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# Rights of nature and rivers in Ecuador's Constitutional Court

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**ABSTRACT**

The article analyses a series of decisions by the Constitutional Court of Ecuador on the rights of nature generally, and the rights of rivers and water bodies specifically. The selected cases are a representative sample of other similar ones and allow for uncovering the logic behind the Court's reasoning in general. The analysis focuses on four major themes. First, the importance of context in discussions of the rights of nature and water is demonstrated through the grounding of the analysis in the specific Ecuadorian context, and highlighting the value of this approach. Second, it engages with the concept of judicial activism, thus bringing a much-needed discussion to the wider literature on water and nature rights. Third, it details the concept of nature that is used in the Court's reasoning. Lastly, it traces the relationship between human rights and the rights of nature, specifically through a discussion of the relative importance of Indigenous law in establishing rights of nature jurisprudence in Ecuador. Perhaps surprisingly, given the general thrust of the literature so far, it shows that Indigenous law has been minimally important in this case. In engaging with these themes, the paper lays a fruitful basis for future comparative research that can bring more clarity and nuance to discussions of the rights of nature elsewhere.

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## 1. Introduction

The constitutional rights of nature (RoN) in Ecuador are the first of their kind, and they are increasingly seen as a blueprint for granting rights to ecosystems, and to rivers specifically, elsewhere. However, the Ecuadorian experience has been controversial, with critics and commentators pointing to a 'gap' in the judicial and executive implementation of constitutional protections, and the inability of RoN to disrupt existing power dynamics in the use and development of natural resources like water. Early cases did not routinely uphold nature's rights. However, recent political and judicial developments in Ecuador have provided fertile ground for a new wave of constitutional RoN jurisprudence, with the rights of rivers, related ecosystems, and peoples being defended in the Constitutional Court (hereafter, the Court).[1] Political instability and social unrest have beset Ecuador

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over the past five years, due to corruption scandals engulfing prominent officials, a security crisis caused by rampant drug trafficking, a cost of living crisis at least partially attributable to austerity measures, and a contentious relationship between the executive and legislative branches of government and Indigenous social movements. In this context, where executive and legislative authority has been weakened and fractured since 2017,[2] recent rulings by the Court, which are widely considered progressive, have proven to be pivotal for the evolution of RoN jurisprudence in Ecuador.[3] Given the transnational reach of the Ecuadorian experiment, these decisions could have significant implications elsewhere.

In this article we analyse a series of recent decisions by the Constitutional Court of Ecuador, uncovering the conceptualisations of nature and rights that guide the Court's reasoning. We focus primarily on cases involving water, both because most of the judgments so far concern water bodies, and because many RoN legal frameworks elsewhere in the world show a similar focus. Our analysis centres on the *Coordinadora Ecuatoriana de Organizaciones para la Defensa de la Naturaleza y Ambiente and others v Presidente de la Republica and others* (2021) (hereafter, *Mangroves*), *Ann y Pamela Monge v Municipio del Distrito Metropolitano de Quito and others* (2022) (hereafter, *Monjas*), and *Fanny Jacqueline Realpe Herrera v Secretaría Nacional del Agua (SENAGUA) and others* (2021) (hereafter, *Aquepi*) cases, with support from others as needed. These are not the only cases to have been decided by the Court since 2019, the year when RoN jurisprudence in the Court accelerated dramatically.[4] Instead, they are a representative sample of decisions that display the kinds of arguments that Court judges have used to particularise the content of RoN in Ecuador.[5] The cases span different kinds of environments, but all deal with water in one way or another.

Our analysis aims to do several related things. First, we situate the Court's decisions within a specific context, in order to guard against the tendency to take judgments, and instances of RoN more generally, as applicable *tout court* everywhere. Being cautious about the dangers of using experiences in other jurisdictions, we follow Gillespie and Nicholson's suggestions to focus on local actors and contexts to identify the capacity of these new legal vehicles to engineer social change.[6] The Ecuadorian Constitution and jurisprudence have been a foundation to advance the declaration and interpretation of the rights of nature in other countries.[7] The starting point of this research involves identifying how local applicants invoke RoN and how the Court interprets these rights.[8]

Second, we follow, through the particular contexts of these cases, several themes that have been influential in RoN scholarship to date. Specifically, we consider whether the Ecuadorian cases are suggestive of judicial activism, critically examine the concept of nature as interpreted by the Court, evaluate the relationship between human rights and RoN, and the relative influence of Indigenous law in these decisions. These four issues are all current and unresolved themes in RoN scholarship, and the cases we analyse clarify their meanings and interrelationships in new and important ways. This article therefore considers the political and social context that has activated specific cases in the courts of Ecuador in order to interpret the rationale and ideas that emerged through judicial processes. The use of Ecuadorian examples in other jurisdictions has generally tended to ignore the relationship of these ideas to their place of origin.[9]

Often in contemporary scholarship RoN are assumed to travel in a fairly uniform way across borders, an idea reinforced by the fact that many trans-jurisdictional judgments refer to each other.[10] In practice, the reference to the Ecuadorian cases tends to take little notice of the political context, the activism, and the role of the Judges that shaped the decisions, and use these experiments as recipes to apply in other jurisdictions.

However, this supposed portability does not mean that cases do in fact embody similar norms everywhere, or that norms which may in fact be similar are actually applied in the same way or for the same purposes. It also does not mean that every case has been part of a horizontal international norm diffusion, an idea routinely popularised by international NGOs, such as the Community Environmental Legal Defence Fund, Earth Law Centre, or the Global Alliance for the Rights of Nature. The growing influence of these organisations, as well as umbrella programmes like the Harmony with Nature Knowledge Network, gives the impression that RoN are both more pervasive than they are (by counting, for example, failed or inert initiatives), and more uniform. For instance, the dogmatic use of capital N nature is such a totalising and homogenising gesture.

In fact, norm diffusion may in some instances be understood as negative, in that different groups may learn what not to do, because the globalised notion of RoN doesn't fit their context.[11] Our analysis, then, lays a fruitful base for future comparative work that can bring more clarity to the diversity of RoN laws worldwide.

### *1.1. The early development of RoN in Ecuador*

The 1990s and early 2000s were fraught with civil society unrest in Ecuador, due in large part to the economic ramifications provoked domestically when global crude oil prices collapsed.[12] The country declared bankruptcy in 1998 and the economy was dollarized in 2000, but inflation continued to skyrocket. The financial woes caused by an economy reliant nearly exclusively upon natural resource extractivism brought a cosmopolitan set of activists into alignment with Indigenous social movements, which for decades had been protesting against violations of their rights, especially where mining and drilling projects were being undertaken on their ancestral lands without their consent.[13] These alliances may be understood as an 'uncommons' that united various heterogenous 'worlds', each of which had 'an interest in nature or the environment that acknowledges neither is only such'.[14]

The Ecuadorian socio-political uncommons was empowered through the 2007–2008 Constituent Assembly process to draft a new Constitution. The new Constitution adopted both the RoN concept that American environmental lawyers endorsed,[15] and recognised a number of '*buen vivir*' rights informed by the Quechua concept of *sumak kawsay*,[16] which is typically translated as 'good living' or 'living well' in contradistinction to 'living better' in the developmentalist sense.[17] The RoN that the Constitution created include the 'right of nature to have its existence respected holistically, and to the maintenance and regeneration of its vital cycles, structure, functions, and evolutionary processes' (*Constitución de La República de Ecuador* 2008 Art. 71). RoN in Ecuador also encompass the right to restoration (*Constitución de La República de Ecuador* 2008 Art. 72), while the government is required to apply precautionary and restrictive measures to activities that may lead to the destruction of ecosystems or the permanent alteration

of natural cycles (*Constitución de La República de Ecuador* 2008 Art. 73). The Constitution empowers 'all individuals, communities, peoples, and nations' to call upon public authorities to enforce RoN (*Constitución de La República de Ecuador* 2008 Art. 71), amounting to a broad legal standing that allows any natural person to lodge a judicial claim to enforce nature's rights.

Although the constitutional recognition of RoN in Ecuador garnered significant attention both domestically and internationally, there was a conspicuous failure of domestic public policy to expand upon the precise meaning and scope of this new category of rights, until recently.[18] While the reform of the Constitution in 2008 inspired the remaking of several subordinate legal regimes, including in ways that aligned with RoN (e.g. the 2014 reform to the Criminal Code), Ecuadorian courts applied inconsistent and sometimes contradictory interpretations of the RoN concept from 2012, the year when the first RoN case, concerning the *Wheeler v. Director de la Procuraduria General de Estado de Loja (Vilcabamba case) Corte Provincial de Loja* (2011) case (hereafter, the Vilcabamba River) was decided, until 2019. In 2019, a new bench was appointed to the Constitutional Court, including two key judges (Ramiro Avila Santamaria and Augustin Grijalva, who presided over the court until 2022).

Most of the RoN claims that have come before the Ecuadorian judiciary before 2019 resulted in positive outcomes for the protection of nature in the form of individual animals, rivers, national parks, forests, and others .[19] However, the reasoning behind the decisions was not always clear or consistent, and confusion remained over the relationship between nature's rights and human rights under the Constitution. Furthermore, many cases were thrown out at early stages on procedural grounds. With the tenure of judges Avila Santamaria and Grijalva, the Court began to select cases of national importance which allowed it to develop jurisprudence around the meaning of RoN. The selection and determination of cases may be understood as an incidence of judicial activism, as we will examine below. First, however, we outline the cases around which we build our argument.

## 2. Recent cases

### 2.1. Mangroves

*Coordinadora Ecuatoriana de Organizaciones para la Defensa de la Naturaleza y Ambiente and others v Presidente de la Republica and others* (2021) case was an *acción pública* (public action) by three not-for-profit organisations in which they challenged the constitutionality of various articles of the *Código Orgánico del Ambiente* [Organic Code for the Environment] (hereafter, COAM) and related regulations concerning 'permitted activities' in mangroves.[20]

The Court examined constitutional protections of the rights of nature, productive and infrastructural activities in mangroves, the practice of monocultural production in ecosystems, the right to prior consultation, and citizen participation.[21] The Court found that the mangrove ecosystem is a 'subject of rights' as protected by the Constitution.[22] It reasoned that each and every element in nature has roles and functions that are interconnected with the whole ecosystem.[23] A mangrove has multiple relationships within and between ecosystems and human beings.[24] Therefore, mangroves require the protection

of their integral existence, maintenance and regeneration of their vital cycles, structures, functions, and evolutionary processes.[25]

On the right to judicial protection (legal certainty) the Court determined that the word 'other' in 'other productive activities or public infrastructure', as it appears in art 104 (7) of the COAM, is unconstitutional because it is unclear and gives ample 'discretion' to the authorities to determine the kind of activities that 'others' imply.[26] In the analysis of the phrase 'public infrastructure', the Court considered it constitutional only if it is sustainable with the mangrove and supports the '*buen vivir*' (good living) of the communities close to this ecosystem.[27] The applicants stated that article 121 of the COAM also allows monocultures, contradicting article 409 of the Constitution, which prohibits them.[28] Ultimately, the Court concluded that article 121 and practices of monocultural production were unconstitutional.[29]

The Court also found that the regulations made the error of conflating prior consultation of Indigenous peoples with environmental consultation.[30] The Court clarified that prior consultation is needed if Indigenous communities are affected, and that environmental consultation is not only an obligation to inform but also to consult and reflect the communities/citizens' views in decision-making.[31] Several amicus curiae also informed the Court's judgment, including the United States RoN not-for-profit organisation the Earth Law Centre.[32]

### 2.2. Monjas

*Ann y Pamela Monge v Municipio del Distrito Metropolitano de Quito and others* (2022) case was an appeal from a lower court on the basis of extraordinary judicial review by Ann Arlene and Pamela Lilian Monge Froebelius, owners of the homestead Hacienda Carcelen, in which they claimed that the municipality of Quito had violated their rights to a healthy environment, life, housing, property, and cultural heritage.[33] The applicants claimed that the municipality's lack of control over wastewater and stormwater had led to a substantial increase in the river' s flow, which in turn had eroded the gorges' walls, putting various buildings at risk of falling on Hacienda Carcelen. The Court considered RoN, the right to live in a healthy environment in connexion with the right to secure habitat, and the right to access and preservation of cultural heritage.[34]

The Court declared that the Monjas River was a subject of rights, and determined that the municipality had violated the river's rights.[35] The Court stated that the fact that the water level exceeded its ecological flow threatened the river's 'existence, functions and structure'.[36] Nature is a system, the judges reasoned, and its components are interrelated, meaning that when the river is damaged, it could also affect other ecosystems and their interconnections.[37] The River Monjas 'is sick', they found, it had lost its ecological equilibrium and required restoration.[38]

The Court also determined that the municipality had infringed the rights to a healthy and ecologically balanced environment, water, sustainable development, the city, and the cultural heritage of the communities living along the river and the inhabitants of Quito. It held that the municipality violated the right of the citizens of Ecuador's capital to a healthy environment by discharging wastewater in amounts that exceeded the limits of the river flow, and for its poor water management.[39] The municipality had violated

the city's rights, due to a lack of appropriate urban planning and sanitation services.[40] The Court also upheld the applicants' claim of infringement of the rights to access and preservation of cultural heritage because the municipality did not protect and support the maintenance of Hacienda Carcelen. The buildings in Hacienda Carcelen have historical value and are part of Quito's cultural heritage, it found, and the municipality has the obligation to preserve them.[41]

### 2.3. Aquepi

The *Fanny Jacqueline Realpe Herrera v Secretaría Nacional del Agua (SENAGUA) and GAD Provincial de Santo Domingo de los Tsáchilas* (2021) case was an *acción de protectión* (judicial review for the protection of constitutional rights) brought by Fanny Jacqueline Realpe Herrera representing the communities Julio Moreno and Recinto San Vicente de Aquepi with respect to an irrigation project (the Carchense Project) that proposed to take water from the Aquepi River in Santo Domingo de los Tsáchilas.[42] The case was brought against the Secretaría Nacional del Agua (National Water Secretariat or SENAGUA) and the local authority Gobierno Autónomo Descentralizado Provincial de Santo Domingo de los Tsáchilas (GAD),[43] which had granted permission to banana producers from three communities to take water from the Aquepi River, leaving 412 families from the claimant communities with insufficient water for human consumption.[44]

The Court considered constitutional protections of RoN (specifically the river's ecological flow) and environmental consultation. The Court declared that the Río Aquepi was a 'subject of rights' entitled to 'respect [of] its structure and functions'.[45] The Court determined that SENAGUA had infringed the rights of the river, for not preserving its ecological flow, and the rights of the communities, for a lack of consultation.[46] It found that SENAGUA had issued its permit based on an estimate of average minimum flow that was later amended without sufficient supporting evidence.[47]

The Court linked RoN and the protection of water and freshwater ecosystems by examining the *Ley de Recursos Hidricos para Uso y Aprovechameinto del Agua* [Use and Exploitation of Water Resources Law].[48] The Court determined that freshwater ecosystems are complex, and a systemic perspective is needed to understand their functioning. The Court determined that the Aquepi River is an 'integrated body of biotic and abiotic elements'. Each element of nature has a role and function in ecosystems, they reasoned, and identifying each element helps to understand the (potential) damage on its vital cycles.[49] The Court stated that elements of nature are also 'interrelated, interdependent and indivisible'.[50] The relationships between the elements that comprise the river are vertical, longitudinal, and lateral.[51] The Court concluded that altering the river, or any of its elements, could affect different ecosystems and the river's functions and contribution to life.[52]

The Court concluded that SENAGUA infringed the affected communities' right to environmental consultation, for not consulting the actions before granting permission.[53] Governmental entities have the obligation to conduct an environmental consultation when a project affects the life of the communities, it found. The Court clarified that consulting some communities while ignoring others 'is not an egalitarian and equitable treatment'.[54] Finally, the Court relied on several amicus curiae including one from a specialist RoN researcher working in Ecuador.

Aside from the *Mangroves, Monjas,* and *Aquepi* cases there have been a number of other Court decisions that concern the application of RoN provisions to aquatic ecosystems, including: the case *Fred Larreátegui Fabara y otros v Ministerio de Ambiente and Attorney General* (hereafter, River Diversion), a constitutional review concerning activities authorised by articles 86 and 136 of the Environmental Regulation for Mining Activities (RAAM); *Gobierno Autónomo Descentralizado Municipal de Santa Ana de Cotacachi (Cotacahi Community) v Empresa Nacional Minera (ENAMI EP) and Ministerio del Ambiente y Agua* (MAAE) (hereafter, *Los Cedros*) (*Gobierno Autónomo Descentralizado Municipal de Santa Ana de Cotacachi v Empresa Nacional Minera (ENAMI EP) and others* 2021) judicial review in which the Municipal de Santa Ana de Cotacachi challenged the authorisation of two mining projects in Magdalena; and *Pueblo Kichwa de Santa Clara and others v Ministerio de Energía y Recursos Naturales, GENEFRAN SA and others* (hereafter, *Piatúa*), an appeal to the Corte Provincial de Pastaza in which the Pueblo Kichwa de Santa Clara opposed the Piatúa Dam project. We will briefly rely on these cases too when required to support our arguments.

## 3. Theme analysis

### *3.1. Judicial activism*

Jurisprudential developments around RoN in Ecuador can be understood in the context of a broader wave of judicial activism that has swept through Latin America since around the 1990s.[55] The growth of judicial activism in the region can only be appreciated in its historical and political context. Furthermore, it is important to recognise that legitimacy of judicial activism is generally contentious, such that dichotomies between law and politics are regularly drawn, and the role of democratically elected officials to legislate is considered by some to be sacrosanct.[56] This is especially the case in the civil law tradition (which is followed in Latin America), in which courts are not supposed to 'make law', but rather law is created by legislative codes that are merely applied by judges without being bound by the doctrine of precedent (unlike in common law systems).[57]

In recent decades, a range of Latin American countries have developed more progressive constitutions providing for justiciable human rights protections intended to shield against tyrannical governments (known as the new Latin American constitutionalism).[58] Still, the executive and legislative branches of these governments have not always applied constitutional protections for the benefit of their people. In this context, the judicial activist has emerged as a judge willing to hold governments to account for implementing and enforcing constitutional rights.[59] Latin American courts have ordered governments to create, design, and give effect to public policies to redress structural human rights violations and have established permanent and innovative forms of judicial monitoring of the policy process.[60] The actions of activist judges are widely perceived as being risky, as an overt resistance to governments, and with obvious potential political consequences.

When political and legal modes cross, it is often unclear how they are to be evaluated, or what domains they may apply to. For example, the political is not shackled with the same procedural constraints as Court proceedings. In representative democracies (like Ecuador), for example, representative claims are presented in a variety of fora (not just in elected bodies) and taken as politically valid.[61] Similarly, the division of powers

changes with political decisions that are taken and presented in a variety of situations, without anyone being able to specify the limits of such situations (where one *cannot* speak politically). So, when different entities like nature, the people, or the community, are intentionally fashioned through the activism of judges, or different power relations are redrawn because of these, the political and the legal intermingle in interesting ways .[62] The concept of nature as a systemic unity, for example (see section 3.2 of this article), is both the result of a legal decision in specific cases, and a political concept because it creates a socioecological category that structures (or attempts to) future policy as much as future law.[63] And it is here, in this fruitful intersection, that judicial activism resides, as the wilful intervention of the Court into the business of the polity.

For example, in the *River Diversion* case-, Judge Ramiro Avila speaks of 'transformative law' and laments the dominant view of jurisprudence as too procedural, perhaps in the sense that procedural technicalities can often derail cases. Instead, he proposes a principle or value-based alternative that would inscribe RoN as having intrinsic value and being perhaps even superior to human rights (see also section 2.3).[64] However, the power of principle-based law is given precisely by its subsequent inscription into procedures. New norms gather power by becoming accepted and operational in a more conservative, procedure-based Court practice.

The crossing of legal and political domains and the activism of the Court is also visible through its repeated decision to select cases that allow it to develop principle-based jurisprudence. Politics and law are mixed in their respective domains because the Court creates a definition of nature (see section 2.2) and a hierarchy of rights, for example, in the Mangroves case (see section 2.3) that is at the same time a new jurisprudential norm, and a widely applicable interpretation of the Constitution,[65] which is a political document as much as a legal one, given that it sets out the very framework within which politics can be practiced. The idea of nature and its relationship to humans and their rights becomes a foundation for future public policy, sometimes explicitly, as much as for judicial decisions. Lastly, the revocation of already existing environmental permits is of clear political significance as doing so redistributes power and overturns entitlements that had been achieved through administrative institutions.[66]

In the *Monjas* case for instance, the Court ordered the respondents to formulate an additional Plan for Development and Territorial Order.[67] Besides providing redress, this Order operates as a way to reshuffle administrative priorities such as development and territorial control. In this case the Court ordered the Secretary of the Environment of Quito to develop a Green–Blue ordinance (a normative framework) to regulate the city's land and water.[68] In *Aquepi* the Court ordered the respondents to create a conservation and preservation plan.[69] Similarly, in *Los Cedros* the Court ordered the defendant to produce a Participatory Plan for the Management and protection of Los Cedros.[70]

In the recent Ecuadorian cases, the determination of the meaning of RoN occurs in isolation, without the influence of alternative law-making bodies that also have legitimate claims to determining the content of these rights, notably the executive and the legislature. Rather than leave policy formation to the democratic branches of government, the Court steps in to define key notions *in lieu* of the standard executive or legislative processes. While recent majority opinions have effectively substantiated RoN, the Court itself does not unanimously accept this approach to norm development. In the *Mangroves* case, the dissenting judges expressed their trust that the competent public

authorities are in principle able to provide regulation that both promotes the development and use of natural resources *and* protects nature's rights.[71] In contrast, the majority opinion, in ordering the removal from the law of the phrase 'other productive activities', shows a deep distrust of the very possibility that extractive economic activities may be undertaken whilst still respecting RoN.[72]

In other words, the majority opinion in the *Mangroves* case embraces an interpretation of RoN as a paradigm shift, a way of always invoking precaution when any part of a natural cycle is potentially affected, a view that for Judges Quevedo and Salazar amounts to a generalised (and therefore illegitimate) condemnation of any productive activity.[73] The dissenting opinions, in other words, do not recognise the supposed incompatibility of anthropocentric and ecocentric legal frameworks, a point that we will return to below.

Similarly, the concurrent[74] opinion in the *Monjas* case turns on what Judge Enrique Herrería Bonnet considers an overreach of the Court in the ordered reparation measures.[75] Though the Judge agrees with the first measures, namely the reparation of specific rights violations that had been proven, he disagrees with other orders that require public authorities to develop policies specifically addressing the river and its wider environment.[76] The concurrent opinion reasons that this kind of mandated public policy puts the Court in a position to substitute itself for the competences of public authorities.[77] Although a minority opinion, Judge Herrería Bonnet's criticism exemplifies the kinds of tensions that arise at the intersection of law and politics.

A final important feature of growing judicial activism in Latin America may be emerging here, namely the figure of the 'celebrity judge',[78] whereby judges in high profile constitutional cases tend to make a name for themselves.[79] The presence of the celebrity judge is clearly visible in RoN cases worldwide, with judges in Colombia and India attaining fame through their radical judgments.[80] For example, judges in both the Atrato and Amazon RoN cases in Colombia (Judges Palacios and Tolosa, respectively),[81] have capitalised on their reputations by presenting to a wide array of international legal and academic conferences and even to the General Assembly of the United Nations.[82] These judges are also regular speakers at conferences organised by RoN advocates, such as the Global Alliance for the Rights of Nature, Earth Law Centre, and UN Harmony with Nature. The emergence of the celebrity judge raises the question of whether some activist judges are driven by a desire to make a name for themselves. Politicians are often considered to be important due to their personas as individuals, whereas judges are supposed to incorporate, even embody, norms of justice. By assuming an activist role judges may approximate political figures in ways that can ultimately undermine their claim to uphold justice.[83]

### 3.2. Towards a concept of nature

The shifting distribution of power, inasmuch as it passes through an interpretation of RoN, is inseparable from a conception of nature that takes shape through the recent Constitutional Court judgments. The cases rely heavily on the definition of nature provided in art. 71 and 72 of the 2008 Constitution.

The concept of nature is broadly defined in systemic terms in the Court judgments, with vital cycles and flows seen as the moving parts, as it were. These are important so

that the system functions as it should – i.e. fulfils its functions. This is an explicitly teleological conception of nature that borders on a wider moral stance resembling doctrines of natural law: the natural order is the good one,[84] and it also implicitly or explicitly provides the standard of restoration.[85] The notion of 'natural cycles' is interesting because it suggests that the system is *indivisible*,[86] a word that is also present in the RoN provisions of the Ecuadorian Constitution.

The specific rights that the Constitution recognises for nature – to its vital cycles, functions, evolution, and restoration – have been amply criticised for being vague. However, the Court interprets these rights as quite specific, and applies them to the letter, arguing that nature is a coherent system whose component parts are all necessary for fulfilling its functions.[87] This implies several things. First, a functionalist view of ecology, meaning that natural processes have a kind of retroactive causality, in the sense that nature's systems exist to maintain themselves (teleology). Second, that the alteration of one component or cycle necessarily leads to the alteration of the whole, and that this is mostly unacceptable under the Constitution.

As with the question of judicial activism, there is also debate within the Court over the conceptualisation of nature. In the *Mangroves* case, dissenting Judges Karla Andrade Quevedo and Daniela Salazar Marín wrote that 'the majority judgment presupposes that activities that may be authorised would *always* be contrary to nature's rights'.[88] For them, whether this is the case should instead be determined contextually and not in a general manner. Whether the majority decision does or does not do what the judges impute is not under discussion. The point is that the holistic concept of nature employed here always opens itself up to this specific tension, between the general consideration of indivisibility and the possibility that some processes can be modified without disrespecting nature's rights. It is always a matter of weighing in context.

In *Los Cedros*,[89] the judges reveal an important idea that validates their holistic view of nature, namely the threshold theory of harm, more widely known as the 'tipping points' thesis.[90] 'In this regard, it is important to understand the ecological principle of tolerance, which maintains that natural systems can only function adaptively within an environment whose basic characteristics have not been altered beyond what is optimal for that system. This principle is closely related to the right to the existence and reproduction of [natural] cycles, because as an environment is modified, the adaptive behavior of the ecosystem becomes more and more difficult and eventually impossible' (authors' translation). This view originates in scientific studies that continue to inform state directives for what constitutes 'safe' drinking water, food, air, and so on, even though the robustness of these studies' results is continuously contested.[91]

Threshold theory, in addition to the idea that every part of nature is necessary for specific functions that are in a sense sought after by natural cycles, is highly dependent on scientific expertise. In the case of *Aquepi*, one of the biggest issues is the correct determination of the river's flow in periods of drought, and the scientific controversy around what that flow may be and how it should be determined takes centre stage.[92] In the *Monjas* case, scientific expertise is used not only in determining specific RoN violations (pollution and flow modification), but also in settling on reparation measures that are technically precise (the construction of a sanitation plant or the permeability of adjacent territory).[93]

The *Monjas* case is also highly significant for tracing how the Court imagines the constitutional definition of nature. In the other cases under discussion, the view of nature did not seem to accommodate already modified, anthropic landscapes. In contrast, because an urban river is in question in *Monjas*, the issue of anthropic pressure is unavoidable. This pressure is seen as the cause of river degradation: 'the Monjas River is sick, it has lost its ecological equilibrium and requires restoration',[94] largely because of wastewater and stormwater discharge, leading to extreme levels of pollution and overflow causing biotic degradation erosion.[95] One culprit is population growth, exacerbated by a general lack of protective action by the Quito municipality.

The reasoning of the Court in the *Monjas* case explicitly builds on the *Aquepi, Mangroves,* and *Mining Law* cases, using these to justify a definition of rivers in functional and systemic terms. However, the Monjas River requires further infrastructural interventions in order to be restored to health and therefore,[96] it cannot return to an 'original' state. Instead, its functions are defined in terms of clean water and appropriate flow rate. To re-establish these, water filtration technology as well as restoration of permeability and riparian vegetation are ordered. In other words, this selects ecological functions that accord with the rights *to* nature that the Constitution also affords (also see below).

We interpret the judicial determinations of indivisible structure and flow as political ideas that use aspects of ecological science to represent a given situation. In doing so, they unify a diversity of empirical givens into a guiding idea of nature. The Court is careful to specify that each territory has its own characteristics and must therefore be treated on its own merits.[97] This means that the different judgments, in applying the same definition to different situations, create a range of possibilities for what it means to protect RoN in a variety of environments, ranging from a tight coupling between RoN and human rights to a preference for the strict protection of wild environments. But the baseline of what is a natural cycle consistently excludes permanent human pressures and their extension into the future. So, even though the Monjas River is carefully treated in its anthropic context, human habitation is not seen as itself part of a natural cycle, unless it corresponds to an imagined harmony that local communities may achieve.[98] This indicates that the operational idea of nature is primarily formed around the imagination of wilderness as the state of a natural optimum,[99] a conceptualisation of nature that is increasingly decried for its erasing impact on local and Indigenous peoples' relationships and livelihoods (environmental colonialism).[100]

### 3.3. The intersection of human rights and rights of nature

In addition to the insights that the recent Constitutional Court cases provide regarding the development of a stable, jurisprudential concept of nature in Ecuador, these decisions are also important because they demonstrate the interplay between RoN and various human rights. Here, we analyse these relationships further, starting with a broader international and legal context.

The judgments we investigate draw widely on multiple jurisprudential theories from domestic comparative and international law, and use these to reinforce the case for RoN, despite many of these other grounds having quite distinct theoretical underpinnings. An example is the precautionary principle,[101] referred to in the *Monjas* and *Mangroves* decisions,[102] with its origins in orthodox international environmental law, firmly

rooted in the sustainable development paradigm. The use of multiple sources of law and reference to more accepted legal theories from other contexts suggests a way of legitimating RoN as emerging legal rights. The linking of RoN to human rights is increasingly characteristic of RoN jurisprudence in Latin America,[103] whereby RoN are framed as threshold rights, necessary to the realisation of a variety of human rights.[104]

In *Los Cedros*, the Court reminds us that the Constitution recognises the human right to water as forming part of the rights to *buen vivir* and to a dignified life.[105] The majority opinion states that the right to water is a right that connects human rights and RoN, because of its condition as an essential element for the existence of all life on Earth and the sustainability of ecosystems.[106] Similarly, the Court elaborates its interpretation of the connection between RoN and the human right to a healthy and ecologically balanced environment. According to the majority opinion, this provision indicates that actions taken by some of the beings that inhabit a given environment should not put at risk the existence of other beings or the elements they require for living.[107]

In this context, humans are understood as a species that, like others, is part of an ecosystem's 'natural cycles' and whose interventions may affect the desired balance.[108] The Court is careful to explain that the 'biocentric conception' of the right to a healthy and ecologically balanced environment does not undermine the entitlement that humans have to exercise this right, but rather that the Constitution demands the reconceptualisation of environmental health, balance, and sustainability such that nature is valued intrinsically, independent of its utility to human society.[109] This interpretation suggests that RoN would need to take primacy over human rights, because the latter are nestled in the former.

In her concurrent opinion to *Los Cedros*, Judge Carmen Corral Ponce argues that the majority judgment reinforces a duality of humans and nature. Instead, she writes, there is no reason to think that development cannot meet both the necessities of humans and the surrounding environment.[110] She specifically refers to sustainable development as a potential answer. Interestingly, the majority opinion also uses the idea of sustainable development to argue for the necessity to respect the intrinsic rights of nature,[111] sometimes drawing on international law for support. The idea of sustainable development is most present in the *Monjas* case, perhaps because of its urban setting. The Court interprets the right to sustainable development as passing through RoN and sees no contradiction between these, or between these and other rights like the right to the city, water, health, and education.[112]

The many rights recognised in the Ecuadorian Constitution are woven throughout the Court's judgments, including the right to prior consultation and cultural rights.[113] These rights are substantiated in relation to the UN Committee on Economic, Social and Cultural Rights,[114] and also linked to a definition of sustainable development that reproduces the classical definition given in the Brundtland Report of 1987, namely the present use of resources in ways that do not undermine the ability of future generation to live a good life (also adopted in the *Mangroves* case).

However, the inclusion of the 'right to sustainable development' amongst the connected human rights has been controversial. It seems contradictory that sustainable development, with all its baggage as an unlimited growth-enabling, extractive paradigm should be protected equality against the rights of nature which are assumed to take an opposite ideological standpoint – at least that is what RoN proponents would have us

believe. However, Gilbert et al. have explained how RoN as a concept and movement replicates many of the troubling hallmarks of orthodox international environmental law (extractivism, universalism, and national sovereignty).[115] Further, the 'right to development' has often been mobilised by Indigenous peoples, including in Aotearoa New Zealand, in order to protect their own right to benefit commercially from development.[116]

The complicated issue of balancing rights is often presented in RoN literature and activism as a paradigm shift, a passing of law from an anthropocentric to an ecocentric mode. This presentation is reflected by the Court. In the *Los Cedros* case, for example, the majority judge is explicit that RoN should be understood as a paradigm shift.[117] The Court also repeatedly refers to the intrinsic value of nature and the need to protect it for its own sake. In other words, the Court does interpret the Constitution as establishing ecocentric rights. But, at the same time, it sets these both above, and side-by-side with an array of human rights. There seems to be, for the Court, no contradiction between the different loci of valuation.

However, based on our previous work we can disentangle two claims that are usually lumped together, namely that RoN are a paradigm shift, and that the shift is one towards ecocentrism. A legal and political paradigm shift is present in the claims of Ecuadorian actors. But the characterisation of the paradigm shift as a movement from anthropocentrism to ecocentrism is a separate claim that is not universally applicable, nor necessarily internally consistent. In other words, it also depends on context. For example, in the Aotearoa New Zealand examples of Whanganui and Te Urewera, similarly described as paradigm shifts,[118] the shifting of dominant legal and political modes is not framed as a move towards ecocentrism, but rather towards Indigenous self-determination, political authority and sovereignty.[119]

While the majority judgments in the cases under discussion uphold the idea of a transition towards ecocentrism, the Court cannot avoid the specifically political task of apportioning power to different human groups. In this sense, the paradigm shift that RoN facilitates may also be towards the empowerment of some communities over others. For example, the Court considers the notion of community to be crucially important, and the judgments often choose between different actors' claims. In the *Aquepi* case, for example, the Court must decide which groups may benefit from water distribution. The choice seems to be made for the community whose interests, in the Court's view, would best align with those of the river. The Court follows a similar rationale in the *Mangroves* and *Monjas* cases. For example, in disagreeing with the majority judgment in the *Mangroves* case, the Judges write that the majority interpretation implies that 'only infrastructure benefiting communities living close to the mangroves would be allowed'.[120]

The coupling of RoN with human rights – and the development of RoN by extension of justiciable human rights – casts doubt on a simplistic ecocentric/anthropocentric dichotomy.[121] In this context, the idea that RoN exist and function autonomously apart from the selfish obsessions of an egotistical humanity does not hold up; rather RoN may be better understood as one of a series of guaranteed human rights, upheld precisely so that humans can enjoy the other rights to which *they* are entitled. In practice, there seems to be no real impact of this largely philosophical distinction. This raises two important questions. First, why does this distinction matter? And second, what does it *do* in RoN advocacy given its practical uselessness? For us, one of the things it

does is sediment the controversial view that Indigenous peoples are inherently ecocentric.[122] We now turn to examining the relationship of the Court's judgments to Indigenous law.

### 3.4. Indigenous law

The Ecuadorian Constitution prominently incorporates two main Indigenous concepts, namely *Pachamama* (routinely translated as Nature) and *sumak kawsay* (*buen vivir* or good living). These notions make very brief appearances in the recent Court judgments (for example, Pachamama in *Los Cedros*, *buen vivir* in *Monjas* and *Mangroves*),[123] but they are not substantively developed by the Court. Whereas the Court imbues RoN with a variety of meanings, as we have discussed above, specific Indigenous ideas are left vague, only referred to in the same terms in which they appear in the Constitution.

In the flurry of cases that the Court has examined since 2019, the importance of Indigenous peoples to the outcomes has been primarily based on their membership of the broader Ecuadorian civil society which is charged with defending RoN, not on their position as Indigenous. One example of an Indigenous group bringing a RoN action is found in the *Rio Piatúa* case, in which the pueblo Kichwa de Santa Clara lodged a protective action. However, Indigenous peoples have not been parties in all, or even most, of the recent Court cases. In the *Aquepi* case, for example, the respondents argued that the communities Julio Moreno and Recinto San Vicente de Aquepi do not self-identify as Indigenous, and so they were unable to invoke the protections for Indigenous rights that the Constitution provides.[124] In this case, the Court ruled on the lack of environmental consultation. The majority opinion drew a distinction between environmental consultation, which is applicable to all communities in potentially affected areas, and *prior* consultation, which is only applicable to Indigenous communities and their territories.[125] In the *Aquepi* case, it was only the beneficiary community of Unión Carchense (banana producers) that was consulted.[126] The Court, therefore, based its judgment in part on balancing rights to environmental consultation, but also on the right to water of different communities (all of which live close to the river) and the rights of the river itself.

Indigenous peoples are not understood by the judicial system as having any special entitlements in relation to RoN beyond other Ecuadorian citizens, a logical consequence of the wide doctrine of standing that the Constitution establishes (which is not even dependent on nationality or residence). Furthermore, specific Indigenous legal traditions do not play decisive roles in the judgments. The Court obviously relies on widely established jurisprudence, perhaps in an effort to legitimise RoN. But this also stands in sharp contrast to the idea that RoN are analogous to Indigenous legal traditions, and that in some sense they translate these. At least in the case of Ecuador, it is not philosophical or legal input that characterises the involvement of Indigenous communities, but rather their advocacy as part of the broader national civil society and the infringement of their right to previous consultation.

Perhaps because of the disconnect between Indigenous philosophy and law and the conceptualisation of RoN, Indigenous activists in Ecuador have tended to invoke RoN only tangentially in their claims, relying instead on alternative constitutional protections to form their central arguments. For instance, art. 57 of the Constitution may be better suited to defending Indigenous rights to their territories, although it does not necessarily

offer a particularly ecocentric vision of nature. The right to prior consultation (and the more long-term fight for *consent*) are also treated as key protections by Indigenous claimants. Free, prior, and informed consent (FPIC) has a long tradition in litigation brought by Indigenous peoples in Latin America and this concept has direct precedents in international and regional law.[127] For example, the community A'I Cofán de Sinangoe stopped more than 20 mining concessions on its territory based on an FPIC claim,[128] and the Asociación Shuar Arutam, Asociacion Shuar Bomboiza, and Asamblea de los Pueblos del Sur stopped the mining project Panantza-Sab Carlos by invoking rights to FPIC.[129] Additionally, the right to prior consultation ensures that those who seek to engage on activities on Indigenous land follow good practices, which benefit Indigenous peoples in Ecuador.[130]

Communities comprised of people from the Waorani nation of Pastaza successfully stopped an oil drilling concession on one half million acres in the Ecuadorian Amazon jungle by arguing that the prior consultation conducted by the government did not comply with the intercultural spirit of the Constitution.[131] The communities argued that the consultation the government undertook was not intercultural because it did not follow Waorani structures for decision making, adequate time frames, and that it was not conducted in an appropriate language, as well as other concerns.[132] In addition to basing their claim on a lack of appropriate FPIC, the Waorani claimants also asked the court to enforce RoN on their territories. The inclusion of a RoN claim was viewed as a strategy to garner international attention, but the Court did not find a violation of RoN in the case because at the time of lodging the claim, Waorani territories had not yet been altered.[133] Given this, the outcome of the Waorani case turned on the violation of constitutional Indigenous rights.[134]

The superficial co-option of Indigenous traditions in much international RoN advocacy is an increasing concern.[135] In Ecuador, despite RoN supposedly resting on the Indigenous-inspired concept of *buen vivir* and a few cases taking place within Indigenous territories, the specificity of Indigenous concepts, traditions, and experiences have mostly been marginal in both advocacy and judgments. This does not mean that RoN provisions cannot, or have not, been used by Indigenous communities, which are well versed in dealing in Western concepts to advance their own claims and interests. This is largely a practice forced upon Indigenous peoples by colonisation. As Hames explains, Indigenous peoples have welcomed the environmental activism that help them to support their territorial claims.[136]

Similar concerns have been raised about RoN jurisprudence from Colombia where the *Amazonas* case,[137] for example, almost completely ignored the rights of Indigenous peoples, despite the case applying to Indigenous territories.[138] This probably reflects the fact that the actors driving RoN public interest cases are often international RoN NGOs who generally subscribe to a Western conservationist ideal of nature.[139] The more radical place-based and variegated Indigenous traditions, with strong connections to local communities, are necessarily more sensitive to context and therefore more conceptually resistant to a generalised norm of RoN. The supposedly smooth travel of global RoN frameworks therefore risks effacing radical alternatives.[140] Now, with more RoN cases to analyse and therefore with less reliance on exclusively conceptual arguments, we in fact see this effacement in practice.

## 4. Conclusions

The series of Constitutional Court cases in Ecuador prominently featuring the rights of nature has attracted a lot of attention. In this paper, we focused on three cases that we take to be representative of a large swath of the extant ones, and provided an analysis that is so far missing in the literature. Specifically, we rooted the cases in the Ecuadorian context, without which they cannot be properly understood, and analysed themes chose for their wide scholarly and practical importance and potential contribution to other jurisdictions.

We showed that these cases can be understood in the context of a wider Latin American judicial activism, and how this blends politics and legal practice in interesting and potentially conflictual ways. The concept of nature, much debated in the abstract, functions in the Court's judgments as a politico-legal one through which different communities' interests and rights are weighed against each other. Specifically, the relationship between human rights and RoN is, in practice, an opportunistic one, in the sense that the theoretical distinction between ecocentric and anthropocentric law does not seem to be what decides the relationship. Instead, contingent, political and historical reasons conspire to delineate a hierarchy of rights rooted in each specific case.

Importantly, the role of Indigenous legal traditions in the Court has been minimal, a finding that deeply questions the claimed theoretical alignment of RoN and onto-legal pluralism. The involvement of Indigenous communities is real, but RoN in this context have not really served as a vehicle for legal pluralism. Instead, the Court's judgments are a next step in a Western legal tradition that heavily relies on rights and, in this case, on a universalist concept of nature that has few parallels elsewhere.

## Notes

1. *Pueblo Kichwa de Santa Clara and others v. Ministerio de Energía y Recursos Naturales, and others* (appeal), *Juicio Especial* No. 16281201900422 (*Sala Multicompetente de la Corte Provincial de Pastaza*, September 5, 2019); *Fanny Jacqueline Realpe Herrera v. Secretaría Nacional del Agua (SENAGUA) and others* (hereafter, *Aquepi*), No. 1185-20-JP/21 (Corte Constitutional del Ecuador December 15, 2021); *Julio Miguel Lozada Basantes v. Consejo Cantoral de la ciudad de Riobamba (GAD Riobamba),* No. 68-16-IN and 4-16-IO (*Corte Constitucional del Ecuador*, August 25, 2021); *Ann y Pamela Monge v. Municipio del Distrito Metropolitano de Quito and others* (hereafter *Monjas*), No. 2167-21-EP/22 (Corte Constitucional del Ecuador January 19, 2022); *Fred Larreátegui Fabara and others v. Ministerio de Ambiente and others*, No. 32-17-IN/21 (Corte Constitucional del Ecuador June 9, 2021); *Gobierno Autónomo Descentralizado Municipal de Santa Ana de Cotacachi (Cotacahi Community) v. Empresa Nacional Minera (ENAMI EP) and others* (hereafter *Los Cedros*), No. 1149-19-JP/20 (*Corte Constitutional del Ecuador,* November 10, 2021); *Coordinadora Ecuatoriana de Organizaciones para la Defensa de la Naturaleza y Ambiente and others v. Presidente de la Republica and others*, (hereafter *Mangroves*), No. 22-18-IN/21 (*Corte Constitucional del Ecuador*, September 8, 2021); and *Wheeler v. Director de la Procuraduria General de Estado de Loja* (Vilcabamba case) (*Corte Provincial de Loja*, 2011).
2. In 2017, President Rafael Correa left office after a decade in power, during which time he had overseen an ambitious program of legal, economic, and social reforms under the banner of his '*Revolución Ciudadana*' ('Citizens' Revolution'). Correa was able to consolidate power through state building and the construction of a broad populist base that drew upon Marxist ideas and Indigenous cosmologies alike and rejected orthodox neoliberalism in favour of an '*economía social y solidaria*' ('social and solidary economy'), sometimes

termed '*el socialismo del buen vivir*' ('*buen vivir* socialism') (Patrick Clark, and Jacobo García, 'Left Populism, State Building, Class Compromise, and Social Conflict in Ecuador's Citizens' Revolution', *Latin American Perspectives* 224, no. 46 (2019): 230–46). Correa's handpicked successor, Lenín Moreno, narrowly won the presidency in 2017. Instead of maintaining the political philosophy of *correísmo*, which had led to deep polarization in Ecuadorian society, once in office Moreno distanced himself from Correa and his Citizens' Revolution. This included the purging of Correa loyalists from state institutions and the pursuit of corruption charges against prominent *correístas* and the former president himself (Jonas Wolff, 'Ecuador After Correa: The Struggle Over the "Citizens' Revolution"', *Revista de Ciencia Política* 38, no. 2 (2018): 281–302). By 2021, public support for the leftist Citizens' Revolution project had evaporated to such an extent that former banker and conservative politician Gullermo Lasso won a definitive victory against Correa acolyte Andrés Arauz, signalling that a majority of the electorate was willing to abandon *correísmo* in favour of a return to neoliberalism and fiscal austerity (John Polga-Hecimovich, and Francisco Sánchez, 'Latin America Erupts: Ecuador's Return to the Past', *Journal of Democracy* 32, no. 3 (2021): 5–18). However, the revival of conservatism was not met with universal support, and in 2022 several prominent Indigenous and Afro-Ecuadorian organizations convened a national strike whose objective was to force Lasso's government to guarantee constitutional rights and address the cost of living and security crises that many Ecuadorians were facing (Gonzalo E. Leyes Ortega, '*El Movimiento Indígena Ecuatoriano Hacia la Descolonialidad del Poder: Reflexiones en Torno al Paro Nacional* 2022', *Revista Sociología y Política Hoy* 8 (2023): 99–113). Against this backdrop, where political instability has reigned in the executive and legislative branches of government since 2017, and where social unrest has amplified Indigenous rights claims, the Ecuadorian judiciary has continued to operate as a bastion for progressive action to advance the rights of nature.

3. Craig M. Kauffman, and Pamela L. Martin, 'Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail' *World Development* 92 (April 2017): 130–42. Kauffman and Martin demonstrate how, through recent judicial decisions, Ecuadorian courts are developing the meaning of RoN. For example, these judgements clarify how RoN relate to other constitutional rights, specify what kinds of actions constitute RoN violations, and impose concrete sanctions for RoN violations. While Kauffman and Martin's study is broadly similar to the analysis that we conduct in this article, our work may be distinguished by its focus on judicial activism, international norm diffusion, and the intersection between RoN and Indigenous legal traditions.
4. Kauffman and Martin, 'Can Rights of Nature Make Development More Sustainable?'; and Alex Putzer et al., 'Putting the Rights of Nature on the Map. A Quantitative Analysis of Rights of Nature Initiatives across the World', *Journal of Maps* 18 (2022): 1–8.
5. There are 62 RoN cases that have been lodged in the Ecuadorian Tribunals and the Court as of June 2023. While most of these had already been decided, some were still pending before the Court, such as Río Nangaritza and San Pablo de Amali (Rio Dulcepamba Project). Observatorio Jurídico de Derechos de la Naturaleza, '*Casos Ecuador*', https://www.derechosdelanaturaleza.org.ec/casos-ecuador/. The cases chosen for our analysis are appropriate for several reasons. First, they span different kinds of environments, therefore avoiding an analysis biased towards, for example, protected areas. Second, they have become instrumental in subsequent cases selected by the Court, where definitions of rights and nature have been used to justify further judgments (see 3.2). Lastly, these cases deal with water, which is the most represented issue so far in the Court's judgments.
6. John Gillespie and Pip Nicholson, 'Taking the Interpretation of Legal Transfers Seriously: The Challenge for Law and Development', in *Law and Development and the Global Discourses of Legal Transfers*, ed. John Gillespie and Pip Nicholson (Cambridge: Cambridge University Press, 2012), 1–26, 5.
7. Elizabeth Jane Macpherson, *Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience* (Cambridge: Cambridge University Press, 2019); and *Centro de Estudios para la Justicia Social "Tierra Digna" y otros v Presidente de la Republica y otros*.

2016. *Corte Constitucional* [Constitutional Court], *Sala Sexta de Revision* [Sixth Chamber] (Colombia).

8. Gillespie and Nicholson, 'Taking the Interpretation of Legal Transfers Seriously', 5.
9. Ibid., 5; Mathias Siems, 'Malicious Legal Transplants', *Legal Studies* 38, no. 1 (March 2018): 103–19.
10. Daniel Bonilla-Maldonado 'Los Derechos de La Naturaleza: Su Arquitectura Conceptual', *Naturaleza y Sociedad. Desafíos Medioambientales* no. 4 (2022): 70–108, https://doi.org/10.53010/nys4.03; Kauffman and Martin, 'Can Rights of Nature make Development More Sustainable'; and Daniel Bonilla-Maldonado, 'El constitucionalismo radical ambiental y la diversidad cultural en américa latina. Los derechos de la naturaleza y el buen vivir en Ecuador y Bolivia', *Revista Derecho del Estado* 42 (November 2019): 3–23.
11. Gillespie and Nicholson, 'Taking the Interpretation of Legal Transfers Seriously'; and Joanne Marras Tate, and Vaughan Rapatahana, 'Māori Ways of Speaking: Code-Switching in Parliamentary Discourse, Māori and River Identity, and the Power of Kaitiakitanga for Conservation', *Journal of International and Intercultural Communication* (2022). https://doi.org/10.1080/17513057.2022.2039269.
12. Alberto Acosta, 'Extractivism and Neoextractivism: Two Sides of the Same Curse', in *Beyond Development: Alternative Visions from Latin America*, ed. Miriam Lang and Dunia Mokrani (Amsterdam: Rosa-Luxemburg Foundation, Quito and Transnational Institute), 61–86. https://www.tni.org/files/download/beyonddevelopment_extractivism.pdf.
13. Mihnea Tănăsescu, 'The Rights of Nature in Ecuador: The Making of an Idea', *International Journal of Environmental Studies* 70, no. 6 (2013): 846–61; Craig M. Kauffman and Pamela L. Martin, 'Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail', *World Development* 92 (April 2017): 130–42.
14. Marisol De la Cadena and Mario Blaser, eds., *A World of Many Worlds* (Durham, NC: Duke University Press, 2018).
15. Farith Simon, '*La Naturaleza Como Sujeto de Derechos En La Constitución Ecuatoriana: La Construcción de Una Categoría de Interculturalidad*', in *La Naturaleza Como Sujeto de Derechos En El Constitucionalismo Democrático* (Bogotá, Colombia: Universidad Libre, 2019), 229–331; Mihnea Tănăsescu, '*Fuentes y Bases Teóricas de Los Derechos de La Naturaleza*', *Naturaleza y Sociedad: Desafíos Medioambientales* 4 (December 2022): 9–52. https://doi.org/10.53010/nys4.01; Alberto Acosta, 'Toward the Universal Declaration of Rights of Nature: Thoughts for Action', *AFESE Journal* 24, no. 1 (2010); Craig M. Kauffman and Pamela L. Martin, *The Politics of Rights of Nature* (Cambridge, MA: Massachusetts Institute of Technology, 2021). Kauffman and Martin argue that the influence the United States-based Community Environmental Legal Defense Fund (CELDF) had on the making of RoN in the 2008 Ecuadorian Constitution is exaggerated in the literature. That said, the conceptualization of RoN in the 2008 Constitution is consistent with and reflects the early proposal by American law professor Christopher Stone to extend legal standing to natural objects: Christopher D. Stone, 'Should Trees Have Standing–Toward Legal Rights for Natural Objects', *Southern California Law Review* 45 (1972): 450–501.
16. Erin Daly, 'The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature', *Review of European Community & International Environmental Law* 21, no. 1 (2012): 63–6; and Mihnea Tănăsescu, *Understanding the Rights of Nature: A Critical Introduction* (Bielefeld: Transcript Verlag, 2022).
17. Alberto Acosta, '*El Buen Vivir En El Camino Del Post-Desarrollo Una Lectura Desde La Constitución de Montecristi*' (Fundación Friedrich Ebert, FES-ILDIS, 2010).
18. Kauffman and Martin, 'Can Rights of Nature Make Development More Sustainable?'.
19. Ibid.
20. *Mangroves* case, 2021.
21. Ibid.
22. Ibid., s. IV Decision 1–8.
23. Ibid., para. 29.
24. Ibid., paras. 42–43.

25. Ibid., paras. 11–43.
26. Ibid., paras. 59, 71.
27. Ibid., paras. 79–80.
28. Ibid., para. 104
29. Ibid., para. 108.
30. Ibid., para. 126.
31. Ibid., para. 152.
32. Confederación de Nacionalidades Indígenas de la Amazonía Ecuatoriana (CONFENIAE), Confederación de Nacionalidades Indígenas del Ecuador (CONAIE), José Enrique Valencia, Francis Dykmans, Hugo Echeverría, Hernán Holguer Payaguaje, CÁRITAS Ecuador, Plataforma por el Acceso a la Justicia, Earth Law Center, Adriana Rodríguez Caguana, Viviana Morales Naranjo, and Edgar López Moncayo.
33. *Monjas* case, 2022, 43.
34. Ibid., paras. 1–5.
35. Ibid., para. 124.
36. Ibid., para. 97.
37. Ibid., paras. 121, 114.
38. Ibid., para. 127.
39. Ibid., paras. 85, 87, 98.
40. Ibid., para. 115.
41. Ibid., para. 138.
42. *Aquepi* case, 2021, para. 1.
43. GAD stands for *Gobierno Autónomo Descentralizado* [Decentralized Autonomous Government].
44. *Aquepi* case, 2021, paras. 11, 34.
45. Ibid., s. IV Decision.
46. Ibid., s. IV, Decision.
47. Ibid., para. 80.
48. Ibid., paras. 42–44.
49. Ibid., paras. 45, 54.
50. Ibid., para. 44.
51. Ibid., para. 44.
52. Ibid., para. 50.
53. Ibid., para. 2.
54. Ibid., paras. 89–90.
55. Javier Couso, Alexandra Huneeus, and Rachel Sieder, *Cultures of Legality: Judicialization and Political Activism in Latin America* (New York: Cambridge University Press, 2010); and César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America', *Texas Law Review* 89, no. 7 (2011): 1669–98.
56. B.C. Berkinshaw-Smith, *Judges and Democratization: Judicial Independence in New Democracies*. 2nd ed. (Abingdon, UK: Routledge, 2023), https://doi.org/10.4324/9781003334613.
57. Couso, Huneeus, and Sieder, *Cultures of Legality*, 3.
58. Roberto Gargarella, 'Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution', *Notre Dame Journal of International and Comparative Law* 4 no. 1 (2014): 3, https://scholarship.law.nd.edu/ndjicl/vol4/iss1/3.
59. Berkinshaw-Smith, *Judges and Democratization*.
60. Gabriel Pereira, 'Judges as Equilibrists: Explaining Judicial Activism in Latin America', *International Journal of Constitutional Law* 20, no. 2 (2022): 696–732.
61. Michael Saward, 'The Representative Claim', *Contemporary Political Theory* 5, no. 3 (2006): 297–318; Michael Saward, 'Shape-Shifting Representation', *American Political Science Review* 108, no. 4 (2014): 723–36; Mihnea Tănăsescu 'Rethinking Representation: The Challenge of Non-Humans', *Australian Journal of Political Science* 49, no. 1 (2014): 40–53.
62. Gary Alejandro Loor-Escobar, and Martha Cecilia Escobar-García, 'El Activismo Judicial y el Desarrollo de los Derechos de la Naturaleza en el Ecuador', *MQR Investigar Revista Multidisciplinaria de Investigación Científica* 7, no. 4 (2023): 2031–43.

63. In the *Monjas* case, for example, the Court explicitly directs city authorities to develop policy in line with the *conceptual* developments in that judgment, specifically with what counts as appropriate river flow, what an urban river is, and so on.
64. *Fred Larreátegui Fabara and others v. Ministerio de Ambiente and others*, No. 32-17-IN/21 (Corte Constitucional del Ecuador June 9, 2021), para. 3.
65. *Mangroves* case, 2021, para. 108.
66. *Monjas* case, 2022, Decision 1–5; *Piatúa* case, 2019, s. Section 4.2; *Los Cedros* case, 2021, para. 344 a–f; and *Aquepi* case, 2021, Decision.
67. *Monjas* case, 2022, para. 147.
68. The idea of green-blue (verde-azul) is from the Metropolitan Plan for Territorial Order.
69. *Aquepi* case, 2021, Decision.
70. *Los Cedros* case, 2021, para. 344.
71. *Mangroves* case, 2021, Dissenting opinion Karla Andrade Quevedo y Daniela Salazar Marín, para. 4.
72. Ibid., para. 93.
73. Ibid, para. 59; and *Los Cedros* case, 2021, Concurrent Opinión Teresa Nuques, para. 20.
74. Concurrent opinions are issued by judges who agree with most, but perhaps not all outcomes of the majority decision, or when they agree with the outcome but not the majority's reasoning.
75. *Monjas* case, 2022, Concurrent Opinión, Enrique Herreria Bonnet.
76. Ibid.
77. Ibid.
78. Peter William Walsh and David Lehmann, 'Academic Celebrity', *International Journal of Politics, Culture, and Society* 34, no. 1 (2021): 21–46, https://doi.org/10.1007/s10767-019-09340-9.
79. Ibid.
80. Elizabeth Macpherson et al., 'Where Ordinary Laws Fall Short: "Riverine Rights" and Constitutionalism', *Griffith Law Review* (September 2021): 1–36.
81. *Centro de Estudios para la Justicia Social 'Tierra Digna' y otros v. Presidente de la Republica y otros*, NoT-5.016.242, *Corte Constitucional*, *Sala Sexta de Revision* [Constitutional Court, Sixth Chamber], 10 November 2016, (Colombia).
82. United Nations, *Ninth Interactive Dialogue of the General Assembly on Harmony with Nature in Commemoration of International Mother Earth Day* (April 22, 2019, New York) http://www.harmonywithnatureun.org/dialogue/wieAVRlGfmX+5a2VgklpXEiCzHJQ7o+8bihs+yeGRAuOwMErB7P9q!15CnagPDtd5tKkCiv!OcTQCuO68Sw6Bg==.
83. To be clear, the mixing of politics and law is not a problem per se. As others have argued, it is inevitable. Instead, our argument is that this intermingling is worth detailing because it shows the fault-lines in the politics of RoN – often within the Court itself, while also spelling out the precise tensions that are part of a specific context. As the concurrent opinions testify, the majority interpretations in these specific cases are largely contingent on the make-up of the court as well as the political moment. For a preliminary analysis of judicial backlash following the Court cases discussed here, see Lena Koehn and Julia Nassl, 'Judicial Backlash against the Rights of Nature in Ecuador: The constitutional precedent of *Los Cedros* disputed', Verfassungsblog, blog entry posted April 27, 2023, https://verfassungsblog.de/judicial-backlash-against-the-rights-of-nature-in-ecuador/.
84. The question of pests, disease, natural disturbance, and other phenomena that are inimical to human well-being is not treated as such. For a classic argument against the identification of nature with the good, see John Stuart Mill, 'On Nature', in John Stuart Mill and George C.W. Warr *Nature, the Utility of Religion, and Theism* (London: Longmans, Green, Reader, and Dyer, 1874).
85. The right to restoration has been present in RoN judgments from the very first case, where the Vilcabamba River was ordered to be restored to its previous state. The issue of a baseline is mostly tacit. In the case of Monjas, a highly urban river, restoration cannot have a strict

natural baseline, whereas in cases dealing with 'wilderness' restoration tends to have the connotation of returning to the wild.

86. As discussed, for example, in *Monjas* case, 2022, para. 11.
87. *Mangroves* case, 2021, para. 26; *Monjas* case, 2022, para. 97; and *Aquepi* case, 2021, Decision.
88. *Mangroves* case, 2021, Dissenting opinión, Karla Andrade Quevedo y Daniela Salazar Marín, 16 (emphasis added).
89. *Los Cedros* case, 2021, para. 44.
90. Johanna Yletyinen et al., 'Understanding and Managing Social–Ecological Tipping Points in Primary Industries', *BioScience* 69, no. 5 (2019): 335–47.
91. For an account of the history of threshold theory, based in selective studies that draw more or less arbitrary boundaries around what is 'safe', see Max Liboiron, *Pollution is Colonialism* (Durham, NC: Duke University Press, 2021), https://doi.org/10.2307/j.ctv1jhvnk1.
92. Yaffa Epstein et al., 'Science and the Legal Rights of Nature', *Science* 380, no. 6646 (2023): eadf4155, https://doi.org/10.1126/science.adf4155.
93. Ibid.
94. *Monjas* case, 2022, para. 107
95. Ibid., 2022, para. 115.
96. Ibid., 2022, para. 161.
97. Ibid., 2022, para. 123.
98. Ibid., 2022, para. 98
99. Or, in the Latourian terms introduced earlier, Nature is unified (hence, politics) *through* the operation of the law.
100. Erin O'Donnell et al., 'Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature', *Transnational Environmental Law* 9, no. 3 (2020): 403–27; Elizabeth Macpherson, 'Can Western Water Law Become More "Relational"? A Survey of Comparative Laws Affecting Water across Australasia and the Americas', *Journal of the Royal Society of New Zealand* 53, no. 3 (2023): 395–424; Phil O'B Lyver et al., 'Building Biocultural Approaches into Aotearoa: New Zealand's Conservation Future', *Journal of the Royal Society of New Zealand* 49, no. 3 (2019): 394–411; Cristy Clark et al., 'Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance', *Ecology Law Quarterly* 45, no. 4 (2019): 787; and Julia Dehm, 'Reconfiguring Environmental Governance in the Green Economy: Extraction, Stewardship and Natural Capital', in *Locating Nature: Making and Unmaking International Law*, ed. Usha Natarajan and Julia Dehm (Cambridge, UK: Cambridge University Press, 2022).
101. Robin Attfield, 'To Do No Harm? The Precautionary Principle and Moral Values', *Philosophy of Management* 1, no. 3 (2001): 11–20, https://doi.org/10.5840/pom2001133.
102. *Monjas* case, 2022, para. 70; and *Mangroves* case, 2021, para. 127.
103. *Centro de Estudios para la Justicia Social "Tierra Digna" y otros v. Presidente de la Republica y otros,* 2016.
104. Elizabeth Macpherson et al., 'Where Ordinary Laws Fall Short'.
105. *Los Cedros* case 2021, para. 170.
106. Ibid., para. 171.
107. Ibid., paras. 241, 243.
108. Ibid., paras. 241, 243.
109. Ibid., paras. 241, 243.
110. Ibid., para. 16.
111. Ibid., see footnote 163.
112. *Monjas* case, 2022, footnote 63.
113. *Constitución de La República de Ecuador* 2008, arts. 83, 84.
114. *Monjas* case, 2022.
115. Jérémie Gilbert et al., 'The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's "Greening" Agenda', in *Netherlands Yearbook of International Law 2021*, ed. Daniëlla Dam-de Jong and Fabian Amtenbrink (The Hague: T.M.C. Asser Press, 2023), 47–74, https://doi.org/10.1007/978-94-6265-587-4_3.

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119. Macpherson, 'Can Western Water Law Become More "Relational"?'
120. *Mangroves* case, 2021, para. 24.
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122. Mihnea Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies', *Transnational Environmental Law* 9, no. 3 (2020): 1–25; and Ariel Rawson and Becky Mansfield, 'Producing Juridical Knowledge: "Rights of Nature" or the Naturalization of Rights?' *Environment and Planning E: Nature and Space* 1, nos. 1–2 (2018): 99–119, https://doi.org/10.1177/2514848618763807.
123. *Los Cedros* case, 2021, para. 28; *Monjas* case, 2022, paras. 68, 71; and *Mangroves* case, 2021, para. 78.
124. *Aquepi* case, 2021, para. 86.
125. Ibid.
126. Ibid., para. 90.
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## Disclosure statement

No potential conflict of interest was reported by the author(s).

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