Judicial Backlash Against the Rights of Nature in Ecuador

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In 2008, Ecuador surprised the world by recognizing nature's own rights in its constitution. The surprise was even bigger when Ecuador unlike other countries began to actually apply and enforce the Rights of Nature, particularly through constitutional jurisprudence since 2019.[1)] The constitutional statements in favor of forests and monkeys in *Los Cedros* and *Mona Estrellita* have already been discussed on this blog (here and here). We show that the strong constitutional precedents, while casting much appreciated light on some legal uncertainties about the novel set of rights, are also met with defiance. Backlashing tendencies are not restricted to the private sector and the government, but are articulated within the judiciary itself. And – as a reflection of both the fragility of the concept of the Rights of Nature and Ecuador's struggle to re-interpret economic development – they are gaining traction. The aim of this article is to illustrate the unfolding struggle for the epistemic and interpretative prerogative about the Rights of Nature or – to use Ihering's term – the *Kampf ums Recht*[2)] within the Ecuadorian judiciary vis-á-vis the Constitutional Court's push for the Rights of Nature. Therefore, we picked the appeal judgment in the case of *Fierro Urco*[3)] which challenges the constitutional precedent of *Los Cedros* by mis–conceptualizing and delegitimizing the constitutional jurisprudence.

Background and Proceeding

The appeal judgment concerns the unconstitutionality of environmental and water licenses issued by the former Ecuadorian Ministry of Environment and the former Secretary of Water to three Canadian corporations to enable industrial mining activities in the zone of the *Cordillera de Fierro Urco* (*Fierro Urco*). Nicknamed "Hydric Star of Southern Ecuador", *Fierro Urco* – according to the plaintiffs (p. 2 f.) – is a vital, yet fragile *páramo* ecosystem of the Andean Highlands: habitat to many endemic species in danger of extinction, the basin of various rivers and source of subterranean watersheds. *Fierro Urco* secures 50 % of the water supply for around 275 000 inhabitants of the surrounding provinces of Loja, El Oro and Zamora Chinchipe.[4)]

The mining companies have been carrying out exploratory activities since 2017, putting at peril – according to the plaintiffs (p. 3) – water supply, food security and social and cultural cohesion in *Fierro Urco*. In March 2022, an initiative of rural residents of the affected region filed a protective measure application in favor of *Fierro Urco* which was turned down in the first instance. In December 2022, the

initiative appealed against the decision at the Provincial Court of Loja – without success. In January 2023, it presented the case at the Constitutional Court.

Páramos are no forests and hence, not holders of Rights of Nature?

The Provincial Court denied constitutional protection to the *Cordillera of Fierro Urco*, *inter alia*, by a too simple equation: 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 (p. 41, 43). This reasoning unveils a misreading of the Constitutional Court's approach to Rights of Nature: Titularity of Rights of Nature is provided by constitutional law and does not constitutively depend on Courts' decisions and, *a fortiori*, not on a positive constitutional precedent, as clarified in *Río Aquepi* (par. 51). To fully comprehend the titularity in the concrete case, the Provincial Court would have had to engage with the particularities of the ecosystem of *Fierro Urco*. Instead, the Provincial Court – refusing to make an analogy to *Los Cedros* – oversimplifies the Rights of Nature and unconstitutionally denies protection to the ecosystem of *Fierro Urco* (p. 42).

Delegitimizing the precautionary approach to Rights of Nature

A particularly interesting and novel feature of the judgment of the Constitutional Court in *Los Cedros* is its application of the precautionary principle to the Rights of Nature. The reporting judge Agustín Grijalva Jiménez argues that, because of the lack of *valid* scientific information on the environmental impacts of the concrete mining projects in the protected forestal area of *Los Cedros*, the precautionary principle must be applied (par. 130 ff., 227 f.; 252). In *Los Cedros*, the precautionary approach to both Rights of Nature and human rights to a healthy environment and water, in connection with the rule of *in dubio pro natura*, culminated in the prohibition of mining activities in the hydrologically important, highly biodiverse and fragile area of *Los Cedros* (par. 116ff; 219ff; 246ff; 348).

The precautionary principle in *Los Cedros* thus works as an antagonist to tendencies to implement economic projects – despite of scientific uncertainty about the concrete effects of potentially very harmful actions.

Just like in *Los Cedros*, in *Fierro Urco* neither the state nor the company representatives could present sufficiently concrete environmental data on detrimental effects of mining in *Fierro Urco* on Rights of Nature or human rights (*see* p. 14). Both refer to the conducted environmental studies and environmental management plans as if their mere existence could waive the state's responsibility (p. 7 f.; 10 f; 12 f.). Yet, in *Fierro Urco*, the Provincial Court dismissed the precautionary principle, arguing that *Los Cedros*, as far as the precautionary principle is concerned, does not have binding effect (p. 40). As the application of the precautionary principle in *Los Cedros* caused considerable controversy among the deciding judges – evidenced by

four concurring and two dissenting votes – no binding precedent could evolve on this matter. This formalistic reasoning, however, is based on a misinterpretation of both the dissenting and concurring votes and a clarifying statement of the Constitutional Court. In the latter, upon request of the Attorney General and the national mining company ENAMI EP, the Constitutional Court indeed agreed that, in principle, both dissenting and concurring votes must be taken into account when assessing the extent of a judgment's binding effect as Art. 436.6 of the Constitution, Art. 190 of the Law on Jurisdictional Guarantees and Constitutional Control (LOGJCC)[5] and Art. 37, 38 of the Rules on Reasoning in Constitutional Court Proceedings (CRSPCCC)[6] evidence (par. 29 f. of the Clarifying Statement). But: The source of conflict among the judges was not whether the principle of precaution is at all applicable to the Rights of Nature – the Constitution gives little leeway to negate this question (Art. 73 of the Constitution) –, but whether to apply the principle of precaution *in the concrete case* (par. 32) and more specifically, which threshold of scientific certainty is required. The Provincial Court in *Fierro Urco*, however, refused to assume the task of evaluating all the available evidence which would have allowed for reasoned conclusions on the level of scientific certainty and hence, the application of the precautionary principle (p. 42).

Instead of entering into a dialogue with the Constitutional Court to further develop the Rights of Nature, especially the delimitation of the preventive and precautionary principle, it refuses debate with an argumentative maneuver. Its delegitimizing momentum becomes particularly evident when read in the context of criticism on the activist role of the Constitutional Court: Implementation of the Rights of Nature, as implied by the Provincial Court, is not only outrunning democratic institutions and separation of powers, but even within the judiciary, it is enforced against the majoritarian vote.

Procedural Law trumps constitutional guarantees?

Having dismissed the precautionary approach, the Provincial Court continues to apply the preventive principle (p. 41) arguing that its requirements have been met by carrying out water and environmental licensing procedures (p. 41, 42).

The Constitutional Court, in contrary, emphasized that an issued permit can and must be subjected to substantive control as, in itself, a permit cannot be proof enough that the Rights of Nature have not been infringed (par. 140).[7] This is a key feature of the *constitutionally* anchored Rights of Nature as opposed to statutory environmental law. By denying any judicial scrutiny and relying on a legality presumption ("*Bestandskraft*") regarding the permit, the Provincial Court falls back to the procedural standards of environmental law and lays bare anachronist tendencies.

Legal and factual struggles for Rights of Nature

The appeal judgment of the Provincial Court of Loja highlights that the Ecuadorian judiciary has not yet come to ease with the application of the novel set of rights. While we are aware that a single judgment is no indicator of the general status quo, it exemplifies backlashing tendencies present in the Ecuadorian judiciary. We acknowledge that one reason behind this is resources: The thresholds and analyses of the Constitutional Court crucially depend on scientific data which, for technical or financial reasons, are not available to courts of lower instance.

But: Backlash in jurisprudence must also be considered in the context of harshening conditions for human, collective and environmental rights defenders in Ecuador. Organized resistance of civil society against extractivist projects has a long history, and, as in the struggle for the protection of *Fierro Urco*, it is co-orchestrated by both the indigenous and rural population. Mass protests continue to erupt across the country. The mining corporations respond with carrots (work and improved infrastructure and public spaces) and sticks (intimidation and humiliation), the State with criminal prosecutions; processes against 268 defenders have only recently been amnestied by Ecuadorian National Assembly.

These struggles are increasingly finding their way into the court room and *Fierro Urco* is a case in point that the progressive interpretation of the Rights of Nature of the Constitutional Court of Ecuador is not self-propelling. The mix of reluctance of lower instance courts to engage with the Rights of Nature and the abundance of open doctrinal questions regarding the Rights of Nature can undermine the practical effectiveness of the Rights of Nature. With *Fierro Urco*, the Constitutional Court has a chance to clarify the precautionary approach to the Rights of Nature and to strengthen the legal fortress against looming backlashes. It will now be highly interesting to observe how it will rule on Rights of Nature in its new composition – will it continue its tradition of a progressive, even activist, constitutional jurisprudence in favor of nature? As the Ecuadorian environmental lawyer Hugo Echeverría rightly pointed out: *“La pelea recién comienza*.”[8)] The war has just begun.

References

- See, i.a.: Los Cedros, Mona Estrellita, Los Manglares, Rio Aquepi, Rio Monjas.
- With his famous lecture „Der Kampf ums Recht“ of 1873, Rudolf von Ihering was one of the first to address phenomena like struggles of the individual for her subjective rights – for our context, to be transferred to a collective’s struggle for the Rights of Nature – at the court room or the ideologic charge of the sense of justice and their implications for the realization of rights.
- Corte Provincial de Justicia de Loja, 19.12.2022, Judgement No. 11333-2022-00183, see here.
- In March 2023, Ecuadorian National Assembly adopted a resolution that urges the Government to declare Fierro Urco a water protection area.
- Ley Orgánica de Garantias Jurisdiccionales y Control Constitucional, Suplemento del Registro Oficial 52 (2009).

- Reglamento de Sustanciación de Procesos de Competencia de la Corte Constitucional, Suplemento del Registro Oficial 613 (2015; last amended in 2021).
- It is true that this approach curtails the legitimate expectations of the mining corporations in the issued permits. But, as the Constitutional Court found rightfully in the Chevron case, the Constitution does not provide for the protection of acquired rights to violate Rights of Nature, see Gutmann, Andreas, Der Nebelwald als Rechtssubjekt – Das Urteil des ecuadorianischen Verfassungsgerichts im Fall Los Cedros, KJ 2022, 36.
- Hugo Echeverría, Interview by Lena Köhn, 10.06.2022, 48 min. 51 sec.

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