



ANALYSIS AND EVOLUTION OF ENVIRONMENTAL LAW IN ECUADOR WITH THE CONSTITUTION OF 2008 AND ITS RELATION TO POLITICAL MARKETING IN THE GOOD WAY OF LIVING

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ABSTRACT

This article is a review and reflection of the new elements of rights and laws, applied to the principle of justice and sovereignty, but above all in the demonstration that law as a science once again allows us to conceive that as a science it evolves and must be modified according to the new conducts that the State and society require, such is the case of the constitutional recognition that this type of rights have. In the last decades, human beings have evidenced that the way in which they interact with nature is causing serious consequences to the ecosystems that compose it. In the past, these consequences were not yet evident and, therefore, the environmental awareness that exists today did not exist. Therefore, it is necessary to analyze and reflect on certain conditions of this right in Ecuador.

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1. Introduction

Several considerations apply to the concept of environmental law. A very important one is that this law cannot be based exclusively on positive law. (Morel Echeverría, 2008. p 5). Another is that there is an unquestionable need for legal protection of natural goods and resources, and, in short, the recognition that the state and its authorities must appreciate and protect natural goods and resources as a mechanism to guarantee the welfare of citizens. However, following the definition years ago by (Brañes Ballesteros, 1992) says: "Environmental law is the set of legal norms that regulate human conducts that can influence in a relevant way the processes of interaction that take place between the systems of living organisms and their environmental systems, by generating effects from which a significant modification of the conditions of existence of such organisms is expected".

For this reason, political factors will have an impact on the realization of the new paradigm that constitutes sustainable development. (Gabaldón, 2002). In other words, environmental, social and economic aspects cannot be separated from the political environment, because this implies different ideological positions or interests that determine political strategies and actions, which have a growing influence on public life.

Thus, we can observe that it was precisely in Ecuador where the most important innovation in environmental policies of the last decades took place: the recognition of the rights of nature. Etymologically, the word "nature" comes from the Latin word *natura*, that is, "to the birth of something". Said in this way and following (Salazar, 1996) defines culture as a set of functionally related elements that includes material artifacts and patterns of social and ideological organization used by human beings to adapt to the environment. As well as (Weber, 1993) states that the representations of nature constitute the projection of the rules of organization and mental categories of each human group on its environment.

In recent decades, human beings have shown that the way in which they interact with nature is causing serious consequences to the ecosystems of which they are composed. Thus, the legal systems did not prescribe extensive regulations on environmental issues as they do now, nor did they emphasize mechanisms to protect these affected ecosystems. Therefore, it is extremely important to analyze the mechanisms provided in Ecuador that can be used for the effective judicial protection of these rights, as the current Ecuadorian Constitution prescribes¹.

Cano places the birth of environmental law in the Conference on the Human Environment held in Stockholm in 1972, which initiates the second period of evolution from the historical perspective of its development in Latin America.

Classical constitutionalism is a reflection of the triumph of liberalism and codification. The fundamental rights recognized to the human being were "developed in a narrow individualistic framework, where personal interest predominates; this individualism characterized the liberal ideology"². Thus, the individual was in charge of acting for his own rights³. This movement was developed by political thinkers of the 17th and 18th centuries (among them Locke, Montesquieu, Rousseau).⁴

However, we have a new trend in constitutional rights, as they are called, the diffuse rights (DF) were, are and will continue to be topics of compulsory approach by doctrinarians of law. In this same logic, we can highlight the clarifications provided by (Gidi, 2004) who defines the term diffuse rights as rights whose holders are an undetermined community that transcend the individual.

In 2008, Ecuador became an intercultural and plurinational state and established a wide range of rights, especially in the chapter on the rights of communities, peoples and nationalities. The constitution also cross-cuts some concepts of indigenous inspiration, such as the good living (*sumak kawsay*) and the rights of Mother Earth or Pachamama. The Constitution establishes a new development regime, which is "the organized, sustainable and dynamic set of economic, political, socio-cultural and environmental systems" to achieve good living⁵. The State is responsible for planning national and

¹ Constitution of the Republic of Ecuador (2008) Registro Oficial 449, Article 66.

² Hernán Salgado Pesantes. *Lessons of Constitutional Law*. Quito: Ediciones Legales, 2012, p. 31.

³ "Intereses Colectivos y Difusos Derecho Comparado". Valparaíso: Library of the National Congress of Chile. Unidad de Apoyo al Poder Legislativo, 2002, p. 5.

⁴ Hernán Salgado Pesantes. *Lessons on Constitutional Law*. Op. cit., p. 31.

⁵ Constitution of Ecuador 2008. Article 275, Title vi: Development Regime.

sustainable development and the redistribution of resources for access to good living⁶. In this context of a State promoting development, natural wealth should benefit individuals, communities, peoples and nationalities so that they can live well⁷, but respecting the right to a healthy and ecologically balanced environment that guarantees good living⁸.

In the face of the environmental crisis understood as a decisive limit to the development of the capitalist mode of production, it becomes necessary to re-read the juridical doctrines that, after the neoliberal illusion of the end of ideologies and history, seemed to have an impregnable destiny. To this end, we will first propose a specific method for approaching the juridical.

In this sense, the first step has to do with the avoidance of any fascination with the "normative moment of law". Its great attraction is liable to confine legal studies to the instances of the ought to be, that is, to the propositional-formal aspects of the juridical.

This is even more relevant today, at a time when humanity is facing the relativization and threat to the basic natural substratum for its survival. This is an issue that, before reformist considerations, demands, given the obvious nature of the problems to be addressed, "fundamental transformations and not just marginal adjustments" (Borón, 2008). (Borón, 2008)

2. Research development

The main objective of the article is to analyze the environmental recognition and protection (evolution of the law) in Ecuador with the 2008 Constitution and its application with the political marketing in the good way of living, from the point of view of the law according to several authors.

According to the antecedents of this law and its evolution, it represents the consolidation of its principles. As can be seen in the classification of principles accepted by several treaties, such as (Coria, 2005) who establishes the following: (i) Environmental interdependence, which refers to the responsibility of the states to ensure that the activities carried out in their jurisdiction or under their control do not cause damage to third states or persons even if they are outside their jurisdictions.

(iii) Principle of equality of environmental protection, which consists of public and private actors assuming responsibilities and equitably sharing responsibilities for the custody of goods and resources.

(vi) Principle of effectiveness, which ensures that the application of environmental standards reflects the national, local or regional context, as well as development options.

The Constitution, in force since 2008, which continuing with the environmental constitutionalism in Ecuador, emphasizes environmental protection and the recognition of environmental rights. Additionally, there are other hierarchically inferior norms to the Constitution, which provide mechanisms for the protection of these rights in areas such as Criminal Law, Civil Law and Administrative Law.

In this way and quoting (Melo, "Constitution and Liability for Environmental Damage", 2007). the Constitution recognizes an individual environmental right. This is foreseen under the title of Rights of Freedom, in numeral 27 of Art. 66, which recognizes and guarantees to all persons "The right to live in a healthy environment, ecologically balanced, free of contamination and in harmony with nature.

This is how we can relate and start with those concepts that are similar to those currently followed in other countries. Citing (Gudynas, 2009) In the constitutional text, Article 74 indicates that the "State shall apply precautionary and restrictive measures for activities that may lead to the extinction of species, the destruction of ecosystems or the permanent alteration of natural cycles". This is a formulation similar to that of other constitutional texts and framework laws on the environment. An important set of norms appears in the chapter on biodiversity and natural resources under the title dedicated to the development regime. For example, Article 395 establishes the transversality of environmental policy, guarantees citizen participation, obliges the adoption of measures to avoid negative environmental impacts, and establishes guidelines on liability.

Other aspects of this type are covered in the following articles, covering issues of control and management of environmental impacts, policies in protected areas, citizen information and consultation, State guardianship, etc. (articles 396 to 415). The coverage is very broad, covering fauna

⁶ Ibid., Article 3 (5), Title I: Constituent Elements of the State.

⁷ Ibid., Article 74, Title ii: Rights.

⁸ Ibid., Article 14, Title ii: Rights.

and flora, soils, water and other natural resources. The thematic approach is also broad, ranging from concepts in environmental policies to precise indications in environmental management.

In short, the Ecuadorian Constitution determines that nature will be subject to those rights recognized by the Constitution⁹, from which it follows that on the one hand, subjective rights were granted to nature, recognizing the intrinsic value of nature regardless of its usefulness, and on the other hand, a constitutional reserve was established for the establishment of these rights.

The seventh chapter of the Constitution, called "Rights of Nature", which is found within Title II designated "Rights of Good Living", establishes the rights of nature as follows:

- Art. 71.- Nature or Pacha Mama, where life is reproduced and carried out, has the right to full respect for its existence and the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. Any person, community, people or nationality may demand from the public authority the fulfillment of the rights of nature. To apply and interpret these rights, the principles established in the Constitution shall be observed, as appropriate. The State shall encourage natural and juridical persons and collectives to protect nature, and shall promote respect for all the elements that form an ecosystem. Concordances:
- Art. 72.- Nature has the right to restoration. independent of the obligation of the State and natural or legal persons to The State shall establish legal obligations to compensate individuals and collectives that depend on the affected natural systems. In cases of serious or permanent environmental impact, including those caused by the exploitation of non-renewable natural resources, the State shall establish the most effective mechanisms to achieve restoration, and shall adopt the appropriate measures to eliminate or mitigate the harmful environmental consequences. (CEP, 2008)

3. Results

Article 57 of the Constitution, under the Title Rights of Communities, Peoples and Nationalities, provides for several rights that are clearly environmental in nature. (Melo, "Constitution and Liability for Environmental Damage", 2007).. Paragraph 8 establishes that these collectivities have the right to protect and conserve biodiversity and the natural environment of their territory. Likewise, numeral 12 establishes that indigenous communities have the right and, at the same time, the obligation to protect and maintain plants, animals and ecosystems within their territories.

The Ecuadorian Magna Carta is strictly inclined to the recognition of environmental rights⁴. The CRE recognizes an environmental right of an individual nature according to (Grijalva, 2007) This right recognizes and guarantees to all persons "The right to live in a healthy environment, ecologically balanced, free of contamination and in harmony with nature", evidencing in this case its marked individual character (person), foreseeing from the procedural perspective that in this case the only person legitimized would be the holder of the right who suffered the damage directly and in his personal sphere.

Art. 57 of the CRE defines collective rights, since the recognition is made to specific groups, leading to the fact that those entitled to protect them will be only the members of the affected indigenous community, opening the legitimacy for their protection, exemplified in the related paragraphs:

Numeral 8: Conserve and promote their biodiversity and natural environment management practices. The State shall establish and implement programs, with the participation of the community, to ensure the conservation and sustainable use of biodiversity. (CONSTITUTION OF ECUADOR 2008 (P.42), 2008).

Numeral 12: Maintain, protect and develop collective knowledge; their sciences, technologies and ancestral knowledge; genetic resources containing biological diversity and agrobiodiversity; their medicines and traditional medicine practices, including the right to recover, promote and protect ritual and sacred places, as well as plants, animals, minerals and ecosystems within their territories; and the knowledge of the resources and properties of fauna and flora. (CONSTITUTION OF ECUADOR 2008. p. 42, 2008)

In order to reference these rights we must cite the Protection Action for Violation of the Rights of the Río Blanco ((ECUADOR), 2013).

⁹ Constitution, (2008) Art. 10 second paragraph.

The owners of a property located in Tabacundo, Pichincha, obtained an artisanal mining concession for the exploitation of stone materials; they began to carry out these activities without the respective environmental license and were causing a landslide of materials in the Granobles River (Rio Blanco), affecting it.

Faced with this situation, two individuals filed a protection action in January 2013 for the alleged violation of the rights of the Blanco River and the threat of violation of the right to water; in the action they also requested precautionary measures, specifically: the eviction and removal of the machinery, dump trucks and other tools found at the site; the immediate suspension of the quarrying activity until the action is resolved.

In qualifying the claim, these measures were accepted and the suspension of the quarrying activities was ordered. In order to issue the first instance sentence, several considerations were made:

- All rights are fully justiciable and equally hierarchical.
- The reversal of the burden of proof in cases of environmental damage was assimilated to an affirmative action or special condition for the exercise of rights.
- The in dubio pro natura principle was accepted, establishing that it must inform the judge's decision in favor of nature when there are doubts.
- The precautionary principle was adopted, stating that when there is a threat to nature, it is not necessary to wait for exhaustive studies before taking measures to prevent damage.

A weighing was made between the right to work of the defendants and the request for the definitive suspension of the activity, requested in the lawsuit, deciding that the provisional suspension until the necessary measures are taken to ensure the minimum environmental impact; in addition, reference is made to the importance of the Blanco River as a source of water supply for consumption and irrigation for the nearby population, as well as the aquatic life that must be protected.

The ruling partially accepted the action and ordered the temporary suspension of mining activities until the corresponding environmental license is obtained; it also ordered a water study of the Blanco River in order to carry out the corresponding remediation processes.

The first instance decision was appealed by the defendants, and the Court decided to deny the appeal and ratify the first instance decision, basing its decision on the priority regime of protection of natural elements and the rights of nature, the precautionary principle, the regulatory regime on environmental licensing, the right to live in a healthy environment, and the reversal of the burden of proof. ((ECUADOR), 2013)

IV.-THE DEVELOPMENT OF ENVIRONMENTAL LAW IN THE 21ST CENTURY AND ITS RELATIONSHIP WITH POLITICAL MARKETING IN THE GOOD LIFE OF ECUADOR:

The principle of sustainability emerges as a broad response to the theoretical and political discourse of economic-ecological globalization. (Leff, 2004)

From this arises the theoretical and political interest in valuing nature in the face of the externalities of the development process. From this debate emerged the strategies of ecodesvelopment, originating new styles of development, based on the conditions and potential of ecosystems and the prudent management of resources. (Sachs, 1982)

The essence of the study of public policies lies in the search for the best solutions to collective problems. All societies seek to raise the standard of living of their citizens, educate them better, guarantee their health and safety, create spaces suitable for the enjoyment of life and infrastructure for transportation and other services, although countries qualify as more developed to the extent that they meet these and other goals, no country achieves fully satisfactory solutions to all its problems. Moreover, citizens' aspirations are infinite, and as soon as expectations are met, even greater demands arise. (Nelly Janet, 2003)

In the construction of socialism, the government, through economic policy, can exercise its direct influence on the regulation, planning and development of the country's economy.

The socialist economic policy represents the concrete form adopted by the development strategy conceived in practice, for a given period of time and with the particularities of the socioeconomic regime in question, it also synthesizes the set of measures that the State adopts in the economic, political and social order to meet the goals set by society. (Jesús P. García Brigos, 1998).

Thus, it is important to highlight that the development of Environmental Law in Ecuador is booming as a result of the political ideal of *sumak kawsay* (good living) or *suma qamaña* (living well)¹⁰ is a concept that represents the aspiration of many Latin American peoples. This concept has had an impact on the academic field of the Political Economy of Development (Hidalgo-Capitán, 2001). (Hidalgo-Capitán, 2012) since it was enshrined in the constitutions of Ecuador and Bolivia in 2008 and 2009. *Sumak kawsay* can be defined as a way of life in harmony with nature and with other human beings. This is the idea that is implicit in these constitutions. This idea is based on a concept of desirable life inspired by the culture of the indigenous peoples, especially the Quechua and Aymara, and is supported by the principles of social equity and environmental sustainability.

Scholars of 21st century socialism, understood as the most appropriate and effective way to transform the reality of underdevelopment and dependence in which Latin America is immersed, agree that it is necessary to build an "authentic democracy" in the region and in each of its countries. This democracy would have to be a post-neoliberal democracy.

In this way, sustainable development emphasizes scientific and technological knowledge as keys to social transformation; it also seeks action plans through the collaboration of the economic agents involved, following the sustainable development approach. The principles that guide it are the following:

- Human right to an adequate environment.
- Generational, intergenerational and gender equity.
- Sovereign right to the use of resources, without causing external damages
- International economic system conducive to sustainability.
- Eradication of poverty and reduction of international inequality.
- Differentiated international liability.
- Incorporation of environmental costs in the economy.
- Incorporation of environmental criteria in development planning.
- Sustainable production and consumption patterns.
- Effective legislation for environmental protection.
- Social participation.
- Transmission, generation and dissemination of environmental scientific knowledge.
- Impact assessment. - Prevention criteria.
- Compensation rules.

We see, therefore, that sustainable development will evolve into a political aspiration, as long as it is understood that its objectives are: "To improve the quality of life, satisfy the basic needs of the population and achieve greater social equity; all this without ecological impoverishment, nor compromising the welfare of future generations". (Lafferty, 1998)

In his study, full of suggestions for research, on leadership charismatic in the popular and revolutionary movements of Latin America Professor Diane Raby has observed how "to understand both Fidel and Chavez it is necessary to recognize that their historical and ideological roots are not in the orthodoxy of the left, but in the Latin American populist tradition.

This is clearly reflected in the discourse of both leaders, both in style and content." (RABY, 2006) Ecuador currently has the twentieth Constitution in force in its history dating back to 1830, as a republican state, this should be considered as a record since we could say that Ecuador has had approximately a new constitution every nine years, seen this way we could say in an arrogant tone that Ecuadorians became experts in constitutionalism", unfortunately it is not so since the constituent assemblies have had full powers of not only the drafting and implementation of new laws, but rather arriving in the appointment of authorities and dignitaries.

The constitutionalization of the Ecuadorian legal system has as its banner of struggle the so-called "constitutional rights", which are extended not only to the rights enshrined in the Fundamental Charter

¹⁰ In this paper we assume that *sumak kawsay* and *suma qamaña* are the Kichwa and Aymara expressions, respectively, of the same concept, as well as words such as *ñandareko* Guaraní, *shin pujut awajún*, *kyme mogen mapuche*, *utz kaslema quiché* or *lekil kuxlejal tseltal*. Here we will use the expression *sumak kawsay*. However, we understand that the materialization of this concept has different peculiarities depending on whether it takes place in one culture or another. These words have been translated into Spanish as 'buen vivir', in Ecuador, or 'vivir bien', in Bolivia, although it seems that the least questioned translation is that of 'life in plenitude'.

of the Ecuadorian State, but also to those from international treaties and conventions that protect human rights. Therefore, the Constitution ceases to be a distant document to the social conglomerate, seeking a closer approach of citizens with the constitutional text and the rights enshrined in it for which judges are entrusted with the protection of the same, as we can see in Article 1.- Ecuador is a constitutional State of rights and justice, social, democratic, sovereign, independent, unitary, intercultural, plurinational and secular. It is organized as a republic and is governed in a decentralized manner.

"Good living, at present, is more marketing than a concept that has validity in real policies. Good living appears in all public sector documents, there is no public sector document that does not incorporate the theme of good living as a slogan. For example, I have one at hand: "Economic policy agenda for good living". It is in the introduction and something in the conclusion, but in the body of the text absolutely nothing. In practice, there is no policy of good living; that is, to build good living, which is not a vulgar development alternative, none.

We should rethink what good living means. I am aware, very aware, that good living is not achieved simply with a constitutional approval.

It is not simply a question of having the regime of good living in the Constitution for it to become a reality. I insist, good living is in tension with the development regime. What is needed is clarity as to what good living means. An unresolved issue. Except perhaps for some contributions such as that of René Ramírez or the first chapter of the National Plan for good living, little work has been done in the Government on the subject.... The rest has very little to do with good living.

"A course of action proposed by the government to solve a social need or problem, which is assumed to be linked to the historical-concrete conditions that generate it and to the predominant social interests, in which the measures that are applied pursue the material and spiritual improvement of the collectivity, in pursuit of the growing welfare of society as a whole." (Pons & H., 2000)

4. Conclusions

It is evident that the weight of the environmental issue in the political agenda has been increasing. However, it is necessary to continue raising awareness of the magnitude of the impact that the depreciation of natural resources is having on the state, both due to environmental degradation and depletion. Sustainable development is not only a matter of economics or ecology; it also involves political, social, educational and cultural aspects, which shows that scientific and academic rigor should share responsibility with all sectors of society.

The Environmental Law of the 21st century must prioritize profound changes that will allow it to respond to planetary limits and to propose how to consolidate safe spaces for humanity to live in harmony with Nature.

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