

# RIGHTS OF NATURE IN THE CONSTITUTIONS OF ECUADOR AND BOLIVIA.

## *THE PRINCIPLE OF BUEN VIVIR AND THE CONSTITUTIONAL SUBJECTIVITY OF NATURE.*

**Damiano Fuschi<sup>1</sup>**

**Abstract [ITA]:** L'espressione castigliana "*buen vivir*" è correlata alla cosmovisione indigena presente in America Latina. Questa è stata inserita nella Costituzione di Ecuador e Bolivia, rispettivamente il 20 ottobre 2008 e 7 febbraio 2009. Stando alla visione occidentale di sviluppo, vi è una vita piena e soddisfacente all'aumentare della ricchezza e della produzione di beni e servizi di ogni singolo Stato che potranno essere usufruiti da ogni singolo cittadino. Per i popoli indigeni tradizionali, la vita non si svolge in funzione esclusivamente alla sfera economica. Molto rilievo viene conferito alle conoscenze tradizionali, al rispetto della natura e alla vita in comunità in condivisione e rispetto reciproco. L'aspetto principale di questa visione cosmogonica è l'armonia con la natura, con la *naturaleza*, tutto ciò si riflette nella produzione di beni e servizi, i quali devono essere il più possibile equilibrati e rispettosi di essa. Questo approccio segna il passaggio, almeno teorico, ad una visione ecocentrica del diritto dell'ambiente. Assume rilievo nei giorni di maggio 2023 la proposta di Correa del 15 agosto 2013 in cui chiese al Parlamento di attuare il cosiddetto "piano b" del progetto Yasuni-ITT, per un parziale sfruttamento del sottosuolo del parco nazionale Yasuni (abitato da popolazioni indigene tradizionali). Contravvenendo sia al rispetto ambientale sia alla tutela della popolazione indigena, questo caso è ritornato attuale poiché la Corte costituzionale dell'Ecuador, dopo un primo diniego, ha approvato il Referendum popolare per decidere sul blocco delle estrazioni dal sito di Yasuni. Pertanto, stando alla disciplina che regola il referendum, in Ecuador, entro 75 giorni dal 9 maggio 2023 sarà indetta la consultazione popolare. Alla luce di questa analisi si propone, in conclusione una riflessione sulla metodologia giuridica utilizzata per studiare questa fattispecie.

**Abstract [ENGL]:** *The Castilian expression "buen vivir" is related to the indigenous cosmovision found in Latin America. This was included in the Constitution of Ecuador and Bolivia on October 20, 2008 and February 7, 2009, respectively. According to the Western vision of development, there is a full and satisfying life as the wealth and production of goods and services of each individual state increases and can be enjoyed by each individual citizen. For traditional indigenous peoples, life is not solely a function of the economic sphere. Much emphasis is placed on traditional knowledge, respect for nature, and living in community in sharing and mutual respect. The main aspect of this cosmogonic vision is harmony with nature, naturaleza, all of which is reflected in the production of goods and services, which must be as balanced and respectful of it as possible. This approach marks the transition, at least theoretically, to an ecocentric view of environmental law. Significant, in the days of May 2023, is Correa's proposal of August 15, 2013 in which he asked Parliament to implement the so-called "plan b" of the Yasuni-ITT project, for the partial exploitation of the subsoil of Yasuni National Park (inhabited by traditional indigenous peoples). Contrary to both environmental respect and the protection of the indigenous population, this case has returned to the present day as Ecuador's Constitutional Court, after an initial denial, approved the People's Referendum to decide on blocking extraction from the Yasuni site. Therefore, according to the Ecuadorean rules governing the referendum, the popular consultation will be called within 75 days from May 9, 2023. In light of this analysis, a reflection on the legal methodology used to study this case is proposed in conclusion.*

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<sup>1</sup> Ricercatore di diritto pubblico comparato, Università degli studi di Milano Statale

**SUMMARY:** 1. Introduction – 2. The meaning of *buen vivir* – 3. From anthropocentrism to ecocentrism – 4. The process of subjectification of nature on the constitutional level – 5. The Ecuadorean Constitution: key aspects – 6. The Constitution of the Intercultural Republic of Bolivia: key aspects – 7. Ecuador and Bolivia compared – 8. Court cases related to nature protection (*buen vivir*) in Ecuador and Bolivia – 9. Conclusions on the method of research on the subject of neo-Andean constitutionalism.

### 1. Introduction

The Castilian expression "*buen vivir*" (to live well) is related to the indigenous cosmovision present in Latin America. It was included in the Constitution of Ecuador and Bolivia on October 20, 2008, and February 7, 2009 respectively.

Before coming up with a definition of this innovative legal concept, we need to analyze and understand the ancestral vision of indigenous peoples; only with an in-depth analysis of them we can best understand *buen vivir*.

According to the Western view of development, a full and satisfying life is connected to the production of goods and services. This is calculated with gross domestic product (GDP). However, according to traditional indigenous peoples, life is not solely a function of the economic sphere.

According to these peoples' view, all living beings, human, animal, and plant, are equal and bearers of the same rights, in a complementary relationship of equal importance.

The main aspect of this cosmogonic vision is harmony with *nature*, with *naturaleza*, all of which is reflected in the production of goods and services, which must be as balanced and respectful of it as possible. As will be detailed later in this paper, the challenge for the Legislature has been to incorporate this vision into the normative framework of a given country; an even more interesting aspect is what the examples of Ecuador and Bolivia, which have incorporated these values into their constitutions, offer us.

Moreover, this vision of *buen vivir* presupposes another fundamental characteristic: living as much as possible in community, as a function of the community. Living in community for community's sake. This translates into experimental forms of participatory and representative democracy.

In addition to the indigenous peoples who have handed down this ancestral vision of *buen vivir* for years, there is also the thought of Evo Morales Ayma, former president of Bolivia's plurinational state and promulgator of the 2009 constitutional reform, to analyze. In summarizing the concept of *buen vivir* he says: "*Nosotros, los pueblos indígenas del planeta, queremos contribuir a la construcción de un mundo justo, diverso, inclusivo, equilibrado y armónico con la naturaleza para el Vivir Bien de todos los pueblos*" and again: "*Vivir Bien es pensar no sólo en términos de ingreso per-cápita, sino de identidad cultural, de comunidad, de armonía entre nosotros y con nuestra Madre Tierra*" and concludes by saying, "*No tenemos muchas alternativas. Either seguimos por el camino del capitalismo y la muerte, o avanzamos por el camino de la armonía con la naturaleza y la vida*"<sup>2</sup>. Interesting, and consistent with his persona, is the reference to the indigenous world and people. It is worth mentioning how Evo Morales was the first indigenous president of Latin America (more precisely, he belongs to the Aymara people). As denoted by his words, *buen vivir* should serve as a model of harmonious development, respecting Mother Earth (and indigenous ancestral traditions). In the affirmation of this

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2 F. Huanacuni, *Buen Vivir/Vivir Bien. Filosofía, políticas, estrategias y experiencias regionales andinas*, «Lima: Coordinadora andina de organizaciones indígenas» (2010).

principle, one can see how strong the critique of capitalism and the Western model of development is<sup>3</sup>. In light of this analysis, a reflection on the legal methodology used to study this case is proposed in conclusion.

## 2. The meaning of *buen vivir*

After this contextualization we can arrive at a definition of the Castilian term *buen vivir*, which is derived from the Aymara language expression *sumaj qamaña* and the Quechua language term *sumak kawsay*. Despite obvious translation problems, some Latin American jurists and academics have proposed several terms that can be equated with the indigenous language but translated into Castilian. Pablo Mamani translates it as "riqueza de vida" or "saber vivir la vida"<sup>4</sup>, i.e., wealth of life and knowing how to live life. Javier Medina translates the concept of *sumaj qamaña* (Aymara language) as: "buena vida, calidad de vida, bienestar, estilo de vida, buen vivir; felicidad, alegría"<sup>5</sup>, i.e.: good life, quality of it, benestare, cheerfulness and *buen vivir*. Finally, Xavier Albó places emphasis on the coexistence of human beings with pachamama, or Mother Earth<sup>6</sup>. The indigenous terms just analyzed have a greater semantic meaning than just the term *buen vivir* (good living), since they refer to values such as: sharing, mutual respect (toward human beings and nature)<sup>7</sup>. We are dealing with an ancestral philosophical vision, which was later placed within the Constitution of Ecuador and Bolivia. These two states are the proponents of the new Andean constitutionalism, with a more careful respect for nature and the ancestral visions of indigenous peoples.

## 3. From anthropocentrism to ecocentrism

After analyzing it as a term, it is time to focus on *buen vivir* and compare it with the Western vision. The Constitutions of Bolivia and Ecuador can be seen as an attempt to overcome the Western hegemonic vision of development by presenting the world with a sustainable and communitarian alternative linked to the indigenous tradition.

The concept extruded from the Andean view is cosmocentric in which human beings have a subordinate role to the order of nature and things. Whereas, in the West, there is an opposing view, with man at the center and not nature, that is, the anthropocentric perspective<sup>8</sup>.

One can find numerous contrasts between the Western hegemonic system and the Latin American counter-hegemonic system, starting with the principles that move and guide the lives of living beings<sup>9</sup>. In the new Andean constitutionalism, there is a complementarity between human beings and nature. This is not found in the West where, for cultural and historical reasons, the legal construction is anthropocentric<sup>10</sup>.

3 E. BERNAL – B. MURIEL – G. OLIVAREZ, *Pobreza, ingresos laborales y trabajo en Bolivia*, (2015).

4 S. SCHAVELZON, *Plurinacionalidad y Vivir Bien/Buen Vivir: dos conceptos leídos desde Bolivia y Ecuador post-constituyentes*, Abya Yala Quito, 2015.

5 *Ibid.*

6 X. ALBÓ, *Movimientos y poder indígena en Bolivia, Ecuador y Perú*, vol. 71, Cipca, 2008.

7 R. PERON – M.-J. CARO-BENÍTEZ, *La subjetividad jurídica de la naturaleza en el nuevo constitucionalismo andino: los casos de Ecuador, Bolivia y Colombia*, «Saber, Ciencia y Libertad», 18/1 (2023).

8 S. BALDIN, *I diritti della natura nelle costituzioni di Ecuador e Bolivia*, «Visioni LatinoAmericane», 10 (2014), pp. 25–39.

9 J. P. BLANCO – E. P. AGUIAR, *El Buen Vivir como discurso contrahegemónico. Postdesarrollo, indigenismo y naturaleza desde la visión andina*, «Mana», 26 (2020).

10 On this point see, also in relation to environmental control and protection, C. SCHMITT – E. CASTRUCCI – F. VOLPI, *Il nomos della terra nel diritto internazionale dello Jus publicum europaeum*, Adelphi, 1991

Importantly, the analysis of *buen vivir* must address both the indigenous legal tradition, which posits a holistic and ancestral link between man and nature, and the prospects for a new model of economic development, in contrast to the prevailing global thinking. Both of these facets are present in the new Andean constitutionalism<sup>11</sup>.

Interestingly, the constitutions of Bolivia and Ecuador explicitly refer to a plurinational and intercultural state (Art. 1 Const. Ec. refers to the state as "*intercultural y plurinacional*"). This fosters a conceptualization of the constitutional state that is more relevant to the social and demographic composition of the two states, thus including in the legal semantics also the indigenous peoples who, until now were the great excluded of past constitutions built merely on the Western model.

The very idea of *buen vivir*, in addition to respect for nature, is based on social cohesion among the various peoples who animate these two states. A passage not taken for granted, given the living conditions of the indigenous people, who have always been inferior to the descendants of the Spanish. Even in recent years, during the Covid-19 pandemic, the problem of indigenous peoples has been exacerbated; in fact, the management of the problems of these social formations has often been marginal and insufficient<sup>12</sup>. In addition, the shift from multinational to plurinational state is another peculiar element, compared to European and Western constitutions.

To conclude, the underlying idea of development is also somewhat antithetical to the Western vision. As denoted in the "*Plan nacional para el buen vivir*" (2017-2021), a five-year document where the Ecuadorean government sets goals to best satisfy the *sumak kawsay*, the term development is from the outset linked to collectivity. There is a focus on creating a link between the whole society, nature and the state, the only way to be able to ensure sustainable and human-friendly development for all<sup>13</sup>. The Ecuadorean state sets three goals for development: rights for all throughout life, affirming the importance of respect for plurinationality, interculturality and Mother Earth; an economy increasingly at the service of the community, both sustainable development and food sovereignty; and, finally, the goal of "*Más sociedad, mejor estado*," through which the Ecuadorean state wants to incentivize participatory democracy<sup>14</sup>.

These three points are also at the heart of *buen vivir*, as it affects the entire state organization both constitutionally and economically.

#### 4. The process of subjectification of nature on the constitutional level.

Art. 10 Const. Ec. establishes that: "*la naturaleza será sujeto de aquellos derechos que le reconozca la constitución*." With this article, nature becomes a subject of law, having equal dignity with other subjects. This article places people, community and nature on the same level. Regarding the rights of nature there is a special part of the Constitution, Chapter VII: *derechos de la naturaleza*, and the referenced Articles are 71 to 74. Among other things, the

11 S. BALDIN, *Il Buen Vivir nel costituzionalismo andino. Profili comparativi*, Giappichelli, 2019, p. 23

12 See: G. M. GARCÍA – M. HABOUD – R. HOWARD – A. MANRESA – J. ZURITA, *Miscommunication in the COVID-19 Era*, «Bulletin of Latin American Research», 39 (2020), pp. 39–46 and R. FLORES-RAMÍREZ – A. A. BERUMEN-RODRÍGUEZ – M. A. MARTÍNEZ-CASTILLO – L. E. ALCÁNTARA-QUINTANA – F. DÍAZ-BARRIGA – L. DÍAZ DE LEÓN-MARTÍNEZ, *A review of Environmental risks and vulnerability factors of indigenous populations from Latin America and the Caribbean in the face of the COVID-19*, «Global Public Health», 16/7 (2021), pp. 975–999.

13 S. F. PAZMAY-PAZMAY – P. D. PAZMAY-PAZMAY, *El Ecuador, plan nacional de desarrollo 2017-2021 toda una vida, derechos y sociedad*, «Domino de las Ciencias», 6/4 (2020), pp. 408–421.

14 A. RINELLA – H. OKORONKO, *Sovranità alimentare e diritto al cibo*, «Diritto pubblico comparato ed europeo», 17/1 (2015), pp. 89–130.

right to the life of nature and the right to the restoration of nature's life cycle is enshrined in art. 72: "la naturaleza tiene derecho a la restauracion, esta serà independiente de la obligacion que tiene el estado". To conclude, art. 73 states that it will be the state's responsibility to promote environmental respect and regeneration.

The Constitution of Bolivia also mentions nature and its respect several times, such as Art. 8 Const. Bol., which points to *suma qamaña* (buen vivir) as one of the moral ethical principles that the state is committed to respect. Art. 33 states that all people have the right to live in a healthy environment, and the next article prescribes that all people may, collectively or individually, bring legal actions to defend the environment.

The big difference between Ecuador and Bolivia is that the former has established the subjectivity of nature in the Constitution itself, while the latter has delegated the affirmation of this subjectivity to the level of ordinary laws, more specifically through the *Ley de derechos de la madre tierra* (law number 71 passed on December 21, 2010). Art. 2 of this law prescribes the various principles that must guide the legislature; these include the collective good (II point), namely: the rights of Mother Earth must prevail over any human activity and over any acquired right<sup>15</sup>. With this point comes the transformation of nature from an object to a rights-bearing subject. Point III of said norm establishes the right of nature's regeneration, while the next point imputes to the state the duty to protect and guarantee respect for nature in order to ensure *buen vivir*. Art. 7 indicates the various rights of nature, among which are: the right to life, balance, water, air as healthy as possible, restoration, and life free of contamination<sup>16</sup>.

Another Bolivian law fundamental to the implementation of *sumak kawsay* is the *Ley marco de la Madre Tierra y desarrollo integral para vivir bien*<sup>17</sup>, passed in October 2012. In this case it is a more specific regulation than the one previously mentioned. Art. 5 dissects the concept of respect for nature and *buen vivir*, indicating the actions of the state to support it.

As two developing states with a lower GDP than the average of Western states<sup>18</sup>, this vision of nature preservation, cohesion and appeal to ancestral indigenous traditions is certainly new. However, there has been no shortage of shadows and inconsistencies, as evidenced by the court case that occurred in Ecuador concerning the province of Loja or Bolivian President Evo Morales himself in the case of building a highway in an Amazon region without the consent of the indigenous population.

### 5. The Ecuadorean Constitution: key aspects.

Rafaël Correa became president of Ecuador in 2007; he went into the elections supported by the *Alianza País* (AP) party, a movement that brought together within it several of the country's social souls, which had always been on the margins of politics. It was a heterogeneous movement composed of extreme left, ecologists, and indigenous<sup>19</sup>. The first act of the newly elected president was to convene a Constituent Assembly, to draft a new Constitutional Charter.

15 G. CLAXTON – A. DAMICO – M. RAE – G. YOUNG – D. McDERMOTT – H. WHITMORE, *Health Benefits In 2020: Premiums In Employer-Sponsored Plans Grow 4 Percent; Employers Consider Responses To Pandemic: The annual Kaiser Family Foundation Employer Health Benefits Survey of the cost and coverage of US employer-sponsored health benefits.*, «Health Affairs», 39/11 (2020), pp. 2018–2028.

16 <https://www.bivica.org/files/tierra-derechos-ley.pdf>.

17 Law n. 301/2012.

18 <https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOWORLD/BOL>.

19 S. BAGNI, *Il sumak kawsay: da cosmovisione indigena a principio costituzionale in Ecuador*, in S. BALDIN – M. ZAGO (eds.), *Le sfide della sostenibilità. Il buen vivir andino dalla prospettiva europea*, FILODIRITTO EDITORE, Bologna, pp. 73–99.

The AP movement won 70 percent of the seats. After years of political unrest and social instability, the constitution could only be visionary, with *sumak kawsay* at the center as the master idea to guide subsequent national politics. There was no shortage of ambiguities, such as the resignation of Constituent Assembly President Alberto Acosta in June 2008, with work under way<sup>20</sup>.

In the first "*plan nacional para el buen vivir*" of 2013 it is stated that *buen vivir* is *sumak kawsay*, furthermore, *buen vivir* is described as: "*la forma de vida que permite la felicidad y la permanencia de la diversidad cultural y ambiental; es armonía, igualdad, equidad y solidaridad*". The indigenous vision of this philosophy has been correctly included in official acts. However, there are inconsistencies, especially with regard to economic development, the consequent role of the state, and how these can be harmonized with *sumak kawsay*'s vision.

Emblematic was Correa's August 15, 2013 proposal in which he asked Parliament to implement the so-called "plan b" of the Yasuni-ITT project, for partial exploitation of the subsoil of the Yasuni National Park (inhabited by traditional indigenous peoples). Contrary to both environmental respect and the protection of the indigenous population, this case has come back to the attention of international media as this paper concludes. In the next section I will detail that the Constitutional Court of Ecuador, after an initial denial, approved the People's Referendum to decide on the blocking of extraction from the Yasuni site.

The Ecuadorian Constitution indicates *buen vivir* as both a principle and a catalog of rights, as reflected in Title II, Chapter II: Rights of *buen vivir*<sup>21</sup>. In total, Ecuador's Constitution has 444 articles, making it one of the longest and most detailed in the world.

Given its ambitious goal as a constitution, it is interesting to analyze the use of the indigenous language, which more than Castilian can represent the claims of the ancestral population and the *sumak kawsay*. This term is mentioned 5 times (in the preamble, Art. 14, 250, 275 and 387). While *pachamama* is mentioned twice: in the preamble and in Art. 71 Const. Ec., where nature is referred to as a subject of law. In contrast, the Castilian translation *buen vivir* is mentioned 21 times. Dependent on this term are the duties and responsibilities of citizens, as well as an important role in the economic development of the state, which must be respectful of this ancestral philosophy, as reflected in Art. 283 Const. Ec.<sup>22</sup>.

Finally, there are matters in Ecuador's Constitution that can be linked indirectly to *sumak kawsay*, for example: an inclusive and social economy, the right to a plurinational and intercultural state, and direct citizen participation in the country's democratic choices<sup>23</sup>.

Therefore, the long Constitution of Ecuador eviscerates the philosophy of *buen vivir*, attempting to analyze all areas of state intervention, from economics to justice, as well as the rights and duties of the Ecuadorean people. Despite the inconsistencies we have analyzed, it remains the first Constitution to place nature as the subject of law.

## 6. The Constitution of the Intercultural Republic of Bolivia: key aspects

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Art. 283 Const. Ec.: -The economic system is social and supportive; it recognizes the human being as both subject and end; it tends toward a dynamic and balanced relationship between society, the state and the market, in harmony with nature; and it aims to guarantee the production and reproduction of the material and immaterial conditions that enable good living.

joint and several, and the remaining ones established by the Constitution.

Popular and solidarity economy will be regulated in accordance with the law and will include cooperative, association and community sectors.

<sup>23</sup> S. BAGNI, *Il sumak kawsay: da cosmovisione indigena a principio costituzionale in Ecuador*, cit.

The Constitution of the Plurinational Republic of Bolivia, desired by President Evo Morales, was promulgated on February 7, 2009 establishing the actions and functions that can be carried out by the state in compliance with *buen vivir*<sup>24</sup>.

The Constitution presents two main visions regarding environmental protection: *buen vivir* on the one hand, and the respect for the indigenous population on the other; both of these ideas are homogeneous and mutually influence each other. For the latter aspect, already Art. 1 Const. Bol. establishes that, “*Bolivia se funda en la pluralidad y el pluralismo político, económico, jurídico, cultural y lingüístico*”, emphasizing the desire to establish a multi-ethnic and pluricultural state. Art. 171 Const. Bol regulates social and economic rights for the indigenous population living within the national territory, as well as the possibility of exploitation of natural resources, and the use of their language and protection of their culture<sup>25</sup>. Legal personality is recognized.

Bolivia's Fundamental Charter establishes ethical and moral principles of the state, which are to be the inspiration, for future laws. Among the various principles listed in Art. 8 Const. Bol. there is also the *suma qamaña*, which can be translated into Castilian as *buen vivir*.

As in the case of the Ecuadorean Constitution, this is a very long and detailed text, with no less than 411 articles. Right from the preamble, it stresses the importance of respect for *pachamama*<sup>26</sup>.

### 7. Ecuador and Bolivia compared.

First, *buen vivir* means a life in harmony with both the community and nature, where the individual, collective, material and spiritual spheres are interdependent<sup>27</sup>.

In both cases, in Ecuador and Bolivia, it is critically important, in order to implement *buen vivir*, to carry out heterogeneous policies in collectivities, always respecting Mother Earth. *Buen vivir* is the result of a counter-hegemonic narrative<sup>28</sup>. These two countries have found in this form of constitutional narrative the way to harmonious development of state institutions following failed attempts to assimilate Western models.

The concept of *buen vivir* has within it several elements such as: participatory democracy, interculturalism, plurinationality, food sovereignty, and the strengthening of environmental protection. All of these rights are present within the two constitutions and are the lynchpin of the new Andean constitutionalism.

To conclude, *buen vivir* can present itself both as a guideline for public policy (obligations are imposed that states must meet in formulating laws) and as a normative principle. The latter is related to the various rights found in the two Constitutions. In Ecuador, Chapter II is dedicated to the rights of *buen vivir*, divided into eight sections: water and food, healthy environment, communication and information, culture and science, education, habitat and housing, health labor and social security<sup>29</sup>. There is to emphasize that the *sumak kawsay* is not just a static list of rights, this vision adjudicates several obligations on the part of the state and the community. The Ecuadorian Constitutional Court itself has repeatedly emphasized that the *sumak kawsay* is a fundamental structure of the state, guaranteeing access to constitutional rights, especially within the framework of economic, social and cultural rights;

24 F. HUANACUNI, *Buen Vivir/Vivir Bien. Filosofía, políticas, estrategias y experiencias regionales andinas*, cit.

25 S. SCHAVALZON, *Plurinacionalidad y Vivir Bien/Buen Vivir: dos conceptos leídos desde Bolivia y Ecuador post-constituyentes*, cit.

26 S. BALDIN, *Il Buen Vivir nel costituzionalismo andino. Profili comparativi*, cit.

27 *Ibid.*

28 J. P. BLANCO – E. P. AGUIAR, *El Buen Vivir como discurso contrahegemónico. Postdesarrollo, indigenismo y naturaleza desde la visión andina*, cit.

29 S. BALDIN, *Il Buen Vivir nel costituzionalismo andino. Profili comparativi*, cit.

while the state plays a leading role, as the Court itself points out in ruling number 0006-10-SEE-CC of March 2010<sup>30</sup>.

The Constitution of Bolivia also has a list of rights. In the original draft there was a distinction between "most fundamental" rights (life, bodily integrity, water, food) and other fundamental rights, the ultimate goal being to eliminate any form of hierarchy and implement concrete equality among rights<sup>31</sup>, however in the approved Constitution there is the first chapter devoted to general provisions, followed by a list of rights. Even the Bolivian Plurinational Court, in 2012, in ruling number 0129, affirmed that the principle of *suma qamaña* is a categorical imperative for the State<sup>32</sup>.

### **Constitution of Ecuador and Bolivia: nature's Rights.**

In Ecuador and Bolivia, both the domain of nature and the relationship established between land and community are sacred. The inclusion of the *buen vivir* philosophy within the two constitutions transforms these preexisting ancestral values into a binding legal norm, placing this harmony between land and community at the center of constitutional semantics<sup>33</sup>. Nature itself becomes the bearer of rights and claims, becoming a subject of law alongside man.

Human beings, moreover, are an integral part of *pachamama*, and for this reason it is everyone's right to live in as healthy an environment as possible.

*Sumak kawsay* and *Suma qamaña* are indigenous expressions of the Bolivian and Ecuadorean indigenous population used to indicate the balance of the individual within the surrounding collectivity and ecosystem<sup>34</sup>. Ecuador and Bolivia, in 2008 and 2009, respectively, incorporated this Andean cosmovision into their constitutions, translating it with the Castilian term *buen vivir*. The ultimate goal is to live in harmony and balance with nature.

In these two Constitutions, nature is configured as a right related to the individual's living conditions. Finally, the claims of nature, including ecological citizenship, are stated on both the constitutional and ordinary legislative levels<sup>35</sup>.

### **Representation of the rights of nature within the Constitution of Ecuador.**

Art. 10 Const. Ec. establishes the subjectivity of nature, which enjoys the rights recognized in the Basic Charter. Nature's claims are equated with those of the human population, according to Art. 11 Const. Ec. Moreover, the state proclaims itself as the promoter of compliance with these prescriptions.

The referenced articles are 71 to 74, which establish the rights of nature, found in the seventh chapter: "*derechos de la naturaleza*". From the outset, the right of *pachamama* to life, regeneration and maintenance of its life cycle is guaranteed. Under Sec. II, all people and communities can demand respect for the rights of nature.

On the other hand, Art. 72 prescribes the "*derecho a la restauración*", so it is a principle that seeks to incorporate remedial actions into the law in cases of environmental damage. In situations of serious environmental damage, it will be the responsibility of the state to

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30 E. IMPARATO, *I diritti della Natura e la visione biocentrica tral'Ecuador e la Bolivia*, «DPCE Online», 41/4 (2020), pp. 2455–2478.

31 S. SCHAVALZON, *Plurinacionalidad y Vivir Bien/Buen Vivir: dos conceptos leídos desde Bolivia y Ecuador post-constituyentes*, cit.

32 E. IMPARATO, *I diritti della Natura e la visione biocentrica tral'Ecuador e la Bolivia*, cit.

33 *Ibid.*

34 F. HUANACUNI, *Buen Vivir/Vivir Bien. Filosofía, políticas, estrategias y experiencias regionales andinas*, cit.

35 S. BALDIN, *I diritti della natura nelle costituzioni di Ecuador e Bolivia*, cit.



implement measures to mitigate the damage, according to Art. 72 c.2. This precautionary principle implies a prudential criterion. The ultimate goal must be to avert any environmentally harmful activity<sup>36</sup>.

*Buen vivir* is explicitly stated in Art. 74, one of the most *anthropocentric* articles of the Charter: all citizens and communities have the right to benefit from both Mother Earth and natural resources to enable *buen vivir*. In this case, *buen vivir* is indicated as the limit, the whole community must be able to enjoy the benefits of the earth, and everyone must enjoy *buen vivir*.

However, already within the Fundamental Charter there are early inconsistencies regarding the right of nature, and consequently *buen vivir*. While the previously mentioned articles can be linked to others that impose positive obligations and prohibitions (again regarding *naturaleza*), such as Art. 15 Const. Ec. (the state promotes the use of *green* technology, both in the public and private sectors) or articles that prescribe the prohibition of mining in protected areas<sup>37</sup>, other articles seem to disregard this biocentric approach. Art. 401 is a prime example. The first part declares the nation as GMO seed-free. However, the second part indicates the possibility of taking advantage of genetically modified seeds (subject to the approval of the President of the Republic and the Assembly)<sup>38</sup>. There is a reminder that *buen vivir* should be a philosophy to improve the life of the community, respecting the sacred relationship between humans and the earth, and this does not seem to be respected in this article. The same goes for Art. 407, which, with the same passage, approves mining in protected areas, although in the first part it is prohibited. In both cases this is justified using balancing national interests.

### **Representation of the rights of nature within the Constitution of Bolivia**

Unlike Ecuador, Bolivia has enacted the legal status of Mother Earth through a law: *Ley de derechos de la Madre Tierra*, No. 071 of 2010. The ultimate goal of this law is to establish balance and harmony with Mother Earth by defining the rights and duties and various roles of the plurinational state<sup>39</sup>. In addition, the state will have to ensure economic development, while at the same time respecting *naturaleza* and guaranteeing *buen vivir* for the population.

Art. 33 Const. Bol. guarantees the right to life in a healthy environment and respect for future generations. However, the various rights of *naturaleza* are found in ordinary laws, and in norms of constitutional status as is the case in Ecuador.

Art. 2 of the aforementioned law states the various guiding principles, among which are cited: harmony between human activity and the life cycles of the earth, guaranteeing the regeneration of the earth in cases of damage (also indicated as a limit, human activity may not harm Mother Earth in any case). Finally, both the prohibition of *mercantilización*, that is, the buying and selling of land, and the intrinsic value of interculturality are indicated. Respect for the land and *naturaleza* also passes through ancestral knowledge, techniques, and visions<sup>40</sup>. The principle of the collective good of the land is also affirmed in this article; this must take precedence over human activities. The definition of *Madre Tierra* is given in Art. 3, where the connection with all life forms and the dynamic aspect of this relationship is

36 F. HUANACUNI, *Buen Vivir/Vivir Bien. Filosofía, políticas, estrategias y experiencias regionales andinas*, cit.

37 S. BALDIN, *Il Buen Vivir nel costituzionalismo andino. Profili comparativi*, cit.

38 A. ACOSTA, *The Buen Vivir: an opportunity to imagine another world*, «Inside a Champion: An Analysis of the Brazilian Development Model» (2012), pp. 192–210.

39 L. M. MONTAÑO RIVEROS, *Pluralismo jurídico y Derechos de la Madre Tierra*, «Revista Jurídica Derecho», 1/2 (2015), pp. 55–64.

40 <https://www.bivica.org/files/tierra-derechos-ley.pdf>.

emphasized<sup>41</sup>. In addition, the surrounding nature is referred to as sacred, respecting traditional cosmovisions.

The legal character of nature is specified in Art. 5: we are dealing with a collective subject of public interest. Both the Earth and all human communities are holders of the rights found within the law itself. Specifically, Mother Earth, under Art. 7, enjoys the right to life, water, clean air, balance and regeneration.

The right to environmental regeneration, present in both Bolivia and Ecuador, is the most evocative representation of both the *buen vivir* philosophy and traditional Andean cosmovision and this biocentric turn implemented by both countries.

The Bolivian law, in Art. 8, in addition to prescribing the various rights of nature, also establishes obligations on the part of the plurinational state, among which are found: to implement public policies of environmental prevention and protection, to promote peace and the elimination of nuclear weapons, and to implement appropriate and nature-friendly energy sovereignty policies. Importantly, it is indicated as a state obligation to respect forms of production and balanced consumption for the satisfaction of the *buen vivir* philosophy. In this way, the legislature seeks to promote this indigenous vision by avoiding waste and adjust production to these principles in order to respect nature more.

*Buen vivir*, in both countries, is seen as an opportunity to preserve in time and space their ancestral peculiarities and traditions. The ultimate goal, rather than the pursuit of development as in the West, must be harmony between community and nature. In both Ecuador and Bolivia constitutions, several articles set as goals the recovery and preservation of nature and an environment that is as healthy as possible. The intangibility of protected natural areas is enshrined in both constitutions. Art. 283 Const. Ec. describes the state's economic policy and sets the environmental limit from the outset, to ensure respect for *buen vivir*. It is interesting to note that such a constitutional device was also included in the Italian Constitution in Art. 41 Const. It. through the Constitutional Law 1/2022.

Bolivia, too, counts respect for natural resources and environmental conservation among the various duties of the state; more precisely, the matter is governed by Art. 9 Const. Bol.

### **Effectiveness of nature's rights. Lights and shadows**

Broader protections vis-à-vis nature are found in countries where popular action is implemented, an instrument that guarantees the protection of diffuse interests of constitutional importance, such as the environment in this case. Several Latin American countries provide this form of direct access to justice (which consequently increases participatory democracy), such as, for example, Brazil, Peru, Costa Rica, and the two countries examined in this paper, Ecuador and Bolivia.

Nature exists apart from man, and its rights will have to be claimed when its harmony is altered through actions carried out by the human community<sup>42</sup>. It will be third parties, through popular action, who will claim the rights of Mother Earth.

The Ecuadorian Constitution establishes in Art. 71, first of all, the right of nature to be respected, and to the regeneration of its life. Furthermore, in Paragraph II, it is indicated that the community (*pueblo* or *nacionalidad*) has the right to demand from public authorities the enforcement of nature's rights and their protection.

41 F. HUACACUNI MAMANI, *Los derechos de la Madre Tierra*, «Revista Jurídica Derecho», 3/4 (2016), pp. 157–169.

42 L. PERRA, *La natura: sujeto de derechos*, "Jus Civile" (2017), pp. 627-645.

Again, the Constitution of Ecuador, in Art. 88, indicates the tool made available by the legal system for those wishing to protect the rights of nature: this is the *acción de protección*<sup>43</sup>. It can be used by any Ecuadorean citizen, thus including those who are not directly harmed and affected. It is a direct and effective action to protect constitutionally enshrined rights<sup>44</sup>.

Linked to Art. 88 Const. Ec. there is Art. 40 of the *Ley Organica de Garantias jurisdiccionales y Control Constitucional* of September 2009. This text outlines the various requirements for the activation of the *acción de protección*, including the violation of a constitutional right and the non-existence of other legal protection mechanisms to protect the constitutional right<sup>45</sup>. This means that if the jurisdictional guarantees provided by the Constitution are not met, this protection action can be used<sup>46</sup>.

There is a point to be made that in the Ecuadorean legal system, thus also with regard to the organization of justice, there is a predominance of *naturaleza*. Nature plays a lynchpin role within the order<sup>47</sup>. The main good, to be preserved, is not the value of life, as is the case in the West, but the value of *buen vivir*. Judges will have to assess that the harmony between human collectivity and nature is respected, and that this relationship is not broken, leading to *mal vivir*.

### 8. Court cases related to nature protection (*buen vivir*) in Ecuador and Bolivia.

Also in Bolivia, the Constitution, in Art. 34, stipulates that any person, whether in an individual capacity or as a representative of a community, can bring legal actions to safeguard the surrounding environment. The same Constitution, in Art. 135, provides for *acción popular* to counter a violation of one of the rights enshrined in the Constitution, among which *naturaleza* is denoted. All citizens can promote this popular action in defense of collective interests. The principle of subsidiarity is excluded, since the ultimate goal is the celerity of action, to safeguard the right to a healthy environment<sup>48</sup>.

Popular action has three purposes: to repair the possible damage, to immediately suspend the negative effects of that action, and a preventive purpose. In addition, in several fundamental laws of the multi-national state, reference is made several times to popular action and respect for nature. The *Ley de derechos de la madre tierra*, in Art. 2, establishes the duty of every citizen and community to respect and guarantee the rights of Mother Earth, for the purpose of achieving *buen vivir*<sup>49</sup>.

This popular action is regulated in Chapter Six, Title II of the *Código procesal constitucional* (July 2012 law). Art. 69 of this law lists the subjects who may initiate this type of proceeding: all citizens, including those who represent the instances of a collectivity, the ministry (*el ministerio público y la defensoría del pueblo*), and finally the attorney general who represents the state<sup>50</sup>. Under Art. 71, if the court approves the guardianship it will result in the annulment of any act or action contrary to collective rights. However, it should be emphasized that environmental protection is extrinsic through legal subjects while Mother Earth is solely an

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43 *Ibid.*

44 I. A. CEVALLOS ZAMBRANO, *La acción de protección ordinaria formalidad y admisibilidad en el Ecuador* (2009).

45 [https://www.oas.org/juridico/PDFs/mesicic4\\_ecu\\_org2.pdf](https://www.oas.org/juridico/PDFs/mesicic4_ecu_org2.pdf).

46 I. A. CEVALLOS ZAMBRANO, *La acción de protección ordinaria formalidad y admisibilidad en el Ecuador*, cit.

47 E. GUDYNAS, *El postdesarrollo como crítica y el Buen Vivir como alternativa* (2014).

48 L. PERRA, *La natura: sujeto de derechos*, cit.

49 <https://www.bivica.org/files/tierra-derechos-ley.pdf>.

50 <https://www.lexivox.org/norms/BO-L-N254.html>.

object of law and the possible positive effects of the subjects' actions will fall indirectly to the object, i.e., Mother Earth<sup>51</sup>.

*Buen vivir* and *sumak kawsay*, as we have seen, are expressions used by traditional Latin American people to indicate the balance that must be established between the human community and nature, in a circular relationship where the Western conception of "development" is absent<sup>52</sup>. As states included as cardinal principles within the constitutions of Ecuador and Bolivia, respect for this ancestral philosophy is demanded, although there is no shortage of internal contradictions, especially in the judiciary, where this vision is not always respected.

According to two pioneers of *Earth Jurisprudence*, namely the U.S. Christopher D. Stone and Chile's Godofredo Stutzin, in both countries, technical-legal references to the concept of *Earth Jurisprudence* are evident when analyzing the Constitutions. Stone indicates nature as a legal subject that must have rights. If these rights are not respected, it will be the duty of the *guardians* to protect and represent nature in court<sup>53</sup>. Reasoning very similar to what is still happening in Ecuador today, even though this book was published in 1973. On the other hand, the second scholar, Stutzin, refers to nature as a legal entity, more specifically a foundation for life<sup>54</sup>.

Let us now turn to concrete examples on the failure to comply with the constitutional dictate. In Ecuador, the ordinary law regulated procedural requirements to protect the rights of nature, which were not provided for in the Constitution, narrowing the scope of application and making it less universalistic than the will of the constituents<sup>55</sup>.

The Constitution, in Articles 75, 86 and 439 respectively, provides for jurisdictional guarantees and direct actions by the entire population in defense of the collective right to *buen vivir* and a healthy environment. In addition, the demonstration of direct injury by the party seeking environmental protection is not required, whereas the ordinary law defeats this guarantor view.

The *Ley Organica de Garantias jurisdiccionales y control constitucional*, in Art. 9, limits the action only to aggrieved persons, who must prove that they have suffered harm, with respect to the failure of a constitutional right<sup>56</sup>. The environmental protection action found within this national law is residual, and admissible only when it is certified that there is serious environmental damage<sup>57</sup>.

Regarding the constitutional principle of *Sumak Kawsay* and the respective judicial actions for environmental protection, there are, as yet few, judicial interventions in favor of this cardinal principle of the Ecuadorian Constitution.

In Ecuador, in 2011, the first criminal judgment in favor of Mother Earth's rights was extended, the case being related to the damaging of the Vilcabamba River (Loja province). This first success in the judicial arena was initiated by two foreign nationals, Richard Frederick Wheeler and Eleanor Geer Huddle, who used the provision of Art. 71 Const. Ec. which governs how nature is to be protected. The two accused the provincial government of

51 J. M. TORTOSA, *Sumak kawsay, suma qamaña, buen vivir* (2011).

52 U. VILLALBA, *Buen Vivir vs Development: a paradigm shift in the Andes?*, «Third World Quarterly», 34/8 (2013), pp. 1427–1442.

53 C. D. STONE, *Should trees have standing--toward legal rights for natural objects*, «S. CAL. I. REV.», 45 (1972), pp. 450.

54 S. BALDIN – M. ZAGO, *Le sfide della sostenibilità. Il buen vivir andino dalla prospettiva europea*, Filodiritto Editore, 2014.

55 S. BAGNI, *Il sumak kawsay: da cosmovisione indigena a principio costituzionale in Ecuador*, cit.

56 [https://www.oas.org/juridico/PDFs/mesicic4\\_ecu\\_org2.pdf](https://www.oas.org/juridico/PDFs/mesicic4_ecu_org2.pdf).

57 S. BAGNI, *Il sumak kawsay: da cosmovisione indigena a principio costituzionale in Ecuador*, cit.

Loja, responsible, in their view, for polluting the Vilcabamba riverbed during the construction and widening of the Vilcabamba-Quinara road by failing to assess the risks of environmental impact<sup>58</sup>. These risks should have been assessed and managed by the Ministry of Environment. In addition, during the winter of 2009, the rainy season, the presence of rocks, debris, and even trees in the riverbed (accumulated due to the construction of the road) caused flooding of neighboring territories<sup>59</sup>.

The two plaintiffs, in the first trial to protect the rights of nature in the Loja Provincial Court, made the following demands: immediately stop the dumping of debris into the river; regenerate nature itself, and immediately remove the various debris still in the river<sup>60</sup>.

The Provincial Court of Loja (case number 1121-2011-0010 of March 30, 2011) recognized the responsibilities and failures of the local government (aggravated by the fact that the area is also protected because of its historical significance given the presence of Inca ruins). Among other things, the Court, in the ruling, openly mentioned respect for nature and its regeneration of life cycles in cases of defacement, a principle present in the 2008 Constitution. The provincial Court, seeing the provincial administrators' disregard for nature, ordered implementing measures to remedy the damage, such as: the application and implementation of the recommendations developed by the Ministry of Environment within a maximum of 5 days (under penalty of work stoppage) and the initiation of an independent task force to monitor the state of works, and finally made a public apology from the provincial government<sup>61</sup>. The Court, in this first ruling related to the rights of nature, ruled that the protective action, governed by Art. 88 Const. Ec., is the only procedural remedy to put an end to environmental damage. Moreover, only the likelihood of environmental damage, not its certainty, is required to put the measures in place<sup>62</sup>.

### **Sarayaku vs. Ecuador.**

The Inter-American Court of Human Rights is located in San Jose, Costa Rica. It has been in operation since 1979 and its ultimate purpose is to protect the rights enshrined in the 1978 American Convention on Human Rights<sup>63</sup>. The Court has jurisdiction over any subject, the only limitation being that it can only try states that have signed the Convention.

A year after the first historic ruling in the province of Loja, in which *naturaleza* was directly protected from human behavior there was, in 2012, another landmark ruling regarding *buen vivir* and respect for indigenous people: the *Sarayaku vs. Ecuador* case. Before then, the Inter-American Court had already protected several indigenous peoples, such as in *awas Tingni vs. Nicaragua* (2001) and the Mayan population in *Toledo District vs. Belize*<sup>64</sup>. However, the 2012 ruling for the first time protects indigenous property.

Ecuador was accused of violating international and national law by granting the use of a region to an Argentine oil company without direct consultation by the affected population, the *Sarayaku*, who inhabit this region<sup>65</sup>.

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58 *Ibid.*

59 S. SUÁREZ, *Defending Nature: Challenges and Obstacles in Defending the Rights of Nature; Case Study of the Vilcabamba River*, Friedrich-Ebert-Stiftung, 2013.

60 *Ibid.*

61 *Ibid.*

62 E. GUDYNAS, *El postdesarrollo como crítica y el Buen Vivir como alternativa*, cit.

63 C. Y. VERBEEK, *Free, Prior, Informed Consent: The Key to Self-Determination: An Analysis of The Kichwa People of Sarayaku v. Ecuador*, "Am. Indian L. Rev.", 37 (2012), pp. 263.

64 *Ibid.*

65 U. KHATRI, *Indigenous People's Right to Free, Prior, and Informed Consent in the Context of State-Sponsored Development: The New Standard Set by Sarayaku v. Ecuador and Its Potential to Delegitimize the*

The Court, in its verdict, accused the State of Ecuador of having disregarded both sources of national law, such as the Constitution itself, and international sources of law, such as the 1989 Indigenous and Tribal Peoples Convention No. 169 and, finally, the Convention on Human Rights. By having granted the usufruct to the Argentine company, the state, by implication, had infringed on the property rights of the *Sarayaku* people. This ruling is significant, especially for condemning a state that did not concretely respect the rights of indigenous peoples. This fact is even more serious, given that the Ecuadorian Constitution formally is based on the traditional indigenous principles of *sumak kawsay* and assumes equal treatment among all communities that populate Ecuador.

The first time this case was cited within the Inter-American Court was in 2003 by the *Sarayaku* people<sup>66</sup>.

The Court ruled that the State of Ecuador failed to respect the right to *Free Prior Informed Consent*<sup>67</sup>, a right recognized within the United Nations Declaration on the Rights of Indigenous Peoples. Specifically, the indigenous people should have given consent to the Ecuadorian state to begin drilling work and consented to the Argentine company to operate in their territory. All this was to protect both the right to property and the self-determination of indigenous peoples.

In the international arena, both the Indigenous and Tribal Peoples Convention and the American Convention on Human Rights (ACHR) (ratified by Ecuador in 1997) have been violated. Specifically, the Court points out how the State decision goes against Art. 21 of the ACHR, which concerns the right to property. The Convention specifies that no one shall abandon their property, the only exception made, under payment of compensation, in cases of public interest<sup>68</sup>.

Not only did the oil company and the state force a forced removal of the *Sarayaku* from their lands (not caring about the peculiar ancestral bond created between the human community and the *naturaleza*), but they also committed an act of defacing the natural environment by using explosives, cutting down the rainforest, and destroying archaeological, spiritual, and cultural sites of prime interest to the people.

In addition, both the 2008 Constitution, which provides for greater attention to the indigenous population in order to achieve *buen vivir* and equal treatment among all people living in Ecuador, and the previous Constitution of 1998, have not been respected by national law, since the facts date from before 2008. In fact, both the state and the oil company (CGC) failed to comply with the requirement of the previous Constitution to implement an exploratory phase between the company itself and the population from the outset (implemented 4 years later, in 2002)<sup>69</sup>.

This ruling, for the first time, indicates an obligation on the part of states to consult their indigenous counterparts in situations such as these. It must be the state directly, and not a third-party company, to interact with the aggrieved population.

### **The Yasuní case.**

With respect to what was said at the beginning, the Yasuní case deserves a closer look because it saw a major breakthrough in May 2023.

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*Belo Monte Dam*, "Am. U. Int'l L. Rev.", 29 (2013), pp. 165.

<sup>66</sup> *Ibid.*

<sup>67</sup> <http://www.fao.org/indigenous-peoples/our-pillars/fpic/en/>.

<sup>68</sup> [https://www.oas.org/dil/treaties\\_b-32\\_american\\_convention\\_on\\_human\\_rights.pdf](https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf).

<sup>69</sup> U. KHATRI, *Indigenous People's Right to Free, Prior, and Informed Consent in the Context of State-Sponsored Development: The New Standard Set by Sarayaku v. Ecuador and Its Potential to Delegitimize the Belo Monte Dam*, cit.

Ecuador's Constitutional Court on Tuesday, May 9, 2023 approved the holding of a popular consultation aimed at protecting the Yasuní National Park, one of the largest biosphere reserves on the planet located in the heart of the Ecuadorian Amazon, from oil exploitation.

The Yasuní National Park, created in 1979 and declared a World Biosphere Reserve by UNESCO in 1989, is the largest protected natural area in mainland Ecuador and is home to more than 2,000 species of trees and shrubs, 204 mammals, 610 birds, 121 reptiles, 150 amphibians and more than 250 fish. It is not surprising, therefore, that it has been considered the place with the greatest biodiversity in the Western Hemisphere<sup>70</sup>. In addition, the park's intangible areas are home to the indigenous people of the Waorani ethnic group, including groups such as the Tagaeri and Taromenane, who live in voluntary isolation, with no contact with society outside their territory. In short, the Yasuní National Park is of great value for biodiversity, conservation, and cultural heritage reasons.

However, in 2013 the state oil company Petroecuador decided to exploit the oil resources of the Ishpingo-Tambococha-Tiputini (ITT) axis, located in the so-called Oil Exploitation Block 43, which also covers areas of Yasuní Park. Currently, Petroecuador is operating in this area, producing more than 55,000 barrels of oil per day (about 11.45 percent of national production). Expanding on this, Petroecuador has been conducting extraction activities in the Ecuadorian Amazon since 1972; during its period of operation, despite claiming to use advanced and environmentally friendly technologies, Petroecuador has not been able to guarantee the conservation of ecosystems<sup>71</sup>.

The exploitation of the so-called Block 43 for oil extraction purposes, while it may bring benefits in economic terms, will almost certainly (as past experience shows) cause risks to biodiversity and to the survival of indigenous peoples who have been settled in the forest for centuries.

This situation led to the establishment of the environmental group Yasunidos, which promoted an initiative against oil exploitation in the area. The proposal calls for leaving underground the crude oil reserves found in the so-called Ishpingo-Tambococha-Tiputini (ITT) axis, located in the so-called Block 43, which affects an important area of the Yasuní Park.

This proposal is nearly 10 years old: in fact, back in 2014, Yasunidos submitted some 757,000 signatures in support of the referendum, equivalent to 5 percent of the electoral roll at the time, as required by the Constitution to hold a plebiscite. However, the National Electoral Council, appointed by the Constitutional Court to review the signatures, did not accept 60 percent of the signatures. The reasons for the rejection were of the most varied; some signatures, for example, were not accepted because they were written on sheets of color and size that did not meet the requirements<sup>72</sup>. The process was finally concluded with the validation of signatures in 2022. The Constitutional Court then finally<sup>73</sup> approved the

70 C. LARREA, *Yasuni ITT Case* [<https://www.rightsofnaturetribunal.org/cases/yasuni-itt-case/>], accessed 17/5/2023.

71 Studies report 4 percent cumulative deforestation of native forests between 1906 and 2005 and a 20 percent loss of large animal density due to commercial hunting with firearms. V. *Ibid.*

72 <https://cuencahighlife.com/court-allows-popular-vote-to-end-oil-production-in-yasuni-it-could-cost-the-government-billions/>.

73 The ruling came after the Court decided on April 21 to reassign the case to a new judge rapporteur after the first appointed judge, Carmen Corral, submitted a ruling that failed to gain the support of the entire body. The Court then appointed Constitutional Judge Ali Lozada Prado to take charge of the case. V. *Aprueban consulta popular sobre prohibir explotación petrolera de Yasuní en Ecuador*, (10/5/2023) [[https://www.swissinfo.ch/spa/ecuador-petr%C3%B3leo\\_aprueban-consulta-popular-sobre-prohibir-explotaci](https://www.swissinfo.ch/spa/ecuador-petr%C3%B3leo_aprueban-consulta-popular-sobre-prohibir-explotaci)]

question they proposed, which is to be submitted to a popular vote. The text of the question will be: "Do you agree that the Ecuadorian government should keep the ITT crude oil, known as Block 43 in Yasuní National Park, indefinitely underground? Yes or No."

Under the law, the popular consultation will be held within a maximum of 75 days, and "Ecuadorians will be able to decide whether as a country we will continue to exploit the place with the greatest diversity on the planet or move toward a model that puts people and nature at the center of the future," as stated by the Yasunidos group in a message on social media after learning of the ruling.

In the event that the Yasunidos' initiative wins the referendum, the oil company will have to cease its operations, both production and testing, within a year. In addition, Petroecuador will have to conclude compensation agreements with companies active in the area. Lastly, if Yasunidos is successful, the state will not be able to exercise actions that tend to "initiate new contractual relations to continue the exploitation of Block 43."

In addition to issuing a ruling in favor of the Yasunidos question, the Constitutional Court ruled that the ballot paper that will be used for the consultation should include text explaining how to dismantle existing oil operations in the area if the initiative wins. In this regard, the Court's own ruling stated that "[s]he will proceed to the gradual and orderly withdrawal of all activities related to oil extraction within a period not exceeding one year."

The Constitutional Court also rebuked "the set of state actions at the time that hindered the full exercise of the participation rights of the applicants and adherents to the initiative." In this regard, Yasunidos representatives did not fail to point out how the government, also using illegal means, slowed down the process of requesting the referendum, and how this caused great harm to the region with the greatest biodiversity in the world<sup>74</sup>.

On the other hand, former Energy Minister Gustavo Trujillo said that Yasunidos' victory would cause irreparable damage to the state, considering that the so-called Block 43 produces more than 15 percent of Ecuador's oil<sup>75</sup>.

In conclusion, the recently approved referendum will be the site of clash between environmental and cultural demands, for the protection of biodiversity and indigenous peoples, and economic demands, which may ultimately also have social repercussions; Trujillo noted that in Ecuador "funding for schools, hospitals, and infrastructure depends on the revenue generated by Block No. 43"; without using overly dramatic tones appropriate for the political arena, the economic well-being of a state can have positive effects on society and on the enjoyment of certain human rights, such as the right to education and to receive healthcare services. The choice between these two instances is now up to the eligible voters.

## **9. Conclusions on the method of research on the subject of neo-Andean constitutionalism.**

It is well known that, within the neo-constitutional framework, the development of the Andean theoretical trend in Ecuador and Bolivia would have been unthinkable without a series of concrete national and regional political circumstances that we have discussed in this work. Andean neo-constitutionalism was born out of Latin American emancipation and anti-colonial tendencies, anti-capitalism of self-determination in the face of the developmentalist model and of repulsion toward of the economic and fiscal guidelines proposed by international organizations. Theoretically, the Andean constitutional model possesses the

<sup>73</sup> <https://www.ambientediritto.it/2023/05/17/n-petrolera-de-yasun-en-ecuador/48500234/>, accessed 17/5/2023.

<sup>74</sup> *Court allows popular vote to end oil production in Yasuni; It could cost the government billions*, (11/5/2023) [<https://cuencahighlife.com/court-allows-popular-vote-to-end-oil-production-in-yasuni-it-could-cost-the-government-billions/>], accessed 17/5/2023.

<sup>75</sup> *Ibid.*



three characteristic features of neo-constitutionalism, namely: the break with the formal model prior to World War II, the importance of new hermeneutic formulas for analyzing constitutional tenor - based on the application of principles and the defeatability - and the formation of a new prescriptive legal theory, heir to Ferrajoli's meta-garantism. As summarized by Ávila Santamaría,

*"Neo-constitutionalism (...) is nothing other than the theory of fundamental rights placed at the center of the theory of law and the state, whereas law must be built on the basis of individuals and collectivities and their rights"*<sup>76</sup>.

A conflict arises as a result of a characteristic dynamic of Latin American legal-political literature: all research soon degenerates into *militant research*<sup>77</sup>. This modality, so deeply rooted in the research and educational sphere of the region, usually converges with classic political militancy<sup>78</sup>. Hence, it is unusual to find literature on Andean neo-constitutionalism devoid of a certain ideological bias. To overcome this excess, I suggest the application of a model of interpretation that allows us to delve into this radical thought with European eyes. This is precisely what Andean neo-constitutionalism pursues: an exercise of profound perspective, a crude, critical evaluation of our personal stance toward the legal and human paradigm, moving away from Western and ethnocentric prejudices. However, we must not fall into what Ávila Santamaría calls the *realist fallacy*<sup>79</sup>, according to which there is a tendency to confuse the underlying theory of a constitutional text with the praxis that results from it. Furthermore, according to Ferrajoli, we must not succumb to the temptation to analyze law from the diatribe *to be*<sup>80</sup>. As we have seen the best normative synthesis of Andean neo-constitutionalism can be found in the Ecuadorian and Bolivian constitutional texts, specifically in their preambles. Both constitutions emerged at a historical moment of successful indigenous popular mobilizations, a regional anti-globalization trend and the exhaustion of the so-called neoliberal model. The popular movements were fundamental in shaping the trend of leftist governments. Through their constitutional texts, Ecuador and Bolivia "expressed their local concerns, the result of concrete political projects"<sup>81</sup>; in the words of Pérez Guartambel, the Latin American constituent processes moved toward "liberation from the oligarchic and neoliberal yoke"<sup>82</sup>. Indeed, in order to understand the neo-constitutionalist irruption in the Andean countries, it is necessary to assimilate their modern history, deeply marked by the emancipation from the adverse effects of neocolonialism. In this sense, Andean neo-constitutionalism not only defends the re-adoption of the indigenous cosmovision in the legal sphere, but also the excommunication of the ideal of developmentalist progress - synonymous with extractivism, competition, consumerism, pollution. Andean neo-constitutionalism can be viewed in two opposing ways: either as Western constitutionalists do, who believe it is the product of ancestral institutions, characterized by the savagery of non-civilization to the ancestral institutions, or according to the authors of the Marxist diagnosis, who see it as the emancipatory path of the peoples of

76 R. ÁVILA SANTAMARÍA, *El neoconstitucionalismo andino*, "Quito: Universidad Andina Simón Bolívar" (2016).

77 F. BORDA, *Orlando, y Carlos Rodríguez Brandao*, "Investigación participativa" (1987).

78 E. FLORES-KASTANIS - J. MONTAYA-VARGAS - D. H. SUÁREZ, *Investigación-acción participativa en la educación latinoamericana: un mapa de otra parte del mundo*, "Revista mexicana de investigación educativa," 14/40 (2009), pp. 289-308.

79 R. ÁVILA SANTAMARÍA, *El neoconstitucionalismo andino*, cit.

80 L. FERRAJOLI, *Law and reason: a theory of criminal guaranteeism* (1989).

81 M. CARBONELL, *Tendencias del constitucionalismo en Iberoamérica* (2009).

82 C. PÉREZ GUARTAMBEL, *La Asamblea Constituyente. Una oportunidad histórica para el pueblo del Ecuador* (2007).

the South. Therefore, it is necessary to turn to a third way, which respects pluriversality and ethnic diversity, but does not fall into the easy capitalist critique. Moreover, one of the great "epochal challenges" of comparative law is the management of diversity, to which the provision of an "effective constitutional law of difference" is called for today. In the geographic-epistemological space of the Global South, in which Latin America is included, these challenges take on the terms of *interlegalidad* and *chthonic* diversity, elements derived from the existence of a relevant indigenous legal tradition. Indigenous *chthonic* law is based on a *sentido de territorialidad* that interweaves the right to ethnic and cultural identity with rights bound to the possession and use of land<sup>83</sup>. The constellation of rights related to the protection of the environment with the rights of effective legal protection and reparation propose to us a new perspective of analysis that is increasingly present in domestic and regional jurisprudence. Since the advantages and disadvantages of human rights-based approaches to environmental protection continue to be debated in the scholarly literature, there is a dearth of research regarding the impact on North-South power relations of the evolving environmental human rights regime. Some scholars have questioned the utility of the human rights framework given the diminished governance capacity of Third World States, which is the result of years of intervention by international law and international financial institutions. This should be analyzed as another aspect that has triggered the evolution of the Andean constitutional model.

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83 D. AMIRANTE, *Environmental Constitutionalism through the Lens of Comparative Law: New Perspectives for the Anthropocene*, in *Environmental Constitutionalism in the Anthropocene*, Routledge, 2022, pp. 148-167.