The Search for Standards: A Jurisprudential Analysis of the Ecuadorian Rights of Nature

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Abstract

On May 6th, 2019, the Constitutional Court of Ecuador selected a case that alleged a violation of the Rights of Nature (RoN), the corpus of legal rights given to Nature, to develop jurisprudence on what the standards of the concept are. Historically, this lack of intelligible standards for the RoN has led many to dismiss the concept as unworkable. Therefore, this article brings together the reasoning of sixteen RoN cases to answer each of the necessary questions to create a standard for the Ecuadorian courts: what is "Nature", what are its rights, what rules and actions may violate these rights, and what mitigating factors may affect whether an action or rule is a violation of these rights. From this, we are able to reason that "Nature" includes non-artificial, mostly biotic beings that usually do not need to be jurisdictionally defined, that are rarely protected from environmentally degradative rules but which are protected from environmentally degradative actions, when those actions lack sufficient economic justification, are not necessary, and are not justified through competing rights. In the end, we find sufficient congealed reasoning to answer the most unique issues the idea faces. We conclude that the RoN is not unworkable, that many of their issues are common to conventional systems of rights, and thus that they hold great potential through their standardized, rational application.

Annotasiya

2019-cu il 6 may tarixində Ekvadorun Konstitusiya Məhkəməsi Təbiətin Hüquqları – Təbiətə verilən hüquqlar toplusunun pozulması iddiası üzrə bir işi seçdi. İşin məqsədi bu konsepsiyanın standartlarının nədən ibarət olduğunu müəyyənləşdirən məhkəmə təcrübəsini inkişaf etdirmək idi. Tarixən Təbiətin Hüquqlarının qorunmasında aydın standartların olmaması bu konsepsiyanı bir çoxlarının qeyri-mümkün hesab etməsinə səbəb olmuşdur. Beləliklə, bu məqalədə Təbiətin Hüquqları ilə bağlı on altı iş üzrə mülahizələr toplanaraq standartın yaradılması üçün zəruri olan suallara cavab verilir: "Təbiət" nədir, onun hüquqları nələrdir, hansı qaydalar və hərəkətlər bu hüquqları poza bilər və hansı yüngülləşdirici amillər hərəkətin və ya qaydanın bu hüquqları pozub-pozmadığını müəyyən edə bilər. Bu mülahizələrə əsasən belə qənaətə gəlmək olar ki, "Təbiət" adətən süni olmayan, əsasən biotik varlıqları əhatə edir, bu varlıqların hüquqi cəhətdən müəyyən olunmasına ehtiyac yoxdur və onlar nadir hallarda ekoloji cəhətdən zərərli qaydalardan qorunur. Lakin bu varlıqlar, kifayət qədər iqtisadi əsaslandırma olmayan, zəruri olmayan və rəqabət hüquqları ilə əsaslandırılmayan ekoloji cəhətdən zərərli hərəkətlərdən qorunur. Sonda belə bir nəticəyə gəlirik ki, bu ideyanın qarşılaşdığı ən çətin suallara cavab vermək üçün kifayət qədər məntiqi əsaslandırma mövcuddur. Həmçinin müəyyən edilmişdir ki, Təbiətin

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Hüquqları qeyri-mümkün deyil, onların bir çox problemləri adi hüquq sistemlərinə də xasdır və buna görə də onların standartlaşdırılmış, məntiqi tətbiqi vasitəsilə ətraf mühitin mühafizəsində böyük potensiala malikdir.

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Introduction

In 2019, the Constitutional Court of Ecuador selected a case for review to develop binding jurisprudence on the Rights of Nature (RoN), specifically to create and review "*standards and limits regarding the exploitation of renewable and non-renewable resources that are managed by the State, the actions of concessionary companies, and their impact on the enjoyment and exercise of collective rights and those of nature*".[1] As the case has worked its way through the nation's appeals system, both sides continued to make two respective arguments: that the action in question must have violated the Rights of Nature because nature was damaged, or that the action in question did not violate the Rights of Nature because not every action of environmental damage inherently violates its rights. These arguments follow the conventional arguments of a RoN case, in which both sides argue using a different, undefined threshold of rights violation. Together, they ultimately make the point that the RoN lacks clear standards of application, explaining the motivation of the Constitutional Court's question.

The aforementioned arguments should sound familiar, they are generic rehashes of deeper issues in jurisprudence. It was nearly two centuries ago that Godwin claimed the whole project of "rights" was misguided, as all rights inherently held the possibility of being in contradictions,[2] thus negating any sound intellectual grounding. Such ideas live on through the likes of Hayek and other libertarians who insist that all rights should be individual.[3] To say the RoN is invalid owing to their conflict with other rights is a possibility, but one that would be explicitly proven. Critics may further claim, that even if these rights are balanceable, it would inherently be an overly subjective balancing act, one that would violate the core of the neutrality of law and thus one of Fuller's eight criteria of law: the constancy of law through time.[4] Yet despite their differences, even Hart and Fuller agreed that all rules have a penumbra.[5] If commands as simple as "no vehicles in the park" and "no sleeping in the train station" can inspire one of the most famous debates of

[1] Sala de Selección de la Corte Constitucional del Ecuador [Selection Chamber of the Constitutional Court of Ecuador], Judgement of May. 6, 2019, No. 502-19-JP.
[2] William Godwin, An Enquiry Concerning Political Justice and Its Influence on General Value and Happiness, 112 (1st ed. 1793).
[3] Friedrich A. Hayek, The Constitution of Liberty, 363 (17th ed. 2011).
[4] Lon L. Fuller, The Morality of Law, 39 (2nd ed. 1969).
[5] Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 73 Harvard Law Journal 630, 630-672 (1958).

modern jurisprudence,[6] we should shy away from damning any rights regime for simply having some ambiguity. Once more, the lack of core meaning would need to be positively demonstrated.

Thus, we may formalise the precedent arguments to ask whether the Rights of Nature are "intelligible" in this context defining it via two prongs: (1) is the rights framework sufficiently harmonious with existing rights to not be considered facially null and (2) is the rights framework meaningful enough to be balanced in a way that is no more subjective than the average rights framework?

Thus, the question of this article is whether we may consider the RoN an intelligible regime. This article does not prescribe to the Court what it should adopt as the exact standards of the RoN, but whether it is possible and what characteristics it would include. To answer this question requires two steps, which form the major parts of the article: firstly, to disprove the pre-existing belief of the unintelligibility of the RoN, and secondly, to affirmatively prove the intelligibility of the RoN. The first step requires an analysis of the conventional RoN narratives in the context of broader jurisprudence to dismiss the corpus of null criticisms and isolate the sui generis questions such a regime actually poses. The second step, which proves intelligibility, involves a review of the existing RoN cases in the nation to see whether individual judges have created sufficient congealed reasoning to demonstrate a conventional pattern of reasoning in such cases, and later answer the previously identified questions.

Part 1 introduces us to the historical context and politics that led to the adoption of the regime. Part 2 attempts to disprove the unintelligibility claim in three parts, using the first part to show how critics have failed to prove unintelligibility and the latter two to affirmatively disprove it. First, we examine the conventional discourse around the RoN and find it confused for either supporting the regime for simple instrumental reasons while ignoring the obvious issues and ambiguities that come with rights regimes, or for damning the regime for the generic ambiguities of rights regimes while ignoring that these issues are common to many if not all rights regimes. Second, we examine the open texture of the RoN in ten randomly selected cases, to show that like many rights regimes, they do not fail to have intelligible influence despite not being solely dependent on falsifiable commands or prohibitions. Third, we isolate the most *sui generis* issues identified in the literature for the RoN to analyse for the following sections. We conclude the section noting that while the RoN may seem unintelligible at first, this impression is only owing to confused narratives and open texture common to rights regimes, and after examining a handful of cases, we can see that the RoN is not inherently unintelligible.

[6] *Id.*, 664.

This leaves us in neutral territory while the RoN is not unintelligible, we still must say they are intelligible. Thus, Part 3 breaks down the concept of the RoN into a series of questions one would necessarily need answers to claim it is an intelligible regime and then provides the answers through a close read and analysis of 16 of the publicisied 64 cases that involve the RoN. First, we ask what is "Nature", both in the sense of at large for the regime and how it is delineated in specific cases. Second, we ask what procedural rights are provided to nature. Third, we ask what substantive rights are provided to nature and how those can create facial challenges to rules. Fourth, we ask how the substantive RoN allows or disallows specific, individual actions, delineated between future potential actions and past actions. Fifth, we ask how the RoN is balanced against competing rights. Together, the cases provide enough information to demonstrate several common concerns, lines of reasoning, and rationalistic weighing from judges that suggest that these questions are handled in a non-fully subjective manner, which allows us to conclude that there is intelligibility to the standard. In Part 4, we demonstrate this intelligibility by using this analysis to finally respond to the questions from the literature.

I. Context

A. Legal Basis of the RoN

The RoN was included in the Ecuadorian Constitution during its 2007 convention in Montecristi, and formally adopted via a national referendum in 2008.[7] Principally, they may be understood in two ways. Firstly, in a more concrete sense, they may be viewed as a reaction to the lack of action and protection provided by the classical environmental law, which has resulted in deforestation, oil pollution within indigenous communities, and a myriad of other environmental issues.[8] Secondly, in a more profound sense, they may also be viewed as a part of Latin American neo-constitutionalism, a stream of legal thought which has contributed to a series of achievements related to rights, social demands, new state structures, and, above all, the recognition of a plurinational state. This intends to realize the "*sumak kawsay*" or good life, the way of life and understanding of the indigenous peoples, for whom the Pacha Mama is a living being.[9] This is given that, during the drafting process,

[7] Tanasescu Mihnea, *The Rights of Nature in Ecuador: the Making of an Idea*, 70 International Journal of Environmental Studies 846, 846 (2013).

[8] *See* Janeen Olsen, *Environmental Problems and Ethical Jurisdiction: The Case Concerning Texaco in Ecuador*, 10 Business Ethics: A European Review 71, 72-73 (2001) (describing the history of the Texaco case as an example of the environmental degradation Ecuador has faced).

[9] *See* Martín Cordovez, et al., *Estado Constitucional de Derechos: Los Conflictos del Pluralismo Jurídico y el Ejercicio de la Justicia Indígena*. [*Constitutional State of Rights: The Conflicts of Legal Pluralism and the Exercise of Indigenous Justice*], 8 USFQ Law Review 119, 119-143 (2021), who defines the indigenous deity of Pachamama as "mother and generator of life" ("madre y

there were numerous influences from a diversity of cultures, an emphasis on community values, and the Andean Cosmovision.[10] This viewpoint has emphasised its principles of relationality, complementarity, correspondence, reciprocity and cyclicity, as well as a dynamic relationship between nature, man and the cosmos.[11]

The attempt to achieve this end has generated great controversy, as some politicians and lawyers consider the recognition of nature as a subject of rights as either a part of legal folklore or a demagogic measure to try to force change, all the while alleging only humans may be the subject of rights. In contrast, others have argued that the RoN should instead be understood as an emancipatory and liberating idea, particularly through the lens of Andean nationality and the perspective of the oppressed.[12] Given that responding to this controversy is the aim of our article, we may briefly recite the actual text of the RoN before turning to the next section to how it has been interpreted.

Articles 71 to 74 of the 2008 Constitution offer four distinct rights, offered partially here:

1. The Right to Exist and Regenerate (Article 71) – "*The right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes*".

2. The Right to Restoration (Article 72) – "*Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems*".

3. The Right to Protection (Article 73) – "*The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles… The introduction of organisms and organic and inorganic material that might definitively*

generadora de vida").

[10] Alberto Acosta, El Buen Vivir, más Allá del Desarrollo [Good Living, Beyond Development], in *Buena Vida, Buen Vivir: imaginarios alternativos para el bien común de la humanidad* [*Good Life, Good Living: Alternative Imaginaries for the Common Good of Humanity*] 21, 47-48 (2014). Centro de Investigaciones Interdisciplinarias en Ciencias y Humanidades, UNAM, 2014. *See* Carlos Santiago Álvarez Rivera, Revalorización de la cosmovisión andina a través de la ilustración [Apprecation of the Andean Worldview through Illustration] (Mar. 11, 2011) (Master theses, University of Cuenca), who defines the Andean Cosmovision as based on "our fundamental principles: complementarity, reciprocity, correspondence and relationality that allow the connection of all" ("cuatro principios fundamentales: complementariedad, reciprocidad, correspondencia y relacionalidad que permiten la conexión de todos los elementos del cosmos desde lo individual y lo colectivo en conformidad con la naturaleza").

[11] Elizabeth Bravo & Melissa Moreano, Whose Good Living? Post-Neoliberalism, the Green State and Subverted Alternatives to Development in Ecuador, in *The International Handbook of Political Ecology* 332, 332 (1st ed. 2015).

[12] Rafael Domínguez et al., *Buen Vivir: Praise, Instrumentalization, and Reproductive Pathways of Good Living in Ecuador*, 12 Latin American and Caribbean Ethnic Studies 133, 143 (2017).

alter the nation's genetic assets is forbidden".

4. The Right to Sustainable Use (Article 74) – "*Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living… Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State*".[13]

B. The Poverty of "Rights of Nature" Discourses

Burdon, writing in 2011, warned that "*if the idea of earth rights is to command reasoned loyalty and gain broader political acceptance then it must be built on a secure intellectual footing*".[14] Given that this intellectual footing was never established, it is not surprising the Constitutional Court of Ecuador is still trying to answer fundamental questions about the RoN. Yet this lack of footing may be based on the fact that a significant portion of the Rights of Nature literature analyses the topic without criticality, both to support and condemn it.

On one hand, scholars of a more activist bent may posit that a number of jurisdictions have passed laws to implement it, that they are phrased in new, and so excitingly, biocentric terms, and so this constitutes a "revolution".[15] What tends to unite such works is that they tend to be comparative (generally referencing US municipalities, Ecuador, Bolivia, New Zealand, India, and to a lesser extent, Colombian court decisions, and US Native American law), include a direct reading of various statutes without much analysis of how they have actually been implemented, and fail to address many of the serious critiques of the idea.[16] They often do not adequately address how such laws may seriously impact the economic well-being of their jurisdictions and often fail to discuss how such subjective concepts as environmentalism could be non-arbitrarily weighed in a judicial setting. This corpus of literature does little to convince the skeptic.

On the other hand, more sceptical scholars may disregard the concept on a number of superficial grounds. For instance, on the grounds that Rights of Nature legal texts are often formulated incredibly broadly and obvious ambiguities remain in their interpretation as if that is not a commonality in rights law. They may also claim certain logical inconsistencies between the

[13] Constitución de la República del Ecuador [Constitution of the Republic of Ecuador], arts. 71-74 (2008).

[14] Peter Burdon, *Earth Rights: The Theory*, 2 IUCN Academy of Environmental Law eJournal 1, 2 (2011).

[15] *See* Guillaume Chapron, et al., *A Rights Revolution for Nature*, 363 Science 1392 (2019); David Richard Boyd, The Rights of Nature: A Legal Revolution that Could Save the World (1st ed. 2017); Valerie Cabanes, *A Legal Revolution for the Rights of Nature,* 19 Green European Journal 118 (2020). Available at: https://www.greeneuropeanjournal.eu/a-legal-revolution-for-the-rights-of-nature/ (last visited April 1, 2025); David R. Boyd, *Recognizing the Rights of Nature*, 32 Natural Resources & Environment 13 (2018).

[16] *Ibid.*

Rights of Nature and human rights,[17] arguing that rights can never be proportionally applied in light of competing rights. They may take advantage of the text's broadness and an, alleged, inability for them to be balanced to argue that they must lead to inane conclusions, such as the illegality of eating.[18] These scholars at least take the argument one step further by addressing the issues that supporters ignore but make an equally fatalistic move by failing to faithfully engage with them. Thus, understanding the superficial narratives and looking to distance ourselves from them, we may turn towards a more substantive analysis.

II. Possible Unintelligibility of the RoN

Now that we have tried to argue that critics have generally failed to prove the unintelligibility of the RoN in Ecuador, we attempt to positively disprove the idea, meaning we must show that it is not the case that the RoN's conflict with other rights means it is facially void and that they cannot be balanced to a sufficiently objective level.

To examine these two points, a random survey of 10 cases was selected out of the 64 available on the Observatorio Jurídico de Derechos de la Naturaleza,[19] to be briefly described and analysed. These cases range from 2009 to 2020, incorporate a variety of legal actions, and go from local courts to the Constitutional Court of the nation.[20]

Methodologically, to analyse the cases, we must make a distinction

[17] *See* Noah Sachs, *A Wrong Turn with the Rights of Nature Movement*, 36 Georgetown Environmental Law Review 39 (2023); Mauricio Guim & Michael A. Livermore, *Where Nature's Rights Go Wrong*, 107 Virginia Law Review 1347 (2021); V. A. J. Kurki, *Can Nature Hold Rights? It's Not as Easy as You Think*, 11 Transnational Environmental Law 525 (2022).

[18] Noah Sachs, *A Wrong Turn with the Rights of Nature Movement*, 36 Georgetown Environmental Law Review 39, 61 (2023).

[19] S*ee* Observatorio Jurídico de Derechos de la Naturaleza (an organisation which catalouges judicial cases which invoke or involve the RoN within Ecuador). Available at: https://www.derechosdelanaturaleza.org.ec/ (last visited April 1st, 2024).

[20] In order of analysis, our cases are: Movimiento de Tierras Puyango [Earthworks in Puyango], No. 11317-2016-00059 (2016); Carretera en Santa Cruz [Road Construction in Santa Cruz], No. 269-2012 (2012); Minería en la Cuenca Alta del Río Nangaritza [Mining in the Upper Basin of the Nangaritza River], No. 19304-2019-00204 (2019); Bosque Protector Samama [Samama Protected Forest], No. 12571-2013-0436 (2019); Caso Llurimagua [Llurimagua Case], No. 10332-2020-00418 (2021); Cóndor Mirador, No. 17111-2013-0317 (2013); Incumplimiento del Mandato Constituyente No.6 [Noncompliance with Constituent Mandate No. 6], No. 002-16-SAN-CC (2016); Inconstitucionalidad de la Ley de Minería [Unconstitutionality of the Mining Law], No. 0008-09-IN (2010); Inconstitucionalidad de la Declaración del Triángulo de Cuembí como Bosque Protector [Unconstitutionality of the Declaration of the Cuembí Triangle as a Protected Forest], No. 20-12-IN (2020); Derrame de Petróleo BP [BP Oil Spill], No. 17111-2013-0002 (2013). As a note, Derrame de Petróleo BP (2013) case involved an outlandish legal theory regarding jurisdiction that was thrown out by the court in the most absolute sense, and thus any analysis of it yields nothing beyond common sense, so this case will not be analysed.

between the traits of unintelligibility and intelligibility, as they are not perfect inverses. To say a rights regime, which in our cases is demonstrated in about 60 cases as of July 2024, is "intelligible" means that there exists at least one way of ordering, linking, and interpreting of the logic of the cases to fulfil the previously described criteria. This does not mean that all possible combinations of cases are intelligible, but merely at least one is. In contrast, unintelligibility does not mean that only one ordering, linking, and interpreting the logic of the cases is unintelligible, but that all are. Therefore, in Part 3, when we attempt to prove that intelligibility does exist, we pick and choose the cases in the same way a judge would, framing the question and picking the previous jurisprudence that addresses said question. One may remark that Part 3 does the work for us, that is there exists one intelligible line of reasoning the regime is not unintelligible. Yet this is an argument on thin ice, for if someone disproves (or simply fails to agree with) the line of reasoning meant to prove the intelligibility, then there would be no affirmative reason to not consider the regime unintelligible. Thus, to have the strongest foundation, we must separately demonstrate it is not unintelligible and is intelligible.

As mentioned, to disprove unintelligibility, it must be demonstrated that the conflict between RoNs and other rights does not render it void and that it can be balanced with these rights to a sufficient degree. This requires making the two prongs of the analysis more concrete. For the first prong analysed in subheading A - whether the RoN is facially in conflict with other rights - we may focus mostly on two things. First, the right to legal certainty, which we can interpret to mean that the RoN should not be used to create fully unexpected conclusions, especially in the context of the pre-existing environmental administrative regulations, and second, that they should not trigger the precautionary principle (causing a stop work order on development projects) too readily. For the second prong analysed in subheading B, we may more directly analyse how the cases balance the RoN against other rights.

A. Unintelligibility through Conflicts between Existing Law and the RoN

To the first part of the first prong, three cases demonstrate that the RoN does not pose a threat to the right of legal certainty and instead may help to reinforce it, as we will soon see, by acting as a strong legal principle to reinforce the existing rule system. In addressing the second part of the first prong, we will observe that the RoN does not appear to lead to an overly liberal application of the precautionary principle—a legal mechanism enabling Ecuadorian courts to preemptively halt actions that pose a threat to a right.

In the Puyango Earthworks case,[21] the construction of a community building was causing debris to fall into a local river, alarming a resident. In the trial, it was revealed that the project lacked the needed permits, causing the judge to order the construction to be stayed until those permits were received. Similarly, in the Santa Cruz Highway case, a judge ordered the construction of a road in the Galapagos to be stayed until proper permits were in order.[22] In both cases, the RoN was alleged to have been violated, but the construction would be allowed to proceed following the permitting. Thus, it seems doubtful that the actual environmental damage (or the Rights of Nature violation it generated) was the deciding issue, given that the difference that receiving a permit would make on the overall environmental impact is minimal in comparison to the absolute damage necessary to construct the two features.

More interestingly, the Río Nangaritza case involved a company's mining operation in a biodiverse area. The first instance judge determined that the mining concessions were granted in a protected area and so mandated a stay while various pro-environmental due diligence was taken,[23] while the second instance judge argued the concession could not be confirmed to be in protected areas, and so no Rights of Nature violation could be spoken of, negating the need for the due diligence.[24] The deciding factor and point of contention, in the case was the legal status of the land, not the agreed-upon fact that environmental damage had occurred. As the first instance judge remarked, "*This has a procedure that does not correspond to constitutional justice, but to administrative jurisdiction…based on the law and regulations on mining and environmental management*".[25]

Thus, these cases illustrate that when judges must consider a rights framework with an extremely open texture (that is, one that has a high degree of indeterminacy that comes from a nonexhaustive list of possible usages which cannot be clarified by simply adding more rules[26]), one of the easiest

[21] Unidad Judicial Multicompetente con sede en el Cantón Puyango, Provincia de Loja [Multicompetent Judicial Unit with headquarters in the Puyango Canton, Province of Loja], Judgement of Apr. 15, 2016, No. 11317-2016-00059 [hereinafter *Puyango Earthworks Case*].
[22] Segundo de lo Civil y Mercantil de Galápagos [Second Civil and Commercial Court of Galapagos], Judgement of Jun. 28, 2012, No. 269 – 2012 [hereinafter *Santa Cruz Highway Case*].
[23] Unidad Judicial Multicompetente con sede en el Cantón Centinela del Condor, Provincia [Multicompetent Judicial Unit with headquarters in the Canton Centinela del Condor, Province], Judgement of Jul. 11, 2019, No. 19304-2019-00203 [hereinafter *First Rio Nangaritza Case*].
[24] Minería en la Cuenca Alta del Río Nangaritza [Mining in the Upper Basin of the Nangaritza River], No. 19304-2019-00204 (2019) [hereinafter *Second Rio Nangaritza Case*].
[25] First Rio Nangaritza Case, *supra* note 23.
[26] Stewart Shapiro and Craige Roberts, *Open Texture and Analyticity*, 192-193 *in* Friedrich Waismann The Open Texture of Philosophy (Dejan Makovec, Stewart Shapiro ed., 2019).

ways to pin down its meaning is to associate it with a body of regulations. If anything, such a strategy aids the concept of legal certainty, given that it reinforces the administratively correct decision. Of course, this would be moot if the regulations were perfectly enforced, yet this is a difficult claim to make when Ecuador ranks 115th out of 180 countries in terms of corruption.[27] As the judge in the Santa Cruz highway case remarked, "*The rights of nature… are indisputable normative support to consider and suspend the execution of the work that does not have the permission of the environmental authority*".[28]

Further, one of the most common findings in the large literature contrasting goal-based regulations and rule-based regulations is that rule-based regimes are "*most suited to relatively simple settings with largely homogenous actors, where uncertainty needs to be reduced to a minimum*".[29] Environmental law, which includes a broad class of diverse actions and actors, usually rife with scientific uncertainty, is an unideal candidate for a fully rules-based regulatory regime. Thus, any environmental law regime could benefit from what Fuller termed the "morality of aspiration", the type of rule which "starts at the top of human achievement" and functions as the ends that other rules work towards.[30] By providing greater pressure to enforce existing regulations and a compass toward the teleological ends of those regulations, it seems more reasonable to assume that the RoN helps, not hurts, the right of legal security. In the second part of the first prong, we will see that the RoN does not seem to trigger an overly liberal use of the precautionary principle, the mechanism which allows courts to preemptively pause an action if it threatens a right.

Articles 26 and 38 of the Ley Orgánica de Garantías Constitucionales y Control Constitucional (LOGJCC) sets out the basic framework of how the standard functions. To trigger them, three conditions must be met: first, an "imminent and serious"[31] violation of rights must be present; second, to be serious it must be either due to the irreversible nature of the damage or the intensity or frequency of the rights violation; and third, the violation must not be able to be rectified through administrative or ordinary channels. For the measure to be granted, the judge need only verify that "*the mere description of the facts that the requirements provided for in this law are met*", as "*no evidence will be required to order these measures*".[32] Article 396 of the Constitution further specifies that this is an appropriate remedy in cases of doubt about the

[27] Our Work In Ecuador, Transparency International, https://www.transparency.org/en/countries/ecuador (last visited Apr. 1st, 2025).

[28] Santa Cruz Highway Case, *supra* note 22.

[29] Christopher Decker, *Goals-based and Rules-based Approaches to Regulation*, 8 BEIS Research Paper 8, 48 (2018).

[30] Lon L. Fuller, The Morality of Law, 5-6 (2nd ed. 1969).

[31] Ley Organica De Garantias Jurisdiccionales y Control Constitucional [Organic Law on Jurisdictional Guarantees and Constitutional Control] art. 27 (Asamblea Nacional [National Assembly], Quito, 2009) [hereinafter *LOGJCC*].

[32] *Id.*, art. 33.

environmental impact of an action, even when "*there is no scientific evidence of the damage*".[33] Thus, the fear that the RoN and mechanism may be abused by activists does, admittedly, seem warranted. Yet the cases of Samama Protected Forest and mining in Llurimagua illustrate some bounds to what may be considered an appropriate use of the mechanism.

In the case of the Samama Protected Forest, a landowner sued the government for the confiscation of his land, alleging that there would be an inevitable RoN violation given that the government had not specifically addressed how they would protect the RoN when confiscating the land. The court ruled against him, given that there was no particular reason specified as to why it was believed these violations would occur, other than the fact it was technically possible.[34] The principle required, if not evidence, the plaintiff to at least specifically indicate the threat. On the other side of the reasonability of granting precautionary measures was the case in Llurimagua. This saw a mining company sued owing to the irregularities and alleged inadequacies in their permitting process, such as the lack of attention paid to four endangered species, inappropriate use of water, and overall lack of precautionary actions, creating too great a risk of environmental harm. The judge found the company at fault and moved to revoke the license of the company and suspend all mining activities. While he confirmed "*that there has not yet been a violation of the rights*",[35] the low quality of the science used in the permitting process meant that there was too high of a possibility of such a violation, and so the mining license was suspended until the company addressed these issues.[36] Thus, we see that precautionary measures are superfluous in the least injurious situations, where the type of harm cannot even be predicted, but become necessary in cases which present great possible injury, such as the extinction of species, even if the chance of that injury is unknown.

In more generic terms, these cases show that the RoN may uncontroversially trigger the precautionary principle when the decision to grant or deny them is fully based on the identity of the harm (such as being unknown or causing species extinction), rather than the chance of the harm. Thus, the accusation of an overly (or underly) liberal use may come when judges are asked to assess harms which would have only a moderate impact and only at some moderate possibility.

In the Condor Mirador (Relaves) case, concerned citizens sued a mining

[33] *Supra* note 13, art. 396.

[34] Bosque Protector Samama [Samama Protective Forest], No. 12571-2013-0436 (2013).

[35] Sala Especializada de lo Civil, Mercantil, Laboral, Familia, Niñez, Adolescencia y Adolescentes Infractores de la Corte Provincial de Justicia de Imbabura [Specialised Chamber for Civil, Commercial, Labor, Family, Children, Adolescents and Adolescent Offenders of the Provincial Court of Justice of Imbabura], Judgement of Mar. 29, 2023, No. 10332202100937.

[36] *Ibid.*

company for their construction of two dams meant to hold toxic tailings, which they alleged were being built to subpar standards and would inevitably collapse. They demonstrated that the dam was being built for a maximum design earthquake lower than the area's maximum credible earthquake, and its inevitable collapse would release more than 390 million cubic meters of toxic waste into sensitive, biodiverse areas, and thus violate the RoN. The judge ultimately denied their request for precautionary measures, reasoning that while it was serious, the discussion of decadal timescales meant that it failed the criteria of immanence.[37] This decision shows that in these middle cases, in which the harm is great but possibly does not violate a bright-line rule and which has an indeterminate long-term probability, the judge does act with great discretion. Yet given that the RoN is about as vague as any other right, this discretion must come from the LOGJCC's procedures on the use of the precautionary principle. If the nation's judiciary was overwhelmingly pro-environmental, we would naturally expect this to lean towards an overapplication of the RoN. Yet given there are large financial interests against the environment and a large amount of corruption in the judiciary,[38] the more likely bias would be against the use of the RoN, likely as we see in the Condor Mirador (Revales) case. Yet we will not engage in such a conspiracy, leaving it suffice to note that nothing about the text of the RoN nor of the precautionary principle, nor their exercise as we have seen it, would so far suggest they have been used overliberally.

In the attempt to answer whether or not the RoN is in conflict with the existing law, principally through the right to legal certainty and the use of the precautionary principle, we saw many cases where the text of the law or surrounding rules avoided any need for overly-subjective decisions. Yet the discretionary space of any open texture system will, at some point, necessitate a subjective weighing of values. This is common to all rights regimes, and there is no reason to think this is worse for the RoN. Further, even if many RoN cases can use more objective criteria to be decided in favour of the environment, the RoN still has a role through its expressive function, that is to function as a normative force to support an uncorrupt decision and an ideal end-point to be aimed for. Thus, we can conclude that the RoN is not unintelligible for the first prong and may move on to the second.

B. Unintelligibility through the Balancing of the RoN and other Rights

The second prong deals with the issue of whether the RoN leads to an

[37] Unidad Judicial de Violencia Contra la Mujer y la Familia [Judicial Unit of Violence Against Women and the Family], 3rd of May, 2019, No. 17574-2019-00084.

[38] Quo vadis Ecuador? A brief analysis with a focus on the role of the justice system, https://dplfblog.com/2024/01/24/quo-vadis-ecuador-a-brief-analysis-with-a-focus-on-the-role-of-the-justice-system/ (last visited Apr. 1st, 2025).

abundance of unfair instances of rights balancing. We will show this is not the case, given that many rights conflicts can be solved with objective procedures, as in the cases of the Unconstitutionality of Constitutional Mandate Six and the Unconstitutionality of the Mining Law demonstrate. Even when rights balancing is necessary, the court may attempt to at least minimise the infringement on both rights to create the most objective possible set of solutions, as in the case of the Unconsitutionality of the Cuembi Triangle.

The cases of the Unconstitutionality of Constitutional Mandate Six and the Unconstitutionality of the Mining Law demonstrate the confines of when balancing is even necessary. In the Unconstitutionality of Constitutional Mandate Six, the court faced an issue of a direct conflict between two rules, particularly that the sixth conditional mandate (passed in the run-up to the 2008 Constitution), revoked all mining permits in various natural areas and called for regulations to enforce this, whereas the then-new Mining Law allowed them. The court summarised the situation as "*a problem of antinomies since prima facie, the compliance with one norm would generate non-compliance with the other*",[39] with one side arguing that they had the normative support of the RoN, the other having the normative support of the right to good living (through natural resource wealth). Thus, the court reasoned they were unbalanceable and simply decided in favour of the Mining Law by claiming it could be seen as the regulations called for by Mandate Six.[40] Thus, the court demonstrated that in the case of legal antinomies, balancing is not the appropriate procedure. This is reminiscent of LOGJCC's call for a systematic interpretation, one of the many procedures that the Court may use instead of rights balancing to rectify conflicts between absolutely conflicting norms. Further, by approving of the mining law as the regulatory manifestation of the mandate, despite the acknowledgement of their clear conflict, the court demonstrates a comfortability with allowing a wide latitude of interpretation for secondary-rule-making bodies.

The case of the Unconstitutionality of the Mining Law demonstrates a similar conclusion. In the case, an Indigenous rights group sued the government for the law's unconstitutionality in form, alleging it violated a number of collective rights relating to Indigenous peoples given the liberal way it would allow mining concessions, with some alleging violations to the RoN as well. The court noted that mining did not automatically create rights violations per se, given the need for permitting which required companies to conduct environmental impact studies and reforestation projects, and given that sensitive areas were already statutorily protected.[41] Thus, if two rules are,

[39] Incumplimiento del Mandato Constituyente No.6 [Noncompliance with Constituent Mandate No. 6], No. 002-16-SAN-CC (2016) [hereinafter *Mandate Six Case*].
[40] *Ibid.*
[41] Inconstitucionalidad de la Ley de Minería [Unconstitutionality of the Mining Law], No. 0008-09-IN (2010) [hereinafter *Mining Law Unconstitutionality Case*].

at worst, vaguely conceived of as being in conflict, there is no reason to attempt to balance them.

Together, these two cases demonstrate the conceptual boundaries of when rights balancing is unnecessary, that is when, on one side, the conflict is so significant as to be between logical antinomies of equal status (forcing the court to turn to textual or other more objective methods, as to avoid subjectively choosing one) or on the other side, when the conflict is between norms is highly theoretical that the court doesn't have much to analyse, and so can simply dismiss it by referring to regulations meant to ensure both rights have some degree of fulfillment. Admittedly, some amount of rights balancing may be necessary, conceptually when two norms exist in a state in which the full fulfillment of either would reasonably lead to some non-total yet non-zero infringement of the other. Thus, before concluding on the second prong of intelligibility, we must address these middle cases.

In the case of the Unconstitutionality of the Declaration of the Cuembí Triangle, the national government had declared a protective, national security zone over a broad swath of territory on the Ecuadorian-Colombian border, which would have covered twenty-three indigenous communities. The plaintiffs argued that the declaration would infringe upon a host of collective Indigenous rights, while the defence argued that this was not the case and that such an action was necessary for the RoN and national defence.

In its analysis, the court identified which rights would be and would not be infringed upon, and that "*although environmental conservation and the protection of the rights of nature is a valid objective, it cannot be achieved at the cost of denying the rights of peoples, communities and nationalities but in harmony with such rights*".[42] Instead of allowing or prohibiting the declaration, they ordered it to remain for one year and the government reformulated its terms through additional community consultations.[43] Thus, instead of trying to balance the non-infringement of rights themselves, they ordered the trade-off to be updated so that only the most non-negotiable (and thus necessary) harm remains. Still, one judge issued a dissenting vote emphasising that the other justices failed to properly weigh the importance of national security,[44] highlighting how any act of right balancing is always a normative procedure. Therefore, in the limited cases of the RoN in which rights balancing is the appropriate procedure, the court has demonstrated its commitment to optimising the trade-off between various rights, meaning that it is at least not more subjective than the rights balancing for any other rights regime. Thus, we may consider the second prong of unintelligibility to be disproved, and

[42] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Jul. 1, 2020, No. 20-12-IN/20 [hereinafter *Cuembí Triangle Case*], § 128.
[43] *Id*., § 163.
[44] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], 1st of July, 2016, Saved Vote of Judge Ponce for Sentence No. 20-12-IN/20.

with the previous part, this analysis suggests the RoN is not unintelligible *per se*.

C. Findings of the Ten Cases

Admittedly, these were only ten cases, yet given this is about a sixth of the cases to use the standard and that they were randomly selected, we have no reason to see them as unrepresentative. These cases demonstrate that, even though the RoN has an incredibly open texture, they have not been abused by misappropriating them into inappropriate sanctions. This is because the RoN does not often lead to sanction themselves, but rather may reinforce regulations or act as the ultimate goal for which more concrete procedures, such as the application of precautionary measures, may be orientated towards. Even in cases of rights conflicts, balancing sensu stricto is not always needed. While this creates the impression of an impotent concept, the language of the judges and the few cases in which the RoN themselves were holding demonstrated that their normative support plays a significant role alongside its ability to sanction.

III. Five *Sui Generis* Issues

If we may now establish that the very concept of the RoN is not, in practice, unintelligible, we must now turn to the genuine and specific issues that the RoN may face. Particularly, the literature has identified five distinct issues that come with such a regime, which we may list below and will return to in the final sections. They are:

1. Anti-human: The RoN may substantially harm human rights, generally by preventing economic development in jurisdictions dependent on environmentally destructive industries.[45]

2. Jurisdictional: It is subjective how one draws the boundaries about what is considered "Nature", both in broad legal terms and in specific court cases.[46]

3. Aggregation: Nature is composed of several distinct entities, and even within a defined jurisdiction, it is ambiguous how one determines the unit of rights bearer, in the same way, that humans are the natural unit of human rights, and how the overall cost-benefit can shift depending on how these constituent parts are aggregated.[47]

4. Multi-dimensionality: The environment contains multiple non-economic values (such as beauty, biodiversity, species health, etc.) which makes it difficult to apply standard government analysis to it, as such analyses often try to boil everything down to monetary values, forcing the question of how

[45] Sachs, *supra* note 18 (2023).

[46] *Ibid.*

[47] Guim & Livermore, *supra* note 17 (2021).

to weigh incommensurable and possibly incomparable values.[48]

5. Interest-having: As a whole, and most organisms individually, cannot be said to have interest in the same way natural people do, begging the question of whether it is even possible to have rights in the first place.[49]

We may now attempt to demonstrate that the RoN is positively intelligible by examining exactly how the rights fit in with the existing legal corpus and how they generally function in instances of rights conflicts.

IV. How to Define Nature?

Now that unintelligibility of the RoN is disproven, we will attempt to show that the RoN is intelligible, such that they are sufficiently harmonious and balanceable with the rest of Ecuadorian law. The harmony between legal regimes depends principally on their content and how they have been used, and thus we must sketch out how the RoN broadly operates. In order to prove intelligibility of RoN by determining what are its rights and how they can be balanced with other rights we must first principally define what is nature and what are its rights. To the latter question, we ask what rules and actions these rights prohibit. We further distinguish between actions that have occurred, and so whose impacts are known, and actions that may occur, and so whose impacts may only be predicted. Finally, once nature and its rights are more deeply understood, we may analyse how the courts have weighed them against competing rights. Methodologically, we analyse a diversity of cases from all levels and numerous provinces. Given that Ecuador is largely a civil law nation, we are not claiming that this interpretation of the RoN is necessarily mandated by precedent, but simply that this understanding is rationally and historically grounded.

A. What is Nature Writ Large?

The most obvious question for the "Rights of Nature" is what constitutes "nature". We can distinguish this into two questions: firstly, what conceptually includes nature and so can be defended under the Rights of Nature, and secondly, in individual cases, how does one delineate a specific entity as the affected "nature". These questions are necessary to understand the scope of the rights regime, and as we will see, the aptness of a subject to being adjudicated under the RoN is based on how biotic and non-artificial something is, and the question of delineation is either moot or out of the court's hands.

The Constitutional Court's guide on the topic gives some comments. To the court, nature is "*where life is reproduced and occurs*"[50] and is an autonomous

[48] *Ibid.*

[49] V. A. J. Kurki, *Can Nature Hold Rights? It's Not as Easy as You Think*, 11 Transnational Environmental Law 525, 547-549 (2022).

[50] Byron Ernesto Villagómez Moncayo, Rubén Fernando Calle Idrovo & Dayanna Carolina

being, meaning its value is not dependent on its use for humans or its instrumental roles. Further, it is a complex and systemic being, meaning it cannot be understood as a unitary whole but instead as a group of interrelated parts. Any effect on one part affects the whole, and so actions must be analysed not just for their direct results but for any secondary ramifications they incur.[51] While important, these concepts do little to help us to say what is or is not covered under the regime.

For instance, given the focus on life and ecosystem processes, would a barren desert count as nature? We may call this the abiotic question.

Further, nature has multiple different definitions regarding how much it can be influenced by humans. One environmental philosopher distinguishes between the "metaphysical" conception of nature, that is the world defined as non-human, and the "surface" conception of nature, that is the plants, animals, and "*ordinary observable features of the world*'' that we tend to associate with the environment.[52] Thus, we can ask how free of human influence must an ecosystem be to be considered "natural"? We may call this the artificiality question.

1. How Are Abiotic and Biotic Components Treated?

Given that the literal definition of nature is "*where life is reproduced and occurs*", one may initially dismiss abiotic components. Yet since its passage, the court has constitutionally stressed that "*Nature is made up of an interrelated, interdependent and indivisible set of biotic and abiotic elements… [that] function as a network*".[53] Thus, the court's wording suggests that abiotic components of the ecosystem receive protection at least because of their influence on biotic components.

We can see this go further in the case of illegal mining in Pastaza. In 2012, a citizen violated the terms of an artisanal mining license, which was found to be a violation of the Rights of Nature.[54] Yet interestingly, the resource being harvested in this case was simply stone and sand. While an important part of the case hinged on the ignored environmental impacts that could result, it was clear the action itself of harvesting these abiotic components was also an issue. This opens the door to asking whether there is an inherent value of abiotic components independent of biotic ones.

In general, some rights of nature theorists have argued against the view of

Ramírez Iza, Guía de Jurisprudencia Constitucional. Derechos de la Naturaleza [Guide to Constitutional Jurisprudence, Rights of Nature] 16. (Centro de Estudios y Difusión del Derecho Constitucional [Center for Education and Outreach of Constitutional Rights] (1st ed. 2023) (hereinafter RoN Guide).

[51] *Ibid.*

[52] Kate Soper, What is Nature? Culture, Politics, and the Non-Human (1st ed. 1995).

[53] RoN Guide, *supra* note 50, 19.

[54] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Jul. 9, 2015, No. 218-15-SEP-CC.

valuing abiotic components for their own ends. For example, Nash insists on a "criterion of conation", the idea that to be inherently valuable a thing must have "*a striving to be and to do, characterized by drives or aims, urges or goals, purposes or impulses, whether conscious or unconscious*".[55] This is suspect when one realizes that such an argument, in short, attempts to be a line in the sand, a bright-line rule created not for any internal logic but simply create some order. Yet, it fails specifically because it is in no way clear what can and cannot rightfully be said to have an interest. This is likely why many, including Nash, acknowledge that any system of RoN necessarily includes some gradient of rights. Yet, if an arbitrary dividing line is actually a gradient and difficult to determine where it falls, it fails its only function and is thus unjustifiable. Thus, we can realistically assume that the gradient of rights is in effect, that abiotic rights are partially owed to their support of biotic ones, yet also partially for their own sake.

2. How are Artificially Occurring, Biotic Parts of an Ecosystem Treated?

To the question of artificiality, we may attempt to extrapolate the contours of some standard based on previous court decisions.

To start, we first must acknowledge how little of the Earth is truly free of human influence. Anthropologists have spent considerable time debunking the theory that the environment, particularly the Western hemisphere, was an untouched wilderness before colonization, instead emphasising that the "*Native Americans shaped their environments to suit them, through burning, pruning, tilling and other practices. And the Amazon is no different…*"[56] Thus, the Ecuadorian courts have continually emphasised the "*complementarity between human beings and other species and natural systems*"[57] Following this, we may dissect ecological artificiality deeper, dividing it into two phenomena: artificiality of occurrence, or the passive status of artificial existence, (such as planted crops or non-native farm animals) and artificiality of conduct, or the active status of exercising artificial action (such as how genetically modified plants or pets behave). To the former, we may analyse the court's jurisprudence on pine plantations in paramo regions, and to the latter, we may analyse the Estrellita case.

For the artificiality of occurrence, we may simply ask when there has been too much human influence on the introduction of some ecosystem element to render it "unnatural". While species are often painted as a binary between non-native (or "invasive") and native, significant examples exist in between.

[55] James A. Nash, *The Case for Biotic Rights*, 18 Yale Journal of International Law 235, 243 (1993).

[56] Ben Panko, *The Supposedly Pristine, Untouched Amazon Rainforest Was Actually Shaped By Humans,* Smithsonian Magazine (2017). Available at: https://www.smithsonianmag.com/science-nature/pristine-untouched-amazonian-rainforest-was-actually-shaped-humans-180962378/ (last visited Apr. 1, 2025)

[57] *Supra* note 50, 17.

This varying scale is what Tribe referred to as the "*distortion of natural landscape*"[58] in his Plastic Trees paper, a variable so nuanced he suggested the training to a specialised cadre of government officials to understand this, and similarly nuanced, environmental impacts.[59]

In Ecuador, some of the most common artificially occuring species are those found in pine plantations.[60] Worryingly, many of these pine plantations have been planted in the paramo, a delicate high alpine landscape. Many have pointed out that these trees may disrupt the hydrological cycle and degrade the soil.[61] Given this, the Ecuadorian government declared illegal any pine plantations between 3,500 and 3,000 meters above sea level.[62] This was the inciting issue to the Tangabana Paramo case, in which a company called "ERVIC SA" planted a pine plantation in between these latitudes, which prompted the local community to sue on behalf of the RoN. They pointed to the above regulation, as well as the general protection for the paramos, to argue that such a plantation was illegal. [63] The defence pointed out that they had been given special legal permission, which was enough to have both the first and second instance judge side with them.[64] In the second instance, the plaintiffs added that "*It should also be noted that here we talk about the moors as unproductive lands… [yet] the "Páramo de Tangabana" is a living moorland, which is in a restoration process and fulfils a very important process for all people*".[65]

This case points to two important debates, the value of low-biotic "wastelands" and the various variables that contribute to naturalness in contrast to artificialness.

Wastelands have never had a formal definition, but the causal "*barren or uncultivated land*" is sufficient for our purposes. The word "paramo" can refer to this specific ecological biome, but also may be translated into English as "wasteland, bleak upland, barren plain".[66] The defence in this case argues

[58] Lawrence Tribe, *Ways Not to Think about Plastic Trees: New Foundations for Environmental Law*, 83 Yale Law Journal 1315, 1321 (1974).
[59] *Ibid.*
[60] Context of the Timber Trade, Ecuador Briefing Document (Forest Law Enforcement, Governance and Trade Program of the European Union). Available at: https://www.traffic.org/site/assets/files/8617/flegt-ecuador.pdf (last visited Apr.1, 2025)
[61] Carlos Quiroz Dahik et al., *Contrasting Stakeholders' Perceptions of Pine Plantations in the Páramo Ecosystem of Ecuador*, 10 Sustainability 1, 2 (2018).
[62] Acuerdo No. 010 Plan Nacional de Forestación y Reforestación [Agreement No. 010 National Plan of Forestry and Reforestation] (2013).
[63] Unidad Judicial Multicompetente con Sede en el Cantón Colta [Multicompetent Judicial Unit with headquarters in the Colta Canton], Judgement of Dec. 10, 2014, No. 06334-2014-1546.
[64] Sala Especializada de lo Penal de La Corte Provincial de Justicia de Chimborazo [Specialised Criminal Chamber of the Provincial Court of Justice of Chimborazo], Judgement of Aug. 24, 2015, No. 0633420141546, [hereinafter *Second Paramo Case*].
[65] *Ibid.*
[66] páramo, WordReference,

against this view of the paramo, instead emphasising the community's use of the land to argue that it is not an unproductive area. The defence co-ops this argument, extending it further to say that the community is only arguing against the pine plantation to preserve their ability to harvest tunda. Thus, both sides agree that this land is not barren, but by needing to argue this, they demonstrate the existence of the conservative view on land value, that is, nature's value is partially dependent on what it provides to humans. The defence argues for the parallels between their actions and the afforestation of the nearby Palmira desert.[67] They are attempting to argue that it is a social good to afforest unproductive lands. While it is never explicitly stated by either side, we can see that there is a clear bias against barren, abiotic lands in contrast to lush, biotic lands, and it is reasonable to extend that into our understanding of the Rights of Nature. Further, the differences between paramos and the Palmira desert point towards the first distinguishable variable of artificiality, that is its occurrence.

The Palmira desert is not actually a desert, it is more properly thought of as "*a few hectares heavily eroded by the wind, the dryness of the environment, and intensive grazing, which has allowed the formation of sandbanks with some small dunes*".[68] While the low rates of participation do create the ideal conditions for desertification, the grazing of domesticated animals points to the ultimately anthropogenic origin of the landscape. In contrast, the paramo naturally exists in its current state. Given that there was no issue with attempting to forest the Palmira desert with pines, but that there have been numerous cases taking issue with paramo pine plantations, this points to the fact that the Rights of Nature tend to prioritise landscapes that do not have a human hand in their origin. In short, the former is "restoration" while the latter is a deviation.

Yet these are easy, black-and-white cases. We may further distinguish artificially occurring entities by how likely they would have occurred without the influence of humans. For instance, one may argue that indigenous practices may artificially introduce and order plants on a landscape, comparable to a modern, western-style pine plantation, yet the latter would likely face more scrutiny. This is because the plants that indigenous peoples tend to cultivate tend to be indigenous themselves, while the two most popular tree species for plantation-style forestry in Ecuador, the Pinus Radiata and the Eucalyptus globulus, come from Mexico and Australia, respectively.[69] Non-native plants (such as those from Australia) have a near-

https://www.wordreference.com/es/en/translation.asp?spen=p%C3%A1ramo (last visited Apr. 1, 2025).

[67] Second Paramo Case, *supra* note 64.

[68] Ivan Tomaselli, Country Report: Ecuador, 12 (2019). Available at: https://www.rinya.maff.go.jp/j/riyou/goho/jouhou/pdf/h30/H30report_nettaib_9.pdf (last visited Apr. 1, 2025).

[69] Ivan Tomaselli, *Country Report: Ecuador* 241, 253 (2019). Available at:

zero percent chance of ever randomly happening to grow in Ecuador, while indigenous peoples may be working with plants that grow in the area, which tend to grow together, and which tend to grow in natural patterns. Thus, when considering the artificiality of occurrence, we can distinguish between two aspects: who directly caused the event and how likely the event would have occurred without their involvement.

Further, as seen in the Tangabana Páramo case, both what is introduced into the ecosystem and the state of the ecosystem at the time of introduction is essential in understanding how courts approach the question of artificiality. In other words, if the artificial ecosystem created life where there was none before, it may be more likely to be considered nature, given the aforementioned heavier weight on biotic versus abiotic components. Awkwardly, this also suggests that productive, in human terms, ecosystems are more definable as nature than non-productive ones. That is why introducing the artifice of occurrence is necessary because, prima facie, it seems difficult for the plaintiffs in this case to argue that planting trees violates the Rights of Nature. Yet if one were to frame it along the lines of "industrial timber production", the violation is much clearer. The already ambiguous meaning and thus implementation of the Rights of Nature only becomes more difficult when "Nature" itself is undefined.

While the above discussion primarily applies to plant life and seeks to clarify the concept of artificiality of occurrence, it is also necessary to include animals in the analysis. Including animals allows for an exploration of the concept of the artifice of conduct, which is an essential part of the artificiality question.

3. How Are Artificially Behaving, Biotic Parts of an Ecosystem Treated?

The case of Estrellita involved a chrongo monkey being taken in by a family soon after birth and raised as a pet for nearly two decades, before being confiscated by the authorities. The family sued for habeas corpus, which the court found applied, given that animals are part of the "*protective spectrum of the constitution*".[70] They specified that animals, through the Rights of Nature, have rights not just for their role in the ecosystem but as unique rights-bearing individuals, with "*the right to food of an Andean condor is not protected or guaranteed in the same way as it is with an Amazon pink dolphin*".[71] Wild animals specifically enjoy certain rights to "*free animal behaviour*" which "*protects the general freedom of action of wild animals; that is, the right to behave according to their instinct, the innate behaviours of their species, and those learned and transmitted*

https://www.rinya.maff.go.jp/j/riyou/goho/jouhou/pdf/h30/H30report_nettaib_9.pdf (last visited Apr. 1, 2025).

[70] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Jan. 27, 2022, No.253-20-JH/22, [hereinafter *Estrellita case*].

[71] *Id.*, para. 98.

among members of their population".[72] This means that humans cannot force them to act in unnatural ways. Thus, the court specifically took instance with the fact that Estrellita would often wear a diaper and eat what it considered to be "human food".[73]

This contributes to our foundational understanding of what the courts mean when they say "nature", by specifically distinguishing wild and domestic animals, and then awarding wild animals (the more "natural" ones) the right to act the way they naturally do, we see that the court is prioritising conduct as an aspect of naturalness. Thus, beyond origin, we may say that there is an artifice of conduct, that how an animal innately acts affects whether or not it is part of "nature", and that this is a protected status. One cannot move a part of the natural environment and bring it into the artificial by modifying its conduct.

Thus, to summarise the concept of abioticism, it seems the courts are willing to acknowledge the rights of abiotic components both for their inherent value and their instrumental value in supporting the ecosystem processes of biotic components, but overall seemingly less than the value of the biotic components themselves. To summarise the concept of artificiality, the main ambiguity rests on what conception of nature the courts have adopted: the surface view, of all that green stuff and all those animals, or the metaphysical, the ontological absence of human influence. We have seen that when the courts need to consider what is "nature", they have, either explicitly or implicitly, considered the artifice of origin and the artifice of conduct. The artifice of origin includes considerations of what being directly caused the environmental component to be there and how likely it would have arisen without their intervention. The artifice of conduct describes the actions of the being in question itself, whether it would have acted in such a way without the influence of humankind.

B. How is Nature Delineated in Each Case?

Now that we have a clear-as-possible picture of what the court considers "nature" in the abstract, we may move on to the second question, when in specific cases, how does the court determine exactly what the harmed entity is? In other words, if a river is polluted, is the harmed entity the waters of the river, is it all the organisms and the waters of the river, or is it everything in the watershed? In their guide, the constitutional court has said this depends on their "*characteristics, processes, life cycles, structures, functions and differentiating evolutionary processes*".[74] Such an answer does not help us very much. Therefore, we attempt to address the two relevant questions: when does the court need to define the limits of harmed entities and how do they

[72] *Id.,* para. 113.
[73] *Id.,* para. 175.
[74] *Supra* note 50, 30.

do that?

To the first question, we may begin by dividing cases by whether the actions have actually happened yet. If plaintiffs are seeking to prevent future damage *ex-ante*, it may be that only the core subject of the damage must be identified sufficiently to prove the case. Further, the court need not order any restoration efforts, and instead simply halt the action that will hypothetically create harm. For both reasons, the exact limits of the harmed entity need not be delineated, and so we may focus on protective actions which seek to remedy harm *ex-post*.

Thus, focusing on protective actions initiated *ex-post*, we may further divide cases between those focusing on discrete and dispersed harm. We may define instances of discrete harm as ones in which the preponderance of harm affects discrete units of the ecosystem (such as specific plants or animals), while cases of dispersed harm see a gradient of harm stretch across an ecosystem (such as through waterway pollution). Multiple cases demonstrate how the RoN repairs instances of discrete harm. In the case of tree felling in Cuenca, the city cut down dozens of trees along a major road and the city's river. After a lengthy analysis in the second instance, this was found to violate the RoN, and the judge ordered *restitutio in integrum*, which was simply replanting new trees.[75] Similarly, in the case of mangrove removal in Guabo, a shrimp farmer was successfully sued for removing mangroves to expand his farm. The judge resolved that the farmer thus needed to first remove all the farm machinery, water pumps, and the new retaining wall, and then replant the lost mangroves.[76] These demonstrate the point that discrete harm is generally repaired with discrete restoration: if a tree is cut down, just replant it.

Therefore, we may further narrow our analysis to dispersed, *ex-post* environmental harm. Given, by definition, the dispersed nature of the harm across multiple ecosystem elements, these cases would require some delineation of the affected entity. Thus, we may use these specific cases to ask the second question: when nature must be delineated in specific cases, how do courts do it? To this, we may look at the case of the sewer line bursting open and polluting the air and waterways of the Flavio Alfaro Canton, or the case concerning gas flaring in hydrocarbon extraction plants. Both cases addressed instances of pollution that saturated the landscape and may have affected human health. Both judges ordered a comprehensive clean-up, with the judge in the case of the sewage leaking commenting that the government

[75] Sala Especializada de lo Penal, Penal Militar, Penal Policial y Tránsito de La Corte Provincial de Justicia de Azuay [Specialised Criminal, Military Criminal, Police Criminal and Traffic Chamber of the Provincial Court of Justice of Azuay], Judgement of Jan. 10, 2023, No. 01204202205578,[hereinafter *Cuenca Trees case*].

[76] Tala de manglar en cantón El Guabo [Mangrove Deforestation in El Guabo Canton], No. 07317-2020-00466 (2021).

needed to "*carry out a toxicity or toxicological examination due to the contamination caused by the discharge of sewage*" before they began "*the execution of the approved plan*".[77] Similarly, in the Flavio Alfaro case, the judge ordered the relevant ministries to undertake a number of technical studies necessary for a long-term plan to repair the issue.[78]

From such a breakdown, two things are relevant: firstly, rarely must courts actually define exactly what parts of nature are being harmed, and secondly, in the specific cases where this must be done, that being dispersed, *ex-post* environmental harm, it is such a technical endeavor that the judges tend to simply order scientific agencies to determine it. Thus, despite the criticism that the Rights of Nature, by virtue of being a rights-based regime, would need to specifically identify the exact limits of the harmed, enfranchised entity, it instead seems to follow the lead of traditional, administrative environmental law in defining the harmed entity in the most utilitarian manner, that is, only when necessary and using outside scientific expertise.

Therefore, concerning both the questions of what is abstract "nature" in the overall purview of the court and how the court jurisdictionally defines a part of nature to be the plaintiff in specific cases, we may see the court has a workable framework. Nature seems to be the thing that is biotic, and sometimes to a less important extent abiotic, and non-artificial, based on its origin and conduct. Further, in specific cases, the actual plaintiff either needs not be fully delineated either if the damage has not yet occurred, as simply pointing to a sufficient part that will experience harm is enough to have the court order it to be prevented, or if the harm is discrete enough, as the needed repair is thus equally discrete. In cases that deal with large-scale pollution that has already affected the landscape, courts do need to delineate the affected entity of "nature", yet can have scientific, bureaucratic agencies to do that. The lack of deeper theory on the concept does introduce some ambiguities, such as the tensions between the surface and metaphysical conceptions of nature as well as possible tensions between what the court and the scientific agency interpret normative matters of environmental restitution, yet these issues are in no way fatal. Thus, now that "nature" is understood, we can continue to ask what its rights are.

V. Nature's Rights

Now that the concept of nature and how it is delineated is clear, we can determine what its rights are, particularly what rules and actions these rights prohibit. We further distinguish between actions that have occurred, and so whose impacts are known, and actions that may occur, and so whose impacts may only be predicted. Finally, once rights of nature are more deeply

[77] Caso contaminación de ríos y aire en el Cantón Flavio Alfaro [Case of River and Air Pollution in the Flavio Alfaro Canton], No. 13322201900024 (2019).

[78] Mecheros petroleros en el Ecuador [Oil Flares in Ecuador], No. 21201-2020-00170 (2021).

understood, we may analyse how the courts have weighed them against competing rights.

A. What are the Procedural Rights of Nature?

With an adequate understanding of what "nature" is, we may move on to its rights. To begin, we may divide them into procedural and substantive. Procedurally, the Rights of Nature elevates environmental protection in several ways.

Firstly, constitutional rights trump other forms of governmental or judicial guarantees. In the case of Unconditionality of Constitutional Mandate 6, the Constitutional Court reaffirmed the broad hierarchy of Ecuadorian laws: constitutional law is the highest, organic law is in the middle, and normal law is the lowest, a reflection of the legal hierarchy established in Article 425 of the Constitution.[79] Thus, the Rights of Nature may theoretically trump environmentally harmful laws passed by the legislature. Importantly, this means that environmental protection is elevated to the same status as other guarantees for various economic activities, the rights with which environmental protection is most facially in conflict. By putting them on the same level categorically, they may be more equally balanced when in tension.

Secondly, constitutional rights may enjoy faster processing given their importance, as the judge in the Paramo case stated that "*processing must take priority over other actions within the jurisdiction of the judge who is responsible for hearing*".[80]

Thirdly, in the specific case of the Ecuadorian court system, the conventional highest court of cassation is technically the National Court of Justice. Yet when conflicts involve constitutional rights specifically, they may be taken up by the Constitutional Court. The Constitutional Court is the only court to enjoy, albeit limited, precedential-making power,[81] meaning that environmental protection may be strengthened through their decisions in a way that cases involving only technical regulations could not.

Fourthly, the Rights of Nature have universal standing in Ecuador, meaning that one need not prove a sufficient connection to raise an action, theoretically solving the issue of standing that has traditionally plagued environmental law. This is due to Article 71 of the Constitution, which establishes that "*any person, community, town or nationality may demand compliance with the rights of nature from the public authority*".[82]

Fifthly, established in the case of Estrellita and emphasised in the Constitutional Court's guide, these rights are non-exhaustive, meaning that it

[79] Mandate Six Case, *supra* note 39, 12-13.
[80] Second Rio Nangaritza Case, *supra* note 24.
[81] LOGJCC, *supra* note 31, art. 25.4.l.
[82] *Supra* note 14, art. 71.

is "*not reduced to guaranteeing the rights stated in positive regulatory bodies*".[83] Thus, the spirit of law takes a stronger position in relation to the letter, theoretically allowing this legal tool to be used flexibly and to cover fringe cases.

Together, these reasons help to explain why, despite the RoN's open texture and so the theoretical possibility of being only "legal poetry", some may see them as impactful. Yet procedural rights do little to prove their intelligibility, and so we must turn to their substantive components.

B. What are the Substantive Rights of Nature?

In the court's guide, they particularly emphasised two distinct aspects: "*right to existence, maintenance, and regeneration of life cycles*", demonstrated by the aforementioned case concerning stone harvesting, and the "*right to restoration*", demonstrated by the case involving the degraded mangrove, which the court ordered to be restored.[84] Thus, based on this choice of emphasis, we may boil down these rights into two things: environmental protection and, failing this, environmental restoration.

Numerous times the courts have affirmed that the right to restoration simply follows the principle of *restitutio in integrum*, as that court says, "*the full restitution of nature by repairing the damage caused to the physical environment until returning, as far as possible, to the original ecosystem*".[85] The important question should be obvious: what does "*as far as possible*" mean? Given it is legally undefined, we may assume that it is defined scientifically on a case-by-case basis. Yet broadly, one of the purposes of a court system is to function as a mechanism in which, when a right is infringed upon, one may seek redress. To separately guarantee that a right may be restored if it is violated is frankly quite strange. This would be the equivalent of ensuring both the right to free speech and the right to have your free speech restored if something were to infringe upon it. One may argue that the right to restoration has a more specific scope: it ensures that the environment is directly and physically restored rather than simply compensated. Yet compensation is almost always monetary payment, and one cannot hand money to the abstract concept of Nature. Thus, without a more specific meaning to "restoration", it may simply be considered the judicial guarantee to what seems to be the ultimate right of nature: protection. Thus, we may turn to asking what violates this right to protection, first focusing on rules.

C. Which Rules Violate the RoN?

The herculean effort of attempting to collate exactly what rules do or do not violate the Rights of Nature can be largely circumvented when one

[83] *Supra* note 50, 40.

[84] *Ibid.*

[85] *Id.*, 44.

understands the concept in relation to administrative environmental law. In short, the following discussion postulates that the Rights of Nature and traditional environmental law overlap significantly, meaning it is more likely than not that any rule or action will either invoke both or neither regime. Thus, we will attempt to isolate the cases in which the regimes split to understand better where the Rights of Nature change the outcome of a case. Specifically, paying attention to two possibilities: firstly, not violating the Rights of Nature and violating administrative environmental law and, secondly, violating the Rights of Nature and not violating administrative environmental law.

The first case initially seems difficult, given that the casual understanding of the RoN as affording greater protections to the environment than administrative law. On the other hand, many judges have presented a near opposite perspective, declaring the RoN not relevant specifically because administrative law already determines a decisive answer, such as we saw in the first instance ruling of the Río Nangaritza case.[86] Thus, we may ask whether it can violate administrative environmental law without running afoul of the RoN?

To this end, it is worth giving credence to the rhetoric of it being a genuine paradigm shift in environmental law, given its specifically anti-extractivist bent. For context, the most recent environmental code was written in 2017, spanning about 90 pages.[87] It would be extremely zealous to allege any violation of 90 pages of technical codes is a genuine rights violation. This is especially true when one considers that environmental regulations may be influenced by extractist groups, the very ones the Rights of Nature attempts to check. For example, in the environmental code, chapter II is devoted to describing "*the environmental powers of decentralized autonomous governments*", which illustrates the broad powers allowed to local governments.[88] Either side of the ideological debate may argue that decentralized policy making is either good or bad, respectively arguing that local governments may be more subject to corruption or that they are more connected to the issues at hand. Yet the recent controversy over oil drilling in Yasuni National Park, in which most of the citizens of the Amazonian province where the drilling was to happen voted to drill while the nation at large voted against it, is illustrative to the point that decentralization does not necessarily lead to environmental conservation. Therefore, one could easily imagine a host of "environmental" regulations that are in practice deleterious for the environment, being broken without violating the more normative RoN.

Yet admittedly, this situation is likely less important than its inverse, the possibilities of actions that are legal under administrative environmental law

[86] *Supra* note 24.

[87] Codigo Organico Del Ambiente [Organic Code of the Environment] (Asamblea Nacional [National Assembly]), (2017).

[88] *Id.,* arts. 25-28.

and illegal under the Rights of Nature. These situations are the principal ones in which the force of the RoN would theoretically create different outcomes. We may divide such a case into two types: administratively permissible rules which violate the RoN and administratively permissible actions which violate the RoN. The former shall make up the remainder of this section, and the latter the next.

The LOGJCC specifies that these complaints of regulatory incompatibility between norms must be "*clear, certain, specific and pertinent*".[89] Thus, we may review three cases of unconstitutionality the Constitutional Court reviewed specifically owing to possible conflicts with the RoN. Theoretically, we may address that laws fall on a spectrum of unconstitutionality: ranging from completely irrelevant to the rights in question, and so fully legal in its regard, to directly negating a specific, higher law, making it fully illegal in its regard. Yet as we will see, the majority of cases fall somewhere in between, often relying on the broadness of the statutes in question, and their promise to ensure proper permitting, to be deemed constitutional.

In the case of the Unconstitutionality of article 86 and 136 of the Environmental Regulation for Mining Activities (RAAM), the plaintiffs took particular issue with the fact these two articles allowed for the diversion of waterways for mining activities. They alleged such activities pose a higher-than-acceptable amount of risk for environmental well-being and thus should be deemed as in violation of the RoN. The defence argued that such activities could only be performed with the proper permitting, which would ensure any undue harm to environmental quality. The justices ultimately ruled in favour of the plaintiff on procedural grounds, given that the RAAM had wrongly allowed such a practice because it had not been given the express authorization to do so by the organic law above it, the Organic Law on Water Resource Uses and Exploitation (LORHUAA). Yet the justice went further to additionally rule on the merits, and concluded that water diversions "*are not in the abstract incompatible with the rights of the nature to have its existence fully respected… This is because the aforementioned authorizations or permits must necessarily have the objective of ensuring that said rights are not violated*".[90]

Thus we may say that rules may permit actions, no matter how *prima facie* egregious, if those rules include a need for permitting, as seen in the case of the Unconstitutionality of the Mining Law in Part II.B, and such a regime flows from the organic law. The justices defend the breadth and necessity of organic law's power to enable action owing to their "*greater deliberation and democratic legitimation*".[91] Yet they further warn that permitting is no "*mere administrative procedure, since this could lead to irreversible damage and violations*

[89] *Supra* note 31, art. 79.5.b.

[90] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Jun. 9, 2021, No. 32-17-IN [hereinafter *Unconstitutionality of the RAAM Case*].

[91] Id., § 49.

of the rights of nature… [and] must ensure the integral respect of nature and the regeneration of its life cycles, structure, functions and evolutionary processes".[92] Such statements now force us to ask, how does one ensure this permitting system is more than a "mere administrative procedure"?

In the case of the Unconstitutionality of the Organic Code of the Environment, restrictions on development in mangrove forests to be skipped with express authorization from the national environmental authority and a promise to reforest, allowed infrastructure to be built in mangroves, allowed monocultures to be established the plaintiffs sued over a number of articles that, in turn, allowed certain to prevent deforestation, and failed to set specific prices for the penalties associated with timber felling violations. The defence rested most of its argument on the idea that anything done under the code required some kind of government oversight and, generally, a permitting procedure, and this oversight would ensure the Rights of Nature would be respected. In turn, the court decided that, firstly, the allowance of development in mangrove forests via exceptions from the government meant that "*discretion is allowed that is contrary to the nature of the constitutional norm that protects the rights of nature*"[93] and so is unconstitutional. Despite this, infrastructure is allowed when permitted, owing to its important public benefit. Further, it is fully illegal to establish monocultures to prevent deforestation, as the constitution expressly prohibits this, thus making it unconstitutional. Lastly, the argument on timber violation prices were ignored, as it is beyond the scope of constitutional analysis.[94]

From this, we can gather important points. Firstly, any amount of government permission, such as through a simple nod, is not inherently a guarantee of the Rights of Nature, meaning the authorization process must have at least some substance. Yet at the same time, environmental laws need not be so granular that they establish specific fees, as that may be devolved to administrative regulations. Further, as is the idea of judicial review, laws cannot be the literal logical negation of higher laws, yet they may go against some of its principles, such as environmental integrity, if it is to balance against a compelling reason, such as development. Thus, we can somewhat narrow down the concept of rules that create a permitting regime with "integral respect" to require a process that requires standardized, non-ad-hoc, steps, but need not go so far as to specify the dollar amount of fines.

Yet this definition is still lacking. One is forced to ask, assuming the rule that allows an activity does not directly contradict a higher rule, and thus respects the concept of legal reserve, *how* substantive must the permitting process be? This will be more specificially addressed in the Los Cedros case.

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[92] Id., § 75.

[93] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Sept. 8, 2021, No. 22-18-IN/21 [hereinafter *Unconstitutionality of the Environmental Case*], § 71.

[94] *Ibid.*

Thus, we may say that environmental laws seem to comply with the RoN if they, procedurally, respect legal reserve and do not violate higher laws, and, substantively, are between the situation of at least having some enforced procedure (in other words, not being able to be ignored with the permission of the authorities) and having specific prices set on violations, with the happy middle probably including things like environmental impact studies and yearly auditing. While the above may sound critical of the court, this regime is likely the optimal situation. Again, the LOGJCC sets a high bar for unconstitutionality as incompatibilities that are "*clear, certain, specific and pertinent*".[95] With the Rights of Nature as open-textured as they are, it is difficult to imagine many clear or certain rule-incompatibilities.

Nor should conflict norms necessarily be sufficient, as if a court were to stray into such grounds as deciding cases based on conflicts between ill-defined norms, they risk becoming judicial activists, thus violating the nonpolitical character of the judiciary that is inherent to the separation of powers. This is not to say they should renounce all attempts to apply for judicial review with the RoN, as even the availability of such a procedure may cause others to take it more seriously. As Jaffe reminds us "*This function [judicial review] may be patently exercised only spasmodically but its availability is a constant reminder to the administrator and a constant source of assurance and security to the citizen*".[96] Thus, we may say that the Rights of Nature do not lend themselves to necessarily forbidding rules whose spirits are anti-environmental, but still serve to prevent those laws who violate basic legal principles, like that of legal reserve and hierarchy. Thus, we may move on to asking what specific actions, even when permitted by the administrative state, violate the Rights of Nature.

D. Which Future Actions May Violate the Substantive Rights of Nature and How Does Regulatory (Non-)Compliance Affect This?

In the question of the legality of discrete actions in the purview of the Rights of Nature, we may divide them into two types, to populate the next two sections: future actions, which tend to invoke the precautionary principle, and past actions, which tend to invoke protective actions. To analyse future actions, we may look at the Los Cedros case, one of the most noteworthy examples of the RoN being used by the Ecuadorian Constitutional Court. As we will see, the case also allows us to examine the relationship between regulatory environmental law and the RoN, as well as demonstrates different conceptions of scientific probability.

Factually, Los Cedros is a protected forest, which acts as a buffer zone to

[95] *Supra* note 31, art. 79.5.b.

[96] Louis Leventhal Jaffe, *Judicial Control of Administrative Action*, 325 (1st ed. 1965).

the Cotacachi-Cayapas National Park. ENAMI EP, the national mining company, was granted a permit for mineral exploration. In the first instance, local government officials sued on the grounds that the granting of such concessions and licenses ignored the protected forest status of the area, [97] the required steps to receive the permit were improperly met, and together these issues amounted to a violation of the RoN.[98]

In the first and second instances, both sides were largely talking past each other. The community's arguments focused partially on technical, regulatory violations, such as building footpaths too large. Yet they focused more so on the argument that no matter if the regulations were fulfiled or not, the RoN was still being violated by the end result of environmental destruction. They claimed that successful permitting does not equate to a non-violation of rights, and that "*the National Environmental Authority must verify that mining activities are sustainable and do not affect the rights of nature"*.[99] One amicus curiae takes this further, by explaining that "*there is a deficient normative premise, which includes an analysis of legal regulations (Mining Law, Secondary Environmental Regulations) that account for an analysis of legality unrelated to the nature of the protection action…. there is no chain of argument that allows reaching profound conclusions regarding the violation or not of certain rights*".[100]

In contrast, the Corporation's arguments barely touched any consideration of rights or the spirit of the law, focusing strictly on their compliance with license requirements and technical regulations. [101]

In both cases, the judges agreed with the Corporation, with the first explaining that a rights violation is something that violates the "minimum core" of a right, causing serious and irreparable damage, while this case only sees a limitation of a right, which, given the need to balance rights, is justifiable.[102] The second follows similar reasoning, agreeing with the Corporation given that nothing that explicitly goes against the regulations of a protective forest occurred.[103]

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[97] Unidad Judicial Multicompetente con Sede en el Cantón Cotacachi [Multicompetent Judicial Unit with Headquarters in the Cotacachi Canton], Judgement of Jul. 23, 2019, No. 10332-2018-00640 [hereinafter *First Instance of Los Cedros*].

[98] As an aside, there was some confusion over the actual status of the land throughout the case (particularly between "what is a protective forest, a protected area, and an intangible zone"), but in the end, it was determined to be a protective forest, meaning that it has a higher level of protection without any unique, categorical protections, thus having little impact on the case. From: First Instance of Los Cedros, *supra* note 97, 5.

[99] *Ibid.*

[100] *Id.*, 31.

[101] *Id.*, 5.

[102] *Id.*, 8.

[103] Sala Multicompetente de la Corte Provincial de Imbabura [Multicompetent Chamber of the Provincial Court of Imbabura], Judgement of Jul. 25, 2019, No. 10332-2018-00640 [hereinafter *Second Instance of Los Cedros*], 93.

In the third and final instance, the plaintiffs appealed on the grounds of legal certainty, arguing broadly that sporadically and forcefully applying imprecise laws, such as that of the RoN, degrades the certainty people have in their legal system. The Constitutional Court disagreed with the first instance judge's perspective that these issues were "*purely administrative matters whose judgment corresponds to the ordinary justice system*",[104] and instead chose to analyse this in the framework of a precautionary principle being employed to safeguard a constitutional right. Thus, based on Constitutional articles 396 and 73, they divided the exercise of the principle into three parts: 1) the verification of a serious threat; 2) the verification of a lack of scientific certainty; and thus 3) the necessity for the state to take timely and effective protective measures. After establishing that the first two conditions are present, the court ordered a stop to all mining activities in Los Cedros to fulfil the third step.[105]

This ruling ultimately presented an unclear perspective on the relationship between the RoN and the environmental regulations necessary to grant permits. While RoN operates as constitutional rights, permitting is governed by regulations or laws, making them theoretically independent, though they are intertwined in practice.[106] Particularly, if we believe the court that this is a matter outside of ordinary justice then there are two distinct ways to view the theory of the case: either that the compliance with the regulations was so minimal that it was void, meaning the permits were granted illegally in the purview of administrative law, and this contributes to the rights violations or that the letter of the regulations was technically followed to a minimal extent, meaning that they were granted legally in the purview of administrative law, yet the actions themselves ended up being constitutionally illegal through their effects. Both the Constitutional Court's reasoning in the final instance and the defence's reasoning in the second instance seems ambiguous to this point.

The first interpretation is shown when the court reminds the defence that "*the mere granting of a permit or license does not replace the obligation to carry out technical and independent environmental studies that guarantee the rights of nature*".[107] In other words, they are saying the established, legal obligations for environmental impact studies had not been met, and give the example of the possible impacts on the endangered Andean bear as a bright-line violation of Article 73 of the Constitution, which expressly prohibits the extinction of species.[108]

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[104] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Nov. 10, 2021, No. 1149-19-JP/20 [hereinafter *Final Instance of Los Cedros*], § 41.

[105] *Id.*, § 348.b.

[106] *Supra* note 39, 12-13; *Supra* note 13, art. 425.

[107] *Id.*, § 131.

[108] Constitución *supra* note 13, art. 73.

The second interpretation is seen in the judge's lamentation over the conduct of the mining company, stating that the process of environmental investigation was "*reduced to the entry of data into a computer system and the automatic issuance of said record, without verifying that there was an analysis*".[109] The judge further says that the Environmental Management Plan is insufficient because it is "*limited to listing in a general way activities to be carried out by the company involved, without further analysis*".[110] Thus, much like the defence of the second instance claiming that the company violated its own plan by promising to only build footpaths violated, which must mean that there is no issue and so no point to the case, or if a when "strictly necessary" and, in the end, building a large number of them, one can see how the above actions feel like they are invalidating the spirit of the regulations, even if they are not dispositive violations.

Of course, the defence's line of reasoning throughout the entire case consistently inverts this: they claim that either no regulation was violated, or if it was, the issue should be reduced to a mere regulatory matter, and therefore fall under ordinary jurisdiction rather than constitutional. Such an understanding of the case, or even of legal rights in general, would make no room for the Constitution and would thus render every right that has corresponding regulations to be non-judicial, an impossible and absurd conclusion.

Ultimately, the distinction between these two lines of reasoning depends on what it means to violate a rule, specifically whether an egregious violation to the spirit of a regulation is sufficient to declare it breached. Whereas the first instance judge recited paragraph upon paragraph of technical regulations the mining company needed to follow and had complied with,[111] the final instance judges interpreted this compliance as mere data entry into a computer, an act of fulfillment so minimal it was possibly illegal.[112] Even if we cannot decide between these two interpretations, at least without trying to find an affirmative answer to what vehicles aren't allowed in the park, we may at least comment on what each actually makes illegal.

To the interpretation that the permits themselves were void owing to the minimal level of compliance, we may note that the court orders all its "*infralegal regulations*" about the Rights of Nature to be adopted, without ever codifying or specifying what those are supposed to be. From a close reading of the case, we may attempt to systemise these infralegal regulations as demands that for the issuance of mining permits:

1. "*each individual case… must be evaluated, with technical and scientific*

[109] *Id.*, § 137.
[110] *Id.*, § 140.
[111] *Supra* note 97, 6.
[112] Final Instance of Los Cedros, *supra* note 104.

information",[113] and be…

2. "*preceded by studies of environmental assessment or risk that accounts for the biodiversity of the respective ecosystem*"[114] which include…
3. "*specific and substantiated scientific information on the impacts on the rights of the nature*",[115] which aim to…
4. "*ensure that the authorization will not lead to the extinction of species, the destruction of ecosystems and permanent alteration*"[116]

In contrast, the court does not allow the issuance of mining permits from,

1. "*listing in a general way activities to be carried out by the company involved, without further analysis appropriate to the reality of the biodiversity,*"[117] or…
2. "*the entry of data into a computer system and the automatic issuance of said record, without verifying that there was an analysis by the environmental authority,*"[118]

Given that this interpretation specifically finds issue with violating the spirit of the regulations, it seems appropriate that it was not a bright-line standard that was issued, but a series of warnings. If a bright-line standard had been issued, that would amount to a substantive change of what the regulations actually are. These infralegal regulations may be especially helpful given the nature of the contested regulations themselves. In the first instance ruling, the judge almost exclusively focuses on procedural regulations, with little care to their outcomes or ends. It is about going through the motions.[119] As the previously discussed issue of solely rule-based regimes made clear, some end goal is necessary to orient and contextualise the procedures. Thus, we may say that it seems that the RoN functioned to reemphasise the intent of the regulations by reminding the court of their constitutional importance, thus inviting stricter scrutiny of their fulfillment, even if there is no bright-line rule of what that fulfillment is. This would cause the unconstitutionality and administrative illegalness to be self-reinforcing states.

To the interpretation that the permits were valid but the action was nevertheless constitutionally illegal, we may now return to the question of what makes an action illegal to the RoN even if it is fully legal under administrative environmental law. This returns us to the precautionary principle, which in Los Cedros, the court breaks it down into three parts: 1) a potential impact; 2) a lack of scientific certainty that this impact will occur; 3)

[113] *Id.*, § 218.
[114] *Id.*, § 131.
[115] *Id.*, § 130.
[116] *Id.*, § 218.
[117] *Id.*, § 140.
[118] *Id.*, § 137.
[119] *Supra* note 97, 6.

and if the previous conditions are met, a necessity of the state to take time and effective protective measures.[120] When asking what triggers the principle, we may combine them to ask, how do the level and potential of threat combine to approach or surpass the threshold necessary for judicial action.

The potential, or uncertainty, of the harm is interchangeably used to refer to two distinct concepts in this case. Firstly, in the sense that there is some, theoretically determinable, percentage chance that this is the true value of how likely the harm is to occur. This seems to be what the court is referring to as "*relatively clear or possible effects of an activity or product*".[121] Yet, this seems to switch meaning when the majority opinion later says that the high degree of ecosystem complexity would rule out the possibility of scientific certainty, even with the appropriate studies.[122] Of course, in reality, ecosystem complexity has no effect on what the true value would be, it would only affect how close our estimations could be to the true value, in other words, the margin of error of any study. Judges Quevedo and Marin's concurrent vote, take clear issue with this, pointing out it is contradictory to fault someone for not having certain studies when, if they did have those studies, they would be insufficient anyway. The dissent is further correct in stating that "*The ruling does not explain why the Court, without relying on technical support, would have the ability to decide a priori what is scientifically demonstrable and what is not*".[123]

Thus, the court is not just suggesting that the traditional understanding of the precautionary principle is at play, in which the courts have to respond to an established risk with an eye towards prevention, but moreover, even the possibility of a possibility of risk may be too much, particularly when that second-order possibility is particularly large (in other words, there is an expectation of a large margin of error).

Thus, it seems we cannot determine any bright-line rule for how small a chance of harm surpasses the threshold for a company to prevent the application of precautionary measures to ensure the RoN. We may at least conclude that independent of that percentage chance, the margin of error of this chance must be fairly low.

We may now focus on what level of harm, independent of bright-line rules and without the doubt that comes from unenthusiastic regulatory compliance, is enough to violate the RoN. Given that the level of harm and the probability of that harm are inseparable when determining if a violation will occur in the context of the precautionary principle, we instead must look at cases where the probability of harm is 100%, to independently isolate the threshold of harm necessary to violate the RoN is. This forces us to consider instances of past harms, in which courts have been asked to decide whether they deserve

[120] *Supra* note 104, § 62.
[121] *Id.*, § 62.2.
[122] *Id.*, § 125.
[123] *Id.*, § 115.

protective actions, specifically because they violate the RoN.

E. Which Past Actions May Have Violated the Substantive Rights of Nature?

To understand what level of harm needs to have occurred to trigger a protective action under the RoN, independent of administrative law violations or unenthusiastic fulfillment of permitting requirements, one may turn to the case law to try to find some threshold, only to find immediate inconsistency: in the aforementioned case of earthworks in Puyango, a RoN violation was declared owing to the deposition of the rock and soil into a river from the digging of a foundation for a single building,[124] while the later RoN case of Condor Mirador (Mining) concerned the deposition of the rock and soil from an entire mining operation being dumped into a river, yet found not to be a violation of the RoN![125]

Yet even if we cannot create such a rule, we may possibly ask if there is a lower bound for sufficiency, in other words, is there a lower threshold, the smallest amount of harm that may still be a violation? As an example, in the aforementioned case of the tree fellings in Cuenca, we saw the city was held in violation of the RoN owing to the felling of only dozens of trees.[126] As another, the singular act of a family keeping a wild animal as a pet was enough to violate these rights in the case of Estrellita.[127] Admittedly, these cases do not inherently create the lower threshold, given that there may be other, lower cases that the author is unaware of, or that future cases may find a violation of these rights owing to even less severe instances of harm. Yet they do give us a sense that judges are willing to entertain, even confirm, instances of rights violation that are seemingly miniscule. So why not entertain cases of vastly larger scales of damage? Two lines of reasoning seem present in the aforementioned cases which may contribute to this seeming inconsistency.

Firstly, economic cost-benefit analysis may not be formally calculated by judges, but one need only be passively familiar with the Tellico Dam controversy[128] to understand the basic principles of rational decision-making lend themselves to some proportionality in environmental protection. Statutorily, Article 283 of the constitution recognises that "*The economic system is socially oriented… it tends towards a dynamic, balanced relationship among society, State and the market, in harmony with nature*".[129] This is seized upon by a number of judges, not least Judge Martinez in a dissenting vote to Los Cedros,

[124] Puyango Earthworks Case, *supra* note 21.

[125] Primera Sala Civil, Mercantil, Inquilinato y Residuales de Zamora Chinchipe [First Civil, Commercial, Tenancy and Residual Chamber of Zamora Chinchipe], No. 1711120130317.

[126] Cuenca Trees case, *supra* note 75.

[127] Estrellita case, *supra* note 70.

[128] Louis P. Cain & Brooks A. Kaiser, *Public Goods Provision: Lessons from the Tellico Dam Controversy*, 43 Natural Resources Journal 979 (2003).

[129] *Supra* note 13, art. 283.

who councils that "*it is not feasible to grant these rights [the RoN] an all-embracing, absolute or prevalent nature over other rights or constitutional norms, reaching the point of excluding all extractive activity*".[130] In short, the Rights of Nature must be applied with a consideration of the economy.

Secondly, we may consider the influence of negligence, or a failure to exercise reasonable care. This is relevant when one acknowledges that extractive projects always require some minimal amount of unavoidable environmental harm, such as the removal of the metals from the earth that mining operations seek, and often tend to involve other amounts of negligent harm, whether from cost-cutting, reckless, or accidental behaviour. The large rhetoric around economic-environmental balance in the constitution contributes to the idea that unavoidable harms should not be subject, or at least be less subject to scrutiny. On the other hand, damages coming from negligence have, by definition, less defence to them, given that they were not necessary, and so are likely more applicable to Rights of Nature violation charges. This mirrors the additional scrutiny that negligent harm (specifically "due to accidents, incidents or poor application of environmental management plans, or due to major non-conformities"[131]) invites in the context of having mining permits revoked. This further fits with the theory of the Cuembí Triangle case,[132] given that the court's order to reformulate the plan was to allow them more time for due diligence, which could have led to an optimisation, and so less non-necessary infringement, of the rights in question.

This is more obvious when we look at the weakness of RoN arguments which allege a RoN violation from the necessary harms of an extractive project. For instance, take the Condor Mirador (Mining) case, in which the plaintiffs tried to allege that mining activity in the area should be prevented owing to the possibility of "*contamination of soil and water, noise and air pollution, elimination of vegetation cover, elimination of forest in an area of at least 2000 hectares…*"[133] This is equivalent to arguing that a specific dam is in violation of the RoN for reducing the downstream water flow. Without any damningly negligent details about that harm, judges are effectively being asked to outlaw entire industries. These damages, while unfortunate, are at least partially inherent to the activity in question, to rule them as illegal would be a dramatic use of judicial power.

As its logical inverse, presenting negligent environmental damages

[130] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], 10th of November, 2021, Saved Vote by Judge Martinez for Sentence No. 1149-19-JP/20, § 20.

[131] Reglamento Ambiental de Actividades Mineras [Environmental Regulation on Mining Activities], § 140 (Asamblea Nacional [National Assembly], Quito, 2016).

[132] Cuembí Triangle Case, *supra* note 41.

[133] First Civil, Commercial, Tenancy and Residual Chamber of Zamora Chinchipe, *supra* note 125.

provides a stronger case for RoN violations. Take the case of the Biodigesters in the Tsáchila Peripa Commune. A corporation had established several pig farms, whose pollution was affecting the community. The company announced they were building biodigestores, to turn the pigs' methane into fuel, which caused the community to allege this would cause a violation of the RoN. The court decided that "*the concern of the plaintiffs about the impact on the environment is legitimate not because of the installation of the biodigesters, but because of the way in which they could function, if the essential, adequate and timely monitoring is not carried out*"[134] In other words, the issue was not the unavoidable harm, but the risk of negligent harm that could arise from the improper conduct.

This further helps to explain the theoretical confluence of administrative environmental law and the RoN. Given that the point of environmental regulations is largely to limit the avoidable environmental damage of extractive projects, when a party only complies with them in the most box-checking fashion possible, the likelihood of negligent damages is likely to rise. In short, the less necessary the harm is, the less defensible it is.

Thus, while there is no bright-line rule for how much harm triggers the RoN, we know that it is modulated by the economic benefit and the level of negligence of the harm. Interestingly, recalling our earlier examples of some of the smallest harms that have successfully violated the RoN, we can see the dynamic between these three variables play out. In the case of tree felling in Cuenca,[135] the level of absolute harm was quite low, yet there was little justifying economic benefit (given it was done for aesthetic reasons), and could be said to be fully negligent, given that it was a completely avoidable action that city voluntarily undertook and could have chosen to rectify at any time (via replanting) prior to the case. Similarly, in the case of Estrellita,[136] which also had an overall quite low level of total harm, given it had to do with the attempted domestication of a single animal, also displayed no justifying economic benefit nor was the harm in any way unavoidable, and on the contrary, was likely a completely-economically neutral and optional exercise of harm. Therefore, we may treat these three principles, the absolute level of harm, its economic justification, and its negligence, less as prongs of any test, but as independent variables and so, even if one is low, the high degree of the others may counter to still create a violation.

Returning to our question on future violations, we saw that it was principally based on both the probability and severity of harm. We dissected the variable of probability into the probability itself and its margin of error and then to isolate and understand how the level of harm is treated, we turned

[134] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Jul. 16, 2009, No. 0567-08-RA, 8.

[135] Cuenca Trees case, *supra* note 75.

[136] Estrellita case, *supra* note 70.

to cases that hinged upon past, discrete action. In these cases, we saw the severity of harm was modulated by how economically justifiable and how negligent it was. Altogether, these five considerations – 1) probability of harm, 2) margin of error in probability, 3) level of harm, 4) economic justifiability, and 5) negligence - present a, if not taxonomical, list of considerations that courts seem to consider when considering if an action will result in a violation of the RoN. This naturally prompts us to ask exactly how the RoN is balanced with competing rights.

VI. How are the Rights of Nature Balanced Against Competing Rights?

Finally, we may take up the challenge of the Galapagos Carretera case judge, who noted the necessity to "*go a little deeper*"[137] on the balance of the RoN and competing rights. Some have argued that proportionality in constitutional law is a "*universal standard of rationality*", such that "*the interference with rights must be justified by reasons that keep a reasonable relation with the intensity of the interference*".[138] This is relevant if one considers Duarte's ideas on social claim rights, meaning those that depend on some positive, government action that enforces one's rights by enforcing another's duty to not infringe on those rights, such as the rights of nature. He explains that the common situation is one of economic scarcity, and thus these rights will not be fully enacted.[139] Thus, the question is what does that RoN balancing concrete look like? While the earlier section showed when balancing is not necessary, and when it is how the procedure may minimise non-necessary infringement, we have yet to address cases in which the Court substantively balanced competing rights. To date, Ecuadorian Courts have, at least, considered how the RoN interacts with a plethora of cultural rights, various property rights and the right to free internal migration.

A. Balancing between the Core and Periphery of Rights

We previously identified that courts need not practice balancing when the norms were in direct logical conflict, as such norms cannot be balanced, or when they were so vague that any conflict is theoretical at best, leaving little to actually balance.[140] We found that balancing was the realm of "middle cases", which hinged upon substantive norm conflicts whose full fulfillment of either would lead to non-total yet non-zero infringement of the other.

This is further refined in the case of the Ley de Galapagos, in which the

[137] Santa Cruz Highway Case, *supra* note 22.

[138] Jan Sieckmann, Proportionality as a Universal Human Rights Principle, in *Proportionality in Law: An Analytical Perspective* 3, 3 (2018).

[139] David Duarte, Gains and Losses in Balancing Social Rights, in P*roportionality in Law: An Analytical Perspective* 49, 62 (2018).

[140] *See supra* note 90, Part II.B.

plaintiff sued the Federal government for a law which restricted internal migration to the islands, accusing this of being a form of unconstitutional discrimination.[141] For context, this law was actually implementing Article 258 of the current constitution, and similar provisions existed even in the prior constitution.[142] Given this, the plaintiff argued for a near-natural law type of argument, claiming the discrimination went against a laundry list of constitutional rights (1, 3, 4, 6, 10, 11, 40, 61, 64, 66, and 424), while the defence simply pointed out that the action is constitutionally approved and that restricting migration to the fragile Galapagos islands was important for the RoN. In response, the court found that this really was not a case of rights balancing, given that the constitution plainly states that this is a legal behaviour, and given that the law itself was explicitly constitutionally enabled and important for the RoN as a norm, it was not unconstitutional.[143]

From this case, we can observe an interesting interpretation of the idea of balancing. The fundamental case contrast in the case is between Article 11, part 2, which reads "*All persons are equal and shall enjoy the same rights, duties and opportunities. No one shall be discriminated against for reasons of ethnic belonging… migratory status*"[144] and Article 258[145] which explicitly discrimination based on migratory status. While the court's decision about the specific law is understandable, in light of the desire to apply the highest and most specific rule available, it largely ignores the broader issue that the constitution itself seems to include a severe contradiction, which should naturally lend to rights balancing. Yet the court seems to oscillate on the question of whether any rights have been infringed or not, stating in the conclusion that the law "*does not threaten the unity of the Ecuadorian State, nor the rights, freedoms and opportunities of citizens; nor against the principle of equality before the law, nor the mobility or migration, which, as has been analysed, the limits [which] arise from one's own Constitution*".[146]

This argument is strongly reminiscent of the first instance judge in Los Cedros, who made a distinction between the "*minimum core*"[147] of a right and the whole of the right, only the infringement of the former being an actual violation, given that rights are not absolute. In the case at hand, the judge seems to consider that the law does limit the more generalized rights of equality (such as in regard to migratory status), but does not infringe on their core, likely because it is not the generalized right to migration which is at

[141] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of Apr. 26, 2012, No. 017-12-SIN-C [hereinafter *Galapagos Law Case*], 2.
[142] *Id.*, 3.
[143] *Id.*, 9-17.
[144] *Supra* note 13, art. 11.2.
[145] *Id.*, art. 258.
[146] Galapagos Law Case, *supra* note 141, 17.
[147] First Instance of Los Cedros, *supra* note 97, 8.

issue, but a very specific instance of it. Analogously, the right to free speech in the US may be rightfully infringed by rules which prohibit speech that leads to imminent public harm, but is wrongfully infringed by rules that prohibit a substantial amount of constitutionally protected speech. Applying the logic of the overbreadth doctrine, we may understand proportionality to allow for the limitation of a right in the form of specified, peripheral carve-outs. Thus, it seems that the Court may also be uninterested in balancing rights in some of the aforementioned "middle cases", those of substantive norm conflicts whose full fulfillment of either would lead to non-total yet non-zero infringement of the other. Yet important, this is because the above case is not truly one of the middle cases. This is owing to the fact that the full fulfillment of the Ley de la Galapagos would only infringe on the periphery of the right to free migration, given that the vast majority of instances of internal immigration would be unchanged, yet the full fulfillment of the right to free migration would fully infringe upon the core of the Galapagos Authorities' special right to control migration, as it would simply remove that privilege from them and give it the migration-governance privileges of any other government. There is an asymmetry between the two rights, given that the core meaning of one is located within the periphery of another, thus forcing the judiciary to decide for the one whose core is in peril when they are in conflict. Yet the core of any right is more identifiable when it is more narrow and specific, thus it seems to emphasise that *lex specialis derogat legi generali.*

B. Balancing the Core of Rights

As a whole, this case gives a paradoxical perspective on the RoN. On one hand, the court did rule in favour of the RoN, given that it upheld the migratory restriction to the Galapagos and so could be said to have upheld its conservation.[148] On the other hand, it suggests that rights balancing only needs to be performed when both the cores of two rights are in conflict. Yet it also seems to suggest the court privileges rights with narrower or more identifiable cores, which is difficult for the RoN given its open texture. Imagine that, as allowed by Art. 407,[149] the president and assembly approve of the extraction of natural resources in a protected area, such as what was recently done for oil drilling in Yasuni National Park. For activists to sue on the grounds of the RoN seems an uphill battle, as deciding against the President would be to directly violate the core and straightforward meaning of one constitutional rule, while deciding for the President could easily be seen as a permissible limit to the periphery of another constitutional set of rules, the RoN. Thus, it seems the severity of a rights infringement in the context of another rights infringement has less to do with the action itself or the importance of each right, but the scope of the rights. Thus, genuine rights

[148] Galapagos Law Case, *supra* note 141, 17.

[149] *Supra* note 12, art. 470.

balancing seems to occur most appropriately when both rights symmetrically infringe onto each other's core meanings when fulfiled. Thus, we may ask what the Court's requirements are in these cases.

One example of such a case involves a shrimp farmer in Cayapas, who had a farm in the mangroves that was eventually decided to be a part of the Mataje-Cayapas Reserve. Unlike his neighbours, he held out from being evicted, arguing that his constitutional rights to work and property defend him against government eviction, something which in the first and second instances judges agreed with. Yet in the Constitutional Court, the judges argued that the past judges failed to consider the RoN, forcing them to ask whether these judges violated due process of the use of public powers. This was broken down into three considerations, whether the previous rulings were reasonable, or based on constitutional principles, logical, implying a coherence between premise and conclusion, and understandable, enjoying clarity of language.[150]

They found the previous courts failed the reasonability standard, given that they "*did not at any time examine the existence or not of a violation of the constitutional rights of nature,*" for instance they "*should have included the study of the potential impacts that the production process in aquaculture generates on nature*". [151] Thus, the ruling was overturned and the case was sent to be retried, and by establishing that the "*reasonable, logical, and understandable*"[152] standard was applicable to the RoN, the Court set the precedent that cases involving environmental harm must at least consider the RoN in their analysis. This is further seen in the recent selection by the Constitutional Court of the Dulcepamba Dam case for their review, in which their reasoning was the same, that the second instance judge failed the reasonability prong by failing to consider the RoN.[153] Now that we are sure courts must consider the RoN in relevant cases of rights conflicts, we can move on to asking how they do so.

For this, we may look again at the Cuembí Triangle case previously described, where the government attempted to create a protective area on the lands of indigenous peoples, which would have, not formally but in practice, restricted their rights. In this case, the technical, text-based, non-conflict of norms was not enough. Instead, the court took a more *de facto* understanding of the situation, for instance acknowledging that many historic communities lack formal titles to their land, and despite this introducing certain legal issues, they were still the owners of that land, and so the exception for communities with titled land was not sufficient to ensure their rights.[154] In a

[150] Corte Constitucional del Ecuador [Constitutional Court of Ecuador], Judgement of May. 20, 2015, No. 0507-12-EP, 8.
[151] *Id.*, 14.
[152] *Id.*, 9.
[153] *Id.*, 15.
[154] Cuembí Triangle Case, supra note 42, § 105.

similar vein, the exception for sustainable "harvesting" activities was simply too vague to count as genuine assurance that they would be able to maintain their food-gathering practices and collective way of life.[155] Thus, clear instances of potential rights violations cannot be hand-waved away with technicalities. This *de facto* understanding is further likely a necessary component of the previous point on ensuring the only the most necessary infringement of each right occurs in the context of rights balancing.

C. The Panoply of Factors when Balancing Nature's Rights

Thus, in summary, as we previously established, the RoN is transversal and *erga omnes*, and so all competing rights have the potential to be balanced against them, including various rights concerning culture and autonomy for indigenous peoples, the right to migration, equality before the law, property, and work. The balancing procedure should lead to conclusions that are reasonable, logical, and understandable, and specifically to be reasonable, the RoN should be analysed in cases where it is contextually appropriate. Yet even then, balancing need not always be necessary, as to be balanced, the rights must infringe each other in the same way, either both to the periphery or both to the core. When balancing is done, the severity of the violations to each should be unavoidable, in other words, one right should not infringe on another in an unnecessary way. This necessitates a de facto, practical understanding of how each right will be limited, rather than relying on theoretical promises that any given right will be respected.

In the previous section, we identified that when a court was asked whether a RoN violation had occurred, specifically allowing us to momentarily skip questions of future possibility and scientific uncertainty, their analysis included elements of the total level of harm, the economic benefit of that harm, the negligence of that harm, and the rights balancing of the case, the final aspect of which we now have a more complete understanding of.

In the section prior to the previous, we attempted to identify the elements that courts analysed when asked to consider whether a future action would violate the RoN. This effectively boiled down to the likelihood of the harm and the severity of the harm. We identified that the likelihood meant not just the chance of the harm in question, but the margin of error of that understood chance.

Together, these three sections attempt to present a taxonomical description and analysis of the elements that Ecuadorian courts, especially the Constitutional Court, have paid attention to over nearly two decades of analysing the Rights of Nature.

Further, in a much earlier section, we attempted to understand what the court considers to be nature, and found it rested principally on two variables: being free from human influence and including biotic life. Further, the

[155] *Id.*, § 147.

previous discussion of how these two variables combine in creating "nature", was telling in so far as how the Rights of Nature can be analysed. For instance, we may say that there is evidence that when courts analyse the RoN, they at least sometimes pay attention to the absolute amount of harm, its economic justifiability, its negligence, and how it affects rights balancing, but we cannot actually say how these variables are themselves weighed against each other. Thus, we may admit that this analysis leaves much unanswered. Yet, even from such a limited analysis, we have been able to start to understand how courts reason on these questions and what variables they include. We may put the utility of such an analysis to the test by asking whether it allows us to answer the questions posed at the beginning of the piece.

VII. Responses to the Initial Five Sui Generis Issues

We may finally address, in turn, the five criticisms of the concept of the RoN presented earlier.

A. Anti-Human Rights

The first criticism was that the RoN is anti-human, usually framed in such a way as to argue that they hurt human well-being by hurting their economic well-being. To this, we have seen that the Ecuadorian courts are willing to consider competing human rights and reprimand lower courts for failing to properly balance them, as in the Cuembí Triangle case.[156] Further, as we saw in Los Cedros, judges have argued to consider the economic considerations of applying the RoN.[157] Together, these examples reinforced via practice the statutory obligation that the RoN be applied transversally, in conjunction with the existing corpus of rights. Limiting and violating rights are not the same, and to balance rights inherently involves competing rights being infringed to some, theoretically acceptable, extent. Therefore, we may say this criticism is partially true, the RoN is often antagonistic to human interests, but to allege that they overpower or trump human interests would be unfounded.

B. The Limits of Nature

The second criticism was that the RoN suffers from jurisdictional issues, firstly by using the vague notion of "the environment" and secondly by failing to include an intuitive notion of who, exactly, the party is in a RoN case. To the first point, we may observe that the RoN has been used largely for biotic and non-artificial beings, and that while ambiguities may exist about exactly how those variables fit together, this is not a fatal flaw. To the second issue, we exhaustively divided theoretical cases of environmental destruction into four types: discrete *ex-ante*, dispersed *ex-ante*, discreet *ex-post*, and dispersed *ex-ante*, and reasoned that in only cases of dispersed *ex-post* harm is this

[156] *Ibid*.

[157] Corte Constitucional [Constitutional Court], Judgement of Nov. 10, 2021, No. 1149-19-JP/20, § 20.

question even relevant. In these cases, the judges have a large scientific bureaucracy to assist them in answering this question. The reason this may seem to even be an issue in the first place is that, in most rights regimes, a specific party must be identified and delineated for reasons of standing, yet given the universal standing of Ecuadorian RoN, this is not an issue. Therefore, we may say this issue is, in practice, moot.

C. The Aggregation of Distinct Entites into "Nature"

The third criticism was that the RoN suffers issues of aggregation, that is even if the jurisdiction of "nature" at large is defined and the part of "nature" that suffers harm has been defined in a specific case, we cannot say how the rights are dispersed amongst the individual entities within the part of "nature" we are paying attention to. Further, the individual entities within any part of "nature" may be helped or hurt by a given remedial action, and thus the net outcome of the action may be reframed as either positive or negative, depending on the, ultimately arbitrary, way the entities are grouped together.

Given the highly theoretical nature of these criticisms, we may contextualise them with a hypothetical case. Imagine a section of rainforest was being polluted by a mining company that had received mining permits under dubious conditions. The aggregation question asks how we conceptualise the right's bearers, for instance, is the whole of the affected area one cohesive entity, does each ecosystem have individual rights, does each species, each animal? Further, we must ask how we weigh the rights of these different parts together. Imagine one remedial plan that helps two of the three watersheds and hurts the last one, but the last watershed contains the majority of distinct species. One may ask whether this is a net good or bad, and further, are these rights inviolable such that the courts may not sacrifice a small number of them for a greater number?

The Constitutional Court has consistently emphasised the systemic idea of nature, that there exist emergent rights that exist for nature greater than the sum of its parts.[158] Thus, to the aggregation question, we may say that all individual entities in the ecosystem have rights, but stronger rights exist for the ecosystem as a unitary whole. Thus, we need not try to divide the rights between its entities. This of course becomes problematic in light of the watershed-species question posed above. If the entities are put in conflict, how is this resolved? Again, the court's emphasis on the systemic perspective is necessary. If the good of the whole is larger than the good of each of its parts, the well-being of the whole should be appropriately prioritised. This is further in line, conceptually, with the concept of balancing previously discussed, if the rights of humans and nature should be balanced, it is difficult to imagine that the rights between aspects of the environment should not either. To the

[158] RoN Guide, *supra* note 50, 40.

hypothetical above, the court thus need not count the plus and minus to watersheds, species, and individual animals and plants, and then decide which category to consider the most important. Instead, the court must consider all the degrees of benefits and harms to the entire, jurisdictionally defined part of "nature" to come to a proper conclusion. Sometimes this may privilege the watershed, and other times the species, but it is never either on a categorical basis.

This may be an unsatisfying response, detractors may claim this is to simply harken to some notion of the "greatest good". Thus, we may further refine the response by adding that in the Estrellita case, we saw the court decide that animals have individual rights distinct from the RoN as a whole. Now this may seem to throw a wrench in the argument, especially if one considers that some animals thrive in degraded and human-influenced environments. Yet this would be to confuse the notion of individual animal rights with the overarching notion of human rights. While human rights generally exist to ensure that humans are better off, animal rights seem to ensure they are able to perform their natural role in an ecosystem. It is the re-emphasis of the systemic view, necessary due to the outsized role that animals play in maintaining ecosystems. In the Estrellita case, the specific rights given to animals do nothing to ensure their well-being in the natural world, but are the right to exist and to free animal behaviour.[159] It is the gazelle's right to be eaten by the lion. Thus, the "greatest good" clearly points to "good" as akin to an environment free of human influence.

To the most dismissive, those who believe that rights must be distributed in an individual, discreet manner, and the conflict between holders must be more defined, they may well ask: "*If an ecosystem would be better off without some species, can the species be reduced? Does that not generate a rights conflict?*". Yet such questions betray a fundamental misunderstanding of what ecosystem health is. One may claim that, in some sense, an ecosystem is better without certain higher trophic levels, as they reduce the overall biomass. Yet this understanding of ecosystem health is not what "nature" means in this context, in this paradigm, nature is the thing that is biotic, and more importantly, absent of human influence. Nature cannot be, *ceteris paribus*, better off without some species, as by the definition of Nature in this regime, given that the presence of natural species is a key component of Nature's health. In total, the system's perspective is absolute, given that while animals seem to enjoy increased rights over other parts of the ecosystem, these rights are only to maintain their natural function within the ecosystem. Thus, the aggregation question is answered quite simply, as it is the ecosystem (as the highest aggregation) that is the most highly valued.

[159] Estrellita case, *supra* note 70, § 175.

D. Comparing Multi-Dimensional Values

The fourth criticism has to do with multi-dimensionality. This is the issue that describes the fact that the value of nature in law is traditionally boiled down into dollar amounts, which allows the possibility of comparing two things, while the RoN forces one to consider multiple, dissimilar values (ranging from the sanctity of species existence to the beauty of the environment to the health of the ecosystem), which forces decision-makers to act, at least before any precedents are set, in an arbitrary fashion.

This is a much larger and much more often debated issue than strictly in the context of the RoN, and so we may start by employing more generalised arguments. Firstly, to ignore a variable is equivalent to setting it at zero. If we acknowledge that the true value is some nonzero, unknown, and intermittent value, then some infinitesimally small estimated value is more likely than zero to be closer to the true value. Secondly, some may take issue with this, arguing that there is no true value, as the importance of any of these disparate values is fully normative. Thus, any estimation is as close as any other estimation, given there is no target. This is true, but only so far as to say that any values our legal systems gesture towards is normative (freedom, democracy, equality, etc.). Thirdly, just because values are incommensurable (meaning they cannot be compared on the same scale) does not mean they are incomparable. Decisions as simple as choosing between restaurants to eat dinner require choosing between numerous incommensurable variables, such as food quality and price.

These abstracted lines of reasoning may seem suspect in the context of the RoN though, given that conventional environmental law already has mechanisms to estimate the dollar value of environmental quality, and so shifting away from it would be a downgrade. Yet this line of reasoning is somewhat confused, given that the RoN simply shifts where the arbitrariness resides. In the RoN, the arbitrary decision is between the intrinsic value of the environment and the dollar value of some environmentally degrading project. In conventional environmental law, if one wants to employ some cost-benefit analysis, the arbitrary decision is how to estimate the intrinsic value of the environment into dollars, which is then non-arbitrarily compared to the dollar gain of the environmentally degrading project. The RoN simply shifts the arbitrariness from a scientific bureaucracy to a judge, and so the criticism that the RoN introduces new arbitrariness is simply to pretend the system was not arbitrary, to begin with.

E. Nature as Having Interests

The fifth criticism has to do with interest having, the idea that inanimate and unconscious entities cannot be properly thought of as having an interest, and so cannot bear rights. This rests on the conception of rights that is status-based, that given some characteristic, some group is rightfully enfranchised.

We can briefly respond in two ways: by arguing that the environment does have interests or by claiming that non-interest-having beings can have rights.

To the idea that the environment does have interest, we can point to the obvious fact that biotic life uses energy and work to further the existence of its genes, whether that be through surviving itself or ensuring the survival of its offspring. Admittedly, this does not apply to abiotic beings, which may be part of the reason the court presents an ambiguous stance on them.

To the idea that non-interest-having beings can have rights, we cannot properly formulate an argument. This is because status-based conceptions of rights, the idea that some group is rightfully enfranchised owing to some quality or characteristic, is also not an argument. These are simply assertions, with the obvious historical context being that what qualities allow enfranchisement has been arbitrarily restricted for the entire history of rights. We may also point out that the negative argument, that the environment cannot have rights because it does not have interests, is an outright "no true Scotsman" fallacy. Given there is no argument to make, we may at least point out that corporations do not, themselves as distinct entities, have interests. Admittedly, one may argue they only have a simplistic interest in generating profit, but this is no less mechanical than an animal's interest in surviving and reproducing.

More importantly, this criticism is a binary argument about the abstract validity of the rights, while the other four issues were about the efficacy of these rights. This criticism, by making a status-based argument about the validity of Nature having rights at large, can be most succinctly shut down by the sheer fact that Nature, at least in Ecuador, does have rights. Any argument that x status cannot hypothetically exist is false when one can observe that x status does exist. À la Popper, one black swan is enough to prove that not all swans are white.[160]

F. Remaining Questions

Thus, the first four criticisms point to some important points. To the anti-human question, the Ecuadorian court system has yet to enumerate taxonomical guidelines on what is an acceptable level of tradeoff between human and natural interests. Whether they ever will seem unlikely, in the same way that few courts have ever tried to enumerate the precise trade-offs between competing values, such as between security and liberty. To the jurisdictional question, it is still ambiguous exactly what is the proper role of the judge and the scientific bureaucracy in determining what characteristics are sufficient to cause an entity to be included as a part of nature in particular suits. To the aggregation question, the relationship between the unique rights of animals and the rights of Nature as a whole, in the rare case they are in conflict, is possibly open. To the multidimensionality question, how the

[160] Karl Popper, The Logic of Scientific Discovery, 373 (2nd ed. 2005).

judiciary can avoid subjectivity when dealing with inherently subjective values is equally open, but to attempt to provide an objective answer to subjective value weighing may simply be a logical contradiction. Thus, while these questions promise future scholarship within the Rights of Nature framework, the adequacy of the answers and exceedingly theoretical gaps left over demonstrate that the RoN is an intelligible framework.

Conclusion

We began by noting the common stereotype of the RoN, that they were just legal poetry, sounding nice but lacking real meaning. This was formalised into our formulation of intelligibility, asking whether these rights were too in conflict with the existing Ecuadorian legal system to be valid and whether they were able to be objectively enough balanced within that legal system. Through an analysis of the metanarrative of the RoN and a slate of random cases, we could see this was not the case and disproved that they were unintelligible. Then, to demonstrate the intelligibility of the regime, we broke it down into logical steps. We first identified what characteristics make something "Nature" and how it as an entity is defined in specific cases. We then determined the procedural and substantive rights that these entities were entitled to, what factors may lead to the idea that actions or rules have violated these rights, and how these rights are balanced against competing ones. Thus, we were able to appropriately answer the literature questions, yet with some questions remained.

Yet our inability to perfectly answer the five literature questions points to a broader point, that we cannot formulate and weigh all of these factors without straying into the realm of legislating. Thus, the Constitutional Court will inevitably be forced to legislate to some extent. The aghastness of legal formalists to such an idea points to the ultimate issue the RoN faces, that by being a novel and sentiment-based rights regime, we cannot employ what Austin termed "*the childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody*".[161] New administrative regulations may be novel, yet they are seen as less problematic given their more objective criteria of fulfillment. Established rights regimes may be based on sentiments, yet their storied nature, societal acceptance, and foundation of congealed reasoning lend them credibility. The fatal combination of being both novel and sentiment-based means that the RoN often commands little respect. Yet throughout these cases, we have seen judges show restraint in their rulings, largely only castigating lower courts when they have entirely failed to even consider the RoN, not for any improper weighing of them. Further, the intertwining of regulations and rights frees the courts from fully being legislators, even if they need to make the law to some

[161] John Austin, Lectures on Jurisprudence or the Philosophy of Positive Law, Vol. 2, 634 (5th ed, 1885).

minimum extent. Thus, we concluded that a continual development of this concept of rights is not a fool's errand, but a consequential step in the ongoing history of the development of legal rights.