More Than Human Rights

An Ecology of Law, Thought and Narrative for Earthly Flourishing

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The Systemic Theory of Law in the Jurisprudence of Nature in Ecuador: From the Machine to the Web of Life

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For the first time in global constitutionalism, the 2008 Constitution of Ecuador recognized nature as a subject with specific rights.[1] Yet,

1 Constitution of Ecuador (2008), art. 71: "Nature or Pacha Mama, where life is reproduced and realized, has the right to full respect for its existence and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes. Any person, community, people or nationality may demand from the public authority the fulfillment of the rights of nature. In order to apply and interpret these rights, the principles established in the Constitution shall be observed, as applicable. The State shall encourage natural and legal persons, and collectives, to protect nature, and shall promote respect for all the elements that make up an ecosystem." (Translation by the author.)

as is often the case with innovative rights, the current legal culture worldwide lacks the theoretical basis to apply them adequately; indeed, in 2008, no legal theory was available to help understand the scope of this recognition and develop its content. Normative recognition alone is not enough. Often, a significant cultural change must occur for jurisprudence to adequately develop. Effectively recognizing the rights of nature will—as recognizing the rights of women and people of African descent did previously—require a paradigm change.

There have been important reflections on the value of nature within the sciences and in the ancestral knowledge of Indigenous peoples, suggesting that all beings that inhabit the planet are connected. In the nineteenth century, the naturalist and explorer Alexander von Humboldt challenged the mechanical view of nature, showing that it is a living organism interconnected with all the elements that compose it.[2] The Inuit and Yupik peoples call the wind *Sila*—akin to the conscience of the world, the source of each breath, which allows us to share the same influence with other beings that feel the wind, such as animals, plants, and mountains.[3] The Sarayaku people of Ecuador consider the forest a living, conscious being endowed with spirituality and comprised of all the beings that inhabit it.[4]

Law is no stranger to these reflections either. A notable contribution was the pioneering discussion on the ability of nature,

2 See Andrea Wulf, *The Invention of Nature: Alexander von Humboldt's New World* (Madrid: Taurus, 2017); see also Andrea Wulf, "'This great chain of causes and effects"—Alexander von Humboldt's View of Nature,' in this volume.

3 See David Abram, "On the Origin of the Phrase 'More than Human,'" in this volume.

4 See *Kawsak Sacha* (last visited Oct. 18, 2023), available at: https://kawsak-sacha.org/.

particularly forests, to appear in court.[5] At the level of international law, the Stockholm Declaration (1972), the Río Declaration (1992), and the Paris Agreement (2016) have been issued. However, the view in those documents conveys that the environment must be preserved for the survival of human beings. The exception is the dialogues that have taken place in a United Nations proposal called "Harmony with Nature," centering nature and not only human interest as worthy of legal protection and expressing Earth jurisprudence and sustainable development objectives.[6] For the most part, laws regarding nature did not affect the foundations of the liberal theory of law, which is based on the notion that nature is individually appropriable (as explained below).

An alternative notion has recently taken hold: nature should be protected not only for its "usefulness" or "effects" on human beings "but for its importance for the other living organisms with whom the planet is shared." This idea was developed in 2017 in the Inter-American system for the protection of rights, specifically in the advisory opinion on environment and human rights by the Inter-American Court on Human Rights (IACHR Court)[7] and in the 2021 resolution on the climate emergency and human rights prepared by the Inter-American Commission on Human Rights (IACHR) and the Office of the Special Rapporteur on Economic, Social, Cultural and Environmental Rights (REDESCA).[8] Three

5 Christopher Stone, *Should Trees Have Standing?: Law, Morality, and the Environment* (New York: Oxford University Press, 2010).

6 Emily Jones, "Can the Rights of Nature Transform the Way Rights Are Conceptualized in International Law?," in this volume.

7 Environment and Human Rights, Advisory Opinion OC-23/17, Inter-American Court of Human Rights (hereafter Inter-Am. Ct. H. R.), paragraphs 59, 62, and 64 (November 15, 2017).

8 IACHR and REDESCA, *Climate Emergency. Scope and Inter-American Human Rights Obligations: Resolution 3/2021* (Washington, DC: IACHR-REDESCA, 2021).

years later, the IACHR Court recognized the right to a healthy environment at the level of jurisprudence. The court ruled that this right is governed by the obligation of states to achieve the "integral development" of their peoples, which arises from other rights.[9]

Despite these slow and timid advances in rights, the current and hegemonic legal theory continues to be one based on market freedom and the free transfer of ownership of goods and services. In this theory, nature remains an object that can be acquired, transferred, and exploited indiscriminately.

Nevertheless, there are many possible ways to develop a theory of nature as a rights holder. The first part of this chapter reviews three theoretical approaches to nature: the pure-liberal theory of law, the theory of environmentalism, and systemic theory. In the second part, I examine the jurisprudence of the Constitutional Court of Ecuador. In the third part, I discuss how a systemic theory of law can shed light on the jurisprudential developments of the Ecuadorian Constitutional Court.

Theories of Law and Nature

Several theoretical perspectives with multiple interpretations have defined nature within the law.[10] While any classification criterion is incomplete and arbitrary, my specific aim is to find a possible explanation for the law's longstanding consideration of nature as

9 Indigenous Communities Members of the Lhaka Honhat Association (Nuestra Tierra) v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) no. 400, paragraphs 202 and 207 (Feb. 6, 2020).

10 This volume includes additional theoretical approaches to acknowledge the relationship between nature and the human species: the moral superiority of the human species, with nature as a machine to be mastered; nature as a postmodern dispositive. See, for example, Catalina Vallejo Piedrahíta, "Making Peace with the Rights of Nature: New Tools for Conflict Transformation in the Anthropocene," in this volume.

an object and its transition toward considering nature as a subject. To this end, I will distinguish three legal theories: (1) mechanistic theory, (2) environmentalist theory, and (3) systemic theory.

The Mechanical Theory of Law

The view that nature is an object dates from the seventeenth century. René Descartes writes that nature is like a clock and the body like a ship—as nature is a machine, "the rules of mechanics are the same as those of Nature."[11] Just like a watch, nature is made up of wheels and springs, which can be detached, replaced, and used. Starting with Descartes, scientific positivism, like modern and classical science, separated and established clear boundaries between disciplines. Traditional science left to each distinct discipline the definition of its object of study, the method to analyze it, and the determination of its truths. Thus, for example, physics describes the functioning of the atom, chemistry the composition of elements in an atom, and biology life from the cell.

When nature is seen as divisible, the human being is considered severable from it. First, we are separated from animals: human beings are the only ones who possess rights, and this quality is "the only thing that makes us men and distinguishes us from the beasts."[12] However, it does not stop there. The human being is also divisible: "The soul, by which I am what I am, is entirely distinct from the body."[13] Once we are not the same as nature, animals, and our own bodies, hierarchy is the next step.

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11 René Descartes, *Discourse on the Method* (Barcelona: Ediciones Orbis, 1983), 91.

12 Descartes, *Discourse on the Method*, 44.

13 Descartes, *Discourse on the Method*, 72.

Kymlicka argues that the hierarchy created by human beings (a narcissistic or aristocratic species, believing themselves to be the most intelligent and better than the rest) has had two major consequences. First, it has endowed the human species with intrinsic value so that humans have been, through the current discourse of human rights, the only species to enjoy legal protection. The other consequence is that all other beings, including animals and nature, have been objectified, relegated to a subordinate status, instrumentalized, and assigned exchange value in the marketplace.[14]

By and large, legal theorists have adopted the postulates of scientific positivism, starting with the name legal positivism. This theory was developed by the Austrian jurist Hans Kelsen in *Pure Theory of Law*.[15] Kelsen set out to "elaborate a theory purified of all political ideology and of all elements of the sciences of nature . . . and to have an object governed by laws that are proper to it."[16] The result was a theory of law as a science with all the characteristics of a scientific discipline. Although its object is to establish norms, these norms could not be the laws of nature or social or moral norms.

Therefore, law had to have its own object, method, and truth. The object of the law was the rule issued by the state in accordance with its constitution; the method was to recognize that valid rule, describe it, and apply it (the legal syllogism); and the "truth" in legal terms was the connection of a rule to a concrete case (once the judge adjudicates a legal rule to a case, that solution is considered to be a kind of "truth"). In an effort to achieve a pure science, practitioners and theorists decided that law should not have any relationship with politics, culture, or nature (i.e., natural sciences).

14 Will Kymlicka, "Rethinking Human Rights for a More-than-Human World," in this publication.

15 Hans Kelsen, *Teoría pura del derecho* (Buenos Aires: Eudeba, 1960), 11.

16 Kelsen, *Teoría pura del derecho*, 112.

Consequently, the law takes no interest in the political process by which a norm is established. From the purely positive legal perspective, it is irrelevant whether the norm comes from a progressive or conservative constitution or whether the state belongs to a liberal, fascist, or socialist regime. Once the rule has been issued in compliance with constitutional procedures, it must be complied with—even if it is unjust.

The pure theory of law aligns with the liberal system of philosophy, politics, and economics. Philosophical liberalism asserts the existence of the autonomous individual, who is endowed with dignity and the freedom to make decisions. Political liberalism postulates the need for a democratic republic based on the division of powers and the recognition of citizens who will advocate for themselves publicly through their votes. Economic liberalism advocates for the existence of a market, the engine of the capitalist system, in which goods and services are exchanged for money.

At the heart of both liberal theory and legal positivism is the view of nature as a machine. Two concepts are key to this instrumentalization of nature: private property and state sovereignty. Through the regulation of property in private legislation (civil code), nature is regarded as an object available for appropriation that can be used and abused; the human owner is the only rights-holder. The concept of sovereignty then allows the state to own what individuals cannot appropriate, such as natural resources in the subsoil, the atmosphere, the sea, the beaches, and other goods that the state considers public.

In this understanding of law, therefore, nature cannot be the subject of rights. However, the concept of property and sovereignty is no longer absolute. It has recognizable limits that originate in the abuse of nature and an understanding that we need to conserve it. Environmental law, the branch of law that deals with the degradation of nature, has best expressed these limits through the human right to a healthy environment.

Legal Environmentalism

The theory of law has been substantially influenced by human rights law. From laws based on a notion of horizontal relations between private subjects who demand guarantees from the state for the fulfillment of their will and whose object is property, we have moved toward a theory of law that engages with the notion of power. Relationships between the state and individuals are now understood as vertical, and human rights recognize that the state exercises power and that people are in a situation of vulnerability or subordination.

The subject matter of the law changes at both the national and international levels. In terms of nature considered as private property, the judicial branch protects different rights and interests from the traditional legal perspective (exclusively private property). Issues such as agrarian reform, labor laws, the legal regime of social security, public health, and education allow the emergence of other subjects of law, as well as a more flexible theory of law.

In the Western legal world, rights are progressively being recognized in national constitutions. Many are related to social demands and struggles, for example, the recognition of women's right to vote, the right to a minimum wage and a limited workday, and the right to have schools and to learn to read and write.

At the international level, the concept of sovereignty was altered when the International Covenant on Civil and Political Rights entered into force in 1976. Subsequently, a person was considered a legal actor for the first time in public international law and, in certain situations, could sue the state for violating rights recognized by a state before the international community. Therefore, sovereignty is not absolute: the state is now accountable for the way it treats the people living in its territory.

Knowledge and awareness of the environment have been incorporated into legal and political debates since 1972 when the United Nations adopted the "Stockholm Declaration on the Environment."

The Stockholm Declaration considers a healthy environment essential for the well-being of human beings and their development. There is already data on environmental damage—such as pollution of water, air, land, and living beings—and evidence of its impact on humans. The declaration refers, for example, to "major disruptions of the ecological balance of the biosphere; destruction and depletion of irreplaceable resources and serious deficiencies, harmful to the physical, mental and social health of man, in the environment created by him."[17] The right to the environment has developed hand in hand with administrative law. Over time, issues such as the need for environmental impact reports, environmental monitoring, environmental control agencies, and restrictions on productive activities that could cause irreversible damage to the environment and human health have been established.

Undoubtedly, this constituted a step forward from a legal regime grounded in an absolute right to property. Limits to property and obligations increased (such as the collection of taxes, the expropriation of property for public utility, or the obligation to remediate environmentally if damage is caused), and the environment emerged in the law. Yet the Stockholm Declaration's solution to the problem of environmental damage was to avoid or mitigate it—aiming not to damage the environment less or differently but to prevent the damage from affecting the sustainability of the planet for human life. Property remains the main object of law and state institutionality, with two important qualifiers: property is limited by social and environmental responsibility. Through the criterion of social responsibility, the state can expropriate property and charge taxes on the transfer of property. Through environmental responsibility,

17 Stockholm Declaration on the Human Environment, in *Report of the United Nations Conference on the Human Environment*, UN Doc.A/CONF.48/14, at 2 and Corr.1 (1972), paragraph 3.

the state can obligate any person or legal entity to maintain green spaces, declare reserves, or not use certain polluting products.

Overall, the right to a healthy environment also has substantive limitations. At the international level, it has not resulted in direct and decisive protection.[18] The theory of positive law has remained practically untouched. The notorious separations achieved by positive-liberal law are still largely in place: the human being is not nature; the law has no relationship with the laws of nature; and the human being is subject and nature object. Consequently, the values of the political, economic, and legal systems (individualism, property, competition, infinite natural resources) continue to be promoted by states, human beings, and international corporations. In this environmentalist paradigm, nature remains an object and is functional to the needs of the human species.

A different view, in which nature is regarded as part of a web of life with its own value, could be termed "systemic."

The Systemic Theory of Law

Ecuador was the first country to recognize nature as a subject of rights. The idea that nature has a life that deserves to be protected beyond the interests and conceptual frameworks of human beings was an unprecedented seismic shock. The impact this recognition could have on the notion of nature as a resource to be economically exploited is akin to a Copernican revolution.

If the rights of nature were fully in force, then the civil code that establishes that nature is an object that can be discarded, the administrative law that regulates nature as the inalienable property of the state, and the rights of Indigenous peoples to collective

18 See César Rodríguez-Garavito, ed., *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (New York: Cambridge University Press, 2022).

ownership of a territory would have to be repealed or seriously limited. Such a recognition would be a total paradigm shift.

We are undoubtedly in a paradigmatic transition. The 2008 Constitution of Ecuador recognizes all these evidently contradictory legal situations: private, public, and collective property; simultaneously, nature is recognized as a subject of rights that, theoretically, could not be appropriated (the "commons"). The best way to understand and overcome these legal contradictions is by adopting a theory of law that can appreciate the complex phenomenon of law and nature.

The systemic approach to law has already attracted the attention of jurists, thinkers, and activists. Today, this approach is developing relatively quickly.[19] In the logic of a system, everything is connected and functions as a network. The individual is understood in the "whole": in processes, within contexts, and holistically.

A wide gulf separates systemic law from positivist law. I will outline some key differences:

1. The separation between human beings and nature is a characteristic of positivism. In contrast, in systemic theory, the human being is like any other being, indissolubly

19 The inspirations for the systemic approach presented here are based on several texts, the most important of which are Fritjof Capra and Pier Luigi Luisi, *The Systems View of Life: A Unifying Vision* (Cambridge: Cambridge University Press, 2014); Fritjof Capra and Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (New York: Berret-Koehler Publishers Inc., 2015); Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Quito, Ecuador: Huaponi/UASB-E, 2019). Other texts provide holistic views of nature, including Germana de Oliveira Moraes, Martonio Mont'Alverne Barreto Lima, and Thaynara Andressa Frota Araripe, *Direitos de Pachamama e Direitos Humanos* (Fortaleza, Brazil: Editora Mucuripe, 2018); Ramiro Ávila Santamaría and Agustín Grijalva, *Derechos de la naturaleza* (Quito, Ecuador: Ecuador Debate N. 116, August 2022); Esperanza Martínez and Adolfo Maldonado, eds., *Una década de derechos de la naturaleza* (Quito, Ecuador: Abya Yala, 2019).

interrelated with nature. Likewise, the jurist cannot be alien to nature or to other knowledge.

2. In positive law, the only valid norm is that of the state, and only when issued in accordance with the procedures established in the constitution. However, systemic law embraces legal pluralism, where several normative systems coexist and have different forms of recognition. Among these systems are those that govern the behavior of persons belonging to an Indigenous community and the "norms" that regulate the behavior of nature.
3. The source of legitimacy of positive law is respect for the constitution. In systemic law, each normative system has its own source of legitimacy. In the relationship between human legal systems and the laws of nature, human norms are legitimate if they respect the natural cycles, structure, functioning, and evolutionary processes of nature.[20]
4. The "truth" in positive law is the valid norm, whether general and abstract or that which is produced in a concrete case by a competent authority through legal adjudication (e.g., legislator, president, judge). On the other hand, systemic law is based on principles and the infinite possibilities that derive from them—there is no single or general truth.
5. Positive law is indifferent to "reality." Its object of study is the valid state norm. To be considered by law, "reality" must be adapted to the normative hypotheses created by humans with authority. In systemic law, norm and reality interact. When reality violates rights, it must be modified. The law is flexible, understanding and adapting to the changing and emerging needs of people and ecosystems.

20 See Cullinan, *Wild Law*.

6. Pure positive law isolates the jurist from other disciplines, and legal knowledge is specialized and professionalized, with marked boundaries. Systemic law is interdisciplinary. It humbly recognizes that it is a partial and incomplete knowledge, and in order to fulfill its mission, it must understand nature and complement itself with what is known as natural and social sciences, in addition to the knowledge that comes from the culture and practices of Indigenous peoples.
7. The jurist in positive law objectively analyzes the valid state norm. They must be distanced from politics, morality, religion, and other disciplines. The jurist in systemic law is committed to the rights and care of the planet, interrelated with all knowledge and practices of care, protection, and regeneration of nature, particularly those from Indigenous peoples.
8. In short, systemic law shifts the conception of nature as an object and regulation as property, which empowers human beings to use, abuse, and dispose of nature, to one in which nature is a subject because it has life and deserves to be respected outside the concept of property. This framework grants responsibilities to human beings to use when necessary and to take care of nature.

Adopting these theoretical approaches, the jurisprudence of the Constitutional Court of Ecuador is an example of a court applying and moving toward a systemic theory of law.

The Jurisprudence of the Constitutional Court Regarding Nature

Since the 2008 constitution was issued, the constitutional court has slowly developed its jurisprudence to give content to the rights of nature,[21] and Ecuador has the largest number of rights of nature cases in litigation globally.[22] Yet despite these legal advantages, the court still faces significant challenges that can be illuminated through a close look at several groups of rulings.

One group of rulings can be called the *jurisprudence of denial and lost opportunities*. From 2008 until 2015, there was little interest in or knowledge of the rights of nature. Therefore, nature was simply not considered—or not considered to have rights recognized by the constitution—even when it was directly related to the subject matter of the case (e.g., contamination of a stream and a lagoon, deforestation of a mangrove swamp, an order to kill a dog that was considered dangerous, mining, diversion of a riverbed).[23] Throughout this period, the court exclusively applied the property rights regime to resolve these cases.

In another group of rulings, the court has used the tools of environmental law and assumes that nature is protected once the

21 Justice Antonio Herman Benjamin, "Beyond Human Rights: A Judge's Perspective on Right of Nature and the Environmental Rule of Law," Working Paper for the 2022 More Than Human Rights Conference (on file with conference organizers) argues that judges are sometimes trapped in the legal theories they learned during their university career. However, he also recognizes the important role that courts play in making legal innovations.

22 See Craig M. Kauffman, "Global Patterns and Trends in Rights of Nature Legal Provisions: Insights from the Eco Jurisprudence Monitor," in this volume.

23 See, for example, Constitutional Court of Ecuador, Judgment nos. 0008-09-IN and 0011-09-IN, March 18, 2010; case nos. 0011-10-EE, July 8, 2010; no. 0008-09-EE, March 25, 2010; no. 0005-11-EE, March 31, 2015; no. 0796-12-EP, October 15, 2014; no. 1281-12-EP, July 9, 2015.

administrative requirements of environmental regulations (e.g., impact reports and authorizations by environmental agencies) are fulfilled. This jurisprudence could be called *environmental jurisprudence and the invisibilization of nature* as a subject of rights.

There are strong links between the rights of nature on the one hand and environmental law and the law of the healthy environment on the other. Both legal branches take nature as their object. Nevertheless, they are not the same. The starting point and aim of environmental law is human welfare, and in the right to a healthy environment, the human being is the rights-holder, while the state is responsible for guaranteeing such rights. In the rights of nature, nature has a value in itself. All the elements that compose nature—humans included but not exclusively—are rights-holders. The objective is ecological balance, and the responsibility lies with the state and the human species.

It is tempting to say that the well-being of nature is inextricably bound to the well-being of the human species. However, we should avoid romanticizing this relationship. Human beings—with our ways of producing food, consuming energy, and inhabiting the world—are primarily responsible for crises like environmental degradation and climate change. Depending on the circumstances, the rights of nature may prevail over certain rights that humans have attributed to ourselves. We can see these tensions at play in cases when the constitutional court resorted to environmental law. The court assumed that if there is an environmental impact report or authorization from the ministry in charge of the environment, then the rights of nature are automatically guaranteed.

Nothing could be further from the truth. In the era of economic globalization, the state has acted as a facilitator and ally of the extractive activities of transnational corporations.[24] When a

24 See, for example, David Korten, *When Corporations Rule the World* (San Francisco: Berret-Koehler Publishers, Inc., 2016); Naomi Klein, *The Shock*

government inserts extractive policies into its economic agenda, the ministry in charge of environmental affairs produces the necessary environmental impact reports and authorizes extractive activities. Without the necessary resources, experts, impartiality, and independence, a government agency cannot be expected to protect the rights of nature. Yet, in some cases, without reasoning or acknowledgment of the rights of nature, the court argued that the existence of an environmental report or a governmental authorization provided sufficient protection.

In 2014, for instance, the court resolved a case regarding an extractive activity when a community (Comuna El Verdum) filed a legal action against a shrimp businessman for impeding access to and destroying a mangrove swamp. The constitutional court argued that the species that inhabit a mangrove forest are of public interest and "belong" to the state; that the Ministry of Environment is in charge of verifying, conserving, protecting, replenishing, prohibiting, and/or delimiting mangrove forests in the country; and that those with permits from the state are allowed to exploit the mangrove forest.[25] In other words, the court assumed that as long as there is an environmental permit, nature is protected.

In the last grouping of rulings, the constitutional court takes the rights of nature seriously, recognizing nature as a subject, alive, with history, with context, with rights, with the possibility of having its rights violated—and that, when violated, nature must be fully repaired. In order to arrive at these considerations, the court developed a systemic theoretical approach to the cases.

Doctrine: The Rise of Disaster Capitalism (New York: Picador, 2008); Joseph Stiglitz, *The Price of Inequality* (New York: W. W. Norton & Company, 2012).

25 Case no. 0796-12-EP, Transitional Constitutional Court of Ecuador, 19–20.

Between 2021 and 2022, the court issued several rulings to protect two ecosystems, two rivers, and a wild animal, declaring that they are subjects of rights. In 2021, the court recognized the mangrove as an ecosystem for the first time—a part of nature and subject of rights. In one case, several civil society organizations had argued the unconstitutionality of several rules of the law and regulations governing the environment for allowing the construction of infrastructure and monoculture plantations in mangroves. The court issued a declaration establishing the unconstitutionality of monocultures and of legal and regulatory language allowing unsustainable activities; it permitted productive activities to be carried out only if they would not interrupt the vital cycles, structure, functions, and evolutionary processes of the mangrove.[26]

Ultimately, this ruling established a rich set of recognitions: mangroves are highly valuable for the planet, surrounding communities, and the mitigation of climate change;[27] they therefore need special protection based on the rights of nature;[28] nature is not an abstract or inert entity, but a complex subject that requires a systemic perspective;[29] the content and scope of the rights of nature depend on the role of each element of an ecosystem,[30] meaning each element that makes up nature must be protected;[31] the state can recognize the rights of an ecosystem or other elements of nature, which could help determine the obligations linked to ownership

26 Case no. 22-18-IN/21, Decision of Judge Ramiro Ávila Santamaría, Constitutional Court of Ecuador (September 8, 2021).

27 Case no. 22-18-IN/21, paragraph 18.

28 Case no. 22-18-IN/21, paragraph 22.

29 Case no. 22-18-IN/21, paragraph 26.

30 Case no. 22-18-IN/21, paragraph 29.

31 Case no. 22-18-IN/21, paragraph 34.

of rights;[32] the elements that make up the mangrove ecosystem are part of a larger whole, which participates in more complex exchanges of nutrients and energy on a regional or even global scale;[33] unsustainable activities in mangrove forests—such as the intensive exploitation of timber, animal species, or water—put the ecosystem at indefinite risk and are prohibited;[34] the ecological, cultural, and economic value of conserving mangrove ecosystems is much higher than that of their land or timber;[35] and the regeneration of mangrove forests will require the diversification of plant and animal species, not monoculture, which generates an imbalance that could lead to their total destruction.[36]

Two months later, the court resolved one of the most emblematic cases in which it developed the content of the rights of nature and the systemic perspective of law: the *Los Cedros* protective forest case, widely considered the "case of the century," and which demonstrates the complex and asymmetrical relationship between transnational mining companies and community resistance.[37] In 2017, the Ministry of Mining granted metallic mineral concessions in the Los Cedros protective forest, and the Ministry of Environment approved the environmental registration for the initial exploration phase of the mining concessions, which were located in Imbabura

32 Case no. 22-18-IN/21, paragraphs 35–37.

33 Case no. 22-18-IN/21, paragraphs 39–40.

34 Case no. 22-18-IN/21, paragraphs 60–61.

35 Case no. 22-18-IN/21, paragraph 68.

36 Case no. 22-18-IN/21, paragraph 103.

37 See Robert Macfarlane's wonderful essay, "Journey to the Cedar Wood," in this volume, in which he uses the Gilgamesh epic as a metaphor; on this case and the relationship with art and social movements, see also Agustín Grijalva, "*Los Cedros* Case: Social Movements, Judges, and the Rights of Nature," in this volume.

province. Legal action was filed claiming that the mining activity violated the rights of nature, among other rights.

In 2021, the court ratified the sentence that accepted the violation of rights, declared that the rights of nature were violated, and ordered reparations.[38] The court affirmed that the recognition of the rights of nature is not a rhetorical lyricism but a transcendent statement and a historical commitment. According to the preamble of the constitution, recognition of the rights of nature demands "a new form of civic coexistence, in diversity and harmony with nature."[39] This recognition has full normative force and constitutes a set of legal mandates, directly applicable and with their own principles for application and interpretation[40]—such as pro natura, the obligation of judges to carry out a careful examination when invoked; the systemic perspective;[41] the principle of tolerance;[42] intrinsic valuation;[43] complementarity between humans, other species, and ecosystems;[44] human adaptation to natural processes;[45] the precautionary principle in the absence of scientific evidence;[46] and biodiversity and endemism.[47]

38 Case no. 1149-19-JP/20, Decision of Judge Agustín Grijalva, Constitutional Court of Ecuador (November 10, 2021), http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcnBldGE6J3RyYW1pdGUnLCB1dWlkOic2MmE3MmIxNy1hMzE4LTQyZmMtYjJkOS1mYzYzNWE5ZTAwNGYucGRmJ30=.

39 Case no. 1149-19-JP/20, paragraph 31.

40 Case no. 1149-19-JP/20, paragraphs 35–36.

41 Case no. 1149-19-JP/20, paragraph 43.

42 Case no. 1149-19-JP/20, paragraph 44.

43 Case no. 1149-19-JP/20, paragraph 47.

44 Case no. 1149-19-JP/20, paragraph 50.

45 Case no. 1149-19-JP/20, paragraph 52.

46 Case no. 1149-19-JP/20, paragraph 55.

47 Case no. 1149-19-JP/20, paragraphs 76–83.

The conclusion of the ruling is blunt: mining activity in Los Cedros would lead to the extinction of species in the forest, diminishing its biodiversity and, consequently, violating nature's right to maintain and regenerate its life cycles, structure, functions, and evolutionary processes.[48] The ruling also re-envisions the role of the environmental control body. Merely granting a permit or license does not replace the obligation to carry out technical and independent environmental studies that guarantee the rights of nature.[49] Before issuing the environmental registration, the environmental authority must examine the biological value of an ecosystem, the rights of the forest and the species that inhabit it, and observe the principles that apply to the case, such as the precautionary principle.[50] Based on the ruling, granting a mining right without environmental certification based on a technical study would be incompatible with guaranteeing the right to water and the rights of nature.[51]

Finally, this ruling also establishes the relationship between the right to a healthy environment and the rights of nature: "The right to a healthy environment is not only a function of human beings but also reaches the elements of nature, as such."[52] This language rejects the anthropocentric notion of the right to the environment. Although the ruling recognizes the impact of the environment on human beings, it does not neglect other factors, such as health, balance, environmental sustainability, and the intrinsic value of nature.[53]

48 Case no. 1149-19-JP/20, paragraphs 116, 120, 124.

49 Case no. 1149-19-JP/20, paragraph 132.

50 Case no. 1149-19-JP/20, paragraph 146.

51 Case no. 1149-19-JP/20, paragraph 226.

52 Case no. 1149-19-JP/20, paragraph 242.

53 Case no. 1149-19-JP/20, paragraph 243.

In 2021, the court also declared a river subject to rights for the first time. In 2015, the state entity in charge of water management authorized the use of water from the Aquepi River (Santo Domingo de los Tsáchilas) to build and implement a community irrigation system for small and medium-sized producers in the sector. The local government received authorization in 2017 to use water for tourism purposes and for the use of a business consortium. Locals opposed the project, arguing that there was sufficient flow for human consumption and irrigation, protesting and filing a lawsuit for violation of the rights of nature in addition to other rights.

The court recognized the Aquepi River as a subject entitled to rights, including the right to respect its structure and functioning when its flow is affected by human activity. The secretariat in charge of water was found to have violated the river's right to the preservation of its ecological flow, and the local government was found to have violated the right of the inhabitants around the river to an environmental consultation.[54]

Other determinations in this ruling included that the river is an element of nature that is part of a larger ecosystem, which can be identified as a watershed; it has functions that enable and sustain the life of humans and other species and vegetation; these functions include the provision of water for humans, self-purification, flood and drought control, maintenance of habitat for fish, birds, and other wildlife, and maintenance of sediment flows, nutrients, and salinity of estuaries;[55] and impacts on a river also affect an entire ecosystem. The ruling recognized that the river needs to achieve

54 Case no. 1185-20-JP/21, Judge Ramiro Ávila Santamaría, Constitutional Court of Ecuador (December 15, 2021), http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcnBldGE6J3RyYW1pdGUnLCB1dWlkOidlMGJiN2I1NC04NjM5LTQ1ZmItYjc4OS0yNTFlNTFhZWI2YTEucGRmJ30=.

55 Case no. 1185-20-JP/21, paragraph 47.

harmony, that is, balance in the ecosystem;[56] is violated in its vital cycle when not allowed to have its natural structure and when its functions are impeded and its evolutionary process disrespected;[57] and has a flow that defines its morphology, biological diversity, and ecosystemic processes—and therefore an infrastructure work that affects the flow could break the connectivity between the elements and biodiversity, violating the rights of nature.[58]

The ruling also established that being a subject of rights allows the determination of the particularities of a natural entity or an ecosystem that has suffered a violation of its rights, such as the identification of its name, location, history, vital cycle, structure, functions, evolutionary processes, and damage that may occur to it. To be a subject of rights means that the state has specific obligations with respect to these elements. The ruling also established the most appropriate reparation measures from a systemic perspective. It recognized that the river, as an element of nature, can appear so that judges can receive claims on its behalf.[59]

In another case, the court heard arguments related to the Monjas River, located northwest of the capital city, Quito. There, in addition to declaring the river a subject of rights, the court invoked the right to have the city provide a comprehensive solution to the problem.

As a result of the construction of a water collector that was discharging industrial, domestic, and rainwater waste, as well as the waterproofing of the soil due to urban growth, the Monjas River is polluted and has widened its flow, eroding the banks of the creek at an accelerated rate. Further, because of its proximity to the Monjas River, the Casa Hacienda Carcelén, which belonged to the

56 Case no. 1185-20-JP/21, paragraph 60.

57 Case no. 1185-20-JP/21, paragraph 65.

58 Case no. 1185-20-JP/21, paragraph 69.

59 Case no. 1185-20-JP/21, paragraphs 54–55.

Marquesa de Solanda and is part of Quito's inventory of heritage sites, has cracked walls and is at very high risk of collapse. The owners of the house filed a lawsuit against the Municipality of Quito and other municipal companies for violating, among other things, their right to live in a healthy, ecologically balanced, and pollution-free environment.

The court declared in 2022 that the municipality violated the rights to the city (recognized in the Ecuadorian Constitution as a right in article 31), to the Monjas River, and to a healthy environment; it also recognized the river as a subject of rights and ordered measures of integral reparation.[60] The court argued that the municipality should have refrained from discharging water that caused erosion and should have taken positive measures to decontaminate the water. By these omissions and actions, the municipality created an unsafe habitat and potential risks for the houses on the banks of the stream;[61] caused an imbalance in the ecosystem of the river; modified the composition of the water; and exceeded the capacity of the river flow, altered its bed, eroded its walls, and accelerated the erosive process.[62] The municipality was ordered to guarantee the balance of the watershed ecosystems, water quality, preservation of the river's functions, and the sustainability of the watershed.[63]

The court applied the right to the city and developed its content. The right to the city includes a range of elements, including economic (fair spatial distribution of resources to ensure good living

60 Case no. 2167-21-EP, Decision of Judge Ramiro Ávila Santamaría, Constitutional Court of Ecuador (January 19, 2022), http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcnBldGE6J3RyYW1pdGUnLCB1dWlkOic5OWVmN2EyZC1kM2I5LTQwOWQtOWY4ZS1jMDc3YzYxYWQ2ZGMucGRmJ30=.

61 Case no. 2167-21-EP, paragraph 79.

62 Case no. 2167-21-EP, paragraph 88.

63 Case no. 2167-21-EP, paragraphs 89, 95.

conditions for the entire population), political (democratic management of the city), cultural (social, economic, and cultural diversity) and natural (harmony with nature).[64] In the last element, urban planning (settlements and urbanization) must aim to establish the conditions for cities to maintain and regenerate the vital cycles of nature.[65] Through its connections, a river affects an entire ecosystem. Like other elements of nature, then, the river should be valued both in itself and in terms of what it contributes to the life of biotic communities, including the human species, and to the abiotic elements along its banks.[66]

"The Monjas River is sick," the court affirmed, "it has lost its ecological balance and requires restoration."[67] Human works and human settlements had broken its connectivity, and the impact on the water and flow seriously affected its biodiversity and ecological functioning.[68] The court ordered short-, medium-, and long-term restoration measures to return the river, to the extent possible, to its former condition.

Finally, in 2022, the so-called *Mona Estrellita* case systematized the jurisprudence on the rights of nature, enunciated animal rights, extended the scope of protection of habeas corpus, and developed the content delineating the rights of nature. In 2018, the Environmental Protection Unit (Ministerio de Medio Ambiente) of Tungurahua received a complaint about the possession of wildlife—a chorongo monkey—in a house. In 2019, a rescue was ordered. The unit raided the home; as reported, they verified that the monkey, named Estrellita, was malnourished and kept in conditions that

64 Case no. 2167-21-EP, paragraphs 101–103.

65 Case no. 2167-21-EP, paragraph 106.

66 Case no. 2167-21-EP, paragraph 121.

67 Case no. 2167-21-EP, paragraph 127.

68 Case no. 2167-21-EP, paragraph 133.

made it difficult for it to consume solid food that is part of its nutritional diet. The animal's keeper was sanctioned, a fine was imposed, and Estrellita was transferred to a zoo. The sanctioned person filed a habeas corpus, alleged that she had lived with Estrellita for eighteen years, and asked for the animal to be reintegrated into her "home." During the trial, Estrellita died of pathologies related to her isolation. The lawsuit in favor of Estrellita was denied in two instances.

The court declared the violation of the rights of nature and of the monkey Estrellita.[69] Its ruling developed several law principles related to the rights of nature, among them the principle of sustainability,[70] interspecies rights (landing to each species)[71], ecological interpretation (according to this principle, the law must observe biological interactions)[72], the principle of conservation, and the principle of intrinsic and systemic valuation[73] (not comparable to human rights)[74]. Adopting a comprehensive view, the protection of nature includes biotic beings and abiotic factors at all levels of ecological organization.[75] The animal is a basic unit of ecological organization, an element of nature, and protected by the rights recognized in the constitution.[76]

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69 Case no. 253-20-JH, Decision of Judge Teresa Nuques, Constitutional Court of Ecuador (January 27, 2022), http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcnBldGE6J3RyYW1pdGUnLCB-1dWlkOic3ZmMxMjVmMi1iMzZkLTRkZDQtYTM2NC1kOGNiMWI-wYWViMWMucGRmJ30=.

70 Case no. 253-20-JH, paragraphs 97–98.

71 Case no. 253-20-JH, paragraphs 97–98.

72 Case no. 253-20-JH, paragraphs 100–104.

73 Case no. 253-20-JH, paragraphs 77–79.

74 Case no. 253-20-JH, paragraphs 60–63, 66.

75 Case no. 253-20-JH, paragraph 70.

76 Case no. 253-20-JH, paragraph 73.

While the court affirmed that the rights of nature are not exhaustive, it recognized all those rights that are suitable for the protection of nature.[77] These include the right to exist; to life in its positive and negative dimensions;[78] to integrity (conservation of the body);[79] to not be extinguished for unnatural or anthropic reasons;[80] to not be collected, extracted, retained, trafficked, domesticated, or forced to assimilate human characteristics or appearances;[81] to free animal behavior; to the behavior of wild animals according to their instinct; and for nature to freely develop its cycles, processes, and biological interactions.[82] If they are outside their habitat, animals must have access to water and adequate food to maintain their health and vigor; the environment in which they live must be adequate for each species; and they must be allowed freedom of movement, adequate sanitary conditions to protect their health and physical integrity, space to ensure the possibility of the free development of their animal behavior, and an environment free of violence and disproportionate cruelty, fear, and anguish.[83]

Wild animals that are domesticated suffer direct violations of their rights to freedom and good living, and their rights to food following the nutritional requirements of their species, to live in harmony with their environment, to health, to habitat, and to the free development of their animal behavior are often affected.[84] Animal rights also have broader implications for the rights of nature.

77 Case no. 253-20-JH, paragraph 96.

78 Case no. 253-20-JH, paragraph 132.

79 Case no. 253-20-JH, paragraph 134.

80 Case no. 253-20-JH, paragraph 111.

81 Case no. 253-20-JH, paragraph 112.

82 Case no. 253-20-JH, paragraphs 113–114.

83 Case no. 253-20-JH, paragraph 137.

84 Case no. 253-20-JH, paragraph 119.

The domestication and humanization of wild animals affect the maintenance of ecosystems and the balance of nature, cause the progressive decline of animal populations, and increase their risk of vulnerability and danger of extinction.[85]

According to the court's ruling, the authority should have evaluated whether it was appropriate to return the species to its natural habitat or another conservation regime, considering a transition period for such purposes.[86] Estrellita did not have the specialized care and assistance she required,[87] and the Environmental Protection Unit limited her freedom without motivation or proportionality, did not comprehensively assess the individual circumstances and physical condition of the animal, and did not engage in other suitable measures.[88] Further, depending on the circumstances, habeas corpus also protects the rights of nature.[89]

In each of these cases, the court has applied principles of systemic theory, overcoming the theoretical and legal approach of legal positivism.

From the Positive Theory to the Systemic Theory of Law in the Court's Jurisprudence: A Conclusion

Each of the theoretical views described above—legal liberal theory, human rights theory, and the systemic theory of law—gives us insight into the jurisprudence of the Constitutional Court of Ecuador. When the legal framework centers the object governed by

85 Case no. 253-20-JH, paragraph 116.

86 Case no. 253-20-JH, paragraph 140.

87 Case no. 253-20-JH, paragraph 144.

88 Case no. 253-20-JH, paragraph 148.

89 Case no. 253-20-JH, paragraph 166.

the right to property, the court simply denies the rights of nature. When the perspective is from the human right to the environment, nature was not valued for its own sake but for the well-being of the human species. Only the final kind of jurisprudence takes the rights of nature seriously and, using a systemic theory of law, develops its content and scope.

Since 2021, the shift in which the court has embraced principles drawing on the systemic theory of law has brought about a number of advances in Ecuadorian jurisprudence:

The court recognizes as evidence the data that comes from the practices and beliefs of Indigenous peoples, as well as from scientific research. This data displays the abundant and marvelous diversity of natural life, including plants, animals, and rare and endangered species.[90]

The rights of nature challenge traditional law.[91] Nature is a complex subject that must be viewed from a systemic perspective. It is not an object, an abstract entity, or inert.[92] Unlike in positive law, the human being in this framework is neither the sole subject nor the center.[93] Nature and its constituent elements have intrinsic value.[94]

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90 Judgment no. 1149-19-JP/21 (Los Cedros), Constitutional Court of Ecuador, paragraphs 73–110; judgment no. 22-18-IN/21 (Manglares), Constitutional Court of Ecuador, paragraphs 11–21; judgment no. 1185-20-JP/21 (Río Aquepi), Constitutional Court of Ecuador, paragraph 56; judgment no. 253-20-JH/22 (Mona Estrellita), Constitutional Court of Ecuador, paragraph 26; judgment no. 2167-21-EP/21, Constitutional Court of Ecuador, paragraphs 29–32.

91 Judgment no. 1149-19-JP/21 (Los Cedros), paragraph 49.

92 Judgment no. 22-18-IN/21 (Manglares), paragraph 26.

93 Judgment no. 1149-19-JP/21 (Los Cedros), paragraph 50.

94 Judgment no. 1149-19-JP/21 (Los Cedros), paragraph 43; judgment no. 253-20-JH/22 (Mona Estrellita), paragraph 57.

1. The court applies the theory of fundamental rights to the content of the rights of nature. First, it discusses the implications of declaring an individual subject of rights and the practical reasons for such recognition.[95] In human rights, every human individual has the right to life and integrity. Secondly, it places the determination of the subject—natural entity or ecosystem—within a historical and ecological context.
2. In order to develop the rights of nature, the court addresses the structure of rights, including the subject, person, or entity obligated and the specific content of the rights.[96] When a subject's rights are violated, the court recognizes the possibility of declaring the violation and providing for full reparation, as for any subject of rights.
3. The specific rights that nature has will depend on each subject, ecosystem, element, or entity of nature. For example, it could be said that the river has the right to the riverbed, while wild animals have the right not to be hunted and to behave according to their instincts.[97]
4. The law cannot conceive of nature as individual and isolated. Nature must be understood as an interrelated, interdependent, and indivisible set of biotic and abiotic entities.[98] Each element has a role, and when one element is affected, the system is altered, and rights are violated.[99] Similarly, from a historical and biological perspective, nature has a

95 Judgment no. 2167-21-EP/21 (Río Monjas), paragraph 122.

96 Judgment no. 1185-20-JP/21 (Río Aquepi), paragraphs 54–60.

97 Judgment no. 253-20-JH/22 (Mona Estrellita), paragraphs 112–13.

98 Judgment no. 1185-20-JP/21 (Río Aquepi), paragraph 44; judgment no. 253-20-JH/22 (Mona Estrellita), paragraph 64.

99 Judgment no. 22-18-IN/21 (Manglares), paragraph 29.

long evolutionary and adaptation process, and if this process is broken, rights are violated.[100] Finally, nature as a subject of rights is interrelated with a healthy environment and the right to participation.[101]

5. When the court recognizes that ecosystems and the elements that compose them are dynamic and interrelated,[102] it is undoubtedly taking a systemic view that is alien to the traditional vision.
6. Among other principles of the systemic theory, we find diversity, self-regulation, and interrelation among beings in the jurisprudence of the constitutional court.[103] In its ruling on the mangrove case, for instance, the court determined that monoculture accelerates degradation.[104] In other words, a monoculture violates the principles that govern nature: it is contrary to diversity; it prevents self-regulation, which depends on human activity; and it reduces ecosystems to a single use—so that a mangrove could be either a shrimp farm or an African palm plantation.
7. Nature is the basis for the existence of other subjects. Human beings are part of nature and in a collaborative relationship with it.[105]
8. Other systemic principles are the ecological principle and the principle of tolerance. According to the ecosystemic principle, nature is a community of species; according to the principle of tolerance, there are limits to the use of

100 Judgment no. 22-18-IN/21 (Manglares), paragraph 32.

101 Judgment no. 1149-19-JP/21 (Los Cedros), paragraphs 207, 211, 213, 242.

102 Judgment no. 1185-20-JP/21 (Río Aquepi), paragraphs 48–50.

103 Judgment no. 22-18-IN/21 (Manglares), paragraph 103.

104 Judgment no. 22-18-IN/21 (Manglares), paragraph 121.

105 Judgment no. 253-20-JH/22 (Mona Estrellita), paragraph 60.

nature, and beyond those limits, nature is prevented from fulfilling its cycles and functions.[106]

9. In terms of the law of nature, the precautionary principle obliges us to protect nature when there is scientific uncertainty and risk of serious damage.[107]

Finally, the court's rulings include words without legal resonance in traditional doctrines, such as natural cycle, function, structure, or evolutionary process.[108] These words have stronger resonance in scientific fields such as biology, geology, and hydrology.

In the case of the chorongo monkey, the court makes legal use of new biological categories, such as the position of animals within the species that are part of the eukaryote, the wild animal, the food chain, and predation.[109]

In one of the cases decided by the court on a river, the structure of the river is related to morphology, the riverbed, the sediments, the flow, and the composition of the water.[110] The function of a river is to provide water, to purify it, to be a medium through which various beings pass, to connect the river with the surrounding ecosystem, and to satisfy the vital needs of various species.[111] The course of a river, as we know it now, results from a long and slow historical process, reflecting millions of years of evolution of the Earth and the beings that inhabit it.

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106 Judgment no. 1149-19-JP/21 (Los Cedros), paragraphs 44–45.

107 Judgment no. 1149-19-JP/21 (Los Cedros), paragraph 60.

108 Constitution of Ecuador (2008), art. 71.

109 Judgment no. 253-20-JH/22 (Mona Estrellita), paragraphs 72, 102, 107.

110 Judgment no. 1185-20-JP/21 (Río Aquepi), paragraph 61; judgment no. 2167-21-EP/21 (Río Monjas), paragraph 120.

111 Judgment no. 1185-20-JP/21 (Río Aquepi), paragraph 62.

In another, on a river that crosses the city of Quito, the Monjas River, the court, invoking the rights to the city, systemically analyzes the rights to water, to a healthy environment, to a safe habitat, to sustainable development, and allows it to address the complexity of the problems as well as the possible solutions.[112] The court affirms that the right to the city has four components: economic, political, cultural, and ecological. In this way, the court can take a systemic approach to the case.[113]

These cases demonstrate that a transition is taking place from a legal conception of property—individual, as a resource to be exploited—to an emerging form of the "commons"—interrelated and as a subject with life. In following this trajectory, the Constitutional Court of Ecuador has taken very important steps. Yet, these are still insufficient to fully transcend a legal, economic, and political model based on the indiscriminate exploitation of nature, a model that has produced multiple forms of violence.

112 Judgment no. 2167-21-EP/21 (Río Monjas).

113 Judgment no. 2167-21-EP/21 (Río Monjas), paragraphs 100–106.