

Upholding Nature's Rights in Ecuador:  
Identifying Problems and Providing Solutions

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## **Introduction**

In 2008, Ecuador became the first country in the world to recognize nature's legal rights at a nationwide, constitutional level. According to Ecuador's Constitution, the highest legal document in the nation, all of nature in Ecuador has the right to exist, maintain, and regenerate its life cycles and evolutionary processes, and the right to be restored. Additionally, anyone in Ecuador can demand the recognition and enforcement of these rights before a court.<sup>2</sup> By recognizing the rights of nature, Ecuador's Constitution is unique in the world in that it opts for an indigenous worldview towards the natural world and treats nature as a subject with rights rather than as an object to be owned, i.e., property. At face value, these articles of the Constitution, Articles 71-74, are revolutionary and have the potential to pave the way for environmental law around the world. Indeed, Ecuador's recognition of nature's rights has led many other countries – such as New Zealand, Bolivia, Colombia, and Bangladesh – to follow suit.<sup>3</sup> In practice, however, Ecuador's progressive intent has not been supported by ideal enforcement in courts. Although Ecuador's recognition of nature's rights has certainly led to increased environmental protection and discourse, and although rights of nature law and practice is certainly developing in Ecuador and around the world,<sup>4</sup> the enforcement of these rights within the Ecuadorian court system has proven extremely challenging.

*The focus of this paper is: (1) identifying the largest challenges and problems Ecuador has encountered since 2008 in upholding the rights of nature in courts, and (2) providing potential*

<sup>2</sup> Republic of Ecuador, Const. Title II, Ch.7, Art.71-74. Translated by Georgetown University, *Political Database of the Americas*.

<sup>3</sup> A robust discussion of communities, cities, and nations that have recognized nature's rights can be found in Part I.C of this paper.

<sup>4</sup> Craig M. Kauffman, *Why Rights of Nature Laws are Implemented in Some Cases and Not Others: The Controlled Comparison of Bolivia and Ecuador*, p.2 (2019). Paper presented at the International Studies Association Annual Conference, Toronto, March 29, 2019.

*solutions to these challenges and problems.* By identifying these problems and providing solutions, as well as by providing an analysis of all 31 rights of nature cases in the country since 2008, this paper aims to assist Ecuadorian lawyers, judges, and civil society in overcoming barriers to enforcing nature's rights in court. Additionally, this paper aims to help other nations and communities, such as Sweden<sup>5</sup> and Uganda,<sup>6</sup> that are considering following Ecuador's steps in recognizing nature's rights, and those, such as Bolivia, Colombia, and New Zealand, that have already recognized nature's rights in some fashion.

### *Overview*

Part I of this paper provides a brief history of the rights of nature, describes the variety of communities and nations that have recognized nature's rights, and introduces the central tenants motivating this movement. Part II focuses on the methods employed to collect the data for this paper and provides a review of relevant literature. Part III concerns the factors that led to nature's rights being recognized in the Ecuadorian constitution, and offers an analysis of the 31 rights of nature court cases in Ecuador since 2008. Part IV explores the three main problem areas that have hindered the enforcement of nature's rights – issues within the constitution, lack of education, and the guardianship model – and proposes possible solutions that may provide for greater enforcement of nature's rights in Ecuador. The paper then concludes in Part V, with an argument for the continued adoption and enforcement of nature's rights, both in Ecuador and around the world.

<sup>5</sup> Jon Queally, *In European First, Proposed Constitutional Amendment in Sweden Would Enshrine Rights of Nature*, Common Dreams (2019).

<sup>6</sup> ANARDE, *Rights of Nature Gain Ground in Uganda's Legal System*, Gaia Foundation (2019).

## I. The Rights of Nature

### A. Old is new again

The rights of nature movement aims to recognize nature as a living entity, and translates this philosophy into modern, western law as granting nature *legal rights* – such as the right to exist, regenerate, and be free of pollution – and *legal standing*, or the ability to bring a case to court. The underlying philosophies behind the rights of nature movement are that all of nature, humans and nonhuman animals included, is deeply intertwined; humans are reliant on nature; as evident in the current climate crisis, conventional environmental law is failing humans, animals, and the planet; nature should be treated as a subject rather than an object; and nature has intrinsic values and rights that should be recognized in law.<sup>7</sup> Rights of nature advocates believe western law currently treats nature and nonhuman animals as property to be owned and exploited, which has led to normalization of widespread exploitation, pollution, extinction, and damage, ultimately resulting in the current climatic catastrophe. As author and rights of nature advocate David Boyd puts it, “The idea that nature is merely a collection of things intended for human use is one of the most universal and unquestioned concepts in contemporary society,” and is largely responsible for the current condition of the planet.<sup>8</sup>

For the large majority of human history, however, many societies and cultures lived with a worldview that rejected the idea that nature is merely a collection of things intended for human use, opting instead to recognize the intrinsic value and ‘being’ that nature possesses. Such

<sup>7</sup> Global Alliance for the Rights of Nature, *What is Rights of Nature?* (2020); Earth Law Center, *What is Earth Law?* (2020); World People’s Conference on Climate Change and the Rights of Mother Earth, *Universal Declaration of Rights of Mother Earth* (2010).

<sup>8</sup> David R. Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World*, ECW Press, Toronto, Introduction (2017).

worldviews are reflected through religion, oral histories, creation stories, legends, and environmental conservation practices. These worldviews are most evident in traditions of animism, a localized spirituality that revolves around the “belief that all natural things, such as plants, animals, rocks, and thunder, have spirits and can influence human events.”<sup>9</sup> Before the development of the modern world religions, animism was the “predominant philosophy all over the world,”<sup>10</sup> and can be traced back to all continents, excluding Antarctica.<sup>11</sup> Although the current number of animists is unknown, many argue that it is the world’s largest religion due to its ability to merge with other religions such as Hinduism and Buddhism, its large numbers of followers in highly populated places such as Southeast Asia and Sub-Saharan Africa, as well as the fact that many animists do not necessarily identify as such.<sup>12</sup>

As the universal aspect of animism throughout history, these ancient values respecting nature as a living entity have gradually been neglected by key concepts of western society, such as private property, industrialization, commodification and economic evaluation of nature. Oren R. Lyons Jr., Faithkeeper of the Turtle Clan of the Seneca Nations of the Iroquois Confederacy, highlighted this societal abandonment of nature’s rights when he represented indigenous peoples of the Western Hemisphere at the 1993 United Nations General Assembly:

There is a hue and cry for human rights – human rights, they said, for all people. And the indigenous people said: What of the rights of the natural world? Where is the seat for the buffalo or the eagle? Who is representing them here in this forum? Who is speaking for the

<sup>9</sup> Cambridge Dictionary, *Animism*; As seen in Eugen Cadaru, *Rights of Nature: Myth, Film, Law, and Culture*, Sustainability and the Rights of Nature in Practice, CRC Press, p.39 (2017).

<sup>10</sup> *Id.*

<sup>11</sup> It is well known that numerous societies in the Americas (such as the Navajo, Aztec, and Inca to name a few), Africa (such as the Dorobo and Sandawe), Asia (such as the indigenous Bhutanese and Ilongot), and Oceania (such as the Paakantyi and Whanganui iwi), and Europe (ancient Celtic, Greek and Roman traditions) featured an animistic worldview; *Id.*

<sup>12</sup> Stephen T. Asma, *The New Atheists' Narrow Worldview*, *The Chronicle of Higher Education* (2011).

waters of the earth? Who is speaking for the trees and the forests? Who is speaking for the fish – for the whales, for the beavers, for our children?<sup>13</sup>

Since the start of the 21<sup>st</sup> century, however, communities, cities, tribes, and federal governments around the world – cognizant of traditional environmental law's inability to avoid the current climate crisis and treat nature as an entity with rights – have recognized nature's rights or the rights of specific environmental features, often with the knowledge that they are translating ancient human worldviews into modern law.<sup>14</sup> As environmental lawyer Maia Wikaira puts it, "It's another example of where long-held Indigenous perspectives and association with the natural world are not only being embedded within our legal system – they're being seen in popular environmental movements as an innovative way forward and a necessary step. So, old is new again."<sup>15</sup>

### **B. A radical idea**

The "rights of nature" was first introduced to the modern legal world in 1972 by University of Southern California Law Professor Christopher Stone. Stone originally expressed his ideas as a thought experiment to his property law class, and then published his thoughts in his celebrated piece, *Should Trees Have Standing?* in the Southern California Law Review.<sup>16</sup> Central to Stone's argument was that nature, as is the case with humans, corporations,<sup>17</sup> ships, universities, and other inanimate objects, should be granted *legal rights* and *legal standing*.<sup>18</sup> In conventional

<sup>13</sup> Oren Lyons, *Our Mother Earth*, World Wisdom, Inc. (2003); As seen in. Boyd, *supra*, Introduction.

<sup>14</sup> Nature's rights have been recognized in some form in fourteen nations: Argentina, Australia, Bangladesh, Belize, Bolivia, Brazil, Colombia, Ecuador, El Salvador, India, Mexico, New Zealand, Uganda, and the United States. For a more complete list and for more information, see Addison Luck, *The Rights of Nature (RoN) and Earth Law Around the World*, ArcGIS, (2019).

<sup>15</sup> Anna V. Smith, *Some Indigenous Communities Have a New Way to Fight Climate Change: Give Personhood Rights to Nature*, MotherJones (2019).

<sup>16</sup> Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, Southern California Law Review 45, p.450-501 (1972).

<sup>17</sup> Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394 (1886).

<sup>18</sup> Stone, *supra*, p.450-501.

environmental law, nature itself has no legal standing to bring a case to court, which oftentimes forces individuals and environmental organizations to make a roundabout claim that they suffered an injury themselves in order to protect nature. In Christopher Stone's proposed framework, however: (1) nature is able to bring a case on its own behalf, as represented by a legal guardian, (2) damages are calculated by loss to nature itself, and (3) judgement and award goes to nature itself rather than an interested human.<sup>19</sup> Stone's framework in real life could look like: (1) a forest ecosystem (the trees, plants, rivers, animals, etc.) in Appalachia brings a case, as represented by a legal guardian, against a mining company for improperly disposing of mining waste in a remote area, (2) injury is calculated by the damage the ecosystem itself faced and not by the economic damages faced by a human, and (3) the judgement and any monetary award goes to restoring the forest ecosystem to its pre waste-disposal state, rather than to humans that may have property or an economic interest in the forest ecosystem. This system simplifies the ability for nature to gain legal standing, protection, and representation within the court system, as it does not rely on a plaintiff proving economic harm, the traditional way to demonstrate legal standing.<sup>20</sup> For an unjust and easily understood historical instance of a being that underwent this transition from rightless to possessing rights, Christopher Stone provided the example of a court case concerning an enslaved human that is beaten by someone other than his 'owner'. Using Stone's methodology, this would have looked like: (1) the slave-owner, if so inclined, could go to trial on behalf of his property and economic interest, the slave, being beaten and damaged, (2) damages are calculated by the slave-owner's economic loss in potential work, and (3) any judgment or award goes to the slave-owner

<sup>19</sup> *Id.* p.459.

<sup>20</sup> Marissa Martin and James Landman, *Standing – Who Can Sue to Protect the Environment?* American Bar Association (2019).



and not to the enslaved person. Just as society has expanded legal rights and standing to include formerly enslaved humans, racial minorities, women, children, and inanimate entities, Stone argued through this analogy that nature should similarly make the legal and societal transition from an object to be owned and exploited to a subject with rights of its own.<sup>21</sup>

During the publication process of *Should Trees Have Standing?* Supreme Court Justice William O. Douglas – a former editor of the *Southern California Law Review* – greatly expanded the reach of Stone's ideas and became a notable advocate for nature's rights. Douglas was one of seven Supreme Court Justices to decide on *Sierra Club v Morton*, a 1972 case that featured environmental organization the Sierra Club in their attempt to stop the development of a Walt Disney Enterprises ski resort in Mineral King Valley, an undeveloped area of Sequoia National Forest in California.<sup>22</sup> Although the Supreme Court ruled 4-3 that the Sierra Club did not have standing to sue on behalf of Mineral King Valley, Justice Douglas – who was exposed to Christopher Stone's work a few months prior – voted in favor of the Sierra Club and wrote a passionate dissenting opinion, arguing for legal rights and standing for nature. Douglas, the longest-serving Supreme Court Justice in United States history, put Stone's ideas at the forefront of the legal world when he wrote:

The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers, and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation (See Stone, *Should Trees Have Standing?*) ... This suit [*Sierra Club v Morton*] would therefore be more properly labeled as *Mineral King v. Morton*.<sup>23</sup>

<sup>21</sup> Stone, *supra*, p.450-501.

<sup>22</sup> *Sierra Club v. Morton*, 405 US 727 (1972).

<sup>23</sup> *Id.* p.405.

### C. A local and global movement

#### 1. *United States*

More than thirty years passed from the 1972 publication of *Should Trees Have Standing?* for the rights of nature to be implemented in actual law. In 2006, the small town of Tamaqua Borough, Pennsylvania became the first community in the world to recognize the legal rights of nature when they passed an ordinance that banned the dumping of toxic sludge in the community. The residents of Tamaqua, frustrated with traditional environmental law's inability to stop sewage haulers from dumping toxic sludge on their agricultural land, recognized nature's rights via a local ordinance as an alternative legal method to ban this harmful practice.<sup>24</sup> This ordinance granted the Borough and all residents within legal standing to seek relief for damages to all ecosystems within the Borough, and recognized nature as a "legal person" for enforcement purposes.<sup>25</sup> This ordinance allows any resident, coalition of residents, or the Borough Council to raise a case on behalf of nature. In their pivotal legal decision, Tamaqua was assisted and inspired by the legal counsel group and nonprofit Community Environmental Legal Defense Fund (CELDF), an organization that has played a major role in passing rights of nature legislation in communities and nations, including Ecuador, around the world.<sup>26</sup>

Since 2006, a wide variety of American communities, cities, and tribal nations have recognized the rights of nature in local law, often with the help of CELDF as well as a smaller nonprofit, the Earth Law Center. A common theme among all that have recognized nature's rights is a frustration with the shortcomings of traditional environmental laws to protect their community,

<sup>24</sup> Elisabeth Eaves, *Tree Rights*, Forbes Magazine (2007).

<sup>25</sup> Tamaqua Borough Council, Tamaqua Borough Sewage Sludge Ordinance, Ordinance 612 (2006).

<sup>26</sup> Community Environmental Legal Defense Fund, *Tamaqua Borough, Pennsylvania* (2015).

city, or nation from a particular environmental harm such as toxic sludge disposal, or a larger threat such as climate change. It is difficult to pinpoint exactly how many American communities and tribal nations have recognized nature's rights, but a common estimate is around twenty communities in ten states.<sup>27</sup> This includes places such as Santa Monica (California),<sup>28</sup> Pittsburgh (Pennsylvania),<sup>29</sup> Nottingham (New Hampshire),<sup>30</sup> Crestone (Colorado),<sup>31</sup> the Ponca Nation of Oklahoma,<sup>32</sup> and the Ho-Chunk Nation of Wisconsin.<sup>33</sup> For example, in 2010 the Pittsburgh City Council – after public outrage met the discreet leasing of open spaces and parcels of city land to natural gas companies – unanimously passed an ordinance that recognized nature's rights and banned fracking for natural gas within city limits.<sup>34</sup> Deliberating on a wide variety of legal and regulatory approaches proposed by over thirty environmental groups and law firms, the Pittsburgh City Council eventually chose to recognize nature's rights as the most effective tool to ban, rather than limit, possible environmental damage from fracking, and to protect the city's rights to clean air and water.<sup>35</sup>

<sup>27</sup> Mari Margil, *The Rights of Nature Gaining Ground*, Open Global Rights (2018).

<sup>28</sup> Linda Sheehan, *Santa Monica Passes West Coast's First Rights of Nature Ordinance*, Earth Law Center (2013).

<sup>29</sup> Madeleine Perkins, *How Pittsburgh embraced a radical environmental movement popping up in conservative towns across America*, BusinessInsider.com (2017).

<sup>30</sup> Nottingham, New Hampshire, Freedom from Chemical Trespass Rights-Based Ordinance (2019).

<sup>31</sup> Darlene Lee and Grant Wilson, *Rights of Nature Takes Hold in Crestone, Colorado*, Vermont Journal of Environmental Law EcoPerspectives Blog (2018).

<sup>32</sup> Movement Rights, *Ponca Nation of Oklahoma to Recognize the Rights of Nature to Stop Fracking*, Intercontinentalcry.org (2017).

<sup>33</sup> Community Environmental Legal Defense Fund, *Ho-Chunk Nation General Counsel Approves Rights of Nature Constitutional Amendment* (2018)

<sup>34</sup> Fracking, short for hydraulic fracturing, is a recently developed technique to extract natural gas and petroleum from the ground. Around the 1990s, fracking became popular and controversial, particularly in Appalachian states such as West Virginia and Pennsylvania. For the ordinance that banned fracking using rights of nature, see The Pittsburgh Code, Title Six, Conduct, Article 1, § 618.03 (2010).

<sup>35</sup> Ben Price, *In Pittsburgh, a Community Bill of Rights Helped Ban Fracking*, Resilience.org (2018).

Additionally, a few communities and tribes in the United States have recognized the rights of specific, historically significant and/or endangered environmental features, ecosystems, and even crops. In 2019 the Yurok Tribe of California recognized the rights of the Klamath River as a potential legal strategy that might assist in restoring the depleting salmon runs,<sup>36</sup> and the White Earth Band of the Ojibwe People recognized the rights of manoomin, a wild rice on which they subsist, as a safeguard for their staple crop threatened by global warming, large agri-businesses, increasing pesticide usage, and monocropping.<sup>37</sup> Furthermore, in 2020 the Menominee Tribe of Wisconsin recognized the rights of the Menominee River in an effort to protect the river from a proposed open-pit gold and zinc mine.<sup>38</sup> These three examples highlight the interconnection between rights of nature and environmental justice among Native American tribes, as well as the varying definitions of nature, a necessary challenge that is relevant to Ecuador's experience with the rights of nature and is discussed more in Part IV.A of this paper.

Worth noting are the variety of rights of nature legislation attempts in the United States that have failed or been struck down. For example, in 2019, the citizens of Toledo, Ohio voted via a citizens' ballot initiative to pass the *Lake Erie Bill of Rights* and grant legal rights to Lake Erie. Those in Toledo who led the campaign believed it a necessary measure to protect the lake from the toxic algal blooms that regularly plague Lake Erie and contaminate local drinking water. As one of the campaign organizers, Tish O'Dell, said, "the state has not fulfilled its responsibility to protect the people and waters of Ohio. They have repeatedly issued permits that protect the

<sup>36</sup> Anna Smith, *The Klamath River Now Has the Legal Rights of a Person*, Intercontinental Cry (2019).

<sup>37</sup> Winona Laduke, *The White Earth Band of Ojibwe Legally Recognized the Rights of Wild Rice*, Yes! Magazine (2019).

<sup>38</sup> Center for Democratic and Environmental Rights, *Our Partnership with Menominee Tribal Members on the Rights of the Menominee River* (2020).

polluters and legalize harm to the Lake.”<sup>39</sup> Agricultural businesses in Ohio, which perhaps felt threatened by potential lawsuits against agricultural runoff that pollutes Lake Erie, quickly launched a media and lobbying campaign against the *Lake Erie Bill of Rights*.<sup>40</sup> Thus, only a few months after the *Lake Erie Bill of Rights* was passed, the state of Ohio passed House Bill 166 and banned all previous and future rights of nature legislation in Ohio.<sup>41</sup> This was challenged but upheld in a federal court, where the state argued they have ownership over the lake while the supporters of the *Lake Erie Bill of Rights* argued that Lake Erie and the people of Toledo have the right to a healthy environment and clean water.<sup>42</sup> Due to the interconnected organizations that advocate for and implement rights of nature legislation around the world and the strength of the movement as a whole, the variety of successful and unsuccessful rights of nature legislation attempts in the United States have impact on nature's rights in Ecuador and all around the world.

## 2. *Ecuador, New Zealand, and the Rest of the World*

Internationally, especially in countries such as Ecuador and New Zealand, the rights of nature have gained greater traction than in the United States. Ecuador was the first country to include the rights of nature in its Constitution, granting legal rights to all of nature within the country and giving guardianship capabilities to all people in Ecuador.<sup>43</sup> The New Zealand Parliament has worked with the indigenous Māori people of New Zealand to recognize the rights

<sup>39</sup> Stacey Schmader, *Does Lake Erie Deserve Legal Rights? A Federal Court Hears Arguments*, InTheseTimes (2020).

<sup>40</sup> Claire Brown, *How Ohio's Chamber of Commerce Killed an Anti-Pollution Bill of Rights*, The Intercept (2019).

<sup>41</sup> Ohio Legislation Service Commission, House Bill 166, R.C. 2305.011, p.277 (2019).

<sup>42</sup> Tyler Gillett, *Federal judge rules Lake Erie Bill of Rights unconstitutional*, Jurist (2020). In addition to the Lake Erie Bill of Rights, a 2017 case seeking personhood for the Colorado River ended when the lead attorney was threatened with sanctions from the Colorado Attorney General. See Lindsay Fendt, *Colorado River 'personhood' case pulled by proponents*, Aspen Journalism (2017).

<sup>43</sup> Republic of Ecuador, Const. Title II, Ch.7, Art.71. Translated by Georgetown University, *Political Database of the Americas*.

and legal personhood of the Te Urewera Forest,<sup>44</sup> Whanganui River,<sup>45</sup> Mount Taranaki,<sup>46</sup> and the Waengachu River.<sup>47</sup> In stark contrast to rights of nature laws in the United States and Ecuador, New Zealand has appointed specific indigenous and non-indigenous guardians tasked with representing the environmental features in legal, administrative, and planning matters. For example, after six years of formal negotiation between the New Zealand Crown and Tūhoe iwi, the Crown agreed to return the Te Urewera forest to its traditional owners, the Tūhoe. In the Tūhoe worldview, however, nature cannot be 'owned' and is considered the ancestor all Tūhoe trace their lineage to. Thus, in 2014 the two groups agreed to recognize in modern New Zealand law the rights of Te Urewera forest, meaning Te Urewera owned itself.<sup>48</sup> To carry out this law, the Crown and Tūhoe each appointed four members, who together create the Te Urewera Board, tasked with acting as guardians of the Te Urewera ecosystem.<sup>49</sup> As the guardians represent Te Urewera's ecological interests in both policy and legal spheres, they are able to proactively protect the Te Urewera forest before resorting to the courts. Because of this, the Board has been able to implement positive ecological changes, such as replacing environmentally harmful predator poisons with traditional traps and hunting techniques, building New Zealand's first 'Living Village', and

<sup>44</sup> New Zealand Parliament, Te Urewera Act (2014).

<sup>45</sup> New Zealand Parliament, Te Awa Tupua (Whanganui River Claims Settlement) Act (2017).

<sup>46</sup> New Zealand Parliament, Taranaki Maunga; Te Anga Pūtakerongo, a Record of Understanding (2017).

<sup>47</sup> New Zealand Parliament, Ngāti Rangi; a Record of Understanding (2018).

<sup>48</sup> Craig M. Kauffman, *Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand*, ISLE: Interdisciplinary Studies in Literature and Environment, p.7-12 (forthcoming). Used with author's permission.

<sup>49</sup> From 2014-2017, four Crown-appointed members and four Tūhoe-appointed members made up the Te Urewera Board. From 2017 onwards, three Crown-appointed members and six Tūhoe-appointed members made up the Board.

covering dirt roads with a mixture of tree sap and fiber rather than traditional asphalt in order to reduce toxins and pollution.<sup>50</sup>

Other countries have similarly recognized nature's rights, often in an effort to formally acknowledge and adopt an indigenous worldview or to assist in protecting nature from a specific threat. In 2019, the High Court of Bangladesh published a verdict granting legal personhood to all ~700 rivers within the country in an effort to penalize encroachers, polluters, and dredging companies.<sup>51</sup> A few months later, in January of 2020, the High Court expanded on this and ordered more than 200 unauthorized factories along the banks of the Dhaka River, one of the most polluted rivers in Bangladesh, to close.<sup>52</sup> Furthermore, the Supreme Court of Colombia has recognized the rights of the Amazon River ecosystem<sup>53</sup> and the Atrato River to help combat illegal mining.<sup>54</sup> Bolivia has included the rights of nature in its Constitution, albeit with few provisions for their enforcement,<sup>55</sup> and Uganda recognized nature's rights via their 2019 National Environmental Act.<sup>56</sup> Communities in Argentina, Brazil, Colombia, and Mexico have also passed local ordinances establishing nature's rights.<sup>57</sup> When recognizing nature's rights, many of these countries and communities have acknowledged Ecuador and New Zealand as trailblazing nations and the

<sup>50</sup> Craig M. Kauffman, *Managing People for the Benefit of the Land: Practicing Earth Jurisprudence in Te Urewera, New Zealand*, ISLE: Interdisciplinary Studies in Literature and Environment, p.20-21 (forthcoming). Used with author's permission.

<sup>51</sup> Sigal Samuel, *This country gave all its rivers their own legal rights*, Vox (2019).

<sup>52</sup> Julhas Alam, *Bangladesh court orders 231 factories closed to save river*, AP News (2020).

<sup>53</sup> Nicholas Bryner, *Colombian Supreme Court Recognizes Rights of the Amazon River Ecosystem*, International Union for the Conservation of Nature (2018).

<sup>54</sup> Nick Mount, *Can a river have legal rights? A different approach to protecting the environment*, Independent UK (2017).

<sup>55</sup> John Vidal, *Bolivia enshrines natural world's rights with equal status for Mother Earth*, The Guardian (2011).

<sup>56</sup> ANARDE, *supra*.

<sup>57</sup> United Nations, *Rights of Nature Law, Policy, and Education*, Harmony with Nature Program (2020).

inspirational model. For a working database of all rights of nature legislation and court cases around the world, see Luck (2019), an [online map](#) made to accompany this paper.<sup>58</sup>

The rights of nature movement is also relevant in current political and social movements around the world. For example, the United States 'Extinction Rebellion' movement and youth climate strikes currently demand the federal government to recognize the rights of nature in law, as part of one of their larger demands to respect indigenous lands and sovereignty and uphold values of environmental justice.<sup>59</sup> In 2019, the Florida Democratic Party adopted the rights of nature into their official party platform. Although this inclusion has no statutory significance, it serves as a nod to the ongoing movement in Florida to recognize the rights of five rivers.<sup>60</sup> Rebecka Le Moine, a Swedish Member of Parliament, recently proposed a constitutional amendment to recognize the rights of nature in Sweden.<sup>61</sup> Additionally, there are ongoing rights of nature campaigns and advocacy groups around the world, from the United States and El Salvador to the United Kingdom and Australia.<sup>62</sup> These modern movements are a local and global response to the environmental crises that threaten ecosystems around the world, and advocates believe they are indicative of the need to rethink environmental law and adopt more respectful environmental attitudes in modern law.

<sup>58</sup> Addison Luck, *The Rights of Nature (RoN) and Earth Law Around the World*, ArcGIS, (2019).

<sup>59</sup> Extinction Rebellion United States, *We Demand* (2020); Global Climate Strikes, *The US Climate Strike Demands* (2019).

<sup>60</sup> Scott Powers. *Florida Democratic Party adopts 'rights of nature' into platform*, FloridaPolitics.com (2019).

<sup>61</sup> Queally, *supra*.

<sup>62</sup> To list a few: *Earth Law Center* (USA), the *Center for Democratic and Environmental Rights* (USA); *Nature's Rights* (Scotland), *Australia Earth Law Alliance* (Australia), and *Sí por los Derechos de la Naturaleza* (El Salvador).



#### **D. Rights of animals**

The legal rights of animals and how these fit within the rights of nature movement are worth special attention. Although differing slightly, much of this movement's goal is to gain legal standing and legal rights for animals, most often for particular individuals or species that have faced cruel and unusual harms. Similar to rights of nature advocates, nonhuman animal rights advocates believe the law views animals as property, which often leads to exploitation via activities such as factory farming, land encroachment, and animal ownership in aquariums, circuses, and zoos. To combat the unfortunately common view that animals can be owned as legal objects, organizations around the world are working to recognize animals as legal subjects. For example, in 2016 an Argentinian judge recognized the rights of Cecilia, a chimpanzee who spent multiple years in confinement and without companionship. In granting Cecilia's writ of habeas corpus, the judge ruled that Cecilia was a 'non-human legal person' and must be transferred from the notoriously insensitive Mendoza Zoo to an ape sanctuary in Brazil.<sup>63</sup> In the United States, the Nonhuman Animal Rights Project (NhRP) is battling for legal rights for captive great apes, elephants, dolphins, and whales that have experienced deprived lives similar to Cecilia's.<sup>64</sup> In India, the Supreme Court of the Northern Indian state Uttarakhand, in an attempt to reduce poaching and rethink attitudes toward wildlife, ruled in 2018 that "The entire animal kingdom, including avian and aquatic, are declared legal entities."<sup>65</sup> In Ecuador, we find that all five rights of nature cases brought on behalf of particular animals have been successful.<sup>66</sup>

<sup>63</sup> Gabriel Samuels, *Chimpanzees have rights, says Argentine judge as she orders Cecilia be released from zoo*, The Telegraph (2016).

<sup>64</sup> Nonhuman Animal Rights Project, *Litigation*, (2020).

<sup>65</sup> Ray Saptarshi, *Animals accorded same rights as humans in Indian state*, The Telegraph (2018).

<sup>66</sup> See Table 1, p.31 for more information.

## **II. Methods**

The focus of this paper is 1) identifying the largest barriers and problems Ecuador has encountered in upholding the rights of nature since their inclusion in the nation's Constitution in 2008, and 2) providing potential solutions to these barriers and problems. While providing guidance to a feasible future for the rights of nature in Ecuador, this paper additionally aims to identify and solve problems that other communities and nations may face when recognizing nature's rights.

I employed three main research methods in completing this paper: 1) interviews with knowledgeable people and parties in Ecuador and the United States to understand Ecuador's greatest barriers encountered in upholding nature's rights, 2) utilizing a recently released database – the Observatorio Jurídico de Derechos de la Naturaleza del Ecuador (Legal Observatory for the Rights of Nature in Ecuador) – of all known rights of nature cases within Ecuador to analyze and compare the success rate and future potential of legal tools, pathways, and actuator/plaintiffs, and 3) incorporating existing literature on Ecuador's laws, culture, government, history, and enforcement of rights of nature with my own research to provide the background and history of the rights of nature in the nation. Additionally, I utilized existing literature on rights of nature enforcement in other countries in order to analyze the potential success of differing strategies and provide solutions to challenges Ecuador currently faces.

### **A. Interviews**

For eight weeks over the summer of 2019, I travelled Ecuador conducting interviews. These travels were funded by four Yale Fellowships (Frank Fellowship in the Science and Humanities, Pierson Richter Fellowship, Steven Clark Senior Essay Travel Grant, and the Summer Environmental Fellowship). I conducted eighteen formal interviews and approximately thirty

informal interviews throughout the country, from as far west as the Galápagos Islands, the nation's environmental pride, to as far east as Nueva Rocafuerte in the Amazon, the birthplace of Ecuador's current President Lenín Moreno. I traveled Ecuador mainly by public bus, as well as a few boat journeys in the Amazon and the Galápagos, and one plane journey to and from the Galápagos Islands. Through a previous working relationship with Ecuadorian environmental lawyer Hugo Echeverría as well as connections I gained through an internship with the nonprofit the Earth Law Center, I organized interviews with lawyers, government officials, scholars, professors, judges, plaintiffs, and environmental activists in Ecuador and the United States. Despite many emails, phone calls, and cancelled meetings, I was not able to formally interview an energy company or an official from Ecuador's Ministry of Energy and Non-Renewable Natural Resources.

I was fortunate enough to have a formal interview with the following persons, listed in chronological order:

1. Tod Swanson – Director of Andes and Amazon Field School, and Associate Professor, Arizona State University (interview via Skype).
2. Rodrigue Gehot – Researcher for the Universidad Andina Simón Bolívar (interview via phone).
3. Francisco Bustamante – Author, consultant, researcher, and environmental lawyer (Quito, Ecuador).
4. Natalia Greene – Activist and President of CEDENMA, a coordinating organization for environmental NGOs in Ecuador. Natalia was a key player in the decision to include the rights of nature in Ecuador's Constitution (Quito, Ecuador).
5. Hana Begovic – Organizing Director of the Global Alliance for the Rights of Nature (Quito, Ecuador).
6. Stephanie Avalos and colleagues – Undersecretary of Climate Change, Ecuador Ministry of Environment (Quito, Ecuador).
7. Rommel Valdez – Environmental activist, member of YASunidos, and ecotourism guide (Rio Napo, Ecuador).
- 8-11. Alexandria, Tulio, Mr. Eriberto, and Ms. Brigida – Four members of the indigenous Kichwa Community of Llanchama (Llanchama, Rio Tiputini, Napo Province).
12. Hugo Echeverría – Environmental lawyer and lecturer, Universidad San Francisco de Quito (Quito, Ecuador).
13. Andres Martinez Moscoso – Professor, researcher, and author, Universidad de Cuenca (Cuenca, Ecuador).

14. Craig Kauffman – Professor, researcher, and author, University of Oregon (interview via Skype).
15. Daniela Salazar – Judge, Constitutional Court of Ecuador (interview via email).
16. Joffre Pérez Villarroel – General Coordinator, Partido Político Cambio Progresista (interview via email).
17. Julio Prieto – Environmental lawyer and author (New Haven, CT).
18. Norie Huddle – Plaintiff who represented the Vilcabamba River in court (interview via phone).

Additionally, I conducted approximately thirty informal interviews with taxi drivers, national park guides, waiters, shop owners, fellow bus passengers, and others. Although I did not ask a standard set of questions or talk for a set amount of time, these informal interviews proved a great way to deepen my understanding of the local perception, or lack thereof, of the rights of nature within Ecuador.

### **B. Legal Observatory**

A recently released database, called the “Legal Observatory of the Rights of Nature in Ecuador,” created by Hugo Echeverría and Natalia Greene, provides a record of all known legal cases in Ecuador where rights of nature have played a role.<sup>67</sup> Inclusion in this list means that at a minimum, nature’s constitutional rights were discussed or referenced by judges and lawyers over the course of the case. I have utilized this legal observatory and built upon Craig Kauffman and Pamela Martin’s compilation of thirteen rights of nature cases from 2008-2016 to create Tables 1, 2, and 3 which provide all 31 rights of nature cases as well as a breakdown of the success rates of various legal tools used and pathways taken in these cases.<sup>68</sup> Expanding on Kauffman and Martin’s table setup as well as their data for the original thirteen cases, I categorized cases by pathway taken

<sup>67</sup> Hugo Echeverría and Natalia Greene, *Derechos de La Naturaleza* (2018).

<sup>68</sup> Craig M. Kauffman and Pamela L. Martin, *Testing Ecuador’s Rights of Nature: Why Some Lawsuits Succeed and Others Fail*, p.6-8 (2016). Conference paper presented at the International Studies Association Annual Conference, Atlanta, GA, March 18, 2016.

(civil society, government, and introduced by judge) and legal tool used (protective action, precautionary measures, criminal, administration action, and constitutional challenges). As an additional resource to this paper, I have plotted the cases on an interactive [ArcGIS map](#) to represent the geographic distribution of successful and unsuccessful cases, as well as to provide descriptions of each case.<sup>69</sup> This map was created using the legal observatory and various websites.<sup>70</sup> A non-interactive picture of the map can be found at Figure 1.

In addition to these thirty-one cases, there are a few circumstances where nature's rights have been wielded outside of court to, for example, pressure a company or organization to halt a certain project, and there are an unknown number of cases where violations of nature's rights were not brought to court. As much as possible through online and interview research, this paper attempts to account for these cases as well.

### **C. Literature review**

There is a wide variety of existing literature on the rights of nature movement around the world and its history and role specifically in Ecuador. In completing this paper, I have grouped the literature I utilized into five main themes, each of which contribute to a major portion of this paper: 1) The global history and philosophy of the rights of nature, 2) varying rights of nature strategies around the world, 3) political and environmental history of Ecuador, 4) history of rights of nature cases in Ecuador, and 5) barriers to rights of nature enforcement.

<sup>69</sup> Luck, *supra*.

<sup>70</sup> Community Environmental Legal Defense Fund, *Advancing Legal Rights of Nature: Timeline* (2019); Global Alliance for the Rights of Nature, *Timeline* (2019).

### 1. *Global history and philosophy of the rights of nature*

The modern rights of nature movement has a fascinating history. Through law Professor Christopher Stone's original inspirational piece in 1970,<sup>71</sup> foundational court cases and legislation,<sup>72</sup> and secondary narratives that recount the history and philosophy of Nature's rights,<sup>73</sup> this paper features a brief overview of rights of nature from its introduction to modern law to its current global presence.

### 2. *Varying rights of nature strategies around the world*

There are a variety of strategies and approaches that have been employed in recognizing and enforcing nature's rights.<sup>74</sup> Around the world, nature is defined differently, granted different legal rights, protected through different legislative approaches, and represented by different people or entities. For example, Ecuador defines nature as, "where life is reproduced and exists", while the New Zealand Parliament has granted rights to specific ecosystems and environmental features.<sup>75</sup> Understanding these differences and the implications they have in enforcement is key to this paper's ability to provide viable solutions to the barriers Ecuador has encountered in recognizing nature's rights.

<sup>71</sup> Stone, *supra*, p.450-501.

<sup>72</sup> For some, see: *Sierra Club v. Morton*, 405 US 727 (1972); Tamaqua Borough Council, Tamaqua Borough Sewage Sludge Ordinance, Ordinance 612 (2006); New Zealand Parliament, Te Urewera Act (2014); New Zealand Parliament, Te Awa Tupua (Whanganui River Claims Settlement) Act (2017).

<sup>73</sup> Boyd, *supra*; Roderick F. Nash, *The Rights of Nature: A History of Environmental Ethics*, University of Wisconsin Press (1989); Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice*, SiberInk (2011); Oliver A. Houck, *Noah's Second Voyage: The Rights of Nature as Law*, *Tulane Environmental Law Journal* 30:1 p.1-50 (2017)

<sup>74</sup> Craig M. Kauffman and Linda Sheehan (forthcoming), *The Rights of Nature: Guiding our Responsibilities through Standard*. Environmental Rights – the Development of Standards, Cambridge University Press (forthcoming). Used with permission of author. Craig M. Kauffman and Pamela L. Martin, *How Courts Are Developing River Rights Jurisprudence: Comparing Guardianship in New Zealand, Colombia, and India*, *Vermont Journal of Environmental Law* (2019). Peter Burdon, *Exploring Wild Law: The Philosophy of Earth Jurisprudence*, Wakefield Press (2010). Elizabeth MacPherson and Felipe Ospina, *The Pluralism of River Rights in Aotearoa, New Zealand and Colombia*, *The Journal of Water Law* 25 (2018).

<sup>75</sup> Craig M. Kauffman and Pamela L. Martin, *Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand*, *Global Environmental Politics* 18:4 (2018).

### 3. *Political and environmental history of Ecuador*

As Ecuador was the first country in the world to recognize the rights of nature, understanding the recent history of the country is vital for understanding the forces and political climate that led to recognizing nature's rights in 2008. Additionally, understanding the role that indigenous peoples in Ecuador played in the 2008 constitutional inclusion is particularly important for this paper. There is a wide variety of literature on Ecuador's political, environmental, and indigenous history, all of which has been useful for this paper's overview of Ecuador and the creation of the country's 20<sup>th</sup> constitution.<sup>76</sup>

### 4. *History of rights of nature cases in Ecuador*

Since 2008, there have been 31 cases where nature's rights have been featured in some fashion.<sup>77</sup> Inclusion in this list does not mean that nature's rights were the resolving or deciding factor (although in many cases they were), but that the judges discussed and considered the rights of nature. In addition to the legal observatory of all Ecuadorian rights of nature cases mentioned above, there are a variety of papers, studies, and articles that describe and recount specific cases.<sup>78</sup> This paper additionally aims to consider campaigns that utilized rights of nature even if there was

<sup>76</sup> Mihnea Tanasescu, *The rights of nature in Ecuador: the making of an idea*, International Journal of Environmental Studies, 70:6 p.1-14 (2013); Marc Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, Latin American Perspectives 38:1 p.47-62 (2011); Allen Gerlach, *Indians, Oil, and Politics: A Recent History of Ecuador*, Scholarly Resources Inc. (2003).

<sup>77</sup> Echeverría and Greene, *supra*.

<sup>78</sup> Randall Abate, *Rights of Nature: US and Foreign Domestic Perspectives*, Climate Change and the Voiceless: Protecting Future Generations, Wildlife, and Natural Resources, Cambridge University Press p.120-172 (2019); Hugo Echeverría, *When Courts Meet Nature: A Real Case on the Rights of Nature*, Vermont Journal of Environmental Law, EcoPerspectives Blog (2018); Kyle Pietari, *Ecuador's Constitutional Rights of Nature: Implementation, Impacts, and Lessons Learned*, Willamette Environmental Law Journal (2016); Natalia Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, Global Alliance for the Rights of Nature (2016).

no specific court case,<sup>79</sup> as well as the wide variety of situations where nature's rights could have been considered but were not.<sup>80</sup>

##### 5. *Identifying barriers to rights of nature enforcement*

Although there are many papers that discuss the history and philosophy of the rights of nature in Ecuador, there are relatively few that touch on issues that Ecuador has encountered in upholding the rights of nature in court.<sup>81</sup> These select few papers often confirm and build upon what I learned in my interviews. Of the three problem areas that I identify in this paper (constitutional issues, education, and guardianship), education has the greatest foothold in existing literature. Of particular mention is Craig Kauffman and Pamela Martin's 2017 study, *Can Rights of Nature Make Development More Sustainable?*<sup>82</sup> In the paper, Kauffman and Martin identify cases where judges' lack of education and awareness contributed to the failure to uphold nature's rights in court. Unique to this paper are the identification of the other two problem areas (constitutional issues and guardianship), the potential solutions that may help strengthen nature's rights in Ecuadorian courts, the compilation and analysis of all 31 rights of nature cases, as well as the detailed historical account of rights of nature's influence around the world. Motivated by the potential for rights of nature to pave the way for environmental law around the world, this

<sup>79</sup> Ecuador Ministry of Environment, *Ministry denies operating permit to the Salinas Zoo and Aquarium Park Project* (2019).

<sup>80</sup> Natalia Greene, *The Politics of Rights of Nature in Ecuador*, Yale Center for Environmental Law & Policy (2014).

<sup>81</sup> Mary Elizabeth Whittemore, *Problem of enforcing nature's rights under Ecuador's constitution: why the 2008 environmental amendments have no bite*, Pacific Rim Law and Policy Journal 3:659 (2011); Craig M. Kauffman, *Why Rights of Nature Laws are Implemented in Some Cases and Not Others: The Controlled Comparison of Bolivia and Ecuador*, p.1-25 (2019). Paper presented at the International Studies Association Annual Conference, Toronto, March 29, 2019.

<sup>82</sup> Craig M. Kauffman and Pamela L. Martin, *Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian lawsuits Succeed and Others Fail*, World Development, Volume 92, Pages 130-142 (2017).



paper aims to be a resource on how to solve for issues countries may face when recognizing nature's rights, using Ecuador as a case study.

### **III. History of the Rights of Nature in Ecuador**

#### **A. Right place, right time**

Although the rights of nature were recognized in Ecuador in 2008, the journey began in 2006 when Ecuador elected Rafael Correa as president.<sup>83</sup> Correa, who's campaign ran with the slogan 'Constituyente ya!' (Constitutional revision now!), provided the impetus to create a Constitutional Assembly, the group tasked with writing Ecuador's twentieth Constitution.<sup>84</sup> Political forces such as the indigenous coalition of CONAIE<sup>85</sup> and the social democratic party Alianza PAIS<sup>86</sup> backed Correa and advocated for a new constitution centered around the ideologies of 'sumak kawsay', a Quechua word that means 'good living.'<sup>87</sup> After Ecuadorians voted 81.7% in favor of convening the Constitutional Assembly,<sup>88</sup> Correa's political party, Alianza PAIS, won 80 of the 130 seats of the Assembly, including the seat of Assembly President, which was assumed by Alberto Acosta.<sup>89</sup> Before resigning from his position, Acosta – an environmentalist and key support of nature's rights – proposed granting legal rights to animals and all of nature in the Constitution.<sup>90</sup> As he wrote prior to the 2008 Constitution's passing, "There is still time for our

<sup>83</sup> Mihnea Tanasescu, *The rights of nature in Ecuador: the making of an idea*, International Journal of Environmental Studies, 70:6, p.1 (2013).

<sup>84</sup> Boyd, *supra*, p.167.

<sup>85</sup> CONAIE stands for 'Confederation of Indigenous Nationalities of Ecuador.'

<sup>86</sup> Alianza PAIS stands for 'Proud and Sovereign Alliance.'

<sup>87</sup> Tanasescu, *supra*, p.2.

<sup>88</sup> The Carter Center, *Final Report on Ecuador's September 30, 2007, Constituent Assembly Elections* (2008).

<sup>89</sup> Marc Becker, *Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador*, Latin American Perspectives 38:1 p.50 (2011).

<sup>90</sup> Alberto Acosta, *Do Animals Have Rights?* (2007); Alberto Acosta, *Nature as a Subject of Rights* (2007). As seen in Tanasescu, *supra*, p.4.

laws to recognize the right of a river to flow, prohibit acts that destabilize the Earth's climate, and impose respect for the intrinsic value of all living things.”<sup>91</sup>

Acosta, CONAIE, environmental activists such as Natalia Greene, notable authors such as Eduardo Galeano, and even conservative members of the Assembly such as Rafael Esteves, argued and lobbied for nature's rights to be included in the country's new Constitution.<sup>92</sup> Although originally met with resistance, their arguments gradually won over the other assembly members. As historian Mihnea Tanasescu noted, “Where in April [2008] the rights of nature failed to convince many, in the discussion of June 6 *everyone* pronounced themselves in favor.”<sup>93</sup> According to David Boyd, author of *The Rights of Nature: A Legal Revolution that Could Save the World*, this was largely due to Acosta and others comparing the legal personhood of corporations to the rightlessness of nature.<sup>94</sup> Eventually, the Constitutional Assembly invited the American-based organization CELDF, the nonprofit that helped pass the world's first rights of nature law in Tamaqua Borough, Pennsylvania in 2006, to meet with delegates, present about the rights of nature, and help draft the legal language the Constitution might use. The language of the original draft CELDF submitted with the help of Ecuadorian nonprofit Fundación Pachamama was extremely similar to the language the Assembly eventually included in the Constitution.<sup>95</sup> The fact that CELDF played such a large role in the creation of this chapter of the Constitution is generally unknown in Ecuador, however, as this foreign and colonial involvement is understandably downplayed.<sup>96</sup> Natalia Greene, the leading Ecuadorian activist for the constitutional inclusion of

<sup>91</sup> Boyd, *supra*, p.169.

<sup>92</sup> In 2008, the world-famous Uruguayan author Galeano published *Nature is not Mute*, an article arguing for Ecuador to include rights of nature in the Constitution.

<sup>93</sup> Tanasescu, *supra*, p.6.

<sup>94</sup> Boyd, *supra*, p.171.

<sup>95</sup> Tanasescu, *supra*, p.9.

<sup>96</sup> Francisco Bustamante, Hugo Echeverría, and Natalia Greene, interviewed by author, Quito, July 2019.

the rights of nature, acknowledged CELDF's critical involvement in an interview but was clear that she and other Ecuadorian activists, lawyers, and legislators prefer to highlight the indigenous inspiration behind the adoption of the rights of nature. Although certainly proud that they are credited and their worldview is somewhat represented in modern Ecuadorian law, members of the indigenous Kichwa community of Llanchama, located in the heart of the Ecuadorian Amazon rainforest, reported that Assembly members did not consult them before or after the Constitution was written in 2008.<sup>97</sup> Although the Llanchama community is one of many Ecuadorian indigenous groups, it seems the inspiration for including the rights of nature in the Constitution is credited to indigenous Ecuadorians but was achieved by CELDF.

During rights of nature discussion, the Constitutional Assembly engaged in a vigorous debate to create "Nature's Ombudsman," a specific person or group who, supporters proposed, would be tasked as the full-time legal guardian of nature. Perhaps due to concerns that this position would create powerful opposition to future development and resource extraction within Ecuador, this idea of electing a single guardian eventually lost in favor to granting guardianship status to all people in Ecuador.<sup>98</sup> This decision for broad guardianship has led to one of the biggest challenges Ecuador has faced in upholding nature's rights, and is discussed in Part IV.C of this paper.

<sup>97</sup> Alexandria, Tulio, Mr. Eriberto, and Ms. Brigida, four members of the indigenous Kichwa Community of Llanchama, interviewed by author, Llanchama, Rio Tiputini, Napo Province, July 2019.

<sup>98</sup> Tanasescu, *supra*, p.7-8.

**B. Constitution of Ecuador: Chapter Seven – Rights of Nature<sup>99</sup>**

**Article 71.** *Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.*

*All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.*

The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

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

In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.

**Article 73.** *The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles.*

The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden.

**Article 74.** Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living.

Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State.

<sup>99</sup> Key areas *italicized* by author. Republic of Ecuador, Const. Title II, Ch.7, Art.71-74. Translated by Georgetown University, *Political Database of the Americas*.

### C. Cases

Since 2008, there have been 31 cases where nature's rights have been featured in some fashion.<sup>100</sup> Inclusion in this list does not mean that nature's rights were the resolving or deciding factor (although in many cases they were), but that the judges discussed and considered the rights of nature. This number does not reflect cases that were outside of the court system, such as the 2019 Ministry of Environment rejection of a proposed 'dolphinarium' (an aquarium for dolphins) in Salinas,<sup>101</sup> as well as situations where nature's rights could have been invoked but were not.<sup>102</sup> Of the 31 court cases, 24 have had positive outcomes for nature and 7 have had negative outcomes for nature. The large majority of cases (19, or 61% of cases) have been brought forward by civil society, meaning environmental nonprofits, local communities, and individual citizens and lawyers. This is followed by cases brought by government agencies (9, or 29% of cases) such as the Ministry of Environment. Lastly are cases where the judge, rather than a plaintiff, invoked the rights of nature in his/her ruling (3, or 10% of cases). As University of Oregon Professor Craig Kauffman notes, courts at all levels within Ecuador, including the Constitutional Court, have upheld nature's rights.<sup>103</sup> Perhaps highlighting the government's influence on the judiciary system, the success rate (from nature's point of view) of government-induced cases is 100% (9 of 9 cases), while the success rate of civil society-induced cases is 63% (12 of 19 cases).

<sup>100</sup> See Table 1.

<sup>101</sup> Ecuador Ministry of Environment, *Ministry denies operating permit to the Salinas Zoo and Aquarium Park Project* (2019).

<sup>102</sup> Natalia Greene, *The Politics of Rights of Nature in Ecuador*, Yale Center for Environmental Law & Policy (2014).

<sup>103</sup> Kauffman, *supra*, p.2.

In representing nature, plaintiffs have utilized five legal tools with varying success rates. The most commonly used tool (17, or 55% of cases) is protective action, which always occurs after some sort of environmental harm has taken place and has the ultimate result of restoring nature to its pre-harm state. As environmental degradation is often not noticed until it is obvious to the human eye, it is not surprising that the majority of cases utilize the post-harm legal tool of protective action. This is followed by the pre-harm tool of precautionary measures (6, or 19% of cases), criminal lawsuits (5, or 16% of cases), administrative action (4, or 13% of cases), and cases that challenge the constitutionality of an action (2, or 6% of cases).<sup>104</sup> See Table 1 for a list of all 31 rights of nature cases in Ecuador, Figure 1 for a spatial distribution of the cases, and Tables 2 and 3 for a breakdown of legal tool used, pathway taken, and success rates.

<sup>104</sup> Three cases used multiple legal tools, which is why the percentages total to more than 100.

Case	Legal Tool	Pathway	Years	Positive outcome for Nature?
Vilcabamba River ( <a href="#">link</a> )	Protective action	Civil Society	2009 - 2011	Yes
Mining Law Challenge ( <a href="#">link</a> )	Constitutional challenges	Civil Society	2009	No
Canton Mera ( <a href="#">link</a> )	Protective action	Civil Society	2009 - 2018	Yes
Biodigestor ( <a href="#">link</a> )	Protective action	Introduced by judge	2009	Yes
Secoya Palm Plantation ( <a href="#">link</a> )	Administrative action	Government	2010 - 2011	Yes
Galápagos Law ( <a href="#">link</a> )	Constitutional challenges	Civil Society	2010 - 2012	Yes
BP Oil Spill ( <a href="#">link</a> )	Protective action	Civil Society	2010 - 2013	No
Cayapas Shrimper ( <a href="#">link</a> )	Administrative action and Protective action	Government	2011	Yes
Esmeraldas Illegal Mining ( <a href="#">link</a> )	Administrative action and Protective action	Government	2011	Yes
Galápagos Shark Fin ( <a href="#">link</a> )	Criminal lawsuit	Civil Society	2011 - 2015	Yes
Santa Cruz Road ( <a href="#">link</a> )	Protective action	Introduced by judge	2012	Yes
Pastaza Illegal Mining ( <a href="#">link</a> )	Protective action	Government	2012 - 2015	Yes
Dead Jaguar ( <a href="#">link</a> )	Criminal lawsuit	Government	2013 - 2014	Yes
Esmeraldas Oil Spill ( <a href="#">link</a> )	Precautionary measures	Civil Society	2013	Yes
Condor-Mirador Mining Project ( <a href="#">link</a> )	Protective action	Civil Society	2013	No
Mining Canton Pedro Moncayo ( <a href="#">link</a> )	Protective action	Civil Society	2013	Yes
Samama Protective Forest ( <a href="#">link</a> )	Precautionary measures	Introduced by judge	2013	Yes
Dead Condor ( <a href="#">link</a> )	Criminal lawsuit	Government	2014	Yes
Tangabana Paramos ( <a href="#">link</a> )	Protective action	Civil Society	2014 - Present	No
Macuma-Taisha Road ( <a href="#">link</a> )	Administrative action, and criminal lawsuit	Government	2014 - Present	Yes
Sea Cucumbers ( <a href="#">link</a> )	Criminal lawsuit	Government	2015 - 2016	Yes
Marine Reserve Valdivia ( <a href="#">link</a> )	Precautionary measures	Civil Society	2015	No
Puyango Earthworks ( <a href="#">link</a> )	Precautionary measures	Civil Society	2016	Yes
Handmade oil pools ( <a href="#">link</a> )	Precautionary measures	Government	2016	Yes
Rio Blanco Mining Project ( <a href="#">link</a> )	Protective action	Civil Society	2018	Yes
GMOs ( <a href="#">link</a> )	Protective action	Civil Society	2018 - 2019	Yes
Sinangoe ( <a href="#">link</a> )	Protective action	Civil Society	2018 - 2019	Yes

Woorani Case ( <a href="#">link</a> )	Protective action	Civil Society	2019	Yes
Condor-Mirador Tailings ( <a href="#">link</a> )	Precautionary measures	Civil Society	2019	No
Cedar Forest ( <a href="#">link</a> )	Protective action	Civil Society	2019	Yes
Piatua River – Arutam ( <a href="#">link</a> )	Protective action	Civil Society	2019	No

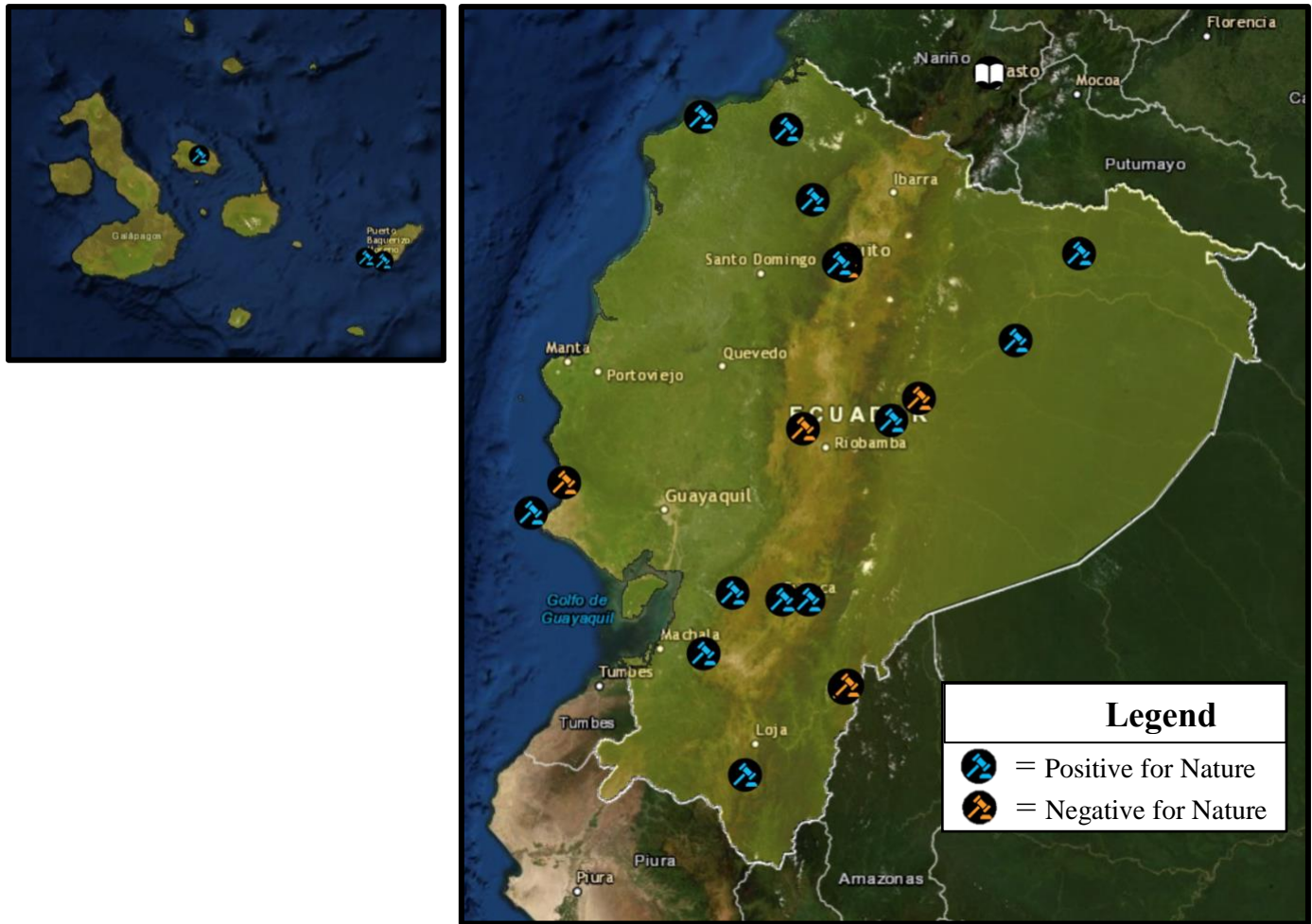
**Table 1** Spreadsheet of all 31 rights of nature cases in Ecuador that have gone to court. Cases [highlighted in blue](#) come from Kauffman and Martin (2016).<sup>105</sup> All other cases compiled by author. To view cases in their original format (in Spanish), including the judgements, visit the links that leads to the Legal Observatory for the Rights of Nature in Ecuador.<sup>106</sup> To view these cases and descriptions in an interactive map (in English), visit Luck (2019).<sup>107</sup> A non-interactive photo of the map is available below as Figure 1.

<sup>105</sup> Kauffman and Martin, *supra*, p.6-8.

<sup>106</sup> Echeverría and Greene, *supra*.

<sup>107</sup> Luck, *supra*.





**Figure 2** A photo of an interactive map made by the author to accompany this paper. This map shows the spatial distribution of rights of nature cases in Ecuador, broken down by positive cases for nature and negative cases for nature. If viewing the map [online](#), case descriptions and links to the judgements accompany each case.<sup>108</sup>

<sup>108</sup> Addison Luck, *The Rights of Nature and Earth Law Around the World*, ArcGIS, (2019).

<b>Legal Tool</b>	<b>Number of Cases</b>	<b>% Successful (for Nature)</b>
Protective Action	17	78%
Precautionary Measures	6	67%
Criminal	5	100%
Administrative Action	4	100%
Constitutional Challenges	2	50%
<b>Total*</b>	<b>31 cases*</b>	<b>77%</b>

\* 3 cases used two legal tools, and the total reflects those cases as one case rather than multiple.

**Table 2**

<b>Pathway</b>	<b>Number of Cases</b>	<b>% Successful (for Nature)</b>
Civil Society	19	63%
Government	9	100%
Introduced by Judge	3	100%
<b>Total</b>	<b>31</b>	<b>77%</b>

**Table 3**

**Tables 2 and 3** were created using **Table 1**, Kauffman and Martin (2016)<sup>109</sup> and the Legal Observatory for the Rights of Nature in Ecuador.<sup>110</sup> Kauffman and Martin (2016) provides the general table setup and inspiration of Table 2 and Table 3. Using the Legal Observatory for the Rights of Nature in Ecuador, I added the most recent eighteen cases to the data and tables.

<sup>109</sup> Kauffman and Martin, *supra*, p.6-8.

<sup>110</sup> Echeverría and Greene, *supra*.

*1. Nature winning in court*

Of the 31 cases where nature's rights have been utilized or invoked in court, 24 have had positive outcomes for nature. Two American expatriates, Norie Huddle and Richard Wheeler, acted as guardians in the first successful rights of nature case in Ecuador. In 2007, Norie and Richard purchased property in southern Ecuador with the intent of creating a model for sustainable agriculture. When they returned to the property in 2008, however, they were shocked at the changes that had occurred. Because of a government-sponsored project to renovate a small, local road into a three-lane highway, thousands of tons of debris had been dumped into the nearby Vilcabamba River, halving its width and disrupting its natural flow.<sup>111</sup> After a significant flood in 2009 and a series of frustrating and unsuccessful legal attempts, Norie and Richard hired a local lawyer, Carlos Bravo, to make a case for nature's recently recognized rights.<sup>112</sup> Acting as legal guardians of the river, Norie, Richard, and Carlos filed a protective action lawsuit against the provincial government, with the river as a plaintiff and knowledge that all financial awards, if any, would go towards the river and not themselves. In the suit they requested, "(1) that the highway project immediately stop dumping debris in the Vilcabamba River, (2) that the natural course of the river be restored, and (3) that the rocks, dirt, gravel, and vegetation deposited in the river be removed."<sup>113</sup> After a dismissal and an appeal, the Vilcabamba River became the first river in the world to have its constitutional rights upheld in court, as the Provincial Court of Loja ruled in favor of the river and ordered the local government to clean up the damage, secure an environmental permit, find a more appropriate site for debris, and publish an apology in the newspaper.<sup>114</sup>

<sup>111</sup> Boyd, *supra*, p.160-161.

<sup>112</sup> Norie Huddle, interviewed by author, via Skype, December 2019.

<sup>113</sup> Boyd, *supra*, p.160-161.

<sup>114</sup> *Id.* p.163.

Notably, however, the court did not terminate the construction project or create an enforcement mechanism following the 2011 ruling, leading a frustrated Norie to assert that “the constitution is more like poetry than law.”<sup>115</sup> The Vilcabamba River case, the first time in Ecuador where nature as plaintiff won a court case, sets an incredible legal precedent for nature’s rights in Ecuador. However, due to the Vilcabamba municipal government’s lack of compliance with the judge’s ruling, this case also highlights some of the critical issues Ecuador has encountered in enforcing these broad rights after established in court proceedings. This lack of post-court enforcement mechanisms undermines the court’s ability to craft meaningful remedies to violations of nature’s rights. Although this paper focuses on the challenges nature faces leading up to the decision in court, it is important to recognize that there are additional challenges – accountability, institutional competence, jurisdictional, etc. – when enforcing court rulings in nature’s favor.

As shown in Table 1, there have been 23 additional court cases since the Vilcabamba River case where nature’s rights have been upheld. These 23 additional cases utilized rights of nature in various contexts, such as helping sharks and sea cucumbers win court cases against illegal fishermen and wildlife traffickers in the Galápagos,<sup>116</sup> canceling initial explorations for mining within a cedar forest,<sup>117</sup> ending large-scale pollution from a swine farm,<sup>118</sup> and supporting indigenous claims to suspend or block mining and/or oil projects.<sup>119</sup>

<sup>115</sup> Norie Huddle, interviewed by author, via Skype, December 2019.

<sup>116</sup> Ecuador Ministry of Environment, *\$5.9 million sentence for comprehensive reparation to the Galapagos National Park in case of Fu Yuan Yu Leng* (2017).

<sup>117</sup> Derechos de La Naturaleza, *Los Cedros Forest* (2019).

<sup>118</sup> Derechos de La Naturaleza, *Canton Mera* (2018).

<sup>119</sup> Derechos de La Naturaleza, *Sinangoe* (2019); Derechos de La Naturaleza, *Caso Waorani* (2019).

## 2. *Nature losing in court*

Of the 31 cases where nature's rights have been invoked in court, seven have had negative outcomes for nature, all of which were brought forward by civil society – mostly nonprofits. The first case, just one year after the passage of the Constitution, challenged the constitutionality of the 2009 Mining Law introduced by former President Correa. The passage of this law, which strengthened mining operations in Ecuador, ignited public outcry and a group of activists quickly filed a case arguing the law violated nature's recently recognized rights.<sup>120</sup> The Constitutional Court of Ecuador upheld the 2009 Mining Law, which Professor Craig Kauffman believes was due to the politicization of the case and a lack of judicial understanding of the rights of nature.<sup>121</sup> This lack of judicial understanding is explored further in Part IV.B.

Of the seven total cases where nature's rights were not upheld, four concerned mining and its waste,<sup>122</sup> one concerned the 2010 BP Deepwater Horizon oil spill,<sup>123</sup> one concerned a large fishing company and a marine reserve,<sup>124</sup> and one concerned a pine tree plantation planted in the highlands near Ecuador's tallest volcano, Chimborazo (discussed more in Part IV.B.1).<sup>125</sup> These cases failed from nature's perspective for a variety of reasons, including judges' lack of knowledge of nature's rights, politicization of cases, and the legality of the extractive industries in Ecuador, all of which play a role in the challenges identified by this paper in Part IV.

<sup>120</sup> See "Mining Law Challenge - 2009", Table 1

<sup>121</sup> Kauffman, *supra*, p.4.

<sup>122</sup> Derechos de La Naturaleza, *Challenge Ley de Minería* (2009); Derechos de La Naturaleza, *Cóndor Mirador* (2013); Derechos de La Naturaleza, *Rio Piatusa* (2019); Derechos de La Naturaleza, *Condor Mirador – Relaves* (2019).

<sup>123</sup> In this case that was eventually dismissed by the Constitutional Court, a group of international environmentalists and human rights activists brought a suit against British Petroleum for their infamous 2010 Gulf of Mexico oil spill. The plaintiffs brought the case on behalf of nature and under the principles of international jurisdiction. Derechos de La Naturaleza, *Derrame de BP* (2013).

<sup>124</sup> Derechos de La Naturaleza, *Reserva Marina: Comuna Valdivia* (2015).

<sup>125</sup> Derechos de La Naturaleza, *Páramo de Tangabana* (2014).

The Constitutional Court, Ecuador's highest court, is currently reviewing a rights of nature case that will undoubtedly bear broad implications for nature's rights in Ecuador. This case concerns a large and poorly constructed hydroelectric dam called 'Hidrotambo', the Dulcepamba River, and the small community of San Pablo de Amalí.<sup>126</sup> By choosing to review the case, the Constitutional Court is obliging itself to define the legal relationship between nature's rights, community rights, energy development, and infrastructure within Ecuadorian law. Ecuadorian lawyer Hugo Echeverría, a knowledgeable outside observer of the case, said the verdict will, "provide elements to, finally, start building a legal theory on rights of nature."<sup>127</sup> The case will likely be decided before May of 2020, and rights of nature activists, lawyers, and academics in Ecuador have high hopes for nature as the new Constitutional Court Justices are thought to be proponents of environmental and human rights.<sup>128</sup> Indeed, one of the nine Justices, Ramiro Avila Santamaria, is known as a passionate advocate of nature's rights. Additionally, although she was not allowed to describe specifics of the Hidrotambo Case, Justice Daniela Salazar spoke of the power of nature's rights when she told me, "While a lot can be accomplished litigating cases through the human right to a healthy environment, nature as a subject of rights goes way beyond this concept and definitely has a future in Ecuador and in the world."<sup>129</sup>

From an outside perspective, it is difficult to tell exactly how well nature's rights have been enforced and received in Ecuador. This is not surprising, though, as recently recognized rights often take time to develop strong jurisprudence and precedent. As Professor Craig Kauffman

<sup>126</sup> Case #502-19-JP, selected May 6, 2019. Shannon Nelson, *The Dulcepamba River gets its day in court - rights of nature and Constitutional law in Ecuador*, Great Lakes Law (2019).

<sup>127</sup> Hugo Echeverría, email to author, August 2019.

<sup>128</sup> Francisco Bustamante and Hugo Echeverría, interviewed by author, Quito, July 2019.

<sup>129</sup> Justice Daniela Salazar, interviewed by author, via email, August 2019.

describes, “RoN [Rights of Nature] jurisprudence has gradually but steadily developed and strengthened in Ecuador... while RoN is still enforced inconsistently and imperfectly, RoN jurisprudence is clearly developing.”<sup>130</sup>

Thus, considering the inconsistent and imperfect rights of nature enforcement in Ecuador, it becomes vital to understand the problems and challenges that the nation has encountered in order to provide possible solutions that may help strengthen the rights of nature in Ecuador. The major problem areas Ecuador has encountered – constitutional issues, education, and guardianship – contribute to a lack of cases brought to court, and providing solutions to these problem areas will increase the likelihood that nature’s rights are upheld and enforced in Ecuador.

#### **IV. Problems and Solutions**

##### **A. Constitutional issues**

###### *1. Clashes within the constitution*

One of the largest barriers to enforcing nature’s rights comes from the same document that recognizes them. The current Ecuadorian Constitution, the twentieth the country has seen in its nearly 200 years as a sovereign state,<sup>131</sup> is full of contradictions. Of particular relevance, the Constitution grants nature rights while it also (1) forbids the “stoppage of oil and gas production”,<sup>132</sup> (2) grants the State exclusive jurisdiction and ownership over minerals, oil, and gas,<sup>133</sup> and (3) guarantees the State’s right to administer, regulate, monitor, and manage

<sup>130</sup> Kauffman, *supra*, p.2.

<sup>131</sup> George Lauderbaugh, *The History of Ecuador*, ABC-CLIO, p.42 (2012).

<sup>132</sup> Republic of Ecuador, Const. Title VI, Ch.6, Art.326. Translated by Georgetown University, *Political Database of the Americas*.

<sup>133</sup> *Id.* Title V, Ch.4, Art.261.

nonrenewable natural resources as well as oil and gas transport and refining.<sup>134</sup> Essentially, this means that “the state can decide to exploit any natural resources it deems of national importance.”<sup>135</sup> The Constitution, therefore, is self-contradictory and refers to nature as both a subject with legal rights and an object to be owned and exploited by the state. According to Ecuadorian lawyer Hugo Echeverría, nature is the only entity that is considered both an object and subject to such an extreme degree through a constitutional lens,<sup>136</sup> which is in itself an incredible claim. The tension that nature poses as an object (private property and a natural resource) and subject (an entity with rights) is central to the challenges associated with the rights of nature movement around the world. The future strengths of both perspectives, nature as an object and nature as a subject, will likely come with profound implications for the health and vitality of nature in Ecuador and around the world.

Oil and mining industries operate in a manner that is at odds with nature's rights. These industries degrade, pollute, and destroy nature more than any other. The oil industry is responsible for more carbon emissions than any other industry in the world<sup>137</sup> and the mining industry is one of the most toxic in the world,<sup>138</sup> yet these extractive industries (oil, gas, and mineral extraction) are the driving force of Ecuador's economy and will likely remain so for the foreseeable future. Crude oil is Ecuador's top export and state-owned oil companies account for more than 80% of oil production.<sup>139</sup> Additionally, industrial-sized mining officially commenced in Ecuador in July of 2019, and it is generally projected that the mining sector will grow to be the bulk of the nation's

<sup>134</sup> *Id.* Title VI, Ch.5, Art.313.

<sup>135</sup> Tanasescu, *supra*, p.6.

<sup>136</sup> Hugo Echeverría, interviewed by author, Quito, July 2019.

<sup>137</sup> Matthew Taylor and Jonathan Watts, *Revealed: the 20 firms behind a third of all carbon emissions*, The Guardian (2019).

<sup>138</sup> Lauren Pagel, *EPA: Metal Mining Most Toxic Industry in America*, EarthWorks (2006).

<sup>139</sup> US Energy Information Administration, *Country Analysis Brief: Ecuador* (2017).



economy.<sup>140</sup> Recently, the Constitutional Court of Ecuador supported the growth of mining practices when they rejected a community petition for a mining ban in a southern province.<sup>141</sup> Because extractive activities are constitutionally protected and controlled by the state, and because of Ecuador's availability and reliance on nonrenewable resources,<sup>142</sup> it is unlikely for rights of nature legislation to stop or ban these environmentally harmful activities outright. This reliance on extractive industries has large complications for nature in Ecuador, and is perhaps the greatest challenge that must be reconciled with nature's rights.

## 2. *Lack of direction*

The lack of clear definition, instruction, and direction by the Constitution, and the lack of secondary laws pertaining to nature's rights, are additional challenges to enforcing nature's rights. Central to this lack of direction are the following questions: (1) what exactly is the definition of nature? (2) what rights should be enforced? (3) how are these rights enforced? and (4) who enforces these rights?

The Constitution offers a vague definition of nature – “where life is reproduced and occurs” – making it difficult to determine if suits can and should be brought on behalf of individual animals, species, entire ecosystems, specific environmental features, biomes, or others. This definition, although not necessarily incorrect, lacks a specificity that would greatly assist in bringing cases on behalf of nature. Additionally, this vague definition raises the issue of how to balance the rights of an individual animal compared to an entire ecosystem, for example. Resourceful lawyers in

<sup>140</sup> Matthew DuPee, *Ecuador Has Big Plans for its Mining Industry: But at What Costs?* World Politics Review (2019); Francisco Bustamante and Hugo Echeverría, interviewed by author, Quito, July 2019.

<sup>141</sup> Reuters, *Ecuador constitutional court backs copper miner SolGold*, Basic Materials (2019).

<sup>142</sup> In 2017, Ecuador had the third largest oil reserves in South America, behind Venezuela and Brazil. In that same year, oil powered 76% of primary energy consumption in Ecuador.

Ecuador have wielded this broad definition to bring lawsuits on behalf of individual animals,<sup>143</sup> ecosystems,<sup>144</sup> and nature in other countries.<sup>145</sup> Additionally, the legal rights granted by the Constitution, such as the right to an “integral respect for its existence” and the “maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes,” are also vague and lack clear instruction. A variety of questions arise from these rights, such as: (1) how does one determine if nature’s existence is not respected? (2) if nature is degraded to such an extreme state but is still regenerating its life cycles, functions, and evolutionary processes, have nature’s rights been violated? and (3) if nature wins in court, how will these rights be enforced and who will enforce them?

In large part, this ambiguity comes from a lack of secondary laws that should have already been introduced through Ecuador’s civil law system. In a civil law framework, laws are meant to be “written, collected, and codified by legislature.”<sup>146</sup> In stark contrast to common law countries such as the United States or United Kingdom, the outcome of lawsuits and the ruling of judges in Ecuador are not meant to create precedent, or a model, for the future of the law. Nature’s rights, however, serve as an anomaly of the civil law system in Ecuador as judges, rather than secondary laws, are the ones primarily developing jurisprudence, or the legal framework. As Craig Kauffman and Pamela Martin note, the expected process of introducing secondary laws to specify enforcement and definition of nature’s rights following the passage of the Constitution was

<sup>143</sup> For example, see Dead Jaguar 2013-2014, Table 1

<sup>144</sup> For example, see Cedar Forest 2019, Table 1

<sup>145</sup> For example, see BP Oil Spill 2010 – 2013, Table 1

<sup>146</sup> Sylvan Hardy, *Civil law (Ecuador) versus common law (U.S.): Societal safeguards or personal responsibility?* CuencaHighLife (2017).

interrupted by the early politics and policies of former President Correa's administration. As they describe:

While Indigenous and environmental groups wanted to strengthen RoN [Rights of Nature] to prevent extractives, Correa and other socialists advocated expanding mining and oil extraction to finance poverty reduction programs. This political conflict obstructed the passage of secondary RoN legislation and channeled contestation over how RoN should be interpreted and applied through the courts.<sup>147</sup>

With the passage of the 2014 Penal Code, Ecuador began, but has not continued, the path of introducing laws that define nature's specific rights.<sup>148</sup> Under the Penal Code, certain activities determined to harm nature's rights were explicitly outlawed, including mistreating animals via mutilation, lesions, or death,<sup>149</sup> creating forest fires in native forest ecosystems,<sup>150</sup> and hunting or transporting species risked with extinction.<sup>151</sup> Although the Penal Code is not revolutionary in the way it protects nature, it is certainly a small step forward in defining nature's rights.

### 3. Future

Ecuador has a long history of rewriting their constitution. Currently on its twentieth in nearly 200 years, Ecuador averages a new constitution every decade.<sup>152</sup> Considering the most recent constitution comes from more than a decade ago, the occasional and recent civil unrest in Ecuador,<sup>153</sup> and current President Lenin Moreno's environmental agenda,<sup>154</sup> there is the possibility

<sup>147</sup> Craig M. Kauffman and Pamela L. Martin, *Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand*, *Global Environmental Politics* 18:4, p.56 (2018).

<sup>148</sup> Ministry of Justice, Republic of Ecuador, Penal Code - Organic Law (2014). As seen in Craig M. Kauffman and Linda Sheehan (forthcoming), *The Rights of Nature: Guiding our Responsibilities through Standard. Environmental Rights – the Development of Standards*, Cambridge University Press (forthcoming). Used with permission of author.

<sup>149</sup> Ministry of Justice, Republic of Ecuador, Penal Code - Organic Law, Art. 249 (2014).

<sup>150</sup> *Id.* Art. 246.

<sup>151</sup> *Id.* Art. 247.

<sup>152</sup> Becker, *supra*, p.47.

<sup>153</sup> Lucy Woods, *After 11 days of civil unrest, Ecuador reinstates fossil fuel subsidies*, *Climate Home News* (2019).

<sup>154</sup> Timm Shutzhofer, *Lenin Moreno's Betrayal*, *Jacobin* (2018).

that Ecuador may introduce a new constitution in the near future. Many environmental lawyers, advocates, and academics are concerned that the rights of nature might be left out of a potential new constitution, largely depending on the political climate.<sup>155</sup>

#### 4. *Potential solutions*

We as a country did the hardest thing already... Include rights of nature in the Constitution. Now we need to define and enforce it! – Julio Prieto<sup>156</sup>

Considering that extractive industries are legalized by the Constitution, it is unreasonable and impractical to expect nature's rights to put an end to these activities. Rather, it might be possible to use nature's rights to influence the manner in which extractive projects are completed. The contradictions within the constitution that legalize the extractive industries and grant rights to nature could be viewed as complementary, with nature's rights informing the extractive industries' practices. As environmental lawyer Hugo Echeverría said when asked how these rights can be balanced, "It is not a matter of mining or no mining, it is a matter of how the mining is done."<sup>157</sup> Mining is inherently harmful, but – supporting 45% of the world's economic activities – is a significant aspect of society.<sup>158</sup> Like all activities, the environmental impact of mining can range from small to large, and by minimizing water and energy inputs, waste production, land usage, and pollution, mining can be achieved in a way that minimizes its impact on nature. In Ecuador, nature's rights might be able to play a significant role in creating and enforcing stringent, binding nature's rights impact assessments. Currently, a 2004 law requires the state and private companies to present an environmental fact sheet or an environmental impact assessment to the government

<sup>155</sup> Francisco Bustamante, Hugo Echeverría, Natalia Greene, and Andres Martinez Moscoso, interviewed by author, Quito and Cuenca, July 2019.

<sup>156</sup> Julio Prieto, interviewed by author, New Haven, CT, September 2019.

<sup>157</sup> Hugo Echeverría, interviewed by author, Quito, July 2019.

<sup>158</sup> Ucilila Wang, *Sustainable mining: an inherent contradiction in terms?* The Guardian (2015).

prior to beginning an extractive project.<sup>159</sup> Under the current framework, project developers, rather than independent third parties, may complete the fact sheet or impact assessment, and in the case of state-owned projects, the state both completes and reviews the report. Additionally, the environmental impact assessment does not require alternative actions to be taken, rather only that they be identified.<sup>160</sup> Foregoing this existing framework, the state should require third party studies that consider the impact an extractive project may have on nature's rights as listed in the Constitution, and provide a variety of *binding* actions to the project developer to limit that impact as much as possible. For example, prior to the state authorizing a copper mining project, a nonpartisan third party might study the impact of the project on nature's ability to maintain and regenerate its integral life cycles and structures, and provide binding suggestions to the state to minimize this impact while continuing to respect nature and mine for valuable metals. Ideally, these studies and suggestions will take a localized and holistic approach to impacts on nature, considering the entire life cycles of the resource in question (e.g., if it is a copper mine, considering extraction, use, and end-of-use phase impacts of copper on nature). If legally binding in the steps the extractive industry must take to minimize impact on nature, this practice has the potential to uphold nature's rights while continuing historically harmful practices, such as those of the extractive industries, that play a large and important role in Ecuador's economy and development.

Because of the lack of clear direction and definition concerning nature's rights, it becomes important that (1) Ecuadorian legislators expand upon the 2014 Penal Code and pass additional secondary laws that provide greater clarity in rights of nature definition and enforcement, and (2) judges continue to consider nature's rights in cases and build strong jurisprudence. The passing of

<sup>159</sup> Republic of Ecuador, Environmental Management Act, R.O. 418 (2004).

<sup>160</sup> Environmental Law Alliance, *Ecuador: Legal Framework* (2019).

additional secondary laws that flesh out nature's rights and define specific activities that are allowed or prohibited is vital for understanding these rights and balancing them against other constitutional rights. Additionally, judge-created jurisprudence will likely come with time as more cases arise concerning nature's rights.

To address the issue of defining nature, doctrine should be developed that provides greater clarity on the breadth of nature that can be represented in court. Although it is not necessarily wrong to define nature as "where life is reproduced and occurs," this definition leads one to conjure limitless possibilities of what nature means. Most helpful would be to define the specific scales of nature that can be represented, such as ecosystems and species, while putting a boundary on the largest and smallest scope of nature that are covered by this clause. This would provide greater instruction to all involved parties, and would most likely result in a greater number of cases brought to court. Ecosystems and species might provide the most effective and practical scope of nature to have these rights, as providing these rights to individual organisms could result in an unmanageable number of cases and requests. Additionally, providing rights to ecosystems and species would, in theory, promote healthy and well-functioning nature around the entire nation.

Lastly is the concern that Ecuador passes a new constitution that does not recognize nature's rights. Time will tell if a new constitution is written, but it is vital that nonprofits, lawyers, and citizens are prepared to lobby and push to keep and expand on nature's rights. Generally, the development of rights recently granted to an entity that has not previously had rights takes time to develop. As Christopher Stone said in expectation of a society granting nature rights,

There will be resistance to giving the thing "rights" until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it 'rights' – which is almost inevitably going to sound inconceivable to a large group of people.<sup>161</sup>

It can be expected, then, that nature's recently granted rights will face opposition. In Ecuador, we can look towards the current trajectory of LGBTQ rights for a comparable model. The 2008 Constitution granted same-sex couples the right to civil union for the first time, but these rights have faced limitations and pushback. For example, same-sex couples are still legally unable to adopt children, and it was not until 2019 that the Constitutional Court legalized same-sex marriage. Although the country is gradually expanding and accepting LGBTQ rights, many within the heavily catholic country still oppose this expansion of rights.<sup>162</sup> This societal pushback to recently granted rights sheds light on the response nature's rights could face in the future. However, evident from an interview with Stephanie Avalos, the Ecuadorian Undersecretary of Climate Change, nature's rights certainly have a variety of strong support within civil society and the government of Ecuador. When asked about the future of nature's rights within Ecuador, she said, "We all bet on the idea that rights of nature will govern and become a base constitutional principle that governs and reconciles our productive side of the nation."<sup>163</sup>

<sup>161</sup> Stone, *supra*, p.456.

<sup>162</sup> The Editors, *Same-sex marriage is legal in Ecuador but will all Ecuadorians accept it?* World Politics Review (2019).

<sup>163</sup> Stephanie Avalos, interviewed by author, Quito, July 2019.

## **B. Education**

There are two main issues with the rights of nature in Ecuador: 1) Not everyone knows of it, meaning civil society is not empowered, and 2) judges are not educated. – Natalia Greene<sup>164</sup>

### *1. Civil society, lawyers, and judges*

Enforcing the rights of nature relies on the adequate education of civil society, lawyers, and judges. Education of all three is necessary, as each group is responsible for a vital segment of upholding nature's rights in court. Civil society's education (i.e., nonprofits and individuals) is critical in order for cases to be identified, raised, and instigated. Lawyers' education is essential for nature to be litigated on behalf of and represented in court, and judges' education is necessary for nature's rights to be adequately applied and enforced in court, even in cases where it may not be a central claim.

The first step in upholding nature's rights is identifying violations of these rights and instigating a case. Considering the current guardianship model that Ecuador employs, the identification and instigation of cases is impossible unless civil society has a deep understanding of nature's rights and their role and capability in representing nature. Although there is no formal data on the general public's awareness of nature's rights, it is clear there is a lack of knowledge and a scarcity of understanding. Informal interviews I conducted during the summer of 2019 with around thirty Ecuadorian citizens (including taxi drivers, waiters, tour guides, and fellow bus passengers) found that around ten knew of nature's constitutional rights. Of those, only two knew of their capability to bring a case to court on behalf of nature, and none had actually instigated a lawsuit or could recall a lawsuit that had called upon these rights. If this informal sampling of civil

<sup>164</sup> Natalia Greene, interviewed by author, Quito, July 2019.



society's awareness and understanding of nature's rights is at least somewhat representative of the larger population of Ecuador, it means there are a minority of people within the nation that are aware of nature's rights, a smaller portion that understand the capability they have, and a tiny fraction that will feel motivated to bring a case to court. This topic, significant for the future of the rights of nature in Ecuador, is additionally discussed in Part IV.C.

The second step in upholding nature's rights in court is preparing cases and representing nature in court. This process would greatly improve if lawyers had a deep understanding of these rights. According to certain lawyers, academics, and activists within Ecuador, there is a huge lack of understanding of nature's rights among lawyers in a nation that has historically looked down upon environmental law.<sup>165</sup> Indeed, the lawyer behind the first successful rights of nature case in Ecuador, the Vilcabamba River Case, did not know much of nature's rights before the claimants approached him wishing to bring a case using this tool.<sup>166</sup> Two environmental lawyers based out of Quito, Hugo Echeverría and Francisco Bustamante, consider themselves to be in the small cohort of lawyers in Ecuador that deeply understand and utilize the rights of nature, and the majority of lawyers within Ecuador think it too romantic an idea to be a practical legal tool.<sup>167</sup>

The last major step in upholding nature's rights in court, but just the beginning of enforcing the rights following the court decision, is judicial application of these rights and rulings in nature's favor. This is only possible if all levels of Ecuadorian judges have a deep understanding of nature's rights and how they balance and compare with other constitutional rights. Of the nine failed rights

<sup>165</sup> Francisco Bustamante, Hugo Echeverría, Natalia Greene, Norie Huddle, and Craig Kauffman, interviewed by author, various locations, July – December 2019.

<sup>166</sup> Norie Huddle, interviewed by author, via Skype, December 2019.

<sup>167</sup> Stephanie Avalos, Francisco Bustamante, and Hugo Echeverría, interviewed by author, Quito, July 2019.

of nature court cases, a few can be directly attributed to a lack of judicial understanding. For example, in 2014 a group of activists filed a suit for protective action against a water-intensive, 200-hectare monoculture pine tree plantation planted in a dry, high-altitude watershed near the iconic Chimborazo Volcano.<sup>168</sup> As Craig Kauffman and Pamela Martin recount, the judge improperly dismissed the case on procedural grounds, saying the claimants did not own any affected land and were not harmed, and thus did not have standing to bring the case. This judge likely lacked a deep understanding of the Constitution, though, which grants legal standing to all people, regardless of claim or interest, to bring a suit on nature's behalf.<sup>169</sup>

On the other side of the spectrum are those judges who considered nature's rights independent of a claimant's request. Of the 31 court cases featuring nature's rights, three of them featured a judge who introduced nature's rights as an additional supporting factor to consider, even though the lawsuit was not originally concerned with the rights of nature. For example, in 2012 eighteen people on the Galápagos Islands brought a suit to court, aiming to stop construction of a road during the high tourist season for fear of it hurting local business. In the decision which did ultimately halt the road construction, the judge additionally applied nature's rights to the case when he cited that the road disrupted the migratory path of iguanas.<sup>170</sup> This judicial introduction and support is extremely positive for the future of nature's rights, and suggests that these laws are gradually becoming normalized among the Ecuadorian judiciary. As Constitutional Court Justice Daniela Salazar said, "judges and lawyers don't have enough knowledge on this matter [nature's

<sup>168</sup> Kauffman and Martin, *supra*, p.11-12.

<sup>169</sup> *Id.*

<sup>170</sup> Derechos de La Naturaleza, *Carretera en Santa Cruz* (2012).

rights], but with time they will because cases will continue to arise and force lawyers and judges to learn and think about the rights of nature.”<sup>171</sup>

## 2. *Potential solutions*

The solution with the greatest potential to address this lack of awareness and understanding of nature's rights within Ecuador is education targeted at the three main cohorts: civil society, lawyers, and judges. As the Constitution grants standing to *all* people in Ecuador to represent nature's rights, it is vital that either *all* of civil society is empowered or the guardianship model is modified to place responsibility of representing nature in the hands of a certain designated group. This portion of the essay discusses solutions to the former, while the next section, Part IV.C.3, discusses the latter. In order to empower all of civil society, extensive education campaigns should be conducted and directed towards all of Ecuador. Currently, there are nonprofit organizations and private groups, such as the Fundación Pachamama, the Global Alliance for the Rights of Nature, and the planned Rio Vilcabamba Center for the Rights of Nature, that provide rights of nature workshops, info-sessions, and online webinars to civil society.<sup>172</sup> These workshops, although proven effective,<sup>173</sup> do not reach as wide as an audience as a government-funded and backed educational effort would and are not yet common enough to be institutionalized throughout all of Ecuador. In order to reach a wider audience and train a future generation of civil society nature guardians, the Ecuadorian government should incorporate rights of nature lessons in public and private schools around Ecuador. This could effectively be implemented as soon as a new

<sup>171</sup> Daniela Salazar, interviewed by author, via email, August 2019.

<sup>172</sup> Natalia Greene and Norie Huddle, interviewed by author, Quito and via Skype, July and December 2019.

<sup>173</sup> A Fundación Pachamama (an environmental nonprofit) workshop inspired Norie Huddle to bring the Vilcabamba River case to court.

nationwide educational program is approved, and the lessons would ideally be discussion-based and feature localized environmental issues and solutions. Another potential consideration is quick and easily understood public service announcements on nature's constitutional rights to be aired on a wide variety of television and radio channels and tailored to age-specific audiences. In 2007, the American Bar Association prepared and funded similar announcements on the basic constitutional rights of children on Ecuadorian television stations frequently watched by youth.<sup>174</sup> Additionally, the government could promote and celebrate one day of the year in honor of the rights of nature, especially as it is already a point of pride among indigenous and non-indigenous Ecuadorians that Ecuador is an internationally recognized leader in the movement to create constitutionally-recognized rights of nature.<sup>175</sup>

In order to better educate lawyers, it would be most beneficial to develop and incorporate formal rights of nature education in universities and law schools around the nation. This would mean developing course curricula, increasing the level of scholarly publications centered around nature's rights, and training professors to teach the subject (or, at a minimum, incorporating nature's rights in the standard law class on constitutional law). When questioned about this possibility, Ecuador's Undersecretary of Climate Change Stephanie Avalos considered it a realistic long-term opportunity, as the Ministry of Environment is currently developing a university level course on the Organic Code, Ecuador's legal climate strategy.<sup>176</sup> There are two real-life examples of how rights of nature legal education is in the early stages of becoming a reality. First is the book

<sup>174</sup> American Bar Association, *Advocacy: Where We Work: Ecuador Programs*.

<sup>175</sup> Hugo Echeverría and Natalia Greene, interviewed by author, Quito, July 2019; Alexandria, Tulio, Mr. Eriberto, and Ms. Brigida, four members of the indigenous Kichwa Community of Llanchama, interviewed by author, Llanchama, Rio Tiputini, Napo Province, July 2019.

<sup>176</sup> Stephanie Avalos, interviewed by author, Quito, July 2019.

that environmental lawyer Francisco Bustamante recently published, titled “Constitutional Justice: Applying the Defense and Protection of the Environment’s and Nature’s Rights.”<sup>177</sup> This book aims to provide Ecuadorian judges and lawyers with correct applications of nature’s rights, and has the potential to prove beneficial for the future of nature’s rights. The second example is the world’s first ‘Earth Law’ textbook, to be published in the Fall of 2020.<sup>178</sup> This textbook, written by legal experts around the world and organized by the nonprofit the Earth Law Center, aims to train the next generation of lawyers on the rights of nature, and will be taught in a variety of law schools around the world starting in 2020. If possible, this textbook should be translated and tailored to Ecuador’s needs and quickly incorporated into Ecuadorian law schools.

In addition to educational books and articles aimed at judges as well as law school course offerings, Ecuador should consider an education campaign on nature’s rights directed at current judges. Similar to how the United States Appellate Judges Education Institute hosted workshops and panels on how judges can best address #MeToo sexual harassment complaints,<sup>179</sup> the Ecuadorian government could hold workshops, seminars, and conferences on the correct application of nature’s rights. Also possible is an educational campaign that comes from an interested third party. For example, in 2011 the American Bar Association conducted an advocacy campaign directed at Ecuadorian judges to address judicial corruption and promote personal responsibility and transparency in the court system.<sup>180</sup> Environmental nonprofits could consider running, with the support of the government, a similar campaign on nature’s rights.

<sup>177</sup> Francisco Bustamante, *Justicia Constitucional: aplicada a la defensa y proteccion de los Derechos Ambientales y de la Naturaleza*, CEDENMA (forthcoming). Used with permission of author and publisher.

<sup>178</sup> Grant Wilson, *Publisher Confirmed for First Earth Law Legal Textbook*, Earth Law Center (2019).

<sup>179</sup> Sharleene Koonce, *#MeToo: Sexual Harassment in the Courtroom*, American Bar Association (2019).

<sup>180</sup> American Bar Association, *Advocacy: Where We Work: Ecuador Programs*.

The above ideas represent only a subset of the ways that Ecuador might cultivate greater awareness and understanding of nature's rights among civil society, lawyers, and judges. They are, however, possibilities that could have a positive impact on the upholding of nature's rights. Overall, it is critical that civil society, lawyers, and judges of all levels and from all provinces are reached in order to ensure adequate upholding of nature's rights throughout the country.

### **C. Guardianship**

#### *1. A problem of the masses*

Similar to the legal guardian of minors or incapacitated adults, the legal guardian of nature is responsible for representing nature in court and speaking on nature's behalf. In Ecuador, there are two main issues surrounding guardianship of nature, both of which stem from the Constitution. First is the extremely broad definition of nature to be represented, which was discussed in Part IV.A.2. The second is the fact that the opportunity for legal guardianship of nature is granted to all people in Ecuador but not required by any one person or group. This granting of legal standing to everyone often results in a lack of action due to an absence of personal responsibility. In other words, this can be seen as a result of the bystander phenomenon or what I call the 'problem of the masses.' Historically, standing requirements demand that plaintiffs have personal stake and loss, and they help identify those who are impacted by a controversy. These requirements are meant to prevent both an excess and an absence of cases brought to court.<sup>181</sup> This gets tricky, however, when nature – the affected party – needs an adequate human guardian to represent it in court, and when all humans in Ecuador have the capability, but not the responsibility, to act as guardian. In Ecuador, these broad standing requirements have inhibited the proactive protection of nature, especially

<sup>181</sup> Hope Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, Regents of the University of California (2016).

when compared with more specific strategies employed around the world for nature's guardianship, such as those applied in New Zealand.

To solve for this lack of obligation and responsibility, in 2015 Ecuador passed the General Organic Code of Processes which specifically stated that, in addition to any person or group of people, the national Ombudsman can act on his/her own initiative and represent nature in court.<sup>182</sup> This law does not require the Ombudsman's office to act as guardian of nature, but rather offers the possibility, which has not resulted in additional cases at the time of this writing.

## 2. *Funding*

Undoubtedly, one of the most significant challenges Ecuador faces in upholding nature's rights within the courts is a lack of funding for civil society and their lawyers that wish to act as guardian of nature and bring a case to court.<sup>183</sup> Litigating nature's rights can be expensive, especially because monetary awards go to the restoration of nature itself rather than to the human guardian. When hiring a lawyer and bringing the Vilcabamba River case to court, Norie Huddle spent several thousands of dollars she knew she would not get back,<sup>184</sup> something extremely unrealistic for the majority of civil society in Ecuador. In bringing a rights of nature case to court in Ecuador, plaintiffs can expect to spend around \$12,500, more than five times the average monthly wage in the country.<sup>185</sup>

<sup>182</sup> Craig M. Kauffman, *Guardianship Arrangements in Rights of Nature Legal Provisions*, Earth Law: Emerging Ecocentric Law, Earth Law Center (forthcoming). Used with author's and publisher's permission.

<sup>183</sup> Francisco Bustamante, Hugo Echverría, and Natalia Greene, interviewed by author, Quito, July 2019.

<sup>184</sup> Norie Huddle, interviewed by author, via Skype, December 2019.

<sup>185</sup> The average rights of nature case in Ecuador costs around \$12,500, reported by Ecuadorian lawyer Hugo Echeverría and President of Fundación Pachamama (an environmental nonprofit that litigates on behalf of nature) Natalia Greene. Expensive cases that require extensive scientific testing can be as high as \$20,000, while less expensive cases are closer to \$5,000. The average monthly wage in Ecuador, for comparison, is currently \$2,230.

Additionally, although certain environmental nonprofits have raised multiple cases on nature's rights, Ecuador does not have a robust nonprofit community with enough funds to regularly bring cases to court. A variety of campaigns to create greater enforcement of nature's rights, such as a failed EcoLex campaign to create a rights of nature hotline where individuals could report rights of nature violations<sup>186</sup> and a current nonprofit being created by a former provincial Ombudsman,<sup>187</sup> have struggled to raise sufficient funds to support their efforts. The associated costs with bringing cases to court greatly limits the ability for civil society and nonprofits to hire lawyers willing to represent nature, which restricts the number of cases brought to court and makes it impossible for nature's rights to be upheld at all. Without a significant change in the economics associated with acting as guardian of nature, it is unlikely that nature's rights will be able to have a substantial impact within Ecuadorian courts and society.

### *3. Potential solutions*

Among the varying rights of nature strategies around the world, there are two main approaches concerning guardianship. One of these, as employed in Ecuador and communities in the United States, is the opportunity for all people to act as guardian when compelled. The other, employed in places such as New Zealand, Bangladesh, and Colombia, is appointing specific guardians responsible for representing particular environmental features in legal, administrative, and planning matters. For example, after recognizing the legal personhood of the Whanganui River in 2017, the New Zealand Parliament authorized the Crown to appoint one guardian of the river and the local indigenous Whanganui iwi to appoint the other. Together, these two guardians are

<sup>186</sup> Craig Kauffman, interviewed by author, via Skype, September 2019.

<sup>187</sup> Norie Huddle, interviewed by author, via Skype, December 2019.



legally responsible to act and speak on behalf of the river's needs.<sup>188</sup> Although there has yet to be a court case with the Whanganui River,<sup>189</sup> this strategy of having identified suitable individuals who are personally responsible to act as legal guardians of the river creates an opportunity for vigilance to discover otherwise unnoticed environmental degradation. Additionally, if guardians – as is the case in New Zealand – are granted authority in the policy world, they can employ preventative measures to avoid the court system, and associated costs, altogether. Thus, considering the benefits of specific guardians, Ecuador should consider appointing guardians to act on nature's behalf throughout specific ecological regions of Ecuador. Most beneficial would be if the Ecuadorian government created an independent agency or group within the existing Ministry of Environment, perhaps with one office in each of Ecuador's twenty-four provinces, of lawyers, ecologists, scientists, and indigenous peoples legally responsible to act as guardian of nature within their province. Rather than rely on the inconsistent and unlikely personal motivations of the national Ombudsman or civil society, this strategy of guardianship would strengthen nature's representation in Ecuador and could provide a model for other nations considering federal recognition of nature's rights. Of course, this state-supported model would not be without controversy. In creating such a system, Ecuador would have to ensure adequate and independent representation of nature even when nature's rights conflict with a government project. In theory, however, the long-term vitality of a nation directly depends on its respect and treatment of nature, which would make it beneficial for the government to create a guardianship agency with independent appointees.

<sup>188</sup> New Zealand Parliament, Te Awa Tupua (Whanganui River Claims Settlement) Act (2017).

<sup>189</sup> Perhaps due to the role the guardians have in administrative and planning matters.

An alternative possibility that Ecuador might consider is layering additional guardianship status atop the current system for particularly important ecosystems and environmental features, such as the Galápagos Islands, Mt. Cotopaxi, Mt. Chimborazo, and the Amazon rainforest. This strategy could provide specific legal guardians – lawyers, scientists, and indigenous peoples – to ecosystems of national importance while also providing the ability for civil society to act as guardian of nature when compelled.

If adequately funded by the government, the creation of an agency tasked with guardianship of nature would solve many of the guardianship and funding issues. Because this is unlikely to occur in the near future, though, it is important to provide other solutions to this economic barrier within the current guardianship system. According to the Constitution, “The State shall give incentives to natural persons and legal entities and to communities to protect nature.”<sup>190</sup> These incentives have noticeably been absent from Ecuadorian society, and nonprofit efforts should be focused on pressuring the state to follow through with this article. Ideally, these incentives could at minimum cover attorney fees and also provide compensation and awards to those in civil society who successfully represent nature in court, without detracting from the awards going directly to nature’s restoration. For example, if a plaintiff spends \$12,500 on a case and successfully represents nature, the court could order the defendant to cover the plaintiff’s punitive fees (in this case, the \$12,500) while still covering the direct compensation for the damage done to nature. Additionally, the government could provide a small monetary incentive to nature’s plaintiffs, which would greatly enhance civil society’s and lawyers’ inclination to represent nature in court and result in greater protection of nature in Ecuador.

<sup>190</sup> Republic of Ecuador, Const. Title II, Ch.7, Art.71. Translated by Georgetown University, *Political Database of the Americas*.

A non-governmental solution to the issue of funding could come from environmental organizations. Currently, there are a small number of international organizations dedicated to the rights of nature.<sup>191</sup> Although these organizations also face the constant challenge of securing funding, it would be extremely beneficial for nature's rights if they could set up a steady source of payment via philanthropic donations or government grants to fund cases within Ecuador. In 2005, for example, environmental organizations in the United States received around 1/6 of their revenue from government grants, an agreement that Ecuadorian nonprofits may wish to push for.<sup>192</sup> Additionally, as the rights of nature movement grows in popularity around the world, more established environmental organizations – such as Earthjustice, Greenpeace, World Wildlife Fund, and the Sierra Club – might be able to assist in the funding of cases. Greenpeace International, for example, spent around \$13 million (of the ~\$80 million they spent in total) on their six major environmental campaigns in 2018.<sup>193</sup> If Greenpeace hypothetically diverted 1/25<sup>th</sup> of their annual campaign spending to rights of nature cases in Ecuador (~\$500,000), they could fund around 40 cases per year.<sup>194</sup> In conclusion, it is vital that Ecuador considers tweaking its current guardianship and funding framework to allow for a greater number of rights of nature cases to be brought to court and for more proactive protection of nature to occur within the nation.

<sup>191</sup> The most active of which are the Community Environmental Legal Defense Fund, the Earth Law Center, and the Global Alliance for the Rights of Nature.

<sup>192</sup> Baird Straughana and Tom Pollak, *The Broader Movement: Nonprofit Environmental and Conservation Organizations, 1989-2005*, The Urban Institute (2008).

<sup>193</sup> Greenpeace International, *Annual Report* (2018).

<sup>194</sup> This calculation is using the average cost of rights of nature cases in Ecuador (\$12,500) as reported by lawyer Hugo Echeverría and environmental nonprofit president Natalia Greene.

## V. Conclusion

### A. Hope for Ecuador, hope for nature

With the recognition of nature's rights in their 2008 Constitution and the at least partial rejection of the notion that nature is mere property to be owned and exploited, Ecuador began the process of rethinking society's legal relationship with nature. Since 2008, Ecuador has understandably faced a wide variety of challenges in upholding these rights in court, but continues to move forward in cultivating a society where respect and consideration for nature is normalized and legally required. There are three central steps in shifting away from a modern society that views nature primarily as an object to be owned and towards a society where nature's rights are constantly considered and respected: (1) recognizing nature's rights in the highest level of law, (2) upholding these rights at an effective quantity and quality within the court system, and (3) enforcing these rulings outside of court. With the passage of its Constitution in 2008, Ecuador became the first modern country in the world to complete the first step and still remains one of few to have even begun this process. As evident with the 31 cases the nation's courts have heard (see Part III.C) as well as the attempted enforcement of rulings in nature's favor,<sup>195</sup> Ecuador is most certainly in the process of the second and third steps. This paper accounts for challenges Ecuador has faced in the second step – upholding nature's rights in court – while also providing potential solutions that may help Ecuador and other communities and nations strengthen nature's rights. In sum, this paper proposes that the upholding of nature's rights in Ecuador would be greatly enhanced by implementing certain solutions to the three problem areas of constitutional issues

<sup>195</sup> For some of the challenges associated with the post-court enforcement of nature's rights in Ecuador, see Norie Huddle, *World's First Successful 'Rights of Nature' Lawsuit*, Kosmos Journal (2013).

(clashes within the constitution, lack of direction, and future), education (civil society, lawyers, and judges), and guardianship (a 'problem of the masses', and funding).

Evident in the wide variety of anthropogenic harms resulting in the current climate crisis, conventional environmental law has failed to limit human impact on the planet to a level required by ecosystems and species around the world.<sup>196</sup> Additionally, conventional environmental law has not been powerful enough to ensure clean water, food, and livelihoods free of pollution, zoonotic diseases, and other harms to many humans around the world.<sup>197</sup> Thus, it is vital that we rethink the ways in which our law treats nature. Cognizant of the shortcomings of traditional environmental law, communities and nations around the world have recognized nature's rights as a hopeful new strategy to protect nature, humans, and other nonhuman animals. Laws reflect societal values, and currently our laws suggest that we view nature and nonhuman animals as private property, subject to economic valuing and widespread exploitation, extinction, pollution, confinement, and damage. For the sake of humans, nonhuman animals, and nature, it is time to change that, and granting legal rights to nature is a promising place to start. Considering Ecuador's successes, and attempting to rectify and account for its failures, provides an excellent guide for the enhanced future of nature's rights in Ecuador and other communities and nations that wish to take the encouraging and necessary step in recognizing nature's legal rights.

<sup>196</sup> For resources on the climate crisis, see Intergovernmental Panel on Climate Change, *IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security, and Greenhouse gas fluxes in Terrestrial Ecosystems*, UNEP (2019).

<sup>197</sup> Center for Disease Control, *Global Water, Sanitation, & Hygiene: Global WASH Fast Facts*.

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