Mother Earth rights in Latin America and the integration of traditional indigenous thinking into Cosmopolitan Constitutionalism

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Abstract

Using Colombia, Ecuador and Bolivia, among other countries, as a reference, this chapter considers how conceptions of the rights of Nature in Latin America have been transformed in recent decades thanks to multiculturalism and interculturalism. It also analyses how these rights have been incorporated into the region's constitutions.

I. Introduction

In contrast to Ronald Dworkin's[1] position that principles depend more on moral criteria than on historical conditions, it is argued here that the values of modern constitutionalism do have their basis in the history of constitutional law, but that they can also transcend law as a discipline and as a concrete order to become part of a cosmopolitan and intercultural *ethos*. In other words, the key elements of constitutional law analysed from a historical and comparative perspective, propose a clear idea of what society, politics and the law itself *should be*, specifying parameters of creation, rectification and application of any legal norm. This includes the constitutional rules themselves, although it is a disputed aspect in which the subaltern sectors of different societies fight for their concrete interests regarding emancipation. Subaltern sectors, in the context of this text, refer to ethnic minority communities in Latin America which, while defending their political and economic interests rather than the capitalist world system, manage to be a real power in some countries of the region, actively integrating themselves into constituent practice so that their worldviews are reflected in constitutional texts. 1

1 Ronald Dworkin, *Los derechos en serio* (Ariel 1989) 72.

2 Consequently, since 1917, global comparative constitutional law allows the recognition of seven values, as follows:

"1. The realization of *gender equality*, specifically through women's suffrage.
2. The effective inviolability of the *constitutional core*, in other words, the non-elusion by the new strategies of the state of siege and special faculties; in addition, the renounce of anti-democratic interventions in the form of prohibitions of undesired political parties.
3. The use of *social constitutionalism* to guarantee socioeconomic security and justice against the risks of impoverishment and marginalisation in industrial society.
4. The use of *economic constitutionalism* to promote and accelerate industrial transformation.
5. Since 1945, the ability to *peacefully cooperate* in the international arena.
6. Since the 1970s, *ecological constitutionalism* guided towards sustainability and viability of the future of industrial society. That recognises the ecosystem limits of human activities on a limited planet.
7. Since the 1980s, the material subordination under a *supranational jurisdiction* in human rights, such as the European Court and the Inter-American Court"[2].

3 To manage the length of this text, the analysis of the constitutional integration of ethnic communities will be restricted to Ecuador, Bolivia and Colombia while a brief cosmopolitan comparison will be provided based on the example of New Zealand. In addition, this article will oscillate between values 3 (Social constitutionalism), 6 (ecological constitutionalism) and 7 (supranational jurisdiction) cited in the above list of modern constitutionalism's values.

4 In this way, constitutional law could be called *cosmopolitan constitutionalism* as it includes both (i) the most historically remarkable elements — from an ethical perspective — of the different constitutional systems and (ii) the international instruments of International Humanitarian Law (IHL) and International Human Rights Law (IHRL), which positivise human rights. Both aspects of cosmopolitan constitutionalism have a high ethical

2 Bernd Marquardt, *Teoría Integral del Estado,* vol 2 (Ibáñez 2018) 312 and 313. See also Bernd Marquardt and David Llinás, "introducción", in Bernd Marquardt and David Llinás (eds.), *Historia comparada del derecho público latinoamericano* (Ibáñez 2018) 6–8.

bond and are philosophically related despite being perfectly distinguishable from each other.

The main distinction emphasised here for the purposes of this work 5
is that the historical elements of constitutional law and the instruments of IHL and IHRL are abstractions drafted as principles but derived from different rational readings. The former is the result of the careful reading of many constitutional texts (national or state) over more than two hundred years of political tradition. In contrast, the latter is the consequence of political decisions that arise as a very concrete response to the crimes perpetrated during the Second World War[3], which have global moral support. Consequently, the international discourse on human rights depends on the persons who are managing the subject, because it may or may not have a universal aspiration. In both cases, it is the triumph of reason over uncivilised barbarism, reason understood as *urbi et orbi*, from Rome to the four winds: from the Empire to the whole world.

The philosophical exercise around the universalism of human rights 6
usually lacks substance, be it material and/or historical and, by extension, cultural. This is because it starts (their universalism) from an ideal conception, either of the human being or society, perhaps of the world, which is typical of the contractual rationalism of the 18th century and which persists today among legal theorists.[4]

The problem with this type of universalist reasoning is that it is more 7
localist than it seems at first sight. Furthermore, it is about the criteria of moral evaluation given by the West to the rest of the world, which is understood as the core of modernity. Additionally, it considers that nature is, in Cartesian terms, *res extensa*, as a set of objects distinguishable from humanity. However, the Western culture associated with public law, with constitutional law is flexible. For that reason, the cosmopolitan constitutionalism mentioned in this text does not simply consist of the intercultural tolerance of two traditions that are, in principle, contradictory — the Western capitalist and liberal, with the traditional, ethnic, and minority. Cosmopolitan constitutionalism is neither the cultural assimilation, nor the simple social and political recognition of a dominant culture over others,[5] but the political integration of some communities, and their vital values, in

3 Samuel Moyn, *The Last Utopia. Human Rights in History* (Harvard University Press 2012).

4 For example, Thomas Pogge, *World poverty and human rights* (Paidós 2005) 124.

5 Willem Assies, 'Pueblos indígenas y sus demandas en los sistemas políticos' (2009), 85–86 CIDOB d'afers internacionals 89, 93–97.

a State originally hostile towards them, through a constituent process. This integration has taken place based on social, political and cultural movements which have used the law for the recognition of their autonomies and rights under their standards.

8 In this order of ideas, the purpose of the present text is simply to comparatively explain how such integration has taken place in the Latin American countries mentioned above.

II. Environmental constitutionalism in Latin America as a dialogue between the West and ethnic minority communities. a brief comparative study

9 Although the difference between the historically remarkable elements and the different international instruments of human rights seems trivial, it allows an understanding of the reason why this text speaks of cosmopolitan constitutionalism instead of global constitutionalism[6] or transnational constitutionalism.[7] These latter concepts are advocated by several authors who relate the international discourse of human rights to a homogenising, globalizing. and universalist effect. In general, within the framework of a comparative law exercise, principles, or values such as human dignity, equality and economic freedom are deduced from the various relevant constitutional texts. As such it is valid to assume that the countries that were the object of comparison are associated within their sphere of influence. Nevertheless, this does not mean that all countries have the protection of the right to life or that all States recognise people as the origin and foundation of political power since there are States that still apply capital punishment. Furthermore, there are States which, together with the people (or without), a monarchy still exists as a factor contributing to the political unity of the nation. However, this does not mean that there are no social struggles within such States that are mobilized to repress these rights or promulgate these principles.

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6 José Joaquim Gomes, *Teoría de la Constitución* (Dykinson 2004) 46–49; René Urueña, 'Espejismos constitucionales. La promesa incumplida del constitucionalismo global' (2010), 24 *Revista de Derecho Público* 14–18. A different approach to the identification of global constitutionalism with human rights declarations, which is elaborated from comparative law, can be seen in Bruce Ackerman, 'The rise of world constitutionalism' (1997), 83 VLR 771.

7 Urueña, 'Espejismos constitucionales', (n 6), 13.

I. Ecuador and the rights of pacha mama

A good and logical way to understand this issue is with a small comparative — and preliminary — analysis of constitutional and legal texts. The comparison exposed that values are conjectured because they are innovations or emergences from an institutional and, above all, social context that opposes economic liberalism characteristics of private law since the 19th century, all of which cannot be validly opposed to all States in all contexts. 10

It is in this sense that the integration of many ethnic communities in Latin America into constitutional discourse can be analysed. This is true even for those who claim not only their rights of autonomy but also the rights of non-human entities, such as nature as a whole. A good example is the Ecuadorian Constitution of 2008, whose seventh chapter deals with this specific issue where Article 71 established that: 11

> "Nature or Pacha Mama, where life is reproduced and realised, 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 fulfilment of the rights of nature. In order to apply and interpret these rights, the principles established in the Constitution shall be observed, as appropriate (...)"[8].

These two paragraphs are extraordinarily important, not only because they consecrate a right concerning a non-human entity —as a view of integral respect for its existence, maintenance and regeneration of its vital cycles—, but also because they create the possibility of demanding the fulfilment of such a right in the mind of each person, community, people and nationality. As a result, the Ecuadorian State recognises a plurality of nations. One clear example is evident in the reading of Articles 1 and 2 of the same Constitution, which establishes Ecuador as an intercultural and plurinational 12

8 "La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos.
Toda persona, comunidad, pueblo o nacionalidad podrá exigir a la autoridad pública el cumplimiento de los derechos de la naturaleza. Para aplicar e interpretar estos derechos se observarán los principios establecidos en la Constitución, en lo que proceda (…)", Ecuador, *Constitución de la República del Ecuador*, in Registro Oficial 449 20.10.2008, <https://www.cec-epn.edu.ec/wp-content/uploads/2016/03/Constitucion.pdf> last accessed 10 October 2021.

State. Additionally, the Ecuadorian Constitution recognises *Kichwa* and *Shuar* as official languages of intercultural relationship with Spanish. Additionally, Article 97 of the previous Constitution (1998) established among the duties of Ecuadorian citizenship the triad of *ama quilla, ama llulla, ama shua*: "not to be idle, not to lie, not to steal".[9] In other words, and greatly simplified terms, it recognises the legal personality of nature and a sort of legal representation of individuals as well as that of human groups and even entire nations.

13 The reasons for such explicit consecration of the rights of nature at the Ecuadorian constitutional level are varied, but it is important to consider that by the 2000s, the problem of the 1998 constitution was its scarce application and its constant State disregard and multinational private companies with extractivist interests in the country, in addition to the political instability that saw ten presidents in eleven years (1996–2007). This constitution, for example, established the principle of sustainable development as a normative containment to economic growth from an environmental perspective (Art. 243), but the impact of oil exploitation by multinational companies from 1967 to the 2000s is well known. In this regard, the operations of the Texas Petroleum Company (Texaco), which ended up having very negative impacts on the environment and people's health in the Ecuadorian Amazon is a prime example.[10] In the 1990s, the awarding of the so-called *Block 23* to Compañía General de Combustibles (CGC), an Argentinean multinational company, dedicated to the exploration and exploitation of hydrocarbons, clearly demonstrated that the constitutional postulates regarding sustainable development were a dead letter.

14 The awarding of the exploration contract posed several problems in legal terms as, for example, it affected territories that overlapped with extensions owned by the Kichwa Indigenous People of Sarayaku, whose right to prior consultation was not respected. Furthermore, the exploration carried out by the company involved the introduction of high explosives based on Pentolite in areas that constituted the traditional fishing and hunting areas of the community, with the consequent affectation of food rights and even the impossibility of expressing themselves culturally through the exercise of their traditions. The Sarayaku people's difficulties were intensified by the

9 Bartolomé Clavero, *Ama Llunku, Abya Yala. Constituyencia indígena y código ladino por América* (CEPC 2000) 11.

10 *Pueblo Indígena Kichwa de Sarayaku vs. Ecuador* [2012] Corte Interamericana de Derechos Humanos [27.6.2012] 19.

arbitrary arrests of community leaders protesting against the exploration, who demanded the cessation of using explosives in their ancestral lands and complained of inhumane treatment during the arrests, both by the authorities and by the foreign company's personnel. Added to all this was the jurisdictional and administrative silence of the Ecuadorian authorities regarding the corresponding complaints and the fact that, despite the existence of protection measures issued by the Inter-American Commission on Human Rights, the Sarayaku leaders were subjected to persecution, harassment and repeated threats.[11]

When the Constituent Assembly was installed in Montecristi in 2007, 15
personalities from different academic and literary fields, including the president of the Assembly itself, Alberto Acosta, started a campaign for the recognition of nature as a subject of rights to be enshrined in the new constitution. The Governing Council of the Confederation of Indigenous Nationalities of Ecuador (CONAIE in Spanish) joined this initiative and was later joined by other actors that embraced the proposal.[12]

Interestingly, on 27 June 2012, the Inter-American Court of Human 16
Rights issued its judgment on the merits and the reparation orders in the case of the Kichwa indigenous people of Sarayaku against Ecuador. The decision protected, among other things, the Kichwa people's rights to the collective property of their ancestral territory as well as the free exercise of their means of subsistence according to their traditions and reaffirmed the need for them to be included in prior participatory consultation. As a consequence, several orders were made, such as the removal of all Pentolite explosives close to the surface, burying the detonation cables and marking those sites where explosives were more than 20 meters underground to avoid accidents. Also, the provisions of integral non-pecuniary reparation, such as the publication and broadcasting of the sentence, the realisation of a public act of the authorities recognising the international responsibility of the State, the payment of US$ 90,000 as material damages as well as the payment of another US$ 90,000 as compensation for the damage caused to the Kichwa people.[13] In addition, Ecuador admitted, on the occasion of the award, the payment of US$ 90,000 for material damages and US$ 1,250,000 for non-material damages to the Kichwa community. Therefore, Ecuador

11 Ibid 74.

12 Mario Melo, 'Derechos de la Naturaleza, globalización y cambio climático' (2013), 5, Línea Sur, 43, 43–54.

13 *Pueblo Indígena Kichwa de Sarayaku vs. Ecuador* [27.6.2012] 88–95.

admitted, on the occasion of the international litigation, that "there will be no oil exploitation here without prior consultation (...). We will not carry out any oil exploitation behind the communities' backs".[14]

17 Clearly then, this scheme of human rights departs radically from the traditional, Western, positivist and liberal conception of what is understood by a subjective right. Indeed, it even deviates from what is a fundamental right, whose ownership usually falls to individuals or, exceptionally, to human collectivities[15]. However, it is also striking that it originates in a social struggle located in Latin America and in the pluralism that confronted the globalising logic of the Washington Consensus.[16] As such, it is a type of *neo-spontaneous law* which, as characterised by Gunther Teubner, is of social origin, does not depend on a central power that grants its validity and is the product of a multidimensional, deconcentrated and polycentric globalisation in which localities transcend their spheres and build global sectors that are autonomous.[17]

18 The polycentric quality of Ecuadorian constitutional law, specifically Article 71, explains that any person, regardless of their ethnic identity, can acquire the benefits of Mother Earth extractivism. This is true even though the protagonist of Mother Earth originated from the indigenous pressure against multinationals. For example, on 30 March 2011, the Criminal Chamber of the Provincial Court of Loja in Ecuador resolved, in a second instance, an action for protection brought by two foreigners, Richard Frederick Wheeler and Eleanor Geer Huddle, against the provincial government of Loja for violating the rights of nature by extending,

14 "No habrá explotación petrolera aquí mientras no haya una consulta previa (…). No vamos a hacer ninguna explotación petrolera a espaldas de las comunidades (…)", *Pueblo Indígena Kichwa de Sarayaku vs. Ecuador* [27.6.2012] 88.

15 Luigi Ferrajoli, 'Derechos fundamentales', in Gerardo Pisarello and Antonio de Cabo (eds), *Los fundamentos de los derechos fundamentales* (Trotta 2001) 19.

16 Antonio Carlos Wolkmer, 'Pluralismo jurídico: nuevo marco emancipatorio en América Latina', in Mauricio García and César Rodríguez (eds.), *Derecho y sociedad en América Latina: Un debate sobre los estudios jurídicos críticos* (ILSA-UNAL 2003) 248–259.

17 Gunther Teubner, 'Global private regimes, neo spontaneous law and dual constitution of autonomous sectors', in Karl H. Ladeur (ed.), *Public governance in the age of globalization* (Ashgate 2004) 71–87. See also Imer B. Flores, 'Hacia un derecho 'glocal' o 'transnacional' y una jurisprudencia 'glocal(izada)' o 'transnacional(izada)': repensar el derecho a la luz de la 'globalización' o 'gobernanza global'', in José Mª Serna de la Garza (ed.), *Gobernanza Global y cambio estructural del sistema jurídico mexicano* (UNAM 2016) 91–103.

without conducting an environmental impact study, the road that connects Vilcabamba with Quinara. The construction residues were deposited in the Vilcabamba river which caused a swell during the rainy season of March and April 2009. Therefore, the lands near the riverbed flooded and several rural and urban landowners, including the plaintiffs, suffered damage. The only reason for the flooding was the dumping of debris in the river, as evidenced by the fact that such a catastrophe never previously happened in rainy seasons. Thus, the lawsuit was justified, not only in Article 71 but also in Article 275, according to which "living well will require that individuals, communities, peoples and nationalities effectively enjoy their rights and exercise their responsibilities within the framework of interculturality, respect for their diversity and harmonious coexistence with nature."[18] The first instance judgement annulled the process and denied the protection requested, since the passive part of the claim was not properly integrated only the provincial government of Loja was sued and the corresponding trustee attorney was not linked.[19]

An appeal to the decision was launched and the Criminal Chamber 19
of the Provincial Court of Loja revoked the first instance judgement and granted, for the first time in Ecuadorian legal history, judicial protection to nature. This decision was pioneering the role that the country has, at a comparative level, concerning the recognition of the rights of nature. The environmental premises of the judgment lead it to reiterate that in environmental law, comparatively, the burden of proof is shifted to the defendants so that the plaintiffs do not have to prove the existence of damage. Contrary to this, the government of Loja had to provide certain evidence that the activity of extending the road would not damage the environment *in situ* or further afield. Additionally, Article 397 of the Constitution not only allows any natural person (including foreigners) but also legal entities, collectivities and/or human groups to exercise protection actions and resort to administrative and judicial bodies for such purposes. This holds true regardless of whether such actors have a direct interest in the matter but

18 "El buen vivir requerirá que las personas, comunidades, pueblos y nacionalidades gocen efectivamente de sus derechos, y ejerzan responsabilidades en el marco de la interculturalidad, del respeto a sus diversidades, y de la convivencia armónica con la naturaleza", Ecuador, Juzgado Tercero de lo Civil de Loja [2010], sentencia del 15.12.2010 <www.derechosdelanaturaleza.org.ec/wp-content/uploads/2018/04/SENTENCIA-LOJA-PRIMERA-INSTANCIA> last accessed 12 November 2021.

19 Ibid.

clearly states that the burden of proof on the non-existence of potential or actual damage will fall to the manager of the activity or the defendant.[20]

20 Regarding the passive legitimisation, the Court assumed a *material* position, contrary to the very formalistic position assumed in the first instance since it argued that the integration of the defendant within the process was properly carried out. That is because only the government of Loja was affected by the judgment, not the trustee procurator.

21 Likewise, the judgment established a series of orders and technical requirements that had to be carried out by the provincial government to guarantee both the restoration of the river and to prevent it from being contaminated again. In addition, some of the immediate measures required by the judgement established that the provincial government had to advance the environmental authorisations before the competent authorities – which they did not process from the beginning, carry out environmental impact studies of the works and implement safety containers to avoid fuel spills. Finally, the government have to locate sites for the debris to avoid dumping it back into the river among others. The *ratio decidendi* of the sentence finally expresses the principle of environmental prevention in terms of probability, not certainty:

> "Given the indisputable, elementary and irresistible importance of nature, and taking into account (sic) as a notorious or evident fact its degradation process, the protection action is the only suitable and effective way to put an end and immediately remedy focused environmental damage. This Chamber reasons that as long as it is objectively demonstrated that there is no probability or certain danger that the tasks carried out in a certain area produce contamination or cause environmental damage, it is the duty of the constitutional judges to immediately protect and make effective the judicial protection of the rights of nature, doing whatever is necessary to prevent it from being contaminated, or to remedy it. Note that we even consider that in relation to the environment, we do not only work with the certainty of damage 'but we also point to the probability'".[21]

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20 Ecuador, Corte Provincial de Loja, Sala Penal [2011], sentencia del 30.3.2011, JP. Luís Sempértegui, 3–4 <www.derechosdelanaturaleza.org.ec/wp-content/uploads/2018/04/APELACI%C3%93N-RIO-VILCABAMBA.pdf> last accessed 12 November 2021.

21 "Dada la indiscutible, elemental e irresumible importancia que tiene la Naturaleza, y teniendo en cuanta (sic) como hecho notorio o evidente su proceso de degradación, la acción de protección resulta la única vía idónea y eficaz para poner fin y remediar

However, as is often the case in Latin America, there is a considerable gap between the content of the most protective judicial decisions and constitutional norms, with the effective social application of all these provisions. In the case of the Vilcabamba River, the authorities did not fully comply with the orders given by the Loja Court, leading to the plaintiffs presenting the Ecuadorian Constitutional Court with an action for non-compliance with judicial rulings. Unfortunately, this Constitutional Court denied the existence of non-compliance under the argument that the activities carried out by the public authorities bound by the second instance sentence were sufficient to guarantee the rights of Pacha Mama.[22] This suggests that much of the institutional apparatus is still tied to previous legal-political conceptions despite the dogmatic and conceptual innovation of the 2008 Constitution. To conclude, the institutional apparatus is still unable to adequately appreciate collective, social and, above all, environmental conflicts.[23] 22

2. Bolivian public law, one of intercultural critique

Bolivian constitutionalism is another example worth highlighting in terms of subalternity. In particular, there is debate in the region as to whether it fits better in the category of *new Latin American constitutionalism*, which is an ideological construction from the militant academy of the Ibero-American left, or whether it falls into the *neoconstitutional* category, a theory of law that presumes new constitutional techniques that have existed in Latin America for at least two hundred years.[24] 23

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de manera inmediata un daño ambiental focalizado. Razona esta Sala que hasta tanto se demuestre objetivamente que no existe la probabilidad o el peligro cierto de que las tareas que se realicen en una determinada zona produzcan contaminación o conlleven daño ambiental, es deber de los Jueces constitucionales propender de inmediato al resguardo y hacer efectiva la tutela judicial de los derechos de la Naturaleza, efectuando lo que fuera necesario para evitar que sea contaminada, o remediar. Nótese que consideramos incluso que en relación al medio ambiente no se trabajo sólo con la certeza de daño 'sino que se apunta a la probabilidad'", ibid 2–3.

22 Ecuador, Corte Constitucional [2018] sentencia núm. 012–18-SIS-CC, caso núm. 0032–12-IS, 28.3.2018 <https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=012-18-SIS-CC> last accessed 12 November 2021.

23 Antonio Carlos Wolkmer, *Pluralismo jurídico. Fundamentos de una nueva cultura del Derecho* (2nd edn, Dykinson 2018) 91.

24 José Manuel Suárez, 'El nuevo constitucionalismo latinoamericano, derechos sociales y agenda ideológica crítica', in Bernd Marquardt (ed.), *El Estado constitucional de los*

24 Irrespective of which constitutional theory is used to identify the Bolivian constitutional phenomenon since 2009, what is certain is that this political charter is a direct consequence of the empowerment of the indigenous Aymara peasant movement. It was strongly felt in both the so-called 'water war' in 2000, a conflict over the privatisation of the drinking water supply in Cochabamba during the final phase of Hugo Banzer's government, and during the gas struggles in El Alto in 2003.[25]

25 Therefore, it is interesting that the Constitution of the Plurinational State of Bolivia (2009) does not explicitly enshrine the rights of Pacha Mama. Apart from two mentions in the preamble — in which it is stated with certain poetic nostalgia that "in time immemorial (...) we populated this sacred Mother Earth with different faces" — the issue is attached to the rights of people to a healthy environment[26] and the integrity of the original native indigenous peasant territory.[27] Is in the legislation, with the Law on the Rights of Mother Earth (2010)[28] and the Framework Law of Mother Earth and Integral Development for Living Well (2012),[29] that the rights of Nature are developed deeply, as well as the intercultural principles of *suma qamaña* (living well), *ñandereko* (harmonious life), *teko kavi* (the good life), *ivi maraei* (land without evil) and *qhapaj ñan* (path or noble life). Which were explicitly established in the Constitution as ethical-moral obligations of the State (Art. 8º).

26 The 2009 Constitution creating obligations for the State based on moral principles constitutes a contradiction with the liberal and positivist postulates on law inherited from the 19th century. As a result, this highlights a

valores (Ibáñez 2015) 291–317; Israel Ramiro Campero, '¿Nuevo constitucionalismo latinoamericano?' (2015), 2 Revista Jurídica 11.

25 Matías Bailone, 'El Bienvivir: una cosmovisión de los pueblos originarios andino-amazónicos', in Eugenio Zaffaroni, *La Pachamama y el humano* (Madres de la Plaza de Mayo 2011) 149, 152.

26 *Constitución Política del Estado*, in Gaceta Oficial de Bolivia, 07.2.2009, art. 33, which is the first norm of the fifth chapter, on social and economic rights.

27 Ibid, Art. 403, núm. I.

28 Bolivia, *Ley (boliviana) 071*, in Gaceta Oficial de Bolivia del 21.12.2010. It establishes several principles of obligatory compliance by the State and society (art. 2), such as harmony, the collective good, the guarantee of Mother Earth's regeneration, respect and defense of Mother Earth's rights, non-commercialization, and interculturality — understood as the recognition, recovery, respect, protection, and dialogue of the diversity of feelings, values, knowledge, knowledge, practices, skills, transcendences, transformations, sciences, technologies and norms of all the cultures of the world that seek to live in harmony with nature —.

29 Bolivia, *Ley (boliviana) 300,* in Gaceta Oficial de Bolivia del 15.10.2012.

profound transformation in the way the State apparatus should function, albeit without denying individual rights, classic freedoms and rights of intervention. For this reason, given that the 2009 Constitution is partially based on the "values of equality, inclusion, dignity, freedom, solidarity, reciprocity, respect, complementarity, harmony, transparency, balance, equal opportunities, social and gender equity in participation, common welfare, responsibility, social justice, distribution and redistribution of products and social goods", all for "living well", or *suma qamaña* (Art. 8), it makes the State subject to these ethical-moral principles. As such, and by way of example, *suma qamaña* is reflected in the text by how the right to land ownership is enshrined.

Indeed, owning and/or accessing property is an individual right that may 27
be vested in land and whose benefits may accrue to individuals, families and companies, although this is limited by the criteria of the common good. Therefore, double land titling and *latifundio,* a large extension of land that is unproductive and involves human exploitation, are both prohibited under Bolivia's 2009 constitution (Arts. 393, 398). In the same way, individual property is also limited when it is recognised as a collective right, which includes both native indigenous peasant territory and native intercultural communities (Arts. 394 and 403). For this reason, they are exempt from taxation and, due to their link with the historical traditions of the natives, they cannot be alienated, are indivisible, imprescriptible and unseizable (Art. 394).

The 2010 and 2012 laws cited above are oriented towards the fulfilment 28
of those political principles, which are proposed as an "alternative civilising and cultural horizon to capitalism and modernity", and which are summarised by the motto *Sumaj Kamaña, Sumaj Kausay, Yaiko Kavi Päve*, that is, 'living well, in harmony and balance with Mother Earth and societies'. These laws and their underlying ethos is based on equity and solidarity that simultaneously seeks to eliminate inequalities and any mechanisms of domination between peoples.

Article 5 of the *Framework Law of Mother Earth and Integral Develop-* 29
ment for Living Well (2012) defines 'Mother Earth' as the dynamic living system made up of the indivisible community of all life systems and living beings, interrelated, interdependent and complementary, which share a common destiny. Mother Earth is considered sacred; she nourishes and is the home that contains, sustains and reproduces all living beings, ecosystems, biodiversity, organic societies and individuals that compose her. From 'living well', and from the institutional protagonism of Mother Earth, all

the technical postulates that involve the use of natural resources, renewable or not, such as integral development, biological diversity, cultural diversity, environmental functions, environmental restoration, regeneration and so forth are derived (Art. 5). This law also includes the rights of Mother Earth (Art. 9º), the obligations of the State (Art. 10º), and the rights and duties of the population (Art. 11º), where the latter is understood not only as a State collective but also as the original nations and the citizenry as individuals (Art. 9º). For example, Article 9 states that 'living well', through integral development, must be guaranteed through, among others, the civil, political, social, economic and cultural rights of the entire population to attend to the needs of the different societies, nations and people in terms of their social, cultural, political, economic, productive, ecological, and spiritual dimensions.

30 In synthesis, the Ecuadorian and Bolivian experiences are a good example of what the Spanish legal historian Bartolomé Clavero calls 'indigenous constituents', that is, of the institutional incorporation of communities traditionally excluded from political power, who are now constituent subjects and have their own constitutional agency, which has been managed as a struggle for political recognition and autonomous rights, as citizen integration in terms of harmony with the environment around them.[30] In other words: rights, in their multiple dimensions, are now understood as an emanation of 'good living' (*Buen Vivir*), of humanity's link with nature and an understanding, taking a worldview different from the West's, of nature as sentient being For this reason, it is not strange that faced with this type of constitutional law, the reaction of jurists trained in traditional positivism and under the schemes of economic liberalism has not only been critical but also attempted to dismantle the postulates of this kind of intercultural constitutionalism. This has been done from the same premise of individualism as the only possible axis of State functionality and understanding of the law.[31] Consequently, there has been a clash of paradigms on the understanding at the social, political and juridical levels as well as with the indigenous and popular responses to the meta-narrative of modernity, which is claimed as the only valid, viable and possible way forward.

30 Clavero, *Ama Llunku, Abya Yala* (n 9) 15.

31 Henry Oporto, 'El (sin)sentido de una Ley -apuntes sobre la Ley de la Madre Tierra-', in Henry Oporto, Ovidio Roca and Hernán Zeballos, *Ley de la Madre Tierra* (Quatro Hermanos 2013) 1, 1–13.

Conversely, both the Ecuadorian constitution and Bolivian laws were conceived under intercultural postulates, and this is important because it is through interculturality that the State identity of both countries is shaped and by that same means, their integration of cosmopolitan constitutionalism. 31

3. Colombian constitutional jurisprudence on the rights of Nature

The comparison between the constitutional text of Ecuador and the Bolivian laws on the rights of nature allows a deduction of a *constitutional value*: the generation of the rights was caused by social mobilisations that generated neo-spontaneously. In addition, it could be formulated as the *right of nature to enjoy the reproduction, maintenance and regeneration of its vital cycles*. Although, in principle, in the Latin American context this principle may be opposable — to the authorities and society — only in Ecuador and Bolivia, the truth is that it can serve as a starting point for social and legal mobilisation in other countries, which can critically adapt it to particular needs in different localities under similar contexts. This could be achieved either through popular mobilisation, that is through the political action of the communities; or through structural litigation in which the values of environmental constitutionalism are debated. 32

An example in this context of structural litigation is the Colombian Constitutional Court's 2016 judgment T-622,[32] which arose from litigation brought by the Centre for Social Justice Studies — *Tierra Digna* — on behalf of the *Consejo Comunitario Mayor de la Organización Popular Campesina del Alto Atrato* (Cocomopoca), the *Consejo Comunitario Mayor de la Asociación Campesina Integral del Atrato* (Cocomacia), the *Asociación de Consejos Comunitarios del Bajo Atrato* (Asocoba), the *Foro Inter-étnico Solidaridad Chocó* (FISCH) and others, against the Presidency of the Republic, the Ministry of Environment and Sustainable Development and other authorities. 33

This judicial decision acquires relevance because neither the Colombian Constitution nor any other legal text in the country enshrines the rights of nature in the Ecuadorian or Bolivian style. Although, judgement T-622 is about creating legal rules for the adjudication of rights by the higher level 34

32 Colombia, Corte Constitucional, sentencia T-622 de 2016, MP. Jorge Iván Palacio, CJ n 9.32.

courts of the country, especially but not only, the Constitutional Court. In the case that led to this judgement, a writ of appeal, which in Colombia is referred to as a *Tutela action* — was filed to stop the intensive and large-scale use of various methods of illegal mining and logging that affect the Atrato River in different ways. The Atrato is a plentiful river that is part of one of the most biodiverse areas of the planet — the Chocó Biogeographic region, which is located close to the Pacific Ocean, although the river itself flows into the Caribbean Sea.

35 Many of the illegal mining activities in question used mercury, one of the most toxic non-radioactive elements on the planet.[33] This element is used to separate gold from other minerals but led to the creation of vapour clouds that were distributed throughout the region by the wind — in the industry, this process is known as *amalgam burning* —. Mercury has long been known to be detrimental to human health and several scientific reports have proven that high-level human exposure could affect the central nervous, renal, cardiovascular and respiratory systems[34]. A further problem came from the residues generated by Mercury usage that ended up discarded in the river, along with an amalgamation of all the unwanted minerals, which affected the Atrato river's plant and animal life as well as its surroundings.

36 Consequently, the Constitutional Court considered the integral effects of mining on the territory, the ecosystem and all forms of life (plant, human and animal). Therefore, it used the approach of *Biocultural Rights*, a new dogmatic trend around the integrality of rights.[35] This set of rights recognises the ethnic and traditional power of communities to administer and exercise Tutela actions over their territories. For this reason, Biocultural Rights make it possible to unify in a single protection clause the different normative provisions that regulate access to natural resources and the cultural autonomy of the different ethnic communities[36], namely what has been called the "Ecological Constitution" and the "Cultural Constitution

33 Ibid CJ n 7.26, 7.27.

34 Ibid CJ n 7.29.

35 See also Gregorio Mesa, *Derechos Ambientales en perspectiva de integralidad. Concepto y fundamentación de nuevas demandas y resistencias actuales hacia el Estado Ambiental de Derecho* (4th edn, Universidad Nacional 2019) 149–330.

36 Kabir Sanjay Bavikatte and Tom Bennett, 'Community stewardship: the foundation of biocultural rights' (2015) 6 *Journal of Human Rights and the Environment* 7, 7–29.

in Colombia".[37] From this perspective, and as recognised by the Court, the conservation of biodiversity necessarily implies the preservation and protection of the forms of life and the cultures that interact with them[38].

In its *ratio decidendi*, the Court considered, under the aforementioned holistic logic, that the river itself is a subject of rights: 37

> "To this extent, taking into account the scope of protection of the international treaties signed by Colombia regarding environmental protection, the Ecological Constitution and the biocultural rights (fundamentals 5.11 to 5.18), which predicate the joint and interdependent protection of the human being with nature and its resources, **the Court will declare that the Atrato River is subject to rights that imply its protection, conservation, maintenance and in the specific case, restoration**. For the effective fulfilment of this declaration, the Court will order the Colombian State to exercise the guardianship and legal representation of the rights of the river in conjunction with the ethnic communities that inhabit the Atrato River basin in Chocó; thus, the Atrato River and its basin will henceforth be represented by a member of the plaintiff communities and a delegate of the Colombian State. Additionally, and with the purpose of ensuring the protection, recovery and due conservation of the river, both parties shall design and form a **commission of guardians of the Atrato River** whose integration and members will be developed in the section on orders to be issued in this judgment."[39] (the highlighting in this translation is transferred from the original document).

37 Colombia, Corte Constitucional, sentencia T-622 de 2016, CJ n 5.22. See also Colombia, Corte Constitucional, sentencia C-632 de 2011, MP. Gabriel Mendoza Martelo, CJ n 4.4.

38 Colombia, Corte Constitucional, sentencia T-622 de 2016, CJ n 5.11, 9.28.

39 "En esa medida, dimensionando el ámbito de protección de los tratados internacionales suscritos por Colombia en materia de protección del medio ambiente, la *Constitución Ecológica* y los derechos bioculturales (fundamentos 5.11 a 5.18), que predican la protección conjunta e interdependiente del ser humano con la naturaleza y sus recursos, es que **la Corte declarará que el río Atrato es sujeto de derechos que implican su protección, conservación, mantenimiento y en el caso concreto, restauración**. Para el efectivo cumplimiento de esta declaratoria, la Corte dispondrá que el Estado colombiano ejerza la tutoría y representación legal de los derechos del río en conjunto con las comunidades étnicas que habitan en la cuenca del río Atrato en Chocó; de esta forma, el río Atrato y su cuenca -en adelante- estarán representados por un miembro de las comunidades accionantes y un delegado del Estado colombiano. Adicionalmente y con el propósito de asegurar la protección, recuperación y debida conservación del río, ambas partes deberán diseñar y conformar una **comisión de**

38 Although it may seem a mere formality, the determination of Tutela action in favour of the river is very important for two reasons. The first is because it entails the idea of assigning legal personality which up to this point, in the legal logic followed in Latin America, only a person in the traditional sense of the word, that is an individual human species or a moral person, could be the holder of rights. As such, although such a provision was not explicit in the decision, it is valid to affirm that with this judgement the Atrato and its basin were recognised as a person with rights, although these rights cannot be asserted by itself, hence the need for legal representatives who, in this case, are comprised of a representative of the ethnic communities culturally linked to the river and an agent of the Colombian State. The second reason the determination of Tutela action in favour of the river is very important is that legal representation resolves the procedural problem of the legal standing to file lawsuits in favour of the Atrato, which is not a minor problem in the evolution of comparative law on this matter. The issue is so important that in a certain way it solves, at least for Colombia, what was an obstacle in the processing of environmental protection through the courts in the United States, as shown by the well-known 1972 US Supreme Court case of *Sierra Club vs. Morton*.[40]

39 In that case, the U.S. Forest Service, which is responsible for the maintenance and administration of national forests, driven by the possibility of expanding a regional economy through tourism, published an invitation announcement for private developers in 1965 to explore the *Mineral King Valley*, an area located in the Sierra Nevada Mountains in Tulare County, California. The valley, which is very close to Sequoia National Park, was to be assessed for the purpose of building and operating a ski resort as well as becoming a summer recreation area. Among the six proposals that were presented, the one chosen came from Walt Disney Enterprises Inc. which was subsequently granted a three-year permit to carry out studies and exploration of the valley. In 1969, this resulted in a plan to spend US$ 35 million to build a complex of hotels, restaurants, swimming pools, parking lots and other structures capable of accommodating some 14,000 visitors

guardianes del río Atrato cuya integración y miembros se desarrollará en el acápite de órdenes a proferir en la presente sentencia" (the highlighting is from the original document).

40 Joel I. Colón-Ríos, 'Naturaleza, Legitimación activa, y el río Whanganui' (2014) Victoria University of Wellington – Faculty of Law, <SSRN: https://ssrn.com/abstract=2883886> last accessed 10 October 2021.

daily. To access the complex, a 20-mile-long road was proposed through Sequoia National Park along with various other constructions on the slopes of the mountains.[41]

40 The Sierra Club, an influential environmental organisation in the United States, opposed the project and filed a suit as an entity with a special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country. The organisation invoked the judicial review provisions of § 10 of the *Administrative Procedure Act*, alleging that future changes would detrimentally impact the aesthetic harmony and ecology of the park. Initially, the District Court for the Northern District of California admitted the lawsuit and granted an injunction, which consisted of suspending all work and activities related to the project. As expected, the developers objected to the validity of the injunction based on the lack of standing of the Sierra Club to bring the case to the court, especially considering that there was no nexus between Walt Disney's plan and any private interest of the plaintiff organisation. With this argument, Disney appealed the decision before the Ninth Circuit Court of Appeals, which reversed the measure and mentioned, on that point, that "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distasteful to them. (...) We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet-level officials of the government acting under Congressional and Constitutional authority".[42]

41 Sierra Club appealed to the Supreme Court through a writ of *certiorari* to review the second instance decision. On this issue, the Supreme Court argued that the standing to sue in the Mineral King Valley case could not fall indiscriminately on all citizens, but would have corresponded only to those who were directly injured by the project, that is, those for whom the aesthetic and recreational values of the area would be diminished by the construction of the road, the hotels or the ski resort. Since the Sierra Club failed to demonstrate that it, as an entity, or that any of its members would be affected in any of their activities or hobbies by the Disney project, the revocation of the injunction was upheld.

41 *Sierra Club vs. Morton*, 405 US 727, 728–729 (1972).
42 Ibid 731.

42 The decision itself demonstrates the preponderance of formal criteria at a time (1972) when environmental awareness was just emerging in the world. Another interesting thing about the case is that it was not unanimous as there was a dissenting opinion by Justice William Douglas, who believed that the protection of nature should lead to granting the elements of the environment a space to demand their preservation so that the fiction of personality could be assigned. Justice Douglas also noted that for maritime purposes, a ship has legal personality while corporations enjoy the same and, therefore, have rights and obligations:

> "So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes: fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as a plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water whether it be a fisherman, a canoeist, a zoologist, or a logger must be able to speak for the values which the river represents, and which are threatened with destruction".[43]

43 As can be seen from the above, the procedural aspect is not a minor matter, indeed, it is fundamental to guarantee access to the administration of justice by non-human persons. The legal representativeness of the Atrato River, its basin and its tributaries, as provided for in Ruling T-622 of 2016, was developed by the Colombian government through Decree No. 1148 of 5 July 2017 and Resolution No. 907 of 23 May 2018. These were the legal instruments that created the *Commission of Guardians of the Atrato River*, composed: (i) *The Guardians of the Communities* which, in turn, is composed of various ethnic organisations, such as *the Asociación de Consejos Comunitarios y Organizaciones del Bajo Atrato* (Ascoba) and the *Foro Interétnico Solidaridad Chocó* (Fisch) and (ii) T*he Guardian of the National Government*, which operates as the legal representative of the river, and for all legal purposes is the Ministry of Environment and Sustainable Development. The Commission was designed as an instance of dialogue between the diverse communities that coexist within the area of influence of the

43 Ibid 743.

Atrato River and the institutions in charge of environmental protection in the country.

Just as in *Sierra Club vs Morton*, the idea of an ecological constitution 44
in Colombia did not exclusively come from the field of litigation promoted by minority ethnic communities. What has happened is that since 1991 the constitutional discourse has had a profound impact on multiple segments of Colombian society, regardless of the ethnic affiliation of those who practice strategic litigation which, moreover, is usually carried out by non-governmental organisations. This has resulted in different pronouncements by judicial courts recognising nature as a subject of rights. For example, an important Supreme Court of Justice judgment of 5 April 2018 resolved an appeal for protection promoted by 25 young people between the ages of 7 and 25 who alleged their belonging to the future generation of the country. They also expressed their concern about the increase of deforestation in the Amazon — a territory that, in Colombia, extends through the departments of Amazonas, Caquetá, Guainía, Guaviare, Putumayo and Vaupés —, a circumstance that would jeopardise their rights to life, health, food and water.

The decision makes it explicit that protection against deforestation is not 45
only an important issue for the children, adults and adolescents who filed the constitutional action, but for all the inhabitants of Colombia from an inter-generational perspective, that is, for its present and future population. To make protection functional, the Court decided, analogously to the case of the Atrato River, that the Amazon as a region is a subject of rights, entitled to protection, conservation, maintenance and restoration by the State and the territorial entities that comprise it[44]. The *ratio decidendi* of the ruling is interesting, not only for referring to the Ecological Constitution or "Environmental Charter" of Colombia, but also because it focuses on the non-compliance with the United Nations Framework Convention on Climate Change, known as the *Paris Agreement* (2015), which was adopted in the country through Law 1844 of 2017[45], of canon 12 of the International Covenant on Economic, Social and Cultural Rights (1966), and of other

44 Colombia, Corte Suprema de Justicia, sentencia STC4360–2018 del 5.4.2018, MP. Luís Toloza.

45 Colombia, *Ley 1.844 de 2017, por medio de la cual se aprueba el 'Acuerdo de París',* in Diario Oficial 50.294 del 14.7.2017.

international instruments that integrate the global ecological public order, such as the Stockholm Declaration (1972) and the Rio Declaration (1992).[46]

46 This constitutional value, the right of nature to reproduction, maintenance and regeneration of its vital cycles, which is explicitly presented only in the Ecuadorian constitution, is transcendental because it results from a dialogue between culturally western concepts — namely the very idea of a constitution— with cosmo-visions alien to the idea of the juridical that exists in the West. However, and for this same reason, the idea of the historical elements of constitutionalism alluded to in the introduction of this work facilitate an intercultural and cosmopolitan exercise and allows us to understand the reason why around the globe, in other locations with different communities and different authorities, the same phenomenon is occurring almost simultaneously: minority ethnic communities integrating their particular worldviews into the public law of their respective States.

4. The New Zealand case: the legal personality of the whanganui river

47 In 2017, the Maori community of the Whanganui River, in New Zealand, entered into a legal agreement with the government of the country to recognise that the river has the right to a legal personality. This presupposes the admission of its existence as both a living entity and legal entity as well as it having the right to enjoy ongoing maintenance and conservation. In the Maori worldview, human beings are linked through kinship relationships with rivers, mountains and trees. They consider themselves descendants of nature itself and, from that perspective, the river from which they draw their livelihoods is not only a living and indivisible entity but a person with rights, an arcane relative that provides health and well-being to its extended family. This system of beliefs proved to be the basis of a historical conflict between the Maoris and the British Crown, the latter being represented by the New Zealand government, that dates back to 1840 with the signing of the Treaty of Waitangi between the British Crown and the chiefs of the Maori *iwi* (tribes). The treaty is considered the founding text of New Zealand and that, in general terms, implied the cession of the right of government in favour of the British monarch, in exchange for the conservation of the tenure of the lands and title of chiefs by the Maori as well as the

46 Colombia, Corte Suprema de Justicia, sentencia STC4360–2018, CJ n 6.1 – 6.5.

recognition, for the latter, of the same rights that English subjects had.[47] The conflicts that arose over the interpretation of the treaty demonstrate what is, in essence, an incompatibility between a capitalist world system and all the liberal and positivist scaffolding behind it as theoretical support, with the traditional vital praxes of various indigenous groups, seen by the capitalist world as premodern and archaic.

48 For such reason, one of the most important antecedents for the affirmation of the legal personality of the Whanganui River was the recognition of the Waikato River in 2010 as a 'living ancestor' and an "indivisible whole", an occurrence that was followed by the recognition of the *Te Urewera* Nature Park as a legal entity in 2014. What is of interest here is that, when identity was granted to the park, it was stated that *"Te Urewera is a legal entity, and has all the rights, powers, duties, and liabilities of a legal person"*, and the explicit purpose of the legislation was expressed in these terms:

> "The purpose of this Act is to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to
>
> (a) strengthen and maintain the connection between Tūhoe and Te Urewera; and
> (b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and
> (c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all."[48]

49 This 2017 piece of legislation was the culmination of 140 years of negotiations between the Maori people and the British Crown that determined not only the legal personality of the Whanganui river but holistically integrated it with the environment around it, legally creating a being comprised of both the river, which flowed from the mountains to the sea, as well as all

47 Joel I. Colón-Ríos, 'Naturaleza, Legitimación activa, y el río Whanganui' (n 40) 8–11.

48 New Zealand, *Te Urewera Act* 2014, *Public Act: 2014, n 51*, <http://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html#DLM6183705> last accessed 11 January 2022.

its physical and metaphysical elements[49]. Similar to the Te Urewera Park, the Whanganui River is now a person with all the rights, powers, duties and commitments of any person:

> "14 Te Awa Tupua declared to be a legal person.
>
> (1) Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.
> (2) The rights, powers, and duties of Te Awa Tupua must be exercised or performed, and responsibility for its liabilities must be taken, by Te Pou Tupua on behalf of, and in the name of, Te Awa Tupua, in the manner provided for in this Part and Ruruku Whakatupua-Te Mana o Te Awa Tupua"[50].

50 As the cited legal text indicates, the legal personality became manifest in the possibility for the Whanganui to challenge claims, to be sued and even to enter into contracts, all exercised through legal representation provided through the 'human face' of the river Te Pou Tupua, the guardian body of the river comprised of two representatives, one appointed by the Crown and the other by the Whanganui tribe.[51]

51 Another interesting aspect of the 2017 law is that it recognised, concomitant with the legal personality of the river, compensation to the Maori people of NZ$ 80 million, plus one million dollars to restore the legal framework of the river.[52]

III. Conclusions

52 How can ethnic worldviews be integrated into cosmopolitan constitutionalism? The position to be assumed in the face of human rights would imply abandoning the idea of universality because it is based on a preconceived

49 New Zealand, *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (2017 n 7), s. 12.

50 Ibid s. 14.

51 Ibid s. 18 and 19. See Elizabeth Jane Macpherson, 'Derechos constitucionales, derechos humanos, derechos indígenas: el lado humano de los derechos de la naturaleza', in María del Pilar García (ed.), *Reconocimiento de la naturaleza y de sus componentes como sujetos de derechos* (Universidad Externado de Colombia 2020) lit. B, n 1.

52 Boaventura de Sousa Santos, 'Derechos humanos, democracia y desarrollo', in Boaventura de Sousa Santos (ed.), *El pluriverso de los derechos humanos. La diversidad de las luchas por la dignidad* (Akal 2019).

moral superiority of the West in the context of the world system. Boaventura de Sousa Santos proposes in several sections of his work the intercultural reconstruction[53] of human rights.[54] It is the declaration of those values from cultural exchanges between different social groups, through what he calls diatopic hermeneutics, in which each party involved in a dialogue-based cultural exchange brings to the debate an ethical system of incomplete values and where the ultimate goal is to reach parity or completeness.[55]

53 Values are incomplete because, for example, the ideas that the West has about freedom and dignity are different from what those ideas and concepts mean in other parts of the world. When looking at a given domestic context, there is no valid way of affirming that one perspective is better — or in the previous thread of argument, more complete — than another. Indeed, sometimes problems occur when, in dialogues, a particular word does not refer to the same subject or concept, in which case there is *no topic* to discuss. De Sousa Santos performed an exercise of diatopic hermeneutics — *of topoi*, commonplace in the framework of a debate, from the topos of Western human rights and the topos of Hindu *dharma*. He did this simply to show how, from the dialectic involved in his hermeneutic proposal, the Western discourse is incomplete because it is plagued by a very simplistic and mechanical symmetry between rights and duties, namely, it grants rights only to those from whom it demands duties. This explains why nature has no rights in the Western concept of human rights: no duties can be imposed on it. For the same reason, it is impossible to grant rights to future generations; they have no rights because they have no duties.[56]

54 However, and at the same time, from the Western point of view, the Hindu *dharma* appears incomplete because of its strong non-dialectical tendency in favour of harmony, thus concealing injustices and disregarding

53 See also Guillermo Hoyos Vásquez, '*Ethos* mundial y justicia global en un enfoque discursivo', in Francisco Cortés Rodas and Miguel Gusti (eds.), *Justicia global, derechos humanos y responsabilidad* (Siglo del Hombre 2007) 347; Miguel Gusti, 'Las críticas culturalistas de los derechos humanos', ibid 304; Liliana María López, 'derechos económicos y sociales, derechos diferenciados y ciudadanía', in Manuel Alonso and Jorge Giraldo R. (eds.), *Ciudadanía y derechos humanos sociales* (Escuela Nacional Sindical 2001) 115–126.

54 Boaventura de Sousa Santos, *Derecho y emancipación* (Centro de Estudios y Difusión del Derecho Constitucional 2012)

55 Boaventura de Sousa Santos, *La Globalización del Derecho. Los nuevos caminos de la regulación y la emancipación* (1th edn, UNAL-ILSA 1998) 200; Santos, *Derecho y emancipación* (n 54) 157–158.

56 Santos, *Derecho y emancipación* (n 54) 159.

the value of conflict as a path to richer harmony. Moreover, *dharma* is unconcerned with the principles of democratic order, freedom and autonomy while it also ignores the fact that, without primordial rights, the individual is too fragile an entity to avoid being oppressed by that which transcends it. Finally, *dharma* tends to forget that human suffering has an irreducible individual dimension: societies do not suffer but individuals do.[57]

55 However, someone could argue that the problem with this type of intercultural reasoning is that only de Sousa Santos and the people in the West who have read it understand diatopic hermeneutics. Either way, these cultural exchanges have not yet occurred at such a level that synthesis has been reached — in the Hegelian sense of the term — between a Western thesis and a non-Western antithesis, especially in the field of human rights, or of what is called here 'cosmopolitan constitutionalism'.

56 Although what has been seen in this work is precisely an example of the opposite: based on the social mobilisation of ethnic minority communities in some Latin American countries, it has been possible to achieve 'constituency', the integration of alternative cultural values into Western modernity that bears the sign of modernity, that is, in constitutionalism itself.

Further Reading

Assies, W, 'Pueblos indígenas y sus demandas en los sistemas políticos' (2009), 85–86 CIDOB d'afers internacionals

Bailone, M 'El Bienvivir: una cosmovisión de los pueblos originarios andino-amazónicos', in

Clavero, B, Ama Llunku, Abya Yala. Constituyencia indígena y código ladino por América (CEPC 2000)

Colón-Ríos, JI, 'Naturaleza, Legitimación activa, y el río Whanganui' (2014) Victoria University of Wellington – Faculty of Law, <SSRN: https://ssrn.com/abstract=2883886> last accessed 10 October 2021

Flores, IB, 'Hacia un derecho 'glocal' o 'transnacional' y una jurisprudencia 'glocal(izada)' o 'transnacional(izada)': repensar el derecho a la luz de la 'globalización' o 'gobernanza global'', in José Mª Serna de la Garza (ed.), Gobernanza Global y cambio estructural del sistema jurídico mexicano (UNAM 2016)

Gusti, M, 'Las críticas culturalistas de los derechos humanos', in Cortés Rodas, F, and Gusti, M (eds.), Justicia global, derechos humanos y responsabilidad (Siglo del Hombre 2007)

57 Ibid.

Marquardt, B, and Llinás, D, "introducción", in Marquardt, B, and Llinás, D, (eds.), Historia comparada del derecho público latinoamericano (Ibáñez 2018)

Mesa, G, Derechos Ambientales en perspectiva de integralidad. Concepto y fundamentación de nuevas demandas y resistencias actuales hacia el Estado Ambiental de Derecho (4th edn, Universidad Nacional 2019)

Sousa Santos, B, 'Derechos humanos, democracia y desarrollo', en Sousa Santos, B (ed.), El pluriverso de los derechos humanos. La diversidad de las luchas por la dignidad (Akal 2019)

Wolkmer, AC, Pluralismo jurídico. Fundamentos de una nueva cultura del Derecho (2nd edn, Dykinson 2018)