Rights of Nature and Indigenous Spirituality: A Case of Ecuador

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Abstract: *This paper focuses on the Indigenous spirituality component of the Rights of Nature law, using Ecuador as an example. By approaching this issue from both theoretical and practical perspectives, this article asks how the Indigenous spirituality component may have an impact on the Rights of Nature law at issue and the legal system as a whole. From a theoretical perspective, the article shows that Indigenous spirituality as a legal reasoning is non-defeasible and non-balanceable. From a practical perspective, the article analyses one of the latest RoN cases in Ecuador – Los Cedros Forest Case (2021). At the heart of the article is the discussion of whether a legal concept with spiritual connotations can function as it is intended (with its spiritual connotations) while embedded in an anthropocentric modern legal system.*

Keywords*: Balancing, defeasible, Indigenous, Los Cedros Forest Case, legal reasoning, Rights of Nature (RoN), spirituality (spiritual)*

1. Introduction

'Should trees have standing?' The question famously asked by Christopher Stone (1972) has opened a decades-long discussion among legal scholars and practitioners on giving rights to nature. In 2008, Ecuador became the first (and still the only) country in the world to bestow rights to nature in its Constitution. Today, at the tipping point of climate change, many countries have passed or considered passing regional or national legislation to give nature rights.[1] In this article, I call this body of legislation the Rights of Nature (RoN) law. Based on its premise, if used effectively, RoN law may become one of the prominent tools that assist in transforming the current anthropocentric legal order(s) to an ecocentric one. An anthropocentric legal order, as the name indicates, puts human beings at the centre of the legal system and considers nature merely as an object that is at human-

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1. At the time of writing, many countries have passed legislation that bestow nature or certain natural objects rights. For up-to-date RoN initiatives in the world, see https://www.garn.org/rights-of-nature-timeline. See also (Putzer et al., 2022).

kind's disposal. An ecocentric legal order, in contrast, claims that nature should have rights of its own for its own sake, taking nature as a proactive subject within a legal order (Borràs, 2016; Knauß, 2018; Kotzé and Calzadilla, 2017).

One essential element that, intentionally or accidently, makes the RoN law pertinent to such transformation is that of Indigenous communities. It is now a well-recognised phenomenon that Indigenous communities have been the driving force behind the RoN law in many countries (Macpherson et al., 2020; Morris and Ruru, 2010; O'Donnell et al., 2020), Ecuador included (Kauffman and Martin, 2017; Tanasescu, 2013). One salient characteristic that RoN laws driven by these Indigenous communities have in common is their connection with Indigenous spirituality: that is, to support RoN law with, among others, the Indigenous spirituality, which relies on an alternative set of beliefs that are different from the modern Western Enlightenment rationale. For instance, in the Ecuadorian Constitution, the RoN concept is largely based on the Andean Indigenous concept of *sumak kawsay* (buen vivir in Spanish, and roughly translated as good living in English), which expresses the idea of living in harmony with nature (Kauffman and Martin, 2016).

While much has been written on the RoN law around the world, there has been little focus on the Indigenous spirituality component of this body of legislation;[2] less on how Indigenous spirituality may have an impact on the RoN law and the legal system as a whole. This article, therefore, tries to fill this lacuna by approaching both theoretical and practical aspects of this question. From a theoretical perspective, based on legal argumentation theory and legal theory, this article indicates that the characteristics of Indigenous spirituality, i.e., being non-defeasible and non-balanceable, may not be compatible with a modern legal system. From a practical perspective, this article uses Ecuador as an example, analyses the Ecuadorian Constitution and the Los Cedros Forest Case (2021), and elaborates on the insights gained from the theoretical analysis. At the heart of this article is the question whether a legal concept with spiritual connotations can function as it is intended (within its spiritual context) while embedded in an anthropocentric and secular legal system.[3] This question is of significance. Without answering it, RoN law that is driven by Indigenous communities will not only fail to recognise and protect the fundamental identities of these communities but will also weaken the modern legal systems in which these RoN laws are embedded. This article takes the first step towards answering this question.

Ecuador is chosen as an example not only because it is the first, and so far the only, country in the world that has included RoN in its Constitution, but also because it has a relatively long history of bringing RoN cases to court compared to other countries that have legislated similar RoN laws. More importantly, since RoN law in Ecuador is largely driven by its Indigenous communities, it is an ideal example for the purpose of this paper.

Part 2 of this article puts forward some working definitions that are relevant for the

2. Some scholars have researched spirituality in the context of Indigenous experience of nature protection. For instance, (Studley, 2020; Verschuuren and Brown, 2019). Others have studied the spiritual component in RoN law outside of the Indigenous context. E.g. Alley, 2019.

3. The word 'embedded' in the question is important. It means this current discussion will not merely assess RoN and its Indigenous spiritual connotation on its own terms but, rather, see it from the perspective of the modern secular legal system that is both anthropocentric and based on the Western Enlightenment logic. In this sense, this article tries to investigate the relationship between RoN law and its Indigenous spiritual connotation on the one hand, and the modern legal system that gives nature such rights on the other.

discussion, including spirituality, legal reasoning and spiritual legal reasoning. Part 3 briefly introduces RoN in the Ecuadorian Constitution, with focus on the spiritual component of the RoN law. Since there are diverse opinions regarding whether and to what extent Indigenous spirituality should be taken into consideration regarding the Ecuadorian RoN law (cf. (Tănăsescu, 2020), this part expounds on the Indigenous spiritual concepts that appear in the law and their role in the legislation. Part 4 investigates one characteristic of spiritual reasoning that may not be compatible with the modern secular legal system, i.e., spiritual reasoning being non-defeasible. In the same vein, Part 5 contemplates another characteristic of spiritual reasoning, i.e., being non-balanceable. Part 6 analyses the recent Los Cedros Forest Case, with a focus on its invocation of RoN. This case shows how the non-defeasible and non-balanceable characteristics of RoN are expressed in practice. This paper further argues that these characteristics may weaken the foundation of the rule of law – legal certainty. Part 7 is the conclusion.

2. Working Definitions: Spirituality, Legal Reasoning and Spiritual Legal Reasoning

Without getting into the rich discussion of the following concepts, as any attempt to do so would be far beyond the scope of this paper, this part clarifies some working definitions, namely spirituality, legal reasoning, and spiritual legal reasoning. These working definitions are based on the general theoretical discussions regarding these concepts and have been chosen because of their wide acceptance and suitability for this discussion.

2.1 Spirituality

It is impossible to proceed to the current discussion without defining spirituality. However, there is a tendency among scholars to avoid this task (De Souza, 2016). Furthermore, different Indigenous tribes and cultures have different strands of spirituality that sometimes may be inaccessible to outsiders. Nevertheless, some basic common threads can be found,[4] which can function as the common denominator that unites different strands of spirituality. These common threads include 1) wholeness and connectedness, 2) awareness and meaningfulness and 3) subjectiveness. As Baskin articulated, 'spirituality is about wholeness, making meaning and creating inner peace. It is a sense of being at one with both one's inner and outer worlds.' (Baskin, 2016, p. 51). Wholeness and connectedness are at the core of a spiritual experience (Florczak, 2010). Spirituality expresses an 'interconnectedness and interrelationship with all life. Everyone and everything (both "animate" and "inanimate") are seen as being equal and interdependent, part of the great whole and as having a spirit' (Baskin, 2016, p. 52). To access such wholeness and connectedness is to be aware. Awareness is the method for accessing spirituality. It is a state of being and a way of knowing. The results are to find profound meanings in everyday life, so that one can appreciate the wonder and mystery of life (Bone, 2010, p. 43). One empirical study suggests that love is one of the main components of the profound meanings that can be experienced through spirituality (Lewis et al., 2007). All these experiences, however, are different to each individual. One is to be inspired to their (own) spirituality. No two spiritual experiences are identical. In this sense, spirituality is subjective. To grasp the meaning of spirituality, it is also important to distinguish it from science. Unlike science, it does not claim universally observable truth that is based on our sense of reality. These three common threads, that is wholeness and connectedness, awareness and meaningfulness, and subjectiveness, are the

4. 'I found countless examples of commonalities among the spirituality of Indigenous Peoples on Turtle Island, New Zealand, Tibet, and the continent of Africa, to name a few.' (Baskin, 2016, p. 56).

general common denominators. This definition should suffice for the current discussion.

Indigenous spirituality is at the centre of identity for Indigenous communities (Tomaselli and Xanthaki, 2021): it is their way of living and being.[5] The spiritual characteristics of wholeness and connectedness mean that the indigenous communities that have such a spiritual identity also have a sacred connection with their land, nature and the planet as a whole. Therefore, they do not share the modern Western dualistic mindset when it comes to nature (Fonda, 2011). As Fonda has eloquently explained,

> For Aboriginal [Indigenous] persons land is not merely material, and nature is not merely natural. Both have spiritual dimensions and make up a sacred substance, which is the source, sustenance, and end of all cosmic life on which everything depends. If the spiritual is not distinct from the land, then taking the land is tantamount to prohibiting traditional spiritual experiences (Fonda, 2011, p. 2).

This also holds true in the context of Latin America (Tomaselli and Xanthaki, 2021).

2.2 Reasoning, Legal Reasoning and Spiritual Legal Reasoning

According to Douglas Walton, reasoning 'is the making or granting of assumptions called premises (starting points) and the process of moving toward conclusions (end points) from these assumptions by means of warrants' (Walton, 1990, p. 403). Reasoning is usually understood by its relationship with other closely linked yet distinctive terms, notably 'argument'[6] and 'argumentation'.[7] The connection between these concepts could be summarised as: a chain of argument constitutes argumentation, which is usually composed of reasoning. In this paper, these terms will be used accordingly, but their differences will not be emphasised unless necessary.

Legal reasoning is a distinctive field of reasoning that differs from logic, scientific or ordinary reasoning (Ellsworth, 2005); it is first and foremost about law. More precisely, it is the logic tool legal professionals use to reach a verdict. According to Ellsworth, legal reasoning has two main types: deduction and analogy. He also indicates that legal reasoning is different from scientific reasoning because legal reasoning is put forward in an adversarial manner and is institutional (Ellsworth, 2005, p. 696; Maccormick, 2010).

Based on the above working definitions, in this paper, spiritual legal reasoning is defined as a logical process that starts from a spiritual worldview and ends with a legal conclusion in the sense that it either supports one side's plea in court (in court cases) or supports a statement that has legal effects (in legislation). This process is also a legal justification.

3. Indigenous Spirituality Component in the Ecuadorian RoN Law

Given the voluminous research on RoN in Ecuador (Daly, 2012; Kotzé and Villavicencio Calzadilla, 2017; Tanasescu, 2013; Villavicencio Calzadilla and Kotzé, 2018; Whittenmore, 2011), this

5. Nevertheless, it is noted that not all Indigenous communities share this kind of spirituality or are spiritually rooted. These Indigenous communities are not included in the scope of the current discussion.
6. According to Walton, an argument is 'a social and verbal means of trying to resolve, or at least to contend with, a conflict or difference that has arisen or exists between two (or more) parties.' It 'necessarily involves a claim that is advanced by at least one of the parties' (Walton, 1990, p. 411).
7. 'In the dialogues, there are many specific arguments, and they are connected together with other arguments … The word "argumentation" denotes this dynamic process of connecting arguments together for some purpose in a dialogue' (Walton, 2006, p. 1).

part will focus on the Indigenous spirituality component of the Ecuadorian RoN law, which so far has received less scholarly attention.

3.1 Spiritual Legal Reasoning in the Ecuadorian RoN Law

In 2008, Ecuador reformed its Constitution, in the process of which it introduced the concept of RoN. This makes it the first (and still the only) constitution in the world to recognise RoN. Article 10 of the Constitution states that '[n]ature shall be the subject of those rights that the Constitution recognizes for it.' The specific rights that nature is granted are listed in Chapter Seven from Article 71 to 74.

There are two important concepts in the 2008 Ecuadorian Constitution that are not only pertinent to RoN, but have a spiritual connotation, i.e., *Pachamama* and *sumak kawsay*.

Pachamama loosely translates as Mother Earth. Rooted in the Andean worldview, Pachamama is seen as 'a living and conscious being that has the ability to produce'(di Salvia, 2019, p. 1175). It is the 'mother of all', because 'mama' refers to a sacred female mother figure and *pacha* is a complex term that indicates concepts such as time and space, the Divine, earth and sacredness. Indigenous thinkers and scholars of the Andes also describe Pachamama as the earth's generative powers (Silverblatt, 1987). It is 'the very construction of life itself' that 'provides the condition of possibility for human life'(Tola, 2018). It is also viewed as the symbol of birth (Hennessey, 2021).[8] Even after the Spanish conquest during the sixteenth century, representations of Pachamama were preserved and continue to permeate Andean culture.[9] It is still seen as the centre of today's Andean culture and viewed 'as the earth itself and therefore as the nurturer of life, but also as connected to death through the earth's power to kill through natural disasters such as lightning and earthquakes' (Hennessey, 2021).

In the Ecuadorian RoN law, Pachamama is synonymous with nature (Sólon, 2018, p. 121). Therefore, nature having rights equals Pachamama having rights.

Sumak kawsay (vivir bien in Spanish) is an ancient Kichwa word, which means to live in harmony with communities, with ourselves and with nature. It is rooted in Indigenous culture throughout the Andean region and the Amazon forest. Although it can be translated and experienced in various ways, one common element of sumak kawsay is living in harmony with nature (https://pachamama.org/sumak-kawsay Last accessed on 29 May 2024). This means humans are not placed above the natural environment but are situated within it (Tanasescu, 2013, p. 433). This concept, with its modern welfare indication, was part of the Amazanga Plan (1992), a work by the Kichwa-Amazonian anthropologist Carlos Viteri. The Amazanga Plan is 'a document in which, for the first time, the wisdom of the people of the jungle (*sacha runa yachai*), the philosophical framework that guided the Kichwa-Amazonian way of life, was revealed' (Hidalgo-Capitán et al., 2020). The sumak kawsay way of living has permeated local Indigenous cultures for thousands of years and is embedded in their ethical values (https://www.pachamama.org/sumak-kawsay). This spiritual way of living is based on three concepts: 'a land free of evil (*sumac allpa*), a clear and harmonious life (*sumac kawsay*) and the art of understanding-knowing-convincing-being sure-seeing (*sacha kawsay riksina*)' (https://www.pachamama.org/sumak-kawsay).

If we recall the definition of spirituality, both Pachamama and sumak kawsay embody spiritual wholeness and connectedness, which are at the core of spirituality. To understand the meaning of both concepts is to be aware of the

8. See also http://visualizingbirth.org/pachamama-fertility-goddess-and-mother-earth#_ftn1.
9. Scholars also found that the image of Panchamama was later mixed with the image of Virgin Mary because of the Colonial influence. See, e.g., (Hennessey, 2021).

wholeness and connectedness among humans, nature, land and spirit. As a way of living and being, both concepts give meaning to everyday human experience, from birth to death. Those meanings, while deeply rooted in the Andean Indigenous communities, are subjective to individual experience. Therefore, since they are the embodiment of the Indigenous spirituality of the Andean region, it is necessary to interpret these concepts together with their spiritual connotations when they appear in the RoN law. To interpret these concepts based on their spiritual connotation is imperative, because it respects the intention and identity of the Indigenous communities who are also the driving force of legislating the RoN law (O'Donnell et al., 2020; Wu, 2020).

3.2 The Role of Spiritual Legal Reasoning in the Ecuadorian RoN Law

Having established that both Pachamama and sumak kawsay should be interpreted in alignment with their spiritual connotation, it is timely to note the role of these spiritual concepts in the Ecuadorian RoN law.

'Pachamama' being used interchangeably with 'nature' is the *subject* of rights in the Ecuadorian Constitution. The preamble says 'CELEBRATING nature, the Pacha Mama (Mother Earth), of which we are a part and which is vital to our existence'. Recall Article 71, which states, 'Nature, or Pacha Mama…has the right…'. As the subject of the rights, Pachamama is, therefore, the most important concept in the whole legislation as far as RoN is concerned. Regarding sumak kawsay, the preamble states, '[h]ereby decide to build: A new form of public coexistence in diversity and in harmony with nature, to achieve the good way of living, the sumak kawsay.' This is further confirmed in Section Two (Healthy Environment), where the rights of the population to have the 'good way of living (*sumak kawsay*)' (Art. 14) are recognised. It is also said to be guaranteed for the Amazon territory (Art. 250) and the overall development structure of the country (Art. 275). Both concepts are used in the preamble and throughout the legislation. Their appearance in the preamble also suggests that they have fundamental importance regarding the legal document, as they frame everything that follows.

In sum, both concepts are based on the Indigenous spirituality in the Andean region that signifies living in complementarity, harmony and balance with Mother Earth and societies. Since these concepts permeate the Ecuadorian RoN law and function among the most important concepts and arguments for granting rights to nature, these concepts together with their spiritual connotation are an indispensable part of the legal reasoning that forms the foundation of the Ecuadorian RoN law.

Nonetheless, since it is far from common practice for a modern secular legal system to include such spiritual legal reasoning, the question arises: how can we assess, implement and operate spiritual reasoning against other secular legal reasoning in a modern secular legal system? The following parts (Part 5 & 6) explore two theoretical barriers that RoN and its corollary spiritual reasoning may encounter when being invoked in a secular legal system. They are barriers because they interrupt the normal legal reasoning process, which in turn, prevents RoN together with its spiritual connotations being invoked effectively in court. The analysis will be mainly based on argumentation theory and legal theory.

4. The First Barrier: Spiritual Reasoning Being Non-Defeasible

Defeasible reasoning is the type of reasoning where 'if the premises hold, the conclusion also holds *tentatively*, in the absence of information to the contrary' (Walton, 2008, p. 161, italic added). Monotonic reasoning means that 'any conclusion that can be obtained from an initial set of premises can still be obtained whenever the original set is expanded with additional premises' (Sartor, 2018, p. 317). In contrast, non-

monotonic reasoning means that 'a conclusion that can be obtained from an initial set of premises may no longer be obtainable when the original set is expanded with additional premises' (Sartor, 2018, p. 317). An example of monotonic reasoning is deduction, because as long as we accept all premises of a deductive inference, by definition we must continue to accept its conclusion. A deductive inference, therefore, is also conclusive (Sartor, 2018, p. 317). At this point, we can also distinguish deductively valid argument from defeasibly valid argument. For the former, 'the premises provide conclusive support for the conclusion: if we accept the premises we must necessarily accept the conclusion' (Sartor, 2018, p. 318). For the latter, however, since 'the premises only provide presumptive support for the conclusion', if we accept the premises we should also accept the conclusion, 'but only so long as we do not have prevailing arguments to the contrary' (Sartor, 2018, p. 318).

Consequently, an argument can be attacked in three ways: by attacking its premises, by attacking its conclusions or by attacking the support relation between premises and conclusions (Sartor, 2018, p. 323). By definition, a conclusive argument can only be attacked by challenging its premises, because as long as we accept the premises, we also accept the conclusions, whereas a defeasible argument can 'also be attacked by denying its conclusion, even if its premises are not questioned' (Sartor, 2018, p. 323).

The majority of legal reasoning is non-monotonic and defeasible. It is defeasible insofar as it involves more than deductive reasoning on the basis of valid law. As long as the external justification (over and above a syllogism) is required, it is possible to attack and defeat legal reasoning by providing new information *qua* legal argument. In this sense, the common process of legal reasoning can be seen as a series of defeating rival arguments, which is summarised by Sartor:

> defeasible reasoning activates a structured process of inquiry in which we draw prima facie conclusions, look for their defeaters, look for defeaters of defeaters, and so on, until stable results can be obtained. A process like this one reflects the natural way in which legal reasoning proceeds. This is especially the case in the law's application to particular situations, when we have to consider the different, and possibly conflicting, legal rules that apply to such situations and must work out conflicts between these rules (Sartor, 2018, p. 346).

In contrast, spiritual reasoning is conclusive monotonic reasoning and can only be attacked on its premises. As the starting point of any kind of spirituality is to accept a set of worldviews, no added information would change the believers' acceptance of them. If the arrival of a new piece of information changes the believer's acceptance of the worldview, the believer will, by definition, fall out of the category of being the subject of the worldview. This is, therefore, a categorical issue.

By embedding spiritual reasoning in legislation, it implies that the legal system accepts such a worldview as the vantage point from which to perceive ourselves, the world/nature, our beliefs and the relationships between them. What is legislated as positive law should be carried out in a society guided by the rule of law principle. This means that the non-defeasibility of spiritual reasoning would be carried over to spiritual legal reasoning once it is incorporated into positive law. In other words, once we accept the spiritual premises in law, the spiritual legal reasoning becomes a deductively valid argument and cannot be defeated by other competing arguments. In the case of the Ecuadorian Constitution, as long as the RoN law is based upon Indigenous spirituality, it trumps other legal arguments as far as RoN is concerned.

This non-defeasibility characteristic is the first barrier one may encounter from a theo-

retical perspective when invoking RoN and its spiritual connotations in court. Nonetheless, just because it is non-defeasible does not mean that it cannot be invoked in a secular modern legal system. For legal arguments or rights that cannot be defeated, as Alexy points out in his *A Theory of Constitutional Rights*, can be balanced and subjected to proportionality analysis (Alexy, 2010). The following part will contemplate the idea of whether spiritual legal reasoning can be balanced.

5. The Second Barrier: Spiritual Reasoning Being Non-balanceable

In order to further consider the justifiability of spiritual legal reasoning in a secular legal system in the context of the RoN law, this part turns to the procedure of balancing. The procedure of balancing together with proportionality analysis is most salient in cases when fundamental rights are concerned. Since fundamental rights cannot be easily defeated by other legal arguments (or sometimes cannot be defeated at all), in cases when different fundamental rights clash it is apt to conduct the balancing procedure where the final decision can be justified. The balancing procedure is triggered whenever 'a judge cannot rely on an existing rule (such as a priority rule) on the basis of which one argument has preference over another argument' (Feteris, 2008, p. 23). There are many ways to conduct the balancing procedure (see e.g., Alexy, 2003; Feteris, 2008; Van Der Sloot, 2016). The detailed discussion of the balancing procedure should be left for another occasion. Here, what is relevant is to understand that a balancing procedure is fundamentally a normative process for choosing one principle over the other(s), all things considered, and being able to explicitly justify the decision as a result of a rational process. As Alexy explains, a balancing process includes three stages:

> the first stage is a matter of establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage, in which the importance of satisfying the competing principle is established. Finally, the third stage answers the question of whether or not the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first (Alexy, 2003, p. 136).

Against this backdrop, unlike secular legal reasoning (fundamental rights included), spiritual legal reasoning is non-balanceable. This is because one can only choose whether or not to side with the spiritual worldview at the beginning of a decision process. One cannot balance it against secular legal reasoning because the process of balancing requires epistemic comparability (referring to the three stages above). Since spirituality is based on different ontologies and epistemologies than those sustain a modern secular legal system, it is not comparable to secular legal reasoning as far as the balancing procedure is concerned. This also means that all justification in choosing between spiritual legal reasoning and non-spiritual legal reasoning can only be made *ex post facto*.

Consider the following example. A local government decides to sign a contract with a mining company based on the assumption that this business opportunity would create thousands of local job opportunities and raise hundreds of households out of poverty. However, this decision is protested against by the residents for environmental reasons. It is also strongly contested by the local Indigenous community because they consider the land to be a sacred being, and any disruption caused by the mining activities would be unacceptable from their spiritual point of view. Let us assign the argument from the government as the right to development (A1), the argument from the residents as environmental protection (A2) and the argument from the Indigenous community as spiritual reasoning (A3). When the court balances A1 and A2, the judge is to choose

between the right to development and environmental protection. According to the above formula given by Alexy, in this case the court has to: first, establish the environmental impact of the mining activities; second, establish the local economic situation and how much economic benefit may come out of the mining activities; third, decide whether the improvement of the local development level is more important than preserving the local environment. From there, it is a delicate balance between facts and norms. For example, if (a) the local economy is far below the poverty line and the mining activities are estimated to lend huge economic benefits and (b) the negative environmental impact of the mining activities could be minimized by, for instance, adopting advanced technology, then the court may consider A1 to be more important than A2, all things considered. However, if the estimated economic benefit is considered insufficient to offset the negative environmental impact, then the court may consider A2 to be more important than A1.

In comparison, if the court has to balance A1 and A3, according to the same procedure, the court has to: first, establish the importance of the spiritual connection between the land and the Indigenous community; second, decide whether there will be large economic benefit from conducting the mining activities; and third, debate whether improving the local economy outweighs the importance of the spiritual connection between the Indigenous community and the land. Before balancing these arguments, it should be noted that preserving the spiritual connection between the Indigenous community and the land is a binary decision. There is no greater of lesser degree of satisfaction concerning such connection. Therefore, there is little balancing space in terms of proportionality. Regarding the balancing procedures, if the judge chooses to subscribe to the same spirituality as the local Indigenous community, such a connection cannot (and shall not) be balanced, for it is their fundamental identity. In fact, one may even argue that such a spirituality frames the 'basic certainty' (Wittgenstein et al., 1969) for the Indigenous community. If, on the other hand, the judge does not subscribe to such spirituality, it becomes an epistemic challenge for the judge to decide whether the economic development shall trump the preservation of the spirituality of the Indigenous community, because A1 and A3 are propositions that are situated in different ontological and epistemic worlds. The judge would not have the epistemic tool to conduct a comparison between them.

RoN, as legislated in the Ecuadorian Constitution, invokes the spirituality of the Indigenous communities. Therefore, it is comprised of, among other things, a type of reasoning that is not defeasible nor balanceable. When this reasoning lends those qualities to RoN (as we shall see in the case below), it means that RoN as codified in the Ecuadorian Constitution is also non-defeasible and non-balanceable. This raises many questions regarding the viability of RoN as a legal concept. For example, what would happen when RoN clashes with other fundamental rights?

More importantly, a non-defeasible and non-balanceable right endangers one of the most important characteristics of the rule of law – legal certainty. This is because based on the premise of legal certainty, a non-defeasible and non-balanceable right shall always trump other legal rights and arguments. However, this is not realistic in legal practice. Therefore, when it comes to RoN, the judge in the given case has full discretion to decide whether the RoN shall trump other rights and arguments. This is because the justification for making such a decision cannot be naturally deducted from the principles of law. Therefore, the justifications can only be based on other considerations, such as political influence or personal beliefs, hence legal uncertainty.

To put the above theoretical analysis into a practical context, the following part will analyse a recent RoN case in Ecuador – the Los Cedros

Forest Case. This case shows that: first, RoN as codified in the Ecuadorian Constitution is indeed non-defeasible and non-balanceable. Second, there is a large degree of legal uncertainty around RoN in the Ecuadorian legal system.

6. The Los Cedros Forest Case

In 2017, Ecuador's national environmental agency authorised two mining concessions for the state-owned corporation ENAMI EP to conduct exploratory mining activities in Los Cedros, a zone designated as Protected Forest in 1995. Los Cedros cloud forest is a protected area known for its exceptional biodiversity and fragility. In 2018, concerned about the impacts of mining activities, the nearby municipality of Santa Ana de Cotacachi went to court to dispute the government's authorisations of the mining concessions. They argued that there had been a possible violation of RoN, among other things (Prieto, 2021). The lower court ruled in favour of the plaintiff citing Article 61.4 of the Ecuadorian Constitution (right to prior consultation). The plaintiff appealed to the Constitutional Court to seek recognition of RoN. The Constitutional Court, in its decision 1149-19-JP/21 of 10 November 2021, again ruled in favour of the plaintiff, declaring that 'the mining concessions and environmental permits previously granted had violated the following rights set out in the Ecuadorian Constitution: a) the Rights of Nature or Pacha Mama (Article 10, Article 73) corresponding to the rights of the Los Cedros forest; b) the right to water (Article 12, Article 313)… and the right to a healthy environment (Article 14); and c) the right of local communities to prior consultation (Article 61.4, Article 398)' (Prieto, 2021).

Specifically referring to RoN, the judgement cited the preamble of the Ecuadorian Constitution, where it '[celebrates] Panchamama, of which we are a part and which is vital for our existence.' The judgement further notes: 'Accordingly, the conception of nature developed by the Constitution in Article 71 includes human beings as an inseparable part of the same, and of the life that it reproduces and forms in its bosom' (*Ruling No. 1149-19-JP/2*, 2021. para.28). Therefore, the judgement holds that RoN necessarily encompasses the right of humanity to its existence as a species (*Ruling No. 1149-19-JP/2*, 2021. para.30). The judgement underscores the spiritual undertone by emphasising that '[t]his is not a rhetorical lyricism, but rather a *transcendent statement* and a historical commitment that, according to the preamble of the Constitution, demands "a new form of civic coexistence, in diversity and harmony with nature"' (*Ruling No. 1149-19-JP/2*, 2021. para.31). The judgement follows with a confirmation of the ecocentric approach, stating that nature (Pachamama) has an intrinsic value, 'regardless of the utility that nature may have for human beings'(*Ruling No. 1149-19-JP/2*, 2021. para.42). In fact, '[t]he intrinsic valorization of nature implies…a defined conception of the human being about himself, about nature, and about the relations between the two' (*Ruling No. 1149-19-JP/2*, 2021. paras 50&51). Because of this, the nature or natural subject (such as a river, a forest, or other ecosystems) 'are seen as life systems whose existence and biological process merit the *greatest possible legal protection* that a Constitution can grant' (*Ruling No. 1149-19-JP/2*, 2021. para.43, italic added). Based on this worldview, an implication of ecocide was found at one location when the judgement compared the extinction of species to genocide (*Ruling No. 1149-19-JP/2*, 2021. para.68). The judgement also mentioned the importance of utilising Indigenous knowledge 'due to their relationship with nature' (*Ruling No. 1149-19-JP/2*, 2021. para.52). Afterwards, a large portion of the judgement established that a strict precautionary principle should be used as the guiding principle in this instance, due to scientific uncertainty regarding the repercussions of the mining activities for the local ecosystems (*Ruling No. 1149-19-JP/2*, 2021. paras 55–148). This led the court to establish a very high burden of proof test that is supported by a strict understanding of the precautionary

principle (*Ruling No. 1149-19-JP/2*, 2021. paras 125–164). As pointed out by one scholar, this implies that 'in the future any economic project that is related to a complex ecosystem will need to provide not only an environmental impact statement…but also *overwhelming* scientific evidence that its industry as such would not produce environmental damage. In practical terms, this could be difficult to achieve' (Prieto, 2021). With seven votes in favour and two dissenting votes, the judgement was passed by the Ecuadorian Constitutional Court.

It should be noted that the decision of the judgement is based on not only RoN, but also right to water and a healthy environment as well as the right of local communities to prior consultation. Nevertheless, given that one third of the final judgement focused on RoN, it cannot be denied that RoN is a significant argument that contributes to final decision. Therefore, following observations can be drawn, which also coincide with the previous analysis: first, although mostly conducted in an implicit manner, Indigenous spirituality as embodied in terms such as Pachamama and sumay kuway is an indispensable part of the foundation that establishes RoN in the Ecuadorian Constitution. The interpretation of RoN, as seen in the judgement, is in line with the Indigenous spirituality that emphasises the wholeness and connectedness of the cosmos. Second, by interpreting RoN in this way, RoN becomes non-defeasible and non-balanceable. This is evident from the adoption of the strict precautionary principle and high burden of proof test that follow with RoN argument in the judgement. Since it is practically unlikely for a scientific community to come to a consensus that a complex economic project will not have serious and irreversible harm to the ecosystems, RoN as established in this judgement cannot be challenged by practically any complex economic projects, including mining activities. Third, it is, therefore, up to the judge to decide whether to choose RoN over economic development (pro nature or pro economic development). Once the judge has decided her original stand, there is little to no rational space to yield to the other side.

These observations can be further proven in two cases: one dating back to 2012; one is still ongoing at the time of writing. The earlier case concerns the Condor Mirador Mine (Condor Mirador Mine Case). In 2012, the Ecuadorian State signed a contract with Ecuacorriente SA (ECSA), which enables the exploration and production of copper in a diverse and fragile ecosystem, the Cordillera del Condor. Similar to the Los Cedros Forest Case, this contract was previously passed by the Environment Impact Assessment and granted an environmental license. In the first instance, the court judged that the mining area, according to the Ministry of Environment in a ministerial agreement, was not a protected zone, therefore the law was not violated. However, the assessment of the area indicated it was a protected zone, i.e., Bosque Protector of the Cordillera del Condor (Yépez, 2014). Additionally, the judgement stated that 'civil society's efforts to protect Nature constituted a private goal, while the Ecuacorriente company was acting in favour of a public interest, namely development. The public interest takes precedent over a private interest' (Kauffman and Martin, 2016). Therefore, the protective action was denied.

One of the latest developments of the Ecuadorian RoN case law concerns the constitutionality of environmental and water licenses issued by the former Ecuadorian Ministry of Environment and the former Secretary of Water to enable industrial mining activities by foreign companies in the zone of the Cordillera de Fierro Urco (Fierro Urco), which is, as with Los Cedros and Cordillera del Condor, a diverse and fragile ecosystem. In March 2022, an initiative of residents of the affected region filed a protective measure application that was turned down in the first instance. In December 2022, the initiative appealed against the decision at the Provincial Court of Loja and was turned down

again. The plaintiff presented the case at the Constitutional Court in January 2023. This case is currently pending admittance and review by the Constitutional Court. The Provincial Court ruled against the appeal based on, *inter alia*, that 'the ecosystem of Fierro Urco, a páramo, is substantially different from the one of Los Cedros, a forest, and thus, the legal standard of Los Cedros cannot be transferred' (Koehn, 2023).

While all three cases share similar crucial facts – all three involve mining activities, environmentally protected zones, and granted environmental permits, the salient difference among them that leads to drastically different results can only lie in the sitting judge(s): this also makes the judgements regarding RoN in Ecuador unpredictable. The over-simplification and abruptness of the Provincial Court decision on the Fierro Urco Case confirms the legal difficulty in balancing RoN against other legal rights and interests as legislated in the Ecuadorian Constitution.

7. Conclusion

Among the voluminous studies on RoN law in general and Ecuadorian RoN law in particular, few have focused on the Indigenous spirituality component of the law. As indicated in this paper, this spiritual component is of significance as it is not only the foundation of the law but also influences how the law is interpreted and practiced. Since it is logically impossible to defeat or even balance RoN as it is legislated in the Ecuadorian Constitution, it is then up to the sitting judges to decide whether they choose to stand by nature or other legal rights and arguments. Since there is little or no logical (epistemic) room for balancing the arguments, the legal justification becomes entirely ex post facto. This in turn disrupts the foundation of the rule of law – legal certainty. As indicated in one of the dissenting opinions of the Los Cedros Forest Case, where Judge Teresa Nuques Martínez expressed that:

> While I agree with the protection of the rights of nature, the right to water, and the right to a healthy environment, in that these are justiciable, and in their progressive development through norms, jurisprudence and public policies, *it is not feasible to grant these rights an omnipotent, absolute or prevailing character over other constitutional rights or norms to the point of excluding all extractive activities*… (Dissenting opinion from Judge Teresa Nuques Martínez. *Ruling No. 1149-19-JP/2*, 2021. Italic added).

The contrasting results of the Los Cedros Forest Case, the Condor Mirador Mine Case, and the Fierro Urco Case are examples of such legal uncertainty.

To give credit where credit is due, as the first and still the only country in the world to include RoN in its Constitution, leading to a triumphant case such as the Los Cedros Forest Case, Ecuador has shown its imagination and determination in protecting nature and its willingness to transcend the current anthropocentric legal order in favour of an ecocentric one. This is a pioneering step among world legal systems. However, because of its pioneering nature, many legal premises in this instance require further investigation. Against this backdrop, this paper points out a lacuna where future endeavour is required. After all, to bestow rights on nature is a much-welcomed development in current legal systems, especially given the looming climate crisis. Nevertheless, this process has to be done diligently, as any significant change of the anthropocentric modern legal order requires a solid theoretical ground. Otherwise, both RoN and Indigenous spirituality are at risk of becoming nothing more than lofty rhetoric that is at mercy of political, economic and social powers.

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