to specify that the exercise of nature's rights is not exclusive of the exercise of other rights. There is no further elaboration on what would happen in the event of an apparent conflict between the rights of nature and any of the diverse rights recognized "in the Constitution, international instruments and other laws."[123]

The lack of acknowledgment in Article 4 that nature's rights and any other right might come into conflict is a glaring deficiency in the statutory language, since it takes little imagination to think of a situation in which nature's rights and one of the many human rights specified in the Constitution might conflict.[124] However, the National Assembly may not have had any other options, because the Constitution requires that the State guarantee the rights it grants. In practice, the textual ambiguity regarding conflicts of rights probably would allow for flexible interpretation of the Code if a conflict between human rights and nature's rights were ruled on by a court. Considered in the

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[122] *Formulario de Consulta: Consulta Prelegislativa*, Asamblea Nacional Republica Del Ecuador, 2, (*translated by* the author of this Article) http://www.asambleanacional.gob.ec/sites/default/files/private/asambleanacional/filesasambleanacionalnameuid-28/FORMULARIO-APAISADO.pdf.

[123] *Id.*

[124] Laurel Fish, *Homogenizing Community, Homogenizing Nature: An Analysis of Conflicting Rights in the Rights of Nature Debate*, http://web.stanford.edu/group/journal/cgi-bin/wordpress/wp-content/uploads/2013/06/Fish-.pdf.

context of the pre-legislative consultation, the strong language in support of constitutional rights coupled with an unrealistic requirement that nature's rights and all other rights be simultaneously observed could be viewed as evidence that the language of Article 4 of the Code was written to garner public approval, with the understanding that nature's rights will not be a useful legal lever in practice.

The other articles of the proposed Code that were included in the consultation form that mention nature's rights are Article 23, which states that nature's rights must be guaranteed under the National System of Protected Areas;[125] Article 221, which states that environmental or social harms or liabilities must be corrected by responsible parties to protect human health and the rights of nature;[126] and Article 24, which states that the National System of Protected Areas must contribute to the maintenance of cultural manifestations and ancestral wisdom or traditional knowledge of the groups, communities, towns and peoples respecting the rights of nature[127]. This final article, number 24, further brings into focus how the enforcement of nature's rights is likely to come into conflict with other provisions of law under the Code.

Ecuador's Constitution and Environmental Code establish broad environmental protections, both through granting nature rights and by other means. They also grant many human and collective rights, and set strict requirements for protection of intangible assets, such as manifestations of traditional cultures. If there is no acknowledgment that conflicts between nature's rights and other laws might occur, and it is required by law that all rights and laws be enforced, public officials can avoid enforcing nature's rights by claiming to protect other rights. The Code appears to deliberately avoid stating that nature's rights should be enforced when they come into conflict with one of the other myriad rights or priorities recognized under Ecuadorian law.

Assuming that politics play a role in how Ecuador's laws are written, the ambitiously strict and diverse protections granted in the proposed Environmental Code

[125] *Id.* at 13.
[126] *Id.* at 23.
[127] *Id.* at 27.

and the Constitution can be viewed as insincere promises to uphold laws favored by a diversity of constituencies. From this perspective, the inclusion of rights of nature in Ecuador's Constitution and the high level of value placed upon them in the proposed Environmental Code is a tactic to increase voter support, achieve majority lawmaker approval, and ensure that the new code survives the pre-legislative consultation. Framing the Environmental Code in terms of its necessity for ensuring the rights of nature would thus have more political significance than legal significance.

Without elaboration on how nature's rights should be treated if they are in tension with other legal imperatives, the National Assembly is able to grant the executive branch significant discretion in its implementation of environmental laws, with minimal likelihood of its conduct being checked against nature's rights. However, from a different perspective, despite lack of clarity about their enforcement, the sweeping requirements that nature's rights not be violated could also serve as a tool for the National Assembly to significantly *limit* the discretion of the executive branch by requiring that no environmental harms be permitted. This Article does not provide evidence that either theoretical situation is occurring in practice.

The National Assembly's informational brochure about the Environmental Code and the pre-legislative consultation provides a final illustration to add support for a theory that nature's rights are functioning as a persuasive rhetorical tool to build support for the proposed Environmental Code. After the cover page of the brochure, which includes a title and beautiful images that show Ecuador's cultural, racial, and environmental diversity, the first text that appears in the brochure reads as follows, translated to English by the author of this Article:

> The Organic Code of the Environment is a necessary regulation for nature and the nation's citizens. This preventative project protects the constitutional rights of Nature, to achieve Buen Vivir or Sumak Kawsay, through sustainability, conservation, balance and protection of the environment.[128]

[128] Temas del Proyecto Código Orgánico del Ambiente, Asamblea Nacional Republica del Ecuador, brochure, http://www.asambleanacional.gob.ec/sites/default/files/private/asambleanacional/filesasambleanacionalnameuid-28/folleto-codigoambiente.pdf.

The very next text reads, translated to English, "What is the Project of the Organic Code of the Environment?" followed by, "The Project of the Organic Code of the Environment (COA) is a regulation that will guarantee the right of nature and people to live in an environment that is healthy and ecologically balanced . . ."[129] The final page of text of the brochure, titled, "Substantive Subjects for the Prelegislative Consultation of the Project of the Organic Code of the Environment," lists four subject areas of the consultation in a grid, with the corresponding articles of the Code and the corresponding constitutional articles listed next to each subject area. The four subject areas are: 1. Property and possession of community land and the National System of Protected Areas; 2. conservation, use and sustainable management of biodiversity and natural resources; 3. protection, maintenance and development of the collective knowledge associated with biodiversity; and 4. knowledge, practices, ancestral and cultural traditions.[130] It is clear that this chart provides an effective way for citizens involved in the pre-legislative consultation to analyze the relevant articles of the Code and the Constitution. It is also clear that the brochure is a marketing material designed to build support for the Code so that the National Assembly can win approval in the pre-legislative consultation.

The pictures throughout the brochure depicting Ecuador's diversity help illustrate another point about Ecuador's Constitution. A wide diversity of goals and specific rights were included in the Constitution. The Constitution itself can be thought of as a mixture of values, put together on paper to establish a model society, one of *buen vivir*. From this perspective, what the Constitution included was not based on legal realism. Instead, it was based on political promises being made to a diversity of constituencies. But so many different constitutional rights cannot realistically all be guaranteed. Similarly, the brochure's visual celebration of Ecuador's diversity and its invocation of the rights of nature appear tailored to garner approval amongst a diversity of constituencies, particularly those whose opinions must be considered during the pre-legislative

[129] *Id.*
[130] *Id.*

consultation: "The indigenous communities, towns and peoples, the Afro-Ecuadorians and the montubio people."[131] Although it is unrealistic to assume that nature's rights and the variety of communal rights specified in the Code could all be enforced, it is clear that they can be used to present a compellingly positive message in marketing materials.

3. Rights of Nature and Administrative Environmental Rulings in Ecuador

With environmental law in Ecuador, most of the application of the law is through administrative rulings, with the courts writing relatively few case decisions. There are two types of administrative actions analyzed for this Article that are published publicly by Ecuador's Ministry of Environment: Acuerdos ("agreements" in English) and Resoluciones ("resolutions" in English). Resoluciones are unilateral decisions with legal force that are announced, and they tend to be specific to one environmental issue brought before the administrative body, such as whether an oil exploration permit shall be issued to an applicant. Acuerdos, on the other hand, are agreements between the Ministry of Environment and other government entities to proceed in the manner specified in the acuerdo. Acuerdos are generally longer and more complex than resoluciones, and may include dozens of articles to spell out a corpus of law pertaining to a specific topic, such as when a new national policy on cellphone recycling is being established. In practice, not all rulings published by the Ministry of Environment as acuerdos actually involve a separate government entity, and would thus be more accurately called resoluciones. However, when the Ministry takes an important action that creates a significant number of new rules to achieve a goal or goals, it is likely to call it an acuerdo, even if it technically appears to be a resolución.

The published format for an acuerdo or resolución is to list on the first page, under the heading "Considerando" ("Considering" in English), the legal justifications for the action being taken. From having looked at dozens of these documents, the author of

[131] Instructivo para la Aplicación de la Consulta Prelegislative por los Derechos Colectivos de las Comunas, Comunidades, Pueblos y Nacionalidades, Asamblea Nacional Republica del Ecuador, 2013-2017, http://www.asambleanacional.gob.ec/sites/default/files/private/asambleanacional/filesasambleanacionalnameuid-28/Instructivo-consulta-prelegislativa-codigoambiente.pdf.

this Article believes that this section always includes at least one reference to an article of the Constitution, as well as multiple other sources of law, such as a statute or administrative source of law. Based on a small-scale, informal analysis of these documents from the Ministry of Environment that should not be considered generalizable, the author of this Article guesses that acuerdos often, but do not always, cite specifically to nature's constitutional rights, and that resoluciones rarely, if ever, do so. The author of this Article did not find any resoluciones that do so, and could find no discernible pattern to highlight the rationales for why a given acuerdos does or does not invoke nature's rights.

Nature's rights were invoked in the Ministry of Environment's 2013 Acuerdo No. 190, which launched the National Policy of Post-Consumption of Electrical Equipment and Electronics.[132] The acuerdo technically looks more like a resolución because it appears to be a unilateral action taken by the Ministry of Environment that does not involve making an agreement with a different entity. In the enumeration of the legal justifications for the agency action, Article 73 of the Constitution is mentioned without specific reference to nature's rights, but with the statement that it is the State's obligation to take precautionary measures to prevent environmental harms including the permanent alteration of natural cycles.[133] Article 83 is also referenced, with the statement that it is the duty of Ecuadorians to respect nature's rights.[134] The same Articles of the Constitution were cited in the Ministry's Instructive for the Recycling of Cellphones, which was announced through Acuerdo 191 of the same year and appears to be an implementation of some of the requirements established by Acuerdo 190.[135] Discussion of a reference to nature's constitutional rights in an acuerdo pertaining to Ecuador's Socio Bosque program can be found in the next subsection of this Article.[136]

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[132] Ministerial Acuerdo No. 190, http://www.ambiente.gob.ec/wp-content/uploads/downloads/2013/01/Acuerdo-Ministerial-190-Pol%C3%ADtica-Nacional-de-Post-Consumo-de-Equipos-Eléctricos-y-Electrónicos.pdf.
[133] *Id.* at 1.
[134] *Id.*
[135] Ministerial Acuerdo No. 191 at 1, http://www.ambiente.gob.ec/wp-content/uploads/downloads/2014/05/AM-191-Intructivo-para-reciclaje-para-celulares_final.pdf.
[136] *Infra* Section II.D.4.

There is a very high level of generality with which nature's rights, and other constitutional requirements, are referenced to justify agency actions in the agency documents analyzed for this Article. Indeed, the references published in resoluciones and acuerdos are copied verbatim, and are repeatedly reused, regardless of the action being taken. That nature's rights are invoked in this manner raises the question of whether they have become a catch-all justification for any legal action that the executive branch takes that arguably benefits the environment. Furthermore, when an agency action is being taken that is likely to result in environmental degradation, if nature's rights need not be mentioned, have they become selectively enforceable?

The author of this Article hypothesizes that a comprehensive study of when nature's rights are and are not invoked as legal bases for agency actions implicating the environment would show that rulemakings that would generally be viewed positively by environmentalists, such as the establishment of a national program to recycle post-consumer electronics, would be far more likely to reference nature's rights than agency actions that are more likely to be viewed neutrally or negatively by environmentalists, such as the issuing of a permit for a resource extractive activity. The research into this question conducted for this Article was too limited to validly test this hypothesis.

4. Rights of Nature and Ecuador's Socio Bosque Program

In 2008, the Ecuadorian government established a program through which it pays landowners, particularly in heavily forested areas, to agree to a host of restrictions on what can be done on their land. The program, called Socio Bosque, is primarily an initiative to reduce Ecuador's high rate of deforestation and protect its ecosystems. Because Socio Bosque involves payments being made to private landowners so that others can enjoy and benefit from a preserved environment, Article 74 of the Constitution is implicated. The first of the two sentences that constitute Article 74 states that "[p]ersons, 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."[137]

[137] CONST. OF ECUADOR, *supra* note 7, at art. 74.

The second sentence reads: "Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State."[138] This raises the question of whether Socio Bosque's implementation constitutes appropriation of environmental services, but also means that even if it does, the program is presumably allowed under Article 74 because the State administers the program.

The author of this Article believes that Socio Bosque was first announced by executive decree in 2008, but cannot find evidence to support this point. However, more importantly, Socio Bosque was created on November 14, 2008, by a Ministry of Environment agency action.[139] One of the stated legal bases for the agency action was the requirement of Article 71 of the Constitution that the State incentivize people and communities to protect nature and promote respect for all elements that form an ecosystem.[140] The program was elaborated and reinstituted through another agency action in 2013.[141] This second action made explicit references to nature's rights in enumerating the legal grounds upon which it was taken, referencing and stating the requirements under Articles 71 and 72.[142] Article 74 is also referenced, but only in the following language, translated to English by the author of this Article: "Article 74 of the Constitution . . . establishes that people, communities, towns, and citizens have the right to benefit from the environment and the natural riches that enable them [to enjoy] buen vivir."[143] Article 74's second provision, regarding appropriation of environmental services, is not mentioned in the acuerdo.

The author of this Article cannot confirm whether Socio Bosque was deliberately structured for compliance with Article 74 of the Constitution, but this has been suggested. Referring to the services whose appropriation is prohibited under Article 74, one report states that nature conservation is the primary goal of Socio Bosque, but that ensuring the continued provision of such services is a secondary goal: ". . . the provision of these

[138] *Id.*
[139] Acuerdo No. 169, El Ministerio del Ambiente, 14 November 2008.
[140] *Id.* at 1.
[141] Acuerdo No. 131, El Ministerio del Ambiente, 19 December 2013.
[142] *Id.* at 1.
[143] *Id.*

ecosystem services as a secondary output of the incentives for the more general goal of nature conservation. In part to comply with Article 74 of the 2008 constitution, that provides only the state the authority to appropriate, produce, deliver and regulate ecosystem services."[144] From this perspective, Socio Bosque is the State's effort to protect the enjoyments of environmental services guaranteed under the first sentence of Article 74, while complying with the second sentence of Article 74 that prohibits appropriation of environmental services. However, from another perspective, the State's conduct could be viewed as a monopolization of the right to appropriate environmental services, thus putting the State in a position to have more control over how land is used.

The author of this Article could find no sources to support an assertion that the controversies implicating Socio Bosque discussed in the next paragraphs are legitimate concerns, and the topics discussed should be further researched before conclusions are drawn. However, as a theoretical matter, they provide an example of potential problems that arise when granting rights to nature in any jurisdiction, and thus provide a useful hypothetical case study.

According to emails from two individuals from international conservation NGOs that work with indigenous communities in areas of Ecuador where land is protected under Socio Bosque, Article 74's prohibition on appropriation of environmental services has prevented landowners and communities from entering other markets to exchange promises to conserve their land for compensation.[145] For example, international NGOs or funds from other governments that would like to pay landowners for the same reasons Socio Bosque pays them might not be able to do so because of Article 74's prohibition on appropriation. If the Ecuadorian State must oversee conduct that implicates compensation for conserving one's land, Socio Bosque may be the *only* legal way for landowners to

[144] Phillip Mohebalian and Leander Raes, *The Socio Bosque Program for rainforest and páramo conservation*, ECUADOR, 2, Version 1.1, last updated June, 2014, http://www.teebweb.org/wp-content/uploads/2014/07/The-Socio-Bosque-Programme-for-rainforest-and-Paramo-Conservation-Ecuador-.pdf (referencing a 2012 Ministry of Environment source).

[145] Emails from Director of Operations in Ecuador, International Conservation NGO based in the U.S., and Senior Fellow with the NGO who worked for multiple years in Ecuador, PhD from a U.S. university, to Kyle Pietari, Law Student, Harvard Law School, (Jan. 12 and Feb. 2, 2016) (on file with author).

access payments for engaging in conservation activities for which landowners in many other countries frequently receive compensation. Socio Bosque, as this argument goes, was the Ecuadorian State's solution to this problem created by Article 74. A result would thus be that the Ecuadorian government is able to retain control over how funds are distributed to landowners, and what restrictions are placed on use of their land.

The UN-REDD (United Nations Reduced Emissions from Deforestation and Degradation) Program, like Socio Bosque, incentivizes conservation.[146] Ecuador is a partner country of UN-REDD, and has received funding through the program.[147] A 2012 letter from the Indian Law Resource Center in Washington, D.C., sent to the Co-Chairs of UN-REDD, raises concerns that oil and gas concessions have been sold on land supposedly protected under Socio Bosque—a program that receives funding from UN-REDD.[148] The letter specifies that the concessions are of concern to indigenous people living on that land, and that the concessions were made without their informed consent.[149] Theoretically, if nature's rights established by Article 74 had not prevented landowners from getting paid to engage in conservation by anyone except the State, those landowners might have signed a conservation agreement with a foreign entity. If that was the case, the Ecuadorian government might not be able to sell oil and gas concessions on the land without causing the landowners to violate their conservation agreement, thus creating unacceptable tensions with the foreign entity.

Socio Bosque has attracted significant international attention as an effective way to protect Amazonian rainforest in one of the world's most biodiverse regions. One environmental lawyer in Quito stated that Socio Bosque is Ecuador's most successful environmental initiative in recent history.[150] By 2010, conservation agreements covering

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[146] *Inside Story: Ecuador's Socio Bosque Programme*, CLIMATE & DEVELOPMENT KNOWLEDGE NETWORK (Sept. 18, 2012), http://cdkn.org/resource/private-conservation-agreements-support-climate-action-ecuadors-socio-bosque-programme/?loclang=en_gb/.
[147] *Ecuador*, Overview, UNREDD PROGRAMME, http://www.unredd.net/index.php?option=com_country&view=countries&id=46&Itemid=605/.
[148] Chris Lang, *Ecuador's Conflict Between Oil Extraction, Indigenous Rights and REDD*, REDD MONITOR (Nov. 6, 2012), http://www.redd-monitor.org/2012/11/06/ecuadors-conflict-between-oil-extraction-indigenous-rights-and-redd/.
[149] *Id.*
[150] Interview, *supra* note 12.

over 400,000 hectares, made with thousands of landowners, had been signed.[151] The program is probably much larger now. More research should be done into whether nature's rights have caused funding for conservation activities from foreign entities to be channeled through Socio Bosque or simply not invested in Ecuador at all, and also whether land protected under Socio Bosque is better conserved than land protected under similar initiatives.

5. Rights of Nature and Ecuador's 2011 Ban on Bullfighting by Popular Consultation

On May 7, 2011, a referendum and popular consultation initiated by President Correa's administration took place.[152] It consisted of ten yes or no questions to institute specific constitutional amendments and other reforms, all of which were passed by a majority of voters.[153] The first five questions were by a referendum process, and the second five were by popular consultation. Question #8, translated into English, asked voters, "Do you agree that in the county where you are a resident; shows where animals are killed be banned?"[154] This question led to a ban in some cities and towns on cockfighting and, most significantly, bullfights in which the bull is killed. Nature's constitutional rights were implicated in this question—as were politics.

Bullfighting spectacles are a cultural tradition that Ecuador inherited from Spain, introduced by conquistadors in the 14th century.[155] Traditionally, bullfights result in a slow killing of bulls by professional bullfighters. To many, the tradition of bullfighting in Latin America is viewed as emblematic of colonial imposition of a European, Christian culture, in which human domination of nature is considered to be God's will, on people

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[151] *REDD+ in Ecuador: Ensuring Social and Environmental Co-Benefits*, UN-REDD PROGRAMME NEWSLETTER, Issue #8 (May 2010), http://www.unredd.net/index.php?view=document&alias=2124-un-redd-programme-newsletter-issue-8-printable-2124&category_slug=newsletters-349&layout=default&option=com_docman&Itemid=134.
[152] *Ecuador President Rafael Correa "wins referendum,"* BBC NEWS (May 8, 2011), http://www.bbc.com/news/world-latin-america-13325112/.
[153] *Id*.
[154] *Id.*
[155] Seann Lenihann, *Ecuadorans pass constitutional amendment to ban cockfighting & bullfighting*, Animal People Online (July 6, 2011), http://newspaper.animalpeopleforum.org/2011/06/01/ecuadorans-pass-constitutional-amendment-to-ban-cockfighting-bullfighting/.

who traditionally valued respect for Mother Earth and saw domination of nature as contrary to their worldview.[156] The Latin American anti-bullfighting movement, which has strong backing from indigenous communities, animal rights activists, environmentalists, and younger generations in general, has made enormous headway in generating bans in various locations, as well as altering public perceptions. Ecuador's ban by popular consultation still permits fights in which the bull is not killed, but Quito's large, annual bullfighting festival has ceased to occur due to the ban.[157] Smaller towns, in counties that did not approve the ban, still hold bullfights.[158] Bullfighting bans in Latin America are a useful metaphor to highlight the tensions between Catholicism and indigenous religion, the need for human sustenance and respect for nonhuman life, and Western anthropocentric legal thought and a legal system that recognizes nonhuman rights.

On January 17, 2011, before the vote, President Correa sent a letter to the President of Ecuador's Constitutional Court, asking for the Court's opinions on the legality of the proposed questions and procedures that would be used in the referendum and popular consultation.[159] In the section of the letter requesting the Court's opinions regarding the five questions to be asked by popular consultation, including the question on public spectacles in which animals are killed, nature's constitutional rights are referenced.[160] Translated by the author of this Article to English, with wording changes for clarity, the relevant text of President Correa's letter reads:

> Within the objectives that Ecuador must have as a State of constitutional rights and justice, is the elimination of violence in all forms, be it perpetrated between human beings or against other beings that equally have the right to have their life be respected regardless of whether they enjoy rational thought, given that they

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[156] Bryan van Hulst Miranda, *The Battle Against Bullfights in Ecuador: A Decolonial Frontier*, TELESUR (Dec. 5, 2015 7:05 PM), http://www.telesurtv.net/english/analysis/The-Battle-Against-Bullfights-in-Ecuador-A-Decolonial-Frontier-20151202-0038.html.
[157] *Voter Ban Ends Quito Bullfighting After 52 years*, CUENCA HIGH LIFE (Nov. 19, 2012), http://www.cuencahighlife.com/ecuador-digest2011-voter-ban-ends-quito-bullfighting-after-52-years/.
[158] *Id.*
[159] Rafael Correa Delgado, *Oficio No. T.5715-SNJ-11-55*, EL UNIVERSO, Jan. 17, 2011, http://www.eluniverso.com/sites/default/files/archivos/13/02/consulta_0.pdf.
[160] *Id.*

> also suffer pain and other sensations of the same nature when their physical integrity is violated.
>
> In the nation there are public spectacles that celebrate this type of practice against animals, whose innocence is for others to analyze, but nevertheless are tortured, bled and attacked until it causes them to die, making these activities one of the clearest sources of violence.
>
> Article 71 and the following articles of the Constitution of the Republic of Ecuador, recognize and elevate to the category of constitutional rights, the rights of nature, against all of the actions that implicate for spectacles, entertainment or sadism, some type of torture or destruction of beings that form part of the *pachamama*, and for this it is time to debate if it should be declared that Ecuador is free from public spectacles in which animals are killed for *simple diversión*.[161]

Critics of President Correa have claimed that the inclusion of the question about public animal killing in the referendum and popular consultation was political maneuvering to increase the likelihood of voter support for the President's other, unrelated proposed policy changes.[162] The proposed text of the actual question to be listed on the popular consultation, which was also included in this letter to the Constitutional Court, includes the following text, translated into English by the author of this Article: "With the goal of preventing the death of animals for *simple diversion, . . .* " After that preamble is text similar to what ended up constituting the entirety of the question's text in the actual popular consultation.[163]

One plausible explanation for the removal of President Correa's proposed preamble is that the Constitutional Court declared the preamble unduly prejudicial in violation of the procedural requirements for enacting a popular consultation. This is essentially the argument that was made in a letter sent to the Constitutional Court by Guadalupe Mantilla de Acquaviva in her role as President of the Asociación Ecuatoriana de Editores de Periódicos (AEDEP) (Ecuadorian Association of Periodical Editors in

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[161] *Id.* at Section III.3.
[162] Lenihann, *supra* note 155.
[163] *See Referendum y consulta popular*, Derecho Ecuador (July 28, 2011 20:33), http://www.derechoecuador.com/articulos/detalle/archive/doctrinas/derechoconstitucional/2011/03/03/referendum-y-consulta-popular/.

English).[164] The purpose of the letter was to advise the Court on how the AEDEP thinks it should rule on President Correa's request for the Court's opinion about the proposed referendum and popular consultation. AEDEP was almost certainly motivated to contribute its own thorough analysis to the Court based on its disagreement with President Correa's proposed changes to the law established in other questions—particularly one regarding media regulation. However, AEDEP also wrote two and a half pages about the animal spectacle question.

AEDEP's letter highlights that the phrase "simple diversión," roughly meaning "purely for entertainment" in English, employs the word "simple" as a pejorative, assumes that no valid reasons for spectacles in which animals are killed exist beyond entertainment, and fails to give voters a free choice to give their responses.[165] AEDEP's letter also argues that banning these activities would violate Article 24 of the Constitution, which grants people the right to recreation, a right that AEDEP argues must be held to the same hierarchical level as other constitutional rights.[166] AEDEP's letter further states that the passage of this ban would expose various fundamental rights to vulnerability by guaranteeing nature's right to a level of excess.[167] The first of these rights mentioned is the "right to work" codified in Article 325. AEDEP argues that passage of the ban would cost people their employment and incomes, and specifies that this policy would go against the State's objective to provide its citizens with access to *buen vivir* by means of obtaining employment.[168] This argument highlights the tension between promoting nature's rights and restricting human freedom to seek work of one's choosing. In this case, though AEDEP does not specify it, it is easily understood that the jobs within the industry built around bullfighting, particularly as a profitable entertainment industry, are the jobs of concern. This tension between competing values,

[164] Letter from Guadalupe Mantilla de Acquaviva to the Señores Jueces de la Corte Constitucional (Feb. 14, 2011), http://www.eluniverso.com/sites/default/files/archivos/13/02/alegato_corte_constitucional-_edep14febrero2011_0.pdf.
[165] *Id.* at 32.
[166] *Id.*
[167] *Id.* at 33.
[168] *Id.*

both of which are constitutional rights, is exemplified by the fact that AEDEP invokes *buen vivir* as justification for the upholding of the right to work, although *buen vivir* is explicitly cited in Article 74 to justify granting rights to nature. This is paradoxical because *buen vivir*, although perceived very differently by many different people, appears to be most accurately viewed as an ideal for how humans should live, yet granting legal rights to nature is often referenced as ecocentric law that is a break from anthropocentric law. It is debatable whether providing legal recognition of rights to nature at the expense of a human right, as a way to recognize that nature has its own intrinsic value, contributes to or hinders human realization of *buen vivir*.

The next constitutional right that AEDEP references as in conflict with the prohibition is "the right to cultural identity," codified in Article 21 of the Constitution. Again, AEDEP's letter makes no mention of bullfighting. Indeed, it does not mention it anywhere in the letter (except in reference to one subspecies of bull, as will be explained two paragraphs from here). Instead, AEDEP's letter invokes Ecuador's diverse cultural heritage, referencing cultural celebrations that represent the mixing of European and indigenous cultures in the mestizo culture predominant in Ecuador.[169] Two tensions worth mentioning are visible here: the tension between rights to practice activities tied to a cultural identity and the rights of nature, and the tension between the indigenous value of respecting nature and indigenous practices that could be viewed as harmful to nature.

Finally, AEDEP argues that the prohibition would constitute a failure of the State to safeguard the intangible cultural heritage, which it is required to do under Article 379.[170] The Constitution specifically calls for the safeguarding of "[l]anguages, forms of expression, oral tradition and diverse cultural manifestations and creation, including those of a ritual, festive or productive nature."[171] AEDEP also cites Article 276, which elaborates objectives of the development structure that the State is required to implement to achieve *buen vivir*, including "protect and promote cultural diversity and to respect its

[169] *Id.*
[170] Letter from Guadalupe Mantilla de Acquaviva, *supra* note 164.
[171] CONST. OF ECUADOR, *supra* note 7, at art. 379.

spaces of reproduction and exchange, to restore, preserve and enhance social memory and cultural heritage."[172] Assuming that some activities of cultural heritage involve environmental impacts, the tension between nature's constitutional rights and the enforcement of these constitutional provisions is clear. It appears that if *buen vivir* requires that both competing rights be upheld, then *buen vivir* is likely unattainable. AEDEP, however, does not think that the two are mutually exclusive.

In the final paragraph, AEDEP cites nature's rights, specifically mentioning *pachamama*, as a reason *not* to allow the prohibition on spectacles in which animals are killed.[173] The letter makes the case for why the prohibition would constitute a violation of nature's rights, rather than enforcement of them. This paradox is called exactly that by AEDEP ("Paradójicamente ["Paradoxically" in English] . . ."). [174] AEDEP argues that underlying the celebratory spectacles in which animals are killed is the raising of those animal beings, and that the prohibition would bring with it the extinction of the *lidia* subspecies of bull, one bred for bullfighting.[175] The Constitution explicitly requires the government to take action to prevent the extinction of species under Article 73, but AEDEP does not cite this requirement. It does argue that this species' extinction "would cause havoc in a natural environment that has grown during hundreds of years in a harmonic and symbiotic relationship."[176] This argument highlights a key difficulty in granting nature rights, which is figuring out how to define "nature." If the lidia bull only exists because it is bred by humans for bullfighting, is it part of nature? If the lidia bull has come to live symbiotically with other species around it only after hundreds of years of cattle ranching in a place where the original ecosystem was destroyed by humans for the purpose of ranching the lidia, does that mean the species has become part of nature? And if the lidia bull is not part of nature, does that mean that President Correa's legal justification for the passage of the prohibition—to protect nature's rights—is invalid?

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[172] *Id.* at art. 275–76.
[173] Letter from Guadalupe Mantilla de Acquaviva, *supra* note 164.
[174] *Id.*
[175] *Id.*
[176] *Id.*

The problem of precise boundaries and definitions would likely arise in the granting of rights to any complex system. Whereas it is easier to define what is and is not a traditional rights-holding legal entity, such as an individual person, defining "nature" without significant disagreement over what it encompasses is probably impossible. Furthermore, nature is composed of many individual beings and inanimate things whose rights might be competing or incompatible. Only with further elaboration on the definition of "nature" by Ecuador's Supreme Court or Constitutional Court can these questions be answered, although the answers would undoubtedly be unsatisfactory to many people.

Despite AEDEP's correctness that other constitutional rights are in clear conflict with a prohibition on spectacles in which animals are killed, the apparent hierarchical supremacy of nature's rights, which can be inferred from Article 395, arguably renders the prohibition's passage by popular consultation legal under the Constitution. Article 395.4 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."[177] More research would be needed to determine whether the Constitutional Court, President Correa's Administration, or anyone else has cited Article 395 to legally justify the prohibition on spectacles in which animals are killed in spite of the fact that the prohibition impairs the enjoyment of several other constitutional rights. However, the author of this Article guesses that Article 395 has never been used to establish that nature's rights can be enforced at the expense of any other constitutional right.

The story of the prohibition on bullfighting by popular consultation as an example of an application of nature's constitutional rights does not end with the passage of the prohibition by voters. The passage of the prohibition shows that nature's rights have been used by public officials to successfully enact a more specific law to guarantee nature's rights. However, the actual enforcement of nature's rights in this context may have been less successful in practice. An environmental lawyer in Quito who is a self-proclaimed

[177] CONST. OF ECUADOR, *supra* note 7, at Art. 395.4.

"radical activist" for animal rights stated that, while bullfighting has ceased to occur in Quito's large stadium historically used exclusively for that purpose, bullfighting has far from ended.[178] According to this lawyer, bullfighting now occurs just outside of Quito in a manner that would less clearly qualify as a "public spectacle." It may have also increased in counties that did not approve the prohibition since the popular consultation. Regardless of the validity of this claim, it raises two points. First, passing laws to guarantee nature's rights may be far easier than actually enforcing them. Second, enforcement of laws in Ecuador is an enormous challenge in many contexts. The gap between the law as it is written and the law in practice is a recurring theme in Ecuador.

6. Ecuador's Rights of Nature Before the Tribunal for the Rights of Nature

In December 2015, Alberto Acosta, then-president of Ecuador's Constitutional Assembly, principal architect of the 2008 Constitution, and leading advocate for the inclusion of rights of nature in the Constitution, presented a verdict against the Ecuadorian government.[179] As a judge for the Tribunal for the Rights of Nature in Paris, Acosta stated the Ecuador's oil exploitation constitutes "ecocide without end" in clear violation of nature's rights under Ecuadorian law.[180] While the Tribunal for the Rights of Nature is a citizen's tribunal whose judgments carry no legal force, the tribunal "provides a platform for informed legal analysis of diverse cases based on Rights of Nature" and "earth jurisprudence."[181] "With each case, the esteemed panel of Tribunal judges will recommend actions for reparation, mitigation, restoration and prevention of further damages and harm."[182] The Tribunal has met multiple times, with the inaugural Tribunal having been held in Quito in January 2014.[183]

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[178] Interview with an environmental lawyer in Quito who works for the Ministry of Environment (Jan. 22, 2016).
[179] Karen Hoffman, *Ecuador Condemned at the New Tribunal for the Rights of Nature*, MONGABAY, December 10, 2015, https://news.mongabay.com/2015/12/ecuador-condemned-at-the-new-tribunal-for-the-rights-of-nature-in-paris/.
[180] *Id.*
[181] *International Rights of Nature Tribunal,* GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE (2015), http://therightsofnature.org/rights-of-nature-tribunal/.
[182] *Id.*
[183] *Id.*

The Tribunal for the Rights of Nature may or may not have influence on court rulings or politicians, but given the small number of rights of nature cases that have been adjudicated in courts, it is a primary venue for the development of jurisprudential theory on applications of rights of nature laws. The fact that this citizen's tribunal conducts formal adjudicative procedures may serve to further legitimize rights of nature law as a valid alternative to conventional legal systems in which nature is not a subject of rights.

E. Public Perceptions and the Law

In a well-functioning democracy, public opinions should shape the law. However, history has shown that the law can also be an instrument for shaping public perceptions and opinions on a wide variety of issues. For example, legal abolition of slavery, desegregation, and prohibitions on hiring practices that are based on race have probably all influenced perceptions of relations between people with different skin colors. More relevant to the topic of this Article, it is likely that the passage of environmental statutes in the U.S. in the past fifty years has played a crucial role in shaping modern perspectives about the environment throughout the world. Since the purpose of this Article is to focus on rights of nature laws from a practical perspective, some discussion of the interplay between Ecuador's rights of nature law and public perspectives is in order, since the law's impacts on public perceptions are a practical implication. Hard data and credible references are lacking here and, therefore, so is academic legitimacy. This Article expresses solely its author's opinions on this matter, which were strongly shaped by conversations with Ecuadorians and the author's own perspectives as a lifelong resident of the U.S. For this reason, this section will place significant emphasis on comparisons between Ecuador and the U.S.

1. Public Perceptions of Constitutional Law

Based on dozens of conversations with Ecuadorians, especially with Ecuadorians who have completed higher education, the author of this Article guesses that a strong majority of Ecuadorians are unaware that an Ecuadorian law grants rights to nature. The author's second guess is that, of those who have heard that there is a rights of nature law,

many Ecuadorians probably do not perceive it as a new or novel legal development. This author further assumes that the fact that nature's rights are enshrined in *constitutional* law is probably of much less significance to the Ecuadorians who are aware of this fact than it is to equally informed U.S. observers, since people in the U.S. have been taught to view constitutional law with particular deference.

In general, the adoption of a new constitution in Ecuador is not viewed the same way it would be in the U.S., which has only had one constitution for hundreds of years. One Ecuadorian law student analogized the adoption of a new constitution in Ecuador to the enactment of significant legislation in the U.S.—it is considered a *standard* route for significantly altering the law.[184] Ecuador has had twenty-one constitutions since its first in 1830,[185] and Ecuadorians generally do not view constitutional law more deferentially than other types of law, in contrast with people in the U.S.

Compared to people in the U.S., Ecuadorians do not have as serious expectations that constitutional violations will be rectified, or even that they necessarily should be. Ecuador's judiciary and law enforcement institutions are comparatively weak. The Ecuadorian Constitution is vastly more detailed than that of the U.S., and at the time of its adoption, virtually nobody who read it expected that Ecuador's legal system would enforce every specific law established in the Constitution. As one journalist has put it, constitutional law in Ecuador is less rigid than in the U.S., and the Constitution should be thought of as an aspirational wish list as much as it is the supreme law of the nation.[186] In principle, the Constitution of Ecuador is binding law, as in the U.S. However, without faith, prioritization, and enforcement of a constitution, it is more like a set of goals.

2. Public Perceptions and Ecuador's Constitutional Rights of Nature

Regarding perceptions, as goes for the Constitution on the whole, so goes for its specific details. Even Ecuadorians who are of aware of nature's constitutional rights are

[184] Interview with an Ecuadorian law student in Quito, Ecuador. (Jan. 16, 2016).
[185] CONSTITUTIONNET, *Constitutional History of Ecuador*, (April 14, 2016), http://www.constitutionnet.org/country/constitutional-history-ecuador/.
[186] Email from an Ecuadorian professional journalist and blogger to Kyle Pietari, Law Student, Harvard Law School (Nov. 21, 2015) (on file with author).

likely to think of them as a hope for the future that may figure in discussions about the environment and advance the environmental agenda in general, and not as binding law that has any practical legal significance. The notion that nature's constitutional rights even *should* be readily enforceable in Ecuador is less likely to be a concern amongst Ecuadorians than amongst environmentalists with U.S. perspectives on constitutional law.

This brings us to the important question of whether granting rights to nature has advanced the environmental agenda in Ecuador. Many would say that it has, but drawing conclusions about causation is difficult. By some accounts, the environmental movement in Ecuador has been stronger in the previous decade than ever before. Environmental degradation, particularly that which results from extractive industrial activities, has been particularly visible in the jungle regions of Ecuador, where most of the indigenous communities are located. Partially for cultural and religious reasons, and partially because they are particularly impacted by the degradation, advancing an environmental agenda has become a political priority for many indigenous communities. Greater scientific awareness of Ecuador's biodiversity, increased international efforts to preserve forests, investment by NGO's in work in Ecuador, growing interest in building Ecuador's ecotourism industry, and widespread concern about climate change were all factors in generally growing the environmental movement in Ecuador in the years leading up to the writing of Ecuador's 2008 Constitution. For all of these reasons, the fact that a new constitution was being written in 2007 and 2008 could be viewed as a fortunate coincidence for Ecuador's environmentalist political contingency, because the creation of the new Constitution happened at a time when there was political will to include unprecedentedly strong pro-environment language.

Thus, from one perspective, the establishment of constitutional rights of nature, as well as all further advancement of the environmental agenda since 2008, are due to the growth of the environmental movement in general. From this view, establishing rights of nature was one environmental victory that might have public perception impacts in the

future, but thus far has only been a result of environmental awareness, and not a generator of it.

From a different perspective, it would be hasty to write off the impacts that the rights of nature law had on the nation's dialogue and views about the environment. During the President Correa era, public education campaigns to promote environmentalism have helped build environmental consciousness. The constitutional rights of nature may have been a factor in this increase in consciousness, since they place an affirmative duty on the Ecuadorian government to promote environmental awareness. Additionally, because nature's constitutional rights would presumably be violated to a greater extent if public awareness about environmentalism were not promoted, it could be that the specter of liability that would be incurred from violations of nature's rights incentivizes awareness-raising activities.

The rights of nature law has caused an increase in the use of mother nature rhetoric in the national dialogue, which may have heightened public concern about environmental protection. If this is the case, it cannot be assured that the effect will linger. One environmental law practitioner in Quito expressed the opinion that the novelty, excitement, and hipness associated with this "folkloric new language with nationalist perspectives" is likely to wear off as people become aware that mother nature rhetoric is, from a practical legal perspective, no different from using more conventional, technical environmental legal jargon.[187]

The use of nature's rights for public relations purposes by the government of Ecuador, as in the example of the Environmental Code pre-legislative consultation,[188] should not be viewed as an inherently negative use of the law. Indeed, it should be stressed that political messaging that incorporates extremely strong language in support of nature's rights could have significant impacts in shaping public dialogue and perceptions towards the environment in a way that ultimately results in environmental protection. Furthermore, situations in which lawmaking does not involve politics are few

[187] Interview, *supra* note 44.
[188] *Supra* Section II.D.2.c.

and far between in any country, and in a functioning democracy, elected officials are expected to compete to garner public support. Arguably, this use of nature's rights dilutes their legal significance, but at the same time promotes environmental consciousness. This dilemma raises a key question. Should codified law and the language used to describe it embody societal goals, or is it better when more realistic, but less inspiring rhetoric is employed?

II. SUMMARY OF KEY TAKEAWAYS AND LESSONS LEARNED

This section highlights important points about Ecuador's law in practice that could be relevant in other jurisdictions that adopt rights of nature laws.

A. "Mother Nature Rhetoric" is Broad and Could Influence Public Perceptions

The text of Ecuador's Constitution pertaining to nature's rights, and the dialogue discussing nature's rights in a variety of contexts both in and outside of Ecuador, employ what the author of this Article calls "mother nature rhetoric." Such rhetoric includes references to nature as a being, humans living in harmony with nature, nature as worthy of certain treatment, such as respect, indigenous Ecuadorian religious beliefs, and, as is common in Ecuador, a connection between preservation of nature and an often-spiritual ideal for human quality of life (*buen vivir* or *sumak kawsay*). Perhaps the most important aspect of Ecuador's rights of nature law is the corresponding shift from the use of language conventionally employed in environmental law, which typically puts greater emphasis on accuracy and precision of technical scientific terminology, to mother nature rhetoric. There are three main takeaways regarding mother nature rhetoric.

First, the mother nature rhetoric employed in the text of the rights of nature law and its applications is broad and general. Indeed, nature's rights are theoretically so expansive as to make virtually any environmentally harmful conduct illegal.[189] This means that nature's rights are likely to be ignored or repeatedly violated with minimal legal repercussions, rendering their enforcement more aspirational than practical. A shift

[189] See *supra* Section II.B. (analyzing the text of the rights of nature provisions of Ecuador's Constitution).

from conventional environmental legal language to mother nature rhetoric makes implementing nature's rights more subjective and raises definitional questions, such as what does and does not qualify as "nature."[190] It also leaves less room for nuanced applications of the law. In practice, it enables parties, especially the government, to have valid legal grounds upon which to selectively prevent a vast range of human activities.[191] Having a clearer definition of what constitutes "nature," with explicit limitations, would eliminate ambiguity surrounding the scope of the law.

Second, the integration of mother nature rhetoric into law is novel and, for many, exciting and inspiring. The fact that rights of nature law carries positive connotations for many Ecuadorians, and reflects personal beliefs and cultural identity for many of indigenous heritage, makes it an effective tool for the government to use in propaganda to influence the public.[192]

Third, mother nature rhetoric could alter public perceptions about the relationship between humans and the natural world, regardless of whether a rights of nature law has practical legal significance.[193] More exposure to mother nature rhetoric could cause individuals to care more about environmental protection, but could also dilute its significance if the change in rhetoric is found not backed up by changes in legal impact. This raises the question of whether changing public perceptions through language usage should be a goal for codified law.

B. Weighing Nature's Rights Against Other Rights is a Challenge

Ecuador's Constitution enumerates many individual and collective rights, along with granting rights to nature. Like nature's rights, many other rights are very broad and are codified in the Constitution by strong language. Such sweeping grants of rights to

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[190] See *supra* Section II.D.5 (discussing how different definitions of the word "nature" were used to support the arguments of parties supporting and opposing a ban on bullfighting).
[191] See *supra* Section II.D.1.b (discussing mining cases in which the government did and did not choose to invoke nature's rights).
[192] See *supra* Section II.D.2.c. (describing the National Assembly's invocation of nature's rights and mother nature rhetoric to garner public approval to pass new legislation).
[193] See *supra* Section II.E. (discussing the relationship between Ecuador's rights of nature law and public perceptions).

nature and people means that they will inevitably conflict,[194] but the Constitution does not provide clear guidance on how such conflicts should be resolved. Courts grappling with this issue have produced a variety of outcomes.[195] Other jurisdictions considering adopting a rights of nature law could avoid this problem by clearly defining a hierarchy of rights, or by establishing a rule governing how to resolve a conflict between nature's rights and other rights.

C. Application and Enforcement of Nature's Rights is Selective

Nature's constitutional rights are so expansive that they are impacted by a wide variety of human activities. Their application and enforcement in legal contexts has been selective. When invoked in courts, judicial rulings have been mixed, with some judges ruling in favor of nature, but others reaching holdings that do not require enforcement of nature's rights.[196] In some cases, the Ecuadorian government has argued for enforcement of nature's rights, while in others it has refused to recognize them.[197] In two cases, courts have unilaterally applied nature's rights without either party invoking them.[198] In other cases, courts have avoided making nature's rights rulings on procedural grounds.[199] When the Ministry of Environment takes an administrative action that likely implicates nature's rights, it sometimes invokes nature's rights as legal justification for its conduct, but other times makes no mention of them.[200]

With nature's rights being so expansive, they are only selectively applied and enforced, and politics plays a role in determining when this happens.

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[194] *See supra* Section II.D.5 (discussing arguments that multiple other rights could be violated by passage of a ban on bullfighting that would allegedly protect nature's rights).
[195] *See supra* Section II.D.1.c. (analyzing a holding by the Constitutional Court that nature's rights do affect all other rights); *supra* Section II.D.1.b (discussing a mining case in which the court ruled against nature's rights because they are a private interest, therefore secondary to the goal of development of the mine, which is a public interest).
[196] *See supra* Section II.D.1. (summarizing various rights of nature cases).
[197] *Id.*
[198] *Supra* Section II.D.1.d.
[199] *See supra* Section II.D.1.a. (summarizing multiple cases, including one in which the judge allegedly applied the wrong rule of procedure); *see also supra* Section II.D.1.e. (discussing the judge's reason for dismissing a British Petroleum Gulf of Mexico oil spill suit brought in Ecuador).
[200] *See supra* Section II.D.3. (explaining how some agency rulings reference nature's constitutional rights and others do not, without following a clear pattern).

D. Enforcing Nature's Rights Does Not Necessarily Promote Environmental Protection

Though this Article does not address the subject in detail, it discusses two scenarios in which the granting and enforcement of rights of nature could cause environmental harms, rather than protections. The first scenario relates to nature's right to not have environmental services be appropriated. It is theoretically possible that this prohibition could prevent landowners from receiving payments in exchange for engaging in conservation activities on their land, though this Article presents no evidence that this has happened.[201] Ecuador's Constitution permits the government to incentivize conservation activities in this manner, which it does through its Socio Bosque program. However, if landowners were not prohibited from operating in equivalent private markets, theoretically they might find stronger incentives to conserve their land outside of the Socio Bosque program.

The second scenario relates to the consequences of a prohibition on bullfighting. From one perspective, allowing killing of bulls for sport violates nature's rights. From another perspective, banning the activity might mean that the breed of bull raised for fights would go extinct, which would violate nature's rights.[202] This controversy implicates the problem of how to define nature, which frequently arises in the practice of rights of nature law.

CONCLUSION

Ecuador's rights of nature law can be thought of as a catch-all, a comprehensive body of environmental protection laws that could be invoked to stop virtually any environmentally destructive activity, squeezed into a few short paragraphs. The very existence of such a powerful legal tool begs the questions of who will successfully wield it, how often will it be applied, and what will be the consequences if it is violated. Thus far, the answers to these questions are, respectively: almost no one, extremely rarely, and

[201] *Supra* Section II.D.4 (discussing Ecuador's Socio Bosque program).
[202] *Supra* Section II.D.5. (discussing a proposed ban on bullfighting).

probably none. From this technical legal perspective, rights of nature constitute a gross simplification of the extremely complex body of environmental law that exists both in and outside of Ecuador. To define environmental protection laws in such sweeping terms is to ignore the importance of volumes and volumes of nuance.

But on the other hand, a different valid perspective is that the aforementioned perspective is a gross simplification of what Ecuador's legally innovative Constitution has accomplished. For one thing, if environmental protection really is a priority, maybe a catch-all environmental law, even if it is unenforceable, is a good idea. Such a law projects a worldview that living as humans without doing any harm to nature—in other words, achieving actual sustainability and ecological balance—is a societal goal. Therefore, even if the law is violated without punishment, at least people will view the resulting harm through the negative lens of illegality. Furthermore, even a minute fear of punishment could incentivize avoidance of causing environmental harm. This is in contrast with traditional systems of environmental law in which, without a catch-all law, environmental destruction can be legally sanctioned. While the harms and lack of punishment might be the same under the two systems, the traditional system projects the worldview that environmental destruction is justifiable to any extent, as long as it is permitted by law. For the purpose of advancing the environmental cause, it is arguable that stigmatizing environmentally harmful activity is a singularly effective approach. Additionally, widespread internalization of mother nature rhetoric likely does more to further environmental protection than widespread internalization of such a notion as, "I am entitled to destroy the environment to the maximal extent my lawmakers have decided to allow, without shame."

This Article provides no data as to what extent the law does alter perceptions in either direction. Thus far, perception changes in Ecuador resulting from the 2008 law are likely extremely minimal. However, that might change over time, and minimal is probably better than nothing.

This Article has provided various examples of nature's rights in legal practice. These examples show insights into Ecuadorian politics, culture, lawmaking, and history.

While a variety of lessons about rights of nature laws can be learned from Ecuador's experience, a key point is that all of these lessons are specific to Ecuador. Whether they are useful for guiding the rest of the world towards more effective systems of environmental law is an open question. At the very least, they might be helpful as Ecuador continues down this jurisprudential path that no other country has taken. [*]

[*] Thank you to the great many people of Ecuador who helped me and who were both warmly welcoming and thoughtfully professional in their interactions with me as a North American visitor. I am forever grateful to have experienced a taste of Ecuadorian *buen vivir* and be left with a feeling of the true meaning of *buen vivir*.