

Rights of Nature in Action: An Analysis of Laws in Ecuador

Derechos de la Naturaleza en Acción: Un análisis del marco jurídico en Ecuador

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ABSTRACT

Context: The keen interest in the rights of nature is not only about the grant of rights to trees, rivers, oceans, and all of nature such that they could stand in a court of law for themselves and on behalf of themselves. The most interesting part of this grant is imagining how these ecosystems would stand in court to speak for themselves. **Objective:** This article first analyses the grant of the Rights of Nature in Ecuador within the 2008 Constitution and justifies why Ecuador is used as a case study. Second, it assesses how nature is represented in court by examining the case law that has emerged since the recognition of these rights. Third, it develops an argument for an eco-centric representative model for ecosystems as legal persons. **Methods:** A doctrinal legal analysis of constitutional provisions and case law is combined with comparative legal reasoning. **Results:** The analysis reveals conceptual and procedural gaps in how nature's rights are represented in judicial practice, showing tensions between anthropocentric and ecocentric approaches. **Conclusions:** This article argues that Ecuador's legal framework should be revised to ensure effective and justiciable representation of the Rights of Nature and that representatives should be trained to mirror a true ecocentric approach.

Keywords: Ecosystem, Legal Personhood, Ecuador, Ecocentric Model, Rights of Nature

RESUMEN

Contexto: El creciente interés por los derechos de la naturaleza no se limita a otorgar derechos a árboles, ríos, océanos y otros elementos naturales para que puedan presentarse ante un tribunal en nombre propio. La parte más interesante de este reconocimiento es imaginar cómo estos ecosistemas podrían hablar por sí mismos ante la justicia. **Objetivo:** Este artículo analiza, en primer lugar, el reconocimiento de los Derechos de la Naturaleza en Ecuador dentro de la Constitución de 2008 y justifica por qué Ecuador es un caso de estudio relevante. En segundo lugar, evalúa cómo se representa la naturaleza en los tribunales mediante la revisión de la jurisprudencia surgida desde el reconocimiento de estos derechos. En tercer lugar, desarrolla un argumento para un modelo de representación ecocéntrico para los ecosistemas como personas jurídicas. **Metodos:** Se aplica un análisis jurídico doctrinal de las disposiciones constitucionales y de la jurisprudencia, complementado con razonamiento jurídico comparado. **Resultados:** El análisis revela vacíos conceptuales y procedimentales en la representación judicial de los derechos de la naturaleza, mostrando tensiones entre enfoques antropocéntricos y ecocéntricos. **Conclusiones:** El artículo sostiene que el marco legal ecuatoriano debe ser revisado para garantizar una representación efectiva y justiciable de los Derechos de la Naturaleza, y que los representantes deben ser capacitados para reflejar un verdadero enfoque ecocéntrico.

Palabras clave: Ecosistema, Personería Jurídica, Ecuador, Modelo Ecocéntrico, Derechos de la Naturaleza

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Introduction

The recognition of an entity as a legal person shifts the entity from being regarded as a property in law to being regarded as a person in law. This is beneficial to the entity because it accrues rights and legal standing for the rights to be enforced against ecosystems polluters. It also brings about respect for the entity being granted legal personhood such that its interests are protected. The basis of the grant of legal personhood helps potential representatives know how to best represent the interests of ecosystems being granted legal personhood and on what grounds. This article will draw on the constitutional provisions on the Rights of Nature and case laws that have emerged since this grant of Rights of Nature in Ecuador. This article will be divided into different parts. Part 1 explains the comparative elements of the choice of Ecuador as a case study. Part 2 will consider the legal framework for the protection of ecosystems in Ecuador within the Ecuadorian constitution. Part 3 of this article will analyse the features of eco-centrism and the elements

of respect and protection of ecosystems by representatives within the framework of the Ecuadorian constitution. Part 4 of this article will examine the legal rulings that have arisen out of the grant of rights to nature. Part 5 analysis the grant of legal personhood in New Zealand for comparative analysis. Part 6 of this article draws arguments from the analysis of the grant of legal personhood to ecosystems in Ecuador to further propose an eco-centred representative model for ecosystems as legal persons.

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Ecuador as a Case Study for the Analysis of the Rights of Nature

Ecuador is the first country in the world to recognise the rights of nature in its national constitution (Constituent Assembly of Ecuador, 2008). Ecuador is a constitutional state of rights and justice; it is a sovereign, democratic, intercultural, multinational and secular State, organised as a republic and governed using a decentralised approach¹. The other similar grant of Rights of Nature is the New Zealand grant. New Zealand is also one of the first countries to recognise the rights of nature, but this was as a legislation. The New Zealand legal personhood of an ecosystem (Whanganui River) came by an agreement signed in 2010 between the NZ government and the Indigenous tribe of Whanganui iwi with a joint representation by indigenous and government representatives². In furtherance to this agreement, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 was enacted (Wilson, 2017) and it declared Te Awa Tupua (Whanganui River) to be a legal person (New Zealand Parliament, 2017) with all the rights, powers, duties and liabilities of a legal person which must be exercised and responsibility of its liabilities must be taken, by Te Pou Tupua (the human face of the river)³ on behalf of and in the name of the WR⁴.

There is the need to assess the “all persons” as representatives of nature in Ecuador to understand the mode of representation best for the protection of the intrinsic value of ecosystems. The grant of legal rights of nature has both moral and legal implications. The moral basis is the fact that the intrinsic value of these ecosystems is recognised and are protected on that basis rather than on the instrumental value basis of the ecosystems. The legal basis is the fact that ecosystems are made legal persons with enforceable rights. The justifications for these in court and as a law teaches the best approach and the appropriate universal model for the protection and representation of the intrinsic value of ecosystems.

An Assessment of the Legal Framework for the Protection of Ecosystems in Ecuador

Ecuador is the first country in the world to recognise the RoN (Rights of Nature) in its national constitution with provisions of the articles of the constitution stating that nature has rights. However, it is questionable whether the basis of the grant of the RoN within the constitution is owing to the need to respect the intrinsic value of ecosystems in Ecuador. It is also questionable whether this grant of legal personhood to ecosystems in Ecuador is well represented based on the connection of the representatives of the ecosystems to legal and theoretical (ecocentric) basis for the grant of legal personhood. Ecocentrism is the theoretical argument that ecosystems have intrinsic value, and it should be respected and preserved on the basis that it has intrinsic value, for themselves. In assessing these, this article will analyse some articles within the Ecuadorian Constitution 2008 and case laws that have ensued since the grant within the constitution. In view of these, an eco-centred representative model will be proffered for an effective representation of the interests of ecosystems that are being granted legal personhood.

Article 71 of the Ecuador Constitution (2008)

The grant of the RoN within the Ecuadorian Constitution 2008 started from the seventh chapter of the Constitution which has four articles (articles 71-74) on the RoN. The first chapter has three parts which commence with the recognition of the intrinsic value of nature. It states specifically that Pacha Mama (meaning Mother Earth or Nature):

*where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes*⁵.

This indicates the recognition of the intrinsic value of nature and the demand for its respect and its maintenance⁶. The second part indicates the need for representatives to help nature enforce its rights. It states that “all persons, communities, peoples and nations can call upon public authorities to enforce the RoN”⁷. This means, within this provision, the representatives of the RoN are all persons, communities, people, and nations. The third part however provides for incentives⁸ to be given to the representatives of nature, “to protect nature and to promote respect for all the elements comprising an ecosystem”⁹. All these indicate that the Ecuadorian constitution recognises the intrinsic value of nature; demands respect for and maintenance of this intrinsic value; encourages everyone, including nations to act as representatives of the RoN with readiness to give incentives for such acts of representation.

This article however argues that this provision of the constitution is not clear enough to give directions as to how people, communities and nations have been empowered to represent nature, protect, and promote respect for it. The non-specificity of the types of persons or representation is problematic. With the constitutional provision, it would be difficult to understand the terms of appointing the representatives; the interests of these representatives in protecting nature and promoting respect for it because the representation can be because of the incentives provided or for their own personal or anthropocentric interests and not the interests of nature or the true respect for nature. As a result, there may be a confusion about the legal basis for the grant of RoN to ecosystems in Ecuador.

¹Constitution of the Republic of Ecuador, 2008, Article 1

²Rafi Youatt ‘Personhood and the Rights of Nature: The New Subjects of Contemporary Earth Politics’ [2017] International Political Sociology, 1, 11

³Te Pou Tupua is the human face of the river; the two people that represent the WR and were appointed by the Crown and Iwi with each side nominating one person but having to agree to each other’s nomination- the Crown nominated, and its nomination was accepted by the WR tribe and the WR tribe also made their nomination. See Zaryd Wilson ‘Whanganui Chronicle- Te Awa Tupua will Take Time to Manifest’ (2017) <www.nzherald.co.nz> accessed 15 December 2024.

⁴Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s14 (1)(2)

⁵Constitution of the Republic of Ecuador 2008, art 71.

⁶Ibid

⁷Ibid

⁸Article 71 does not mention which kind of incentives to be given for the protection of nature and the promotion of respect for all the elements comprising an ecosystem.

⁹Constitution of the Republic of Ecuador 2008, art 71.

It could be said that the constitutional framework for the recognition of the intrinsic value and the respect for it is good because it serves as a good platform for the recognition of the respect for elements within the ecosystems and their intrinsic value but does not give a good enough framework for representatives of these values.

In addition, the certainty of the types of representatives of nature is not stipulated. There seems to be a conceptual uncertainty of representatives within the provision of the constitution, and it might amount to administrative unworkability if “all persons, communities, peoples and nations can all call upon public authorities to enforce the RoN”¹⁰. The categorisation of representatives is too wide. Even though the issue of interests as mentioned above could be uncertain, the degree of commitment to nature itself might be absent or conflicting. The advancement of the theory of eco-centrism might be overshadowed by the continuity in the advancement of the theory of anthropocentrism. Anthropocentrism, in its original connotation in environmental ethics, is the belief that value is human-centred and that all other entities are means to human ends. It may be difficult to discern who amongst the people capable of representing nature values the intrinsic value of nature and who sees nature as being only of instrumental value to humans.

Therefore, the provision of article 71 of the Ecuadorian constitution can only be used as a model for the advancement of the theory of eco-centrism by the grant of legal rights to entities within the ecosystem only when the issues of interests, and representatives are ironed out.

Article 72 of the Ecuador Constitution (2008)

Article 72 also has two parts. The first part confers the RoN by stating that “nature has the right to be restored.” It explicitly states that this is different from the compensation given to individuals and communities that depend on affected natural systems but the restoration of nature itself. Although the argument is that ecosystems with intrinsic value are irreplaceable if destroyed, however, as argued by Roston III (Roston, 1991), in *Environmental Ethics: Values in and Duties to the Natural World*, (1991), restoration is considered an ecocentric duty if it is for the restitution of the intrinsic value of ecosystems.

Article 72 recognises nature’s right to restoration, separate from human compensation¹¹. Though meant to reflect nature’s intrinsic value, it is criticised for inconsistency|promoting both harm prevention and post-damage restoration.

The general aim of Torts Law is to restore a legal person who has been injured to the position they would have been had the harm not been inflicted¹² (Cooke, 2017). In this case, the article states that the State shall establish the most effective mechanisms to achieve restoration but in fact, when the impact is severe or permanent, restoration is almost impossible. For instance, there is no way the life of a person, when confirmed dead, can be restored regardless of the compensation given. Nevertheless, when the impact is not severe, it can be likened to a lost limb that can be replaced by a prosthetic¹³. This however would not still amount to placing the ecosystem in the position they would have been had the harm to it have not occurred. It’s natural

value, would have been lost¹⁴. Therefore, until there is the framework that instils, in its entirety, an ecocentric approach towards respecting the intrinsic value of an ecosystem without creating an impression that they can be restored, representing these ecosystems will still be problematic. This may amount to the continuation of the anthropocentric approach because deep rooted anthropocentrism makes for anthropocentric reparation even when ecocentric reparation is intended¹⁵. By Elliot’s standards (Elliot, 1997), restoration of the intrinsic value of an entity is impossible except nature is faked¹⁶.

Article 73 of the Ecuador Constitution (2008)

The third article (article 73) has two parts. It states that:

*the State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles*¹⁷.

In addition to the issues raised with restoration above, this article questions the pattern of articles of this constitution and whether it would have been better if the right to be restored was stated after the duty of the state to prevent and restrict activities that might lead to the destruction of ecosystems. This may have created the impression that there should be prevention of destruction before restoration¹⁸. On the whole, the order of the RoN includes firstly, the right to integral respect for existence which can be enforced by “people” with incentives. Secondly, the right to be restored where severely or permanently impacted, not with compensation to individuals but for effective mechanism to achieve restoration and elimination of environmental consequences. Thirdly, the application of preventive and restrictive measures.

This presumes the right to exist, the right to be restored and the right to prevention of destruction but might have been better if the right to prevention of destruction comes before the right to be restored because sometimes, with ecosystems, the situation might not be that of the lost limb but that of the lifeless being as described above. The right to restoration is also good to the extent that ecosystems can be restored but there should also be some form of reprisal under criminal law to punish those who destroy ecosystems.

Subsequently, the second part of the third article however provides that the introduction of organisms and organic and inorganic material that might definitely alter the nation’s genetic assets is forbidden¹⁹. It is worthy of note that this may be more useful as a motivation for the representatives for the performance of their duties, but it also remains vague

¹⁰Constitution of the Republic of Ecuador 2008, art 71.

¹¹Constitution of the Republic of Ecuador 2008, art 72.

¹²John Cooke, Law of Tort (13th edition, Pearson Education Limited 2017) 19.

¹³I am thankful to Dr Joe Wills, University of Leicester = for this analysis.

¹⁴Robert Elliot, Faking Nature: The Ethics of Environmental Restoration (Routledge 1997) 78. This is related to Elliot’s contention that natural value, when lost, even if restoration is possible, an important basis for natural values will be missing.

¹⁵Ibid

¹⁶Ibid

¹⁷Constitution of the Republic of Ecuador, 2008, art. 73

¹⁸Prevention is better than cure.

¹⁹Elliot (n 14) 78.

whether this preventive and restrictive measures are for the ultimate goal of being valuable for humans (anthropocentric) or being valuable for nature's interests itself or perhaps the recognition of nature as the nation's genetic asset.

The fourth article (Article 74) has two parts. The first part provides that:

persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living.

Pertinently, this provision is pragmatic. This is because ecosystems have both intrinsic and instrumental value, therefore, people can benefit from it instrumentally. The second part of the article provides that this benefit will be regulated by the State. It is worthy of note that the same set of "people" mentioned in article 71 to represent nature and help protect and promote its respect are the same set of people mentioned in article 74 to be able to benefit from nature for them to enjoy the good way of living but this will be regulated by the State. However, it is vague who the constitution refers to as the state and whether they are also representatives and whether they have ecocentric interests or anthropocentric interests in the regulation of how people benefit from ecosystems.

The Ecuador constitution did not state the criteria to be used or proven by 'nature's millions of potential representatives' to earn standing for nature and this could become problematic during litigation because the court can easily strike out their cases for lack of standing²⁰. A criteria for the qualification of representatives to have standing for nature is expedient to ensure effective representation.

In addition, there is no clarification of the fact that the use of "environmental services" should not be detrimental to nature such that it will destroy its intrinsic value. As regards the use by people, article 83(6)²¹ includes as part of the duties of people or citizens to "respect the RoN, preserve a healthy environment and use natural resources rationally, sustainably and durably". Article 83(13)²² also states that people are to preserve the country's cultural and natural heritage and to take care of and uphold public assets. These clarifications could have been included in the provision of Article 74 and it should have also reflected in all the parts of the constitution consistently.

In addition, how the State will regulate use if the same people who will regulate it are the same people using it excessively is also vague. Although article 403 of the same constitution makes provisions for the pattern of regulation by the State by stating that "the State shall not make commitments to cooperation agreements or accords that include clauses that undermine the conservation and sustainable management of biodiversity, human health, collective rights and RoN". The most precise is in view of the regulation of the use of nature by the state where article 399 provides that "the full exercise of state guardianship over the environment and joint responsibility of the citizenry for its conservation shall be articulated by means of a decentralised national environmental management system which will be in charge of defending the environment and nature". It is not clear if this means that these are the representatives of nature and its rights or "all people" as earlier provided.

Elements of Ecocentrism within the Ecuadorian Legal Framework

In determining whether there is an element of eco-centrism with the grant of RoN, the section²³ on the RoN can be assessed. As mentioned above, article 71 recognises the rights and respect of all of nature. Therefore, Kotze and Calzadilla (Kotzé and Calzadilla, 2017) see the constitutional RoN in Ecuador as a clear expression of an eco-centrist rights orientation which contracts starkly with the anthropocentric ontology of rights that justifies, enables, and intensifies human entitlements²⁴. A justification for the ecocentric idea of the constitution is evident in article 71 and article 73. Article 71 states the need to enforce the RoN within the principles of the constitution and the fact that nature, which is where life is reproduced, has the right to integral respect for its existence and the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes²⁵. This presumes that they have a natural value which is inviolable and therefore have the right to integral respect. Article 73 therefore presumes an ecocentric idea with the mention of species, ecosystems, and the natural cycle. This implies that all of nature and not only humans are put in consideration.

Ecuador's lack of a clear standing doctrine as regards who to bring an action on its behalf and what they may prove to gain standing is also a problem²⁶. The texts of the constitution are vague and inconsistent with other provisions²⁷. This article states that even if these provisions are clear enough as regards the specific people who would be representatives of nature, it needs to also be clear what criteria is used for appointing or making them representatives in order to bring about effective representation.

However, in agreement with Kotze and Calzadilla, the preamble of the Ecuadorian constitution sets the foundation for an ecocentric, rather than an anthropocentric worldview, but in the long run, not all environment-related constitutional provisions are ecocentric²⁸. Kotze and Calzadilla contend that eco-centrism provides a more radical expression of a re-evaluated, re-envisioned relationship between human beings and nature; one that recognises, among other things, material agency and the legal subjectivity of natural entities, ecological integrity, and the inherent value of nature, and the sufficient (as opposed

²⁰Mary Elizabeth Whittenmore 'The problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite' (2011) 20 (3) Pacific Rim Law and Policy Journal Association 659,668.

²¹Constitution of the Republic of Ecuador 2008.

²²Ibid.

²³Constitution of the Republic of Ecuador 2008, art 71 -74.

²⁴Louiz J. Kotze and Paola Villavicencio Calzadilla 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) Transnational Environmental Law 1,4.

²⁵Constitution of the Republic of Ecuador 2008, art 71.

²⁶Mary Elizabeth Whittenmore 'The problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite' (2011) 20 (3) Pacific Rim Law and Policy Journal Association 659,665.

²⁷Ibid 666.

²⁸Louiz J. Kotze and Paola Villavicencio Calzadilla 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) Transnational Environmental Law 1, 18-19.

to optimal) accommodation of human use and occupancy within ecological constraints²⁹.

However, according to them, the Ecuadorian environmental RoN provisions are no different from the other typical environmental rights formulations which is mostly human-centred and provides little or no support for the RoN³⁰. This article does not agree with this in its entirety because it presumes there is a form of indication that ecosystems' protection is paid attention to than humans' interests. This is because emphasis is made on the fact that the restoration of the RoN is, not for the compensation of individuals and communities that depend on affected natural systems but for having effective mechanisms put in place to restore the extinction of species and the destruction of ecosystems or prevent the permanent alteration of natural cycles³¹. However, this article also observes that there is no consistency in the "ecocentric idea" of the Ecuadorian constitution in the attempt to grant RoN; some still seem very anthropocentric than ecocentric.

Elements of Promotion of Respect and Protection of Ecosystems by Representatives

It is worth considering why ecosystems should be legal persons with speculations on whether they should be legal persons because they matter especially because they possess intrinsic value and are worthy of recognition respect. Therefore, it has been deduced that the grant of RoN probably brings about an ecocentric idea of the need to respect the intrinsic value of all of nature/ecosystems. Therefore, with the legal framework of the grant of RoN, this article questions whether there is a proper framework for the promotion of the respect and protection of these respect and intrinsic value such that the representatives of them or the agents of the promotion of these respect and intrinsic value can have a good framework to work with in seeking to carry out their duties of representing the best interests of ecosystems.

In view of the above, and with the analysis of the Ecuadorian constitution so far, this article questions whether there is a criterion for appointment; and whether the ecocentric interests or the anthropocentric interests of the representatives are put into consideration. The legal framework for the protection of nature in Ecuador is such that the intrinsic value of nature is recognised and given legal rights, but if this right will be protected by whoever wants to enforce the rights on behalf of nature, then there is no specific provision for who the representatives of the ecosystems will be and no criteria for appointing them.

However, this could suggest a continuation of the anthropocentric approach which has mostly been used in the protection of nature, rather than a shift towards an ecocentric approach. As questioned earlier, even if the members of the National Environmental Management System were the representatives of nature, the criteria for making them representatives are not specified. It is not enough the constitution has the interests or the respect for the intrinsic value of nature in mind, this should also be reflected in the representatives. The constitution is presumed to give an ecological responsibility to "the people" to "promote respect for all the elements comprising an ecosystem"³². It may be difficult to achieve this if

anthropocentrism is ingrained in the representative. The custody or the responsibility of a child is generally given, not only to the parent who is deemed to always seek for the best interests of the child but also a care giver who seems to be committed to a child and the protection of the child. In addition, a next friend, representing the interests of prisoners generally proof that they have their best interests before they are allowed to represent them. In addition, lawyers as representatives of the interests of clients in court do not have to be committed to their client's cause or interests.

Therefore, eco-centrism is presumed to be better than anthropocentrism because it accommodates both the values of humans and non-humans. Therefore, this means that all of nature or ecosystems deserve respect owing to their intrinsic value, there will be a balance of representation. However, if all persons, and not particular representatives (who prioritise the interests of nature in their representation of it than the interests of only humans) are to represent nature, it might be confusing whether the representation is for humans' interests only or for the interests of nature from the recognition respect of their intrinsic value. This is because if the RoN are to be well represented and the ecocentric vision of the constitution is to be maintained, representatives of nature need an ecocentric mindset to be good representatives, else there could be conflict of interests and other difficulties.

Tanasescu (Tanasescu, 2015) also contends against the Ecuador provision that all persons should speak on behalf of nature³³. He argues that nature's advocates present claims on behalf of nature but all they do is just to represent but do not have some sort of privileged access to what nature's interests really might be³⁴. He gives an example of the Vilcabamba river claim which had damages awarded to the river but had some things attached to it. Firstly, the direct interest the plaintiffs had in the enforcement of the RoN was what geared them towards suing for nature and not for the benefit of their downriver "property"³⁵. Secondly, Tanasescu argues that it was the flooding quadrupled by the dumping of material excavated on an adjacent road construction site that prompted the lawsuit and not the genuine respect for the RoN³⁶.

Tanasescu also argues there are situations where despite the grant of RoN, the grant is invoked against property rights. He explained that in the case of *Esmeraldas v Manuel De Los Santos of Marmexa Shrimp Company*³⁷, where the Ministry of Interior sought to protect the RoN from illegal mining

²⁹Louiz J. Kotze and Paola Villavicencio Calzadilla 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) *Transnational Environmental Law* 1, 13.

³⁰Louiz J. Kotze and Paola Villavicencio Calzadilla 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) *Transnational Environmental Law* 1, 21.

³¹Constitution of the Republic of Ecuador 2008, art 72; 73.

³²Constitution of the Republic of Ecuador 2008, art 71.

³³Mihnea Tanasescu, 'The Rights of Nature: Theory and Practice' unpublished 6 https://www.academia.edu/25399912/The_Rights_of_Nature_Theory_and_Practice?auto=download accessed 10 February 2025.

³⁴Ibid 6.

³⁵Ibid 12.

³⁶Ibid 12.

³⁷*Esmeraldas v Manuel De Los Santos of Marmexa Shrimp Company*.

activities, the government invoked the RoN against property rights³⁸. This implies that if an ecocentric approach is not taken, there could be a misrepresentation of RoN because there are high chances that the orthodox anthropocentric approach prevails.

In view of the above, determining the interests of the representatives or the enforcers of the RoN may be problematic. Determining the interests of the “enforcer” of the RoN and whether there will not be “conflict of interests” in the enforcement of these rights; and whether there can be certainty as to the interests of whoever intends to protect the RoN for nature’s sake and not for some anthropocentric reason should be considered.

There should be clarity of all these terms and conditions; and interests and representatives so much so that subsequent laws are also clear about the need to protect the RoN and how. For instance, in Ecuador, it has been observed that there are sometimes deviations from the protection of the intrinsic interests of nature encapsulated in the Ecuadorian constitution. This can be because some of the provisions of the constitution as regards the grant of the RoN are not clear³⁹.

Overall, if there is unity of interests as there would normally be in a joint partnership and in view of the “relation claim” made by Tanasescu, it is possible that there would be no problems of interests envisaged with representation. It is trite that the responsible people or the best representatives will be those who have a duty to treat nature in such a way that it can exist, maintain itself and regenerate to the fullest extent possible⁴⁰.

There is an analysis by Whittenmore (Whittenmore, 2011) which encapsulates all the issues found of the Ecuadorian constitution. Whittenmore argues that there are barriers to the implementation of the environmental amendments within the constitution. Firstly, Whittenmore argues that Ecuador lacks a clear standing doctrine as regards who to bring an action on its behalf and what they may prove to gain standing⁴¹, and that this lack of standing doctrine creates fundamental uncertainty about the justiciability of claims under the constitution. Secondly, Whittenmore believes the texts of the constitution are vague and inconsistent with other provisions⁴². Whittenmore explains further that Ecuador’s standing doctrine is poor and undeveloped because there will be the problem of who has the requirement to be a proper plaintiff standing for nature⁴³. Whittenmore therefore contends that until this standing criterion is sorted, plaintiffs will not be able to effectively sue, and nature’s new rights will remain unenforceable⁴⁴.

Whittenmore also points that the constitution only provides those public authorities can be called upon to enforce nature’s rights and that where damages are awarded to nature by the court, how will the money judgment be executed and to whom is it payable?⁴⁵. Whittenmore also questions what environmental damage will be enough requirement to show causation? Overall, Whittenmore suggests that Ecuador should codify an “open” standing doctrine to give effect to the amendment’s purpose⁴⁷. She specifically proposes that Ecuador should codify an “open” standing doctrine to give effect to the purpose of the amendment; this will serve as a guideline for plaintiffs to rely on⁴⁸.

Legal Proceedings from Ecuadorian Rights of Nature

Court rooms are also a legal institution for the grant of RoN and strengthening the already existing legal framework through interpretation. Kauffmann and Martin added a tabular appendix to their article on page 6 of “Testing Ecuador’s RoN: Why Some Lawsuits Succeed and Others Fail”⁴⁹. This has an analysis of the lawsuits that the courts have entertained after the enactment of the constitution. Kauffman and Martin (Kauffman and Martin, 2016) identified four legal tools for the application of RoN in Ecuador and thirteen cases where the legal tools were used to protect RoN⁵⁰. These tools include constitutional lawsuit for protective action; criminal lawsuits; and a combination of administrative actions and constitutional lawsuit for protective action or criminal lawsuit; and administrative action by a government agency such as the Ministry of Environment to uphold the RoN. All of these will be analysed in subsections.

Civil Cases Involving Direct Representation of Nature

*Conaie (Indigenous Movement) And Community Water Councils v 2009 Mining Law*⁵¹

³⁸Mihnea Tanasescu, ‘The Rights of Nature: Theory and Practice’ unpublished 6 https://www.academia.edu/25399912/The_Rights_of_Nature_Theory_and_Practice?auto=download accessed 10 February 2025.

³⁹Craig Kauffman and Pam Martin ‘Testing Ecuador’s Rights of Nature: Why Some Lawsuits Succeed and Others Fail’ (2016) Article Presented at the International Studies Association Annual Convention, Atlanta, GA, March 18, 2016 1,9 <https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5748568c8259b5e5a34ae6bf/1464358541319/Kauffman++Martin+16+Testing+Ecuador+RoN+Laws.pdf> accessed 10 February 2025. Kauffmann and Martin presume that the subsequent Mining Law 2009 passed in Ecuador did not encapsulate the grant of the RoN in the Ecuadorian constitution which was done barely one year before.

⁴⁰Louiz J. Kotze and Paola Villavicencio Calzadilla ‘Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador’ (2017) *Transnational Environmental Law* 1,23.

⁴¹Mary Elizabeth ‘The problem of Enforcing Nature’s Rights under Ecuador’s Constitution: Why the 2008 Environmental Amendments Have No Bite’ (2011) 20 (3) *Pacific Rim Law and Policy Journal Association* 659,665.

⁴²*Ibid* 666.

⁴³*Ibid* 667.

⁴⁴*Ibid* 668.

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⁴⁷*Ibid* 685.

⁴⁸*Ibid* 685.

⁴⁹Craig Kauffman and Pam Martin ‘Testing Ecuador’s Rights of Nature: Why Some Lawsuits Succeed and Others Fail’ (2016) Article Presented at the International Studies Association Annual Convention, Atlanta, GA, March 18, 2016 1,9 <https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5748568c8259b5e5a34ae6bf/1464358541319/Kauffman++Martin+16+Testing+Ecuador+RoN+Laws.pdf> accessed 18 April 2025.

⁵⁰Craig M. Kauffman and Pamela L Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (The Massachusetts Institute of Technology Press 2021).5.

⁵¹*Conaie (Indigenous Movement) and Community Water Councils v 2009 Mining Law* (2009) 0008-09-IN Y 0011-09-IN (Acumulados) CC (Conaie case).

From the appendix table that was attached⁵², it is observed that the first case with a form of RoN application was the case of *Conaie (Indigenous Movement) And Community Water Councils v 2009 Mining Law*⁵³ in the year 2009. This case was against the Mining Law enacted in 2009 with the argument that the law violated the provisions of the constitution on RoN and that mining in fragile areas should be prohibited. Nevertheless, the ruling of the court was that the Mining Law was not against the Constitution because it states procedures to avoid environmental damages by ensuring environmental impact assessments were done and other procedures to prevent environmental damages. In this case however, it is shown that the interests of ecosystems (nature) within the constitution is represented by putting forward the impact mining will have on the area and the court strengthened the already existing legal framework for the RoN by interpreting the constitutional law to give a balance to conflicting interests within the ecosystem⁵⁴.

*A collection of Indigenous Movements, Environmental and Human Rights NGOs, and Community Organizations v Ecuacorriete (mining company); Ministry of Non-renewable Natural Resources; Ministry of Environment (government)*⁵⁵

In 2013, the case above⁵⁶, the *Ministry of Non-renewable Natural Resources; Ministry of Environment (government)* which requested suspension of a Candour -Mirador Mining Project which has the tendency to cause total removal of various ecosystems including habitats which endangered endemic species rely thereby causing the extinction of one or more species thus violating RoN. It therefore requested that a more thorough environmental impact assessment to be done. The judge ruled that the project did not violate RoN because the mining project will not affect a protected area and that the civil society's effort to protect nature was a private goal while the private company was acting in favour of a public interest which has to do with public development. The judge then ruled that the public interest takes precedence over a private interest and therefore, the protective action was denied.

This case also shows effective representation of ecosystems following the grant of rights of nature although the ruling of the court shows that there is no respect for nature and there is a nonchalant attitude towards the extinction of species. This could be because these species are seen as mere properties and therefore of instrumental and not intrinsic value. It could be deduced that with mining cases, the interests of the public are always prioritised despite effective representation.

Civil Cases Involving Indirect Representation of Nature

*Collection of 16 Community Members from Canton Santo Domingo De Los Colorados v Juan Rivadeneira, Director of the Company PRONACA*⁵⁷

In the same vein, in the year 2009, there was another case between *Collection of 16 Community Members from Canton Santo Domingo De Los Colorados v Juan Rivadeneira, Director of the Company PRONACA*⁵⁸ where the RoN was applied by the court itself. In this case, there was a claim that machines used by a pork-processing plant company had impacts on the flora and fauna and aquatic systems. The claimants argued that the act violated

their constitutional rights to health and safe and clean environment while the judge held that the case involved potential violations of the RoN according to articles 71 and 72 of the Ecuador Constitution 2008 instead. The judge then ordered the creation of a commission to audit and monitor the biodigesters to protect the RoN. In this case also, there was no direct representation of nature. There was an indirect form of representation which was on the basis that the claimants have constitutional rights to a healthy environment. This indicates that owing to the anthropocentric interests of the claimants as the main intent of representation, the flora and fauna and aquatic systems also get protected.

Significantly, there was a different legal basis for the action other than an ecocentric basis. The legal basis was anthropocentric because it sought to protect the constitutional rights to health and safe and clean environment of the citizens and not particularly seeking to protect the intrinsic value of the flora and fauna or promoting an integral respect for them. Therefore, the approach of the court was ecocentric because it put into perspective all of nature. However, even if the citizens had basically instituted the action based on the RoN, it is possible that ecocentric interests could have been used as a cover up for their own private anthropocentric interests of their rights to health and safe and clean environment. In fact, the rights of pigs being 'processed' in the plant were not considered at all and this suggests that anthropocentrism was present beneath the ecocentric framing.

*Nori Huddle and Richard Fredrick Wheeler (local landowners) v Provincial Government of Loja*⁵⁹

In 2010, the case between Nori Huddle and Richard Fredrick Wheeler (local landowners) and Provincial government of Loja Vilcabamba River was the first court victory in Ecuador (?) in 2011 after its rights were violated by road

⁵²Craig M. Kauffman and Pamela L Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (The Massachusetts Institute of Technology Press 2021) 6-8.

⁵³Conaie case (n50).

⁵⁴Kotze and Calzadilla also contend that there is evidence of normative conflicts of eco-centrism and anthropocentrism in the Ecuadorian constitution and that this calls into question the sincerity of the inclusion of the RoN in the Ecuadorian Constitution. Kotze and Calzadilla 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (n24),26.

⁵⁵Craig M. Kauffman and Pamela L Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (The Massachusetts Institute of Technology Press 2021).

⁵⁶Ibid 90.

⁵⁷Collection of 16 Community Members from Canton Santo Domingo De Los Colorados v Juan Rivadeneira, Director of the Company PRONACA (2009) 0567-08-RA CC. See also Craig M. Kauffman and Pamela L. Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (The Massachusetts Institute of Technology Press 2021) 95.

⁵⁸Collection of 16 Community Members from Canton Santo Domingo De Los Colorados v Juan Rivadeneira, Director of the Company PRONACA (2009) 0567-08-RA CC. S

⁵⁹Nori Huddle and Richard Fredrick Wheeler (local landowners) v Provincial government of Loja, (2011) 11121-2011-0010 PCL. See also Craig M. Kauffman and Pamela L Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (The Massachusetts Institute of Technology Press 2021).90.

construction⁶⁰. A three-year old road-widening project resulted in large amounts of rock and excavated material pushed into the Vilcabamba River without an environmental impact study. This increased the river flow and provoked a risk of disasters from the growth of the river with the winter rains, causing large floods that affected the riverside populations who utilise the river's resources⁶¹.

The court of first instance held that the claimants lacked standing. On appeal, the Loja Provincial court acknowledged that it had standing per the constitutional provision on RoN (RoN). In addition, the judge ruled that the claimants did not have to prove damages to themselves but to nature. The judge then ordered restoration through measures specified by the Ministry of Environment (MOE).

Therefore, this does not only show a non-anthropocentric approach in dealing with RoN cases. It points the effects or the outcome of the grant of RoN. These include pointing that the parties lacked standing for their own personal interest in the case but had standing for the enforcement of the RoN, and as a result, damages must be proved for the river and not for themselves. It can however be presumed that the legal framework for the grant of legal rights to ecosystems laid more emphasis on the specific reparation of the river for the river itself and not for humans or the people. The reparations provided by the court must be ecosystems specific, rectificatory and symbolic. In this case, the provincial court established means of reparation for amends to be made for the wrongs done to the Vilcabamba River⁶².

The Vilcabamba also case shows that the RoN can be enforced by citizens on behalf of nature; and it also shows that the procedure will be proof of damages to nature and not to humans. The court of first instance for this case ruled against the standing of the landowners because, perhaps, it is still confusing who should stand in for nature as representatives. There are no justifications for why "all people" can represent nature and conflicts of interests in most cases especially where there are the landowners' interests and there are nature's interests.

This also indicates that, apart from the provision that all persons have legal standing for the RoN, follow up representatives are being appointed by the courts. This highlights the problems with having all persons stand in for the RoN and not specific representatives who would protect the interests of the ecosystems and not the interests of human persons.

Criminal Cases Involving Direct and Indirect Representation

*The Conservation Sector of the Galapagos Marine Reserve; Sea Shepherd (environmental NGO); Prosecuted by Galapagos National Park v Captain of The Fishing Boat for Mary and 11 Crew Members.*⁶³

In view of all these issues concerned with the application of RoN, there are also relevant criminal lawsuits. The most related to this article is the case of Conservation Sector of *The Galapagos Marine Reserve; Sea Shepherd (Environmental Ngo); Prosecuted by Galapagos National Park v Captain of The Fishing Boat for Mary and 11 Crew Members*⁶⁴. A criminal lawsuit invoking RoN to defend the rights of the

sharks in the Galapagos Marine Reserve against the captain and crew members of the fishing boat. It was ruled that the Conservation Sector was not permitted to speak for the sharks in court. The Conservation Sector then submitted an amicus curia brief and the RoN application was successful. The judge only permitted Galapagos Park Prosecutor to try the case. This however raises the question of who can represent nature in criminal suits following the grant of RoN and the fact that the representative probably needs to have unbiased interests in defending an ecosystem or an ecocentric interest.

Therefore, it could also be indicated that amicus curiae (friends of the court) briefs can be submitted on behalf of nature to help the court or give the court information about the RoN to assist in arriving at fairness and equality in the court of justice. Therefore, it is also worth considering whether amicus curies only are enough as representatives of nature.

*MAE v Luis Alfredo Obando Pomaquero (hunter)*⁶⁵

In 2013 to 2014, there were cases of dead jaguar and dead condor rights being prosecuted as crime against nature⁶⁶. There was another case in 2014⁶⁷ between where a pine plantation place in the Paramo of Tangabana was asked to be removed and the ecosystem of Paramo restored by the plantation company which was created through a reforestation program. The argument was that the pine plantations violated the rights of the Paramo to maintain its vital cycles and to be restored when degraded. It also alleges violations of the rights of defenders of nature (art 71) resulting from intimidation against community members. The judge denied protective action on procedural grounds saying the claimants did not prove their ownership over the land and the claimants' evidence was invalid because it was not presented with its respective testimony. The claimant appealed saying ownership of land is irrelevant since the constitution allows anyone to bring a suit on

⁶⁰Nori Huddle and Richard Fredrick Wheeler (local landowners) v Provincial government of Loja, (2011) 11121-2011-0010 PCL. See Harmony with Nature 'Rights of Nature Law, Policy and Education' <<http://www.harmonywithnatureun.org/rightsofNature/>> 9 January 2025; See also Kauffman and Martin, The Politics of Rights of Nature: Strategies for Building a More Sustainable Future (n 54) 94.

⁶¹Environmental Justice Atlas 'Road Widening at Vilcabamba River and Recognition of Rights of Nature Ecuador' <<ejatlas.org>> 9 January 2025.

⁶²Natalia Greene 'The First Successful Case of the Rights of Nature Implementation in Ecuador' <https://therightsofnature.org/first-ron-case-ecuador/> accessed 10 January 2025.

⁶³Craig M. Kauffman and Pamela L Martin, The Politics of Rights of Nature: Strategies for Building a More Sustainable Future (The Massachusetts Institute of Technology Press 2021)100.

⁶⁴Ibid.

⁶⁵Kauffman and Martin (n39) 8. See also Kauffman and Martin, The Politics of Rights of Nature: Strategies for Building a More Sustainable Future (n 54) 100.

⁶⁶Ministry Of Environment v Luis Alfredo Obando Pomaquero (Hunter) (2012) 0010-2011; Provincial Director of Environment Ministry in Napo Province V Manuel Damian (Hunter). See Kauffman and Martin (n39) 8; See also Craig M. Kauffman and Pamela L Martin, The Politics of Rights of Nature: Strategies for Building a More Sustainable Future (The Massachusetts Institute of Technology Press 2021).100.

⁶⁷Environmental Activists (Yasunidos Chimborazo, Accion Ecologica) & Indigenous Pastorate of Chimborazo V Ervic S.A. (Private Company Owned by Retired Military Captain, Carlos Rhor Romeno). See also Craig M. Kauffman and Pamela L. Martin, (n 54) 92- 93.

behalf of nature. The judge's evidentiary procedure was applicable only to criminal lawsuits and not required in constitutional lawsuits. On appeal, the provincial court upheld the local court's ruling. In 2015, they appealed to the constitutional court, alleging previous court decisions were not rooted in constitutional law. It is observed that the court of first instance did not address the issues based on ecocentric considerations. This basically shows that sometimes, even judges are not inclined with the RoN and the fact that whatever is being raised for them is on their behalf. However, with representation, there is a high chance that claimants may institute actions on behalf of ecosystems, but for their own personal interests. This form of representativeness is flawed.

Cases Involving Representation by Administrative Personnel

In the administrative action involving *Galapagos National Park, Galapagos Government Council; Judicial Unit of San Cristobal and Secoya Indigenous Community*, the *Secoya* indigenous community cut 180 hectares of native forest to establish *Secoya* palm plantation without permission from MOE⁶⁸. MOE claimed their action violated the RoN provisions in the constitution and article 78 of Forest Law; and they therefore claimed for \$375,000 to restore the logged area⁶⁹.

The above case presumes the fact that an ecocentric approach was used in dealing with the issues and the Ministry of Environment are somewhat presumed to be the appropriate representatives of the ecosystem within the meaning of the constitution because they seem to be promoting respect of and the interests in the existence of the native forest⁷⁰. However, what does not seem clear is whether the interest is in the existence of a forest; or the forest and its intrinsic value; or mere enforcement of the law as administrative agents of enforcement. It has been stated in the constitution that when an ecosystem is destroyed, it should be restored. However, being a criminal action, in addition to the fine, there could be terms of years of imprisonment to set an example for potential degraders of ecosystems. Overall, this mode of representation by the MOE is effective.

Ministry of Interior (Lawsuit for Protective Action) Administrative Action by Multiple Agencies v Artisanal Miners Lacking Government Concessions

In 2011, following the mining law 2009, the Ministry of Information, in Ministry of Interior (Lawsuit for Protective Action) Administrative Action by Multiple Agencies v Artisanal Miners Lacking Government Concessions, petitioned for MOI to have precautionary measures authority to combat unauthorised mining in the provinces; and mining activities which violates RoN particularly the rights of water. The court approved this and ordered armed forces and other government agencies to conduct operations to control illegal mining to uphold RoN⁷¹.

It is worth considering whether armed forces could also be representatives of the RoN. This is because armed forces are not civilians and the constitution did not include them in the list of "representatives" of nature⁷². Therefore, it can be presumed that this court order lacks constitutionality and indicates that there needs to be a delineation of who

should represent these ecosystems as legal right holders to promote and protect respect and maintenance and their intrinsic value.

*Esmeraldas V Manuel De Los Santos of Marmexa Shrimp Company*⁷³

In 2010 also, Santiago Garcia Llore, Provincial Director of The Ministry of Environment in *Esmeraldas v Manuel De Los Santos of Marmexa Shrimp Company*⁷⁴ had claims for their rights to property and work. The Ministry of Environment (MOE) tried to protect mangrove systems by removing shrimp companies illegally operating in three ecological reserves. The shrimp company then instituted an action against the MOE. In first instance, the judge ruled that MAE's effort to remove the company constituted an infringement on Mr Meza's constitutional rights to property and to work and ruled Marmexa could remain in the reserve. MOE appealed but failed. MOE then appealed to the Constitutional Court and argued that the RoN was not considered because the economic interest of an individual (company) was placed above that of nature. MOE sued for Protective Action to prevent implementation of the Provincial Court decision⁷⁵. The Constitutional Court explained that the RoN are by nature transversal and as a result, it affects all other rights, therefore it should be considered because the non-consideration of it would violate due process and could make the decision of the court to be invalid. In view of this, the Constitutional Court granted MOE the protective action, and annulled the Provincial Court sentence for retrial. With the retrial, the RoN was considered in its decision⁷⁶.

Collection of 18 citizens from canton Santa Cruz v Autonomous Municipality of Santa Cruz represented by Mayor Leopoldo Bucheli Mora and lawyer Olimpido Ismael Morales

⁶⁸Craig Kauffman and Pam Martin 'Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail' (2016) Article Presented at the International Studies Association Annual Convention, Atlanta, GA, March 18, 2016 1,9 <https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5748568c8259b5e5a34ae6bf/1464358541319/Kauffman++Martin+16+Testing+Ecuadors+RoN+Laws.pdf> accessed 10 February 2025.

⁶⁹Ibid.

⁷⁰Constitution of the Republic of Ecuador 2008, art 72.

⁷¹Ministry of Interior (Lawsuit for Protective Action) Administrative Action by Multiple Agencies v Artisanal Miners Lacking Government Concessions.

⁷²Article 71.

⁷³Craig Kauffman and Pam Martin 'Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail' (2016) Article Presented at the International Studies Association Annual Convention, Atlanta, GA, March 18, 2016 1,9 <https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5748568c8259b5e5a34ae6bf/1464358541319/Kauffman++Martin+16+Testing+Ecuadors+RoN+Laws.pdf> accessed 10 February 2025.

⁷⁴Ibid.

⁷⁵The specific question before the Constitutional Court was whether the Provincial Court's ruling violated the right of due process guaranteed by Art. 76(7) of the Ecuadorian Constitution.

⁷⁶Craig Kauffman and Pam Martin 'Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail' (2016) Article Presented at the International Studies Association Annual Convention, Atlanta, GA, March 18, 2016 1,9 <https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5748568c8259b5e5a34ae6bf/1464358541319/Kauffman++Martin+16+Testing+Ecuadors+RoN+Laws.pdf> accessed 10 February 2025.

Furthermore, in 2012, citizens from Santa Cruz filed a lawsuit to prevent construction to expand a road fearing it would disrupt business during high tourist season. The claimants or representatives did not make an environmental case nor RoN case but a public interest case. A procedural argument was made noting that the government lacked necessary environmental license for construction. The mayor argued that the decentralised rights of municipal governments allowed them to continue work to avoid tourism issues. The judge acknowledged the RoN and cited the Vilcabamba case⁷⁷ as precedence and ordered the suspension of the construction until an environmental impact assessment is conducted in a way that would protect species habitat. This case establishes further precedent regarding the court's duty to protect the RoN, even above the autonomous rights of decentralised municipalities. These also make this article question which interests prevail where there is a conflict of interests within the constitution during representation.

*Ministry of Environment (administrative action); Attorney General (criminal lawsuit) v Provincial Government of Morona-Santiago (administrative action); Marcelino Chumpi, Prefect of Morona-Santiago Province (criminal lawsuit)*⁷⁸

Lastly, in 2014, there was an institution of a case where the provincial government took over the construction of a road which was to enable oil extraction to reduce the community's isolation. The MOE which licensed the construction of the road accused the government of non-compliance with the environmental license in building the road and violating the rights of soil and water due to indiscriminate logging and discarding waste in rivers. The MOE revoked the provincial government's license and sent the military to decommission equipment used in road construction and this led to violent clashes with community members to protect the equipment.

All these judicial proceedings show to a large extent the applicability of the provisions of the constitution on the grant of legal RoN. It thereby also exposes the fact that there are uncertainties and confusions about the interests of legal persons, nature, ecosystems, and representatives. These must be clear, crisp, and well considered.

The Ecuadorian system seems to be a better model for this article which puts forward the idea that there should be a theory of eco-centrism for how ecosystems acquire legal rights and are represented. This is because while NZ laws are more restricted in protecting the rights of ecosystems (river, park, and mountain), the Ecuadorian law protects all of nature (all ecosystems). Additionally, the basis for the grant of legal rights to all of nature by the Ecuadorian constitution brings about respect given to the intrinsic value of nature (ecosystems) rather than the grant given to only a river or a park or a mountain in NZ. The Ecuadorian approach can foster the theory of eco-centrism over anthropocentrism.

This is not to say that the Ecuadorian ecocentric approach is perfect. This article contends that the option of reparation provided in the constitution is misplaced. It has been argued in this article that when destroyed, ecosystems with intrinsic value cannot be restored just as a dead human cannot be brought back to life. This article contends that the constitution had rather emphasise more on the prevention of harm to ecosystems than restoration of them. The

Ecuadorian constitution is also inadequate in the aspect of representatives. This will be discussed later.

Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 in New Zealand

The main purpose of this act as stipulated is to give effect to the provisions of the deed of settlement that settles the historical claims of Whanganui Iwi (the indigenous Maori tribes of the Whanganui river region in New Zealand) as those claims relate to the Whanganui River (WR) of New Zealand⁷⁹. Section 14 recognises the legal status of the WR⁸⁰. It states that the WR is a legal person and has all the rights, powers, duties and liabilities of a legal person and that all decision makers must have particular regard to this legal status of the WR in carrying out their obligations⁸¹. Hutchinson (Hutchinson, 2014) explains that the WR has always be seen as an indivisible whole (I am the river and the river is me) in NZ and not even as a property as in the European context or a profit-generating resource⁸².

The human faces of the WR (WR representatives) are the Te Pou Tupua whose offices are also established by the act⁸³. The functions of the WR representatives are to act and speak for and on behalf of the WR; to uphold the representative status; promote and protect the health and well-being of the WR; to deal with the land vested in the WR and enter into legal relations on behalf of the WR⁸⁴. All of these functions must be in the interests of the WR⁸⁵.

The act particularly recognises four intrinsic values of the WR known as Tepua te Kawa. It is intended that these values are intended to be considered when decisions are made around the river and catchment⁸⁶. The first intrinsic value connotes that the river is a source of physical and spiritual sustenance, sustaining life and natural resources⁸⁷. This value presumes an inviolable intrinsic value which exists from creation and cannot be replaced once destroyed. Therefore, there must be considerations of the fact that representatives of this form

⁷⁷Nori Huddle and Richard Fredrick Wheeler (local landowners) v Provincial government of Loja, (2011) 11121-2011-0010 PCL. See Harmony with Nature 'Rights of Nature Law, Policy and Education' <<http://www.harmonywithnatureun.org/rightsOfNature/>> 9 January 2025; See also Kauffman and Martin, The Politics of Rights of Nature: Strategies for Building a More Sustainable Future (n 54) 94; Kauffman and Martin 'Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail'(n 39) 6.

⁷⁸Craig Kauffman and Pam Martin 'Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail' (2016) Article Presented at the International Studies Association Annual Convention, Atlanta, GA, March 18, 2016 1,9 <https://static1.squarespace.com/static/55914fd1e4b01fb0b851a814/t/5748568c8259b5e5a34ae6bf/1464358541319/Kauffman++Martin+16+Testing+Ecuador+RoN+Laws.pdf> accessed 10 February 2025. 8.

⁷⁹Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s3.

⁸⁰Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s14.

⁸¹Ibid, s15.

⁸²Abigail Hutchinson 'The Whanganui River as a Legal Person' (2014) 39 Alternative Law Journal 179,180.

⁸³Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s18.

⁸⁴Ibid, s19.

⁸⁵Ibid, s19 (2)(a).

⁸⁶Zaryd Wilson 'Whaganui Chronicle- Te Awa Tupua will Take Time to Manifest' (2017) <www.nzherald.co.nz> accessed 17 April 2025.

⁸⁷Ibid.

of value need to protect the inviolable intrinsic value of the river.

The second intrinsic value is that the river flows from the mountain to the sea (a concept of indivisibility) therefore thinking about the river as a whole and not rather a responsibility of the district council or regional council or any other body⁸⁸. The concept of indivisibility however must be thought through before decisions are made particularly when it comes to the choices of representatives. Where there are representatives of the intrinsic value of ecosystems who also take the interests of ecosystems seriously, indivisibility will be taken seriously. If there are none and “all persons” are to represent ecosystems, this wouldn’t be a priority. This is because the appointed representatives may not be fit for the protection or representation of ecosystems. Overall, there must be good considerations of who should represent ecosystems as legal persons.

The third value is that the subtribes of Whanganui (Iwi Hapu) have an inalienable relationship with the river, and this has been held to recognise a lot of historical issues and nature of talking about things. This relationship presumes that there has been an incremental intrinsic value attached to the WR. This incremental intrinsic value presumes that the more of the existence of the river there is, the more the intrinsic value of the river and the stronger the relationship between the river and the people. On this basis, representatives fit for the protection of this intrinsic value of the river will be best chosen by those in this relationship with the river.

The fourth value connotes the small and large streams flow into one another and from one river⁸⁹. This presumes the need for the river to have the right to exist, and to flow freely without pollution or degradation. This should be defended when interrupted.

In furtherance to this agreement, and these four values, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 was enacted and it declared Te Awa Tupua (WR) to be a legal person with all the rights, powers, duties and liabilities of a legal person which must be exercised and responsibility of its liabilities must be taken, by Te Pou Tupua⁹⁰ (the human face of the river) on behalf of and in the name of the WR⁹¹. The legal effect of this as provided in the act⁹² is that representatives must have regard to the WR (Te Awa Tupua) and their duties are only owed to those four values and the status of the WR because they represent the WR and not the Crown or the Whanganui tribe⁹³.

The concept of trusteeship for the WR is a distinct concept which has the tendency of advancing the interests of the WR if it is for the sole purpose of compensating the WR and not some other persons. Therefore, these WR representatives are not chosen freely from the iwi or from the New Zealand citizens. The appointments of the WR representatives are done by the iwi and the crown. “One person must be nominated by the iwi with interests in the WR and one person must be nominated on behalf of the Crown”⁹⁴. The person nominated on behalf of the crown is actually nominated by the Minister for Treaty of Waitangi Negotiations, in consultation with the Minister for Maori Development, the Minister of Conservation, and the minister of Environment⁹⁵. It could be assumed that these are experts in determining who is apt for the functions and duties of the representation of the WR. The consultants nominate on the basis of mana, skills, knowledge and

experience⁹⁶. Therefore, before making a nomination, a nominator must give notice to other nominators of the name of the proposed nominee, inviting comments from the other nominator on the suitability of the proposed nominee⁹⁷. The nominators then jointly appoint the persons nominated with regard to the ability to fulfil the purpose and functions of WR⁹⁸. This is a well-structured procedure for the appointment of representatives of WR and this could give credence to the protection of the intrinsic value of the WR for its own self and not for the interests of the representatives.

The above procedure for appointment of the WR representative shows an attempt to have a good structure for the appointments of representatives of legal persons. The consultations made before appointments are from people deemed to have the interests of ecosystems in mind such as the Minister of Environment, Minister for Maori Development, and the Minister of Conservation. However, it is also pertinent to note that these consultants put assess the mana, skills, knowledge, and experience of potential representatives before nominating them⁹⁹. Follow up comments are then made by nominators to ensure the suitability of the proposed nominee to fulfil the purpose and functions of the WR.

However, this act goes further to be clear about the extent of the liability of these representatives. It states that for liability, the persons appointed are not personally liable for any action taken or omission made in their capacity as WR if they acted in good faith¹⁰⁰. In addition, the WR representative also acts for the WR in administrative matters which include entering into contract with the trustees; as officers of WR for applying for registration as a charitable entity under the Charities Act 2005; as a public entity and auditor-general¹⁰¹.

Apart from the WR representatives, the act also provides for a team of advisors and strategy groups to help the fulfilment of the purpose and functions of the duties of the WR representatives. They are also appointed based on consultations and are assumed to act in the interests of the WR and considering the intrinsic values (tupua te kawa) of the WR¹⁰². The appointment of the advisors called “Te Karewao”, is done by the trustees, the iwi with interests in the WR (other than the WI) and the relevant local authorities who all appoint one person each¹⁰³.

⁸⁸Ibid.

⁸⁹Ibid.

⁹⁰Te Pou Tupua is the human face of the river; the two people that represent the WR and were appointed by the Crown and Iwi with each side nominating one person but having to agree to each other’s nomination- the Crown nominated, and its nomination was accepted by the WR tribe and the WR tribe also made their nomination.

⁹¹Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s14 (1)(2).

⁹²Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s15.

⁹³Wilson (n 144).

⁹⁴Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s20(2).

⁹⁵Ibid s20(3).

⁹⁶Ibid s20(5).

⁹⁷Ibid s20(6).

⁹⁸Ibid s20(7).

⁹⁹Ibid s20(5).

¹⁰⁰Ibid s21.

¹⁰¹Ibid s22-24.

¹⁰²Ibid s27(2).

¹⁰³Ibids28.

Importantly, the WR representative performs a function in relation to a discrete part of the WR, the Te Karewao works with the WR Representative on this but only provides advice and support about that function. This Te Karewao for this function is appointed by the Iwi (tribe) and Hapu (sub-tribe) with interests in that part of the WR but the WR representative can invite other persons to assist it or Te Karewao, but they do not become members of Te Karewao. The other persons can be from the tribe or sub-tribe with interests in the Whanganui, local authorities, and relevant department of State and other agencies that Te Pou Tupua considers relevant in the circumstances¹⁰⁴.

The strategy group consists of not more than 17 members appointed by the trustees; the iwi with interests in the WR; the relevant authorities; the Director-General of Conservation; the New Zealand Fish and Game Council or its successor; the Genesis Energy Limited or its successor; members to represent environmental and conservation interests; members to represent tourism interests; recreational interests; and primary industries sector¹⁰⁵. Each appointer considers the mana, skills, knowledge or experience of the person to be appointed¹⁰⁶. The appointment of a strategy group (Te Kopuka) for the WR with the sole functions of monitoring the implementation of and to review the Te Heke Ngahuru (check what this means). It also provides a forum for discussion of issues relating to the health and well-being of the WR and performs any functions that may be delegated to it by a local authority and takes any other action that the strategy group considers appropriate for achieving its purpose and performing its functions¹⁰⁷. All of these functions are regarding the WR status and the intrinsic values of the WR to be protected.

The representation team also includes the collaborative group that manages the activities on surface of water of the WR. This group consists of representatives of iwi with interests in the WR; the Department of Conservation; and Maritime New Zealand; and the relevant local authorities¹⁰⁸. The collaborative group consider the nature and extent of existing and possible future activities on the surface of the WR. It considers the relationship between activities on the surface of the WR and activities on the land adjacent to the WR. It also considers matters relevant to public health and safety; and the health and well-being of the WR (Te Awa Tupua) and any other relevant matters¹⁰⁹. All of the above done by the collaborative group, must be done in consultation with the WR representatives and they must report to the relevant Ministers¹¹⁰ on the completion of the work¹¹¹.

From all the above, this article argues that New Zealand seems to have a better structure for the appointment of representatives of legal persons who do not have the physical capacity to represent themselves. A proper consultation is done; and the skill and experience of the proposed representatives are checked. In addition, this article points that the other team members observed such as the advisory group, the strategy group and the collaborative group all work together as representatives of the WR. Perhaps, appointing human faces (representatives) are not enough; there could be a committee of representatives of legal persons who all work together for the advancement of the purpose and functions of the WR.

Analysis of the Grant of Legal Personhood to Ecosystems in Ecuador

The ecocentric approach of evaluating entities bring about the respect for the intrinsic value of entities. If this approach is applied to entities with intrinsic value, there will be an effect in the way and mode of protection of the ecosystems rather than the instrumental value approach being struggled with.

From this research however, it is observed that one of the significant issues of these grants is lack of a proper structure for the appointment of representatives of ecosystems as legal persons in Ecuador.

For a universal consideration of the grant of Rights of Nature in Ecuador, there must be a consideration of the fact that legal systems vary. Knowledge on the diversity of the legal systems helps this article to conclude that the grant of legal rights to ecosystems is workable both in common law and civil law jurisdictions. It prevents the restriction of the analysis of the article to only one legal system.

The constitutional aspects of the law in Ecuador show that a constitutional structure or alternatively, a Code of Practice will work. It may be more difficult to follow in countries without a codified constitution, therefore, in such countries, it is better to have it entrenched in statutes or as mentioned earlier, have a Code of Practice to ensure all the details on the protection of ecosystems are contained in them. Although some believe constitutionalism has been a way to augment environmental care through the perceived power of constitutionalism being the grundnorm and being superior to other statutes¹¹², the grant of legal rights of ecosystems does not have to be constitutional to be effective. It could also be a legislation or an act for it to be effective. As mentioned earlier, some believe that "legal personhood is the ultimate protection"¹¹³.

There could be preference for a structure for representatives and not "all persons" as representatives as in Ecuador. Justifications for the mode of appointment, the mechanisms for appointment, the criteria for appointment, and whether these appointed representatives have the intrinsic value or the interests of ecosystems as their priority should be had.

These justifications are necessary for understanding the core of the choice of representatives so that other legal systems with plans of the grant of legal personhood to ecosystems will use them as a criterion for the appointment

¹⁰⁴Ibid s28.

¹⁰⁵Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s32.

¹⁰⁶Ibid, s32.

¹⁰⁷Ibid, s30.

¹⁰⁸Ibid, s64.

¹⁰⁹Ibid, s64.

¹¹⁰The relevant ministers include one or more of the Minister of Conservation; Minister for the Environment; Minister for Workplace Relations and Safety; the Minister of Local Government; the Minister for Maori Development and the Minister of Transport.

¹¹¹Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s64.

¹¹²Louiz J. Kotze and Paola Villavicencio Calzadilla 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) Transnational Environmental Law 1,2.

¹¹³Alexis Dyschkan, 'Legal Personhood: How We are Getting it Wrong' (2015) University of Illinois Law Review 2075, 2100.

of their own representatives. For instance, Uganda, an African country has replicated the Ecuadorian model of “all persons” representing ecosystems as legal persons for its grant of legal personhood to ecosystems¹¹⁴. Nevertheless, the considerations of representatives for ecosystems as legal persons will be determined.

The use of the word legal rights of nature in Ecuador implies recognition, respect, and grant for the rights of ecosystems. Where legal rights are granted to ecosystems it makes them become legal persons. It also brings about legal standing to these ecosystems, a feature which was not in existence prior to the grant of legal personhood to them. In fact, it does not matter if the legal term used is personhood or legal rights. It doesn't matter whether the legal system is civil or common law for the grant of legal personhood to ecosystems. It doesn't matter if one grant is constitutional, and the other is non-constitutional. What matters is the conferment of legal personhood or rights, and the appointment of appropriate representatives. The grant of constitutional RoN in Ecuador is an ecocentric approach to recognising the ecological integrity and the intrinsic value of nature (Harmony with Nature, 2025).

Conclusion

This article has been able to draw lessons from Ecuador on the grant of legal rights to ecosystems and the appointment of representatives for ecosystems as legal persons and compared it with that of New Zealand. It is however observed that there must reflect the ecocentric approach to granting legal personhood to ecosystems throughout the texts and also the cases before the courts. Without this, it could be said that the orthodox anthropocentric approach is still in existence and will not amount to the realisation of the benefits of the grant of legal personhood to ecosystems. Pertinently, it has been observed that the criteria for the appointment of some of the representatives, especially in Ecuador lacks justifications and this is one of the reasons why there are a plethora of cases in court resolving Rights of Nature issues. New Zealand has a better structure than Ecuador and this works to prevent litigation. Overall, it is expedient to assess who the best representative of ecosystems as legal persons should be and whether these representatives will fit in with the argument that the eco-centred and indigenous representative example in New Zealand should be considered as a model for the representation of the legal personhood of ecosystems.

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¹¹⁴National Environment Act 2019.