



**The plurinational and intercultural state: a look into the enactment of
the *buen vivir* in Ecuador's and Bolivia's constitutions and its challenges**

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List of Abbreviations

AIOC - Autonomía Indígena Originaria Campesina
ILO - International Labor Organization
INRA - National Institute of Agrarian Reform
ITT - Ishpingo-Tambococha-Tiputini block
NCL - Nuevo Constitucionalismo Latinoamericano
UN - United Nations
UNDP - United Nations Development Program

Introduction

The *buen vivir* vs. development

We live in a world obsessed with the idea of development. The United Nations embraced a sustainable development plan, we classify countries based on how developed they are considered to be, and we even use it as a self referential term. This concept evokes the idea of a higher quality of life and it is in fact associated with the notion of modernity shared by the west and the geographic areas it has influenced.¹ Development inevitably involves the growth of the economy, but we have come to a point in time where unrestrained economic growth is not viable anymore and with it our ideas of quality of life require adaptation.

What if we generally strived for a *good* life instead of constantly chasing a *better* one? This is what the *buen vivir*, a concept that flourished from Andean indigenous cosmovisions, broadly proposes. The constitution as the embodiment of liberal constitutionalism is strongly influenced by ideas of modernity and development. In Latin America this approach has exacerbated economic and social inequality as neoliberalism has become the archetypical economic model.² So within the sphere of constitutional law the *buen vivir* allows us to re-evaluate the organization of society and shift it into a more equitable one.

¹ Jayanta Bandyopadhyay, 'Development and Modernity in the Global South: Why a Science and Technology Studies Perspective is Important' (2017) 52 EPW 1

² Dawisson Belem Lopes, 'Why is neoliberalism back in Latin America?' (*ALJAZEERA*, 15 July 2017) <<https://www.aljazeera.com/opinions/2017/7/15/why-is-neoliberalism-back-in-latin-america>> accessed 06 December 2024

Within the context of Latin America constitutionalism is part of the legal transplant from European legal culture that resulted from colonization. During the colonial period the local chthonic legal culture was largely dismissed and even criminalized, creating a breach between the two cultures far beyond their contrasting characteristic elements.³ It is only natural that the liberal model of constitutionalism - a framework that developed against the context of the rise of the homogenous nation-state in Europe - results unsuitable for the diverse societies of the region.

Ecuador and Bolivia took a critical stance back in 2008 and 2009 when they implemented the *buen vivir* into their constitutions. Due to the framework's post-development stance this was considered as an exemplary case of the attempt to decolonize constitutional law.⁴ As a paradigm applicable to the constitution, the *buen vivir* has allowed these countries to change the way in which two important issues are addressed: the marginalization of indigenous peoples and the environmental crisis. These issues align with the elements of interculturality, plurinationality and ecocentrism that the *buen vivir* relates to.

Interculturality and the plurination are ideas that have grown in relevance in relation to re-envisioning Latin American societies. The recognition of plurinationality is closely intertwined to the call on self determination of indigenous peoples as claimed by social movements starting in the 70s. Similarly, interculturality feeds on the rise of this social movement to recognize the inherent value of the diverse cultures that interact in the context of Latin America, which contributes to the process of decolonizing the law and its institutions.⁵ In this way these two elements of the paradigm work as a framework to regard indigenous epistemologies and with it the ecocentric approach that they hold. As an integral view on relations, indigenous cosmovisions recognize the intrinsic value of Nature as an entity for itself, making us re-evaluate the anthropocentric idea of its ownership. This perspective is crucial for the development of culturally-relevant sustainability frameworks in the time of environmental crisis.

The aim of this thesis is to explore the *buen vivir* as a tangible alternative to the premises of liberal constitutionalism from a socially relevant perspective. The analysis will be focused on Ecuador and Bolivia as the two countries which have implemented the paradigm. The elements

³ For further reference on legal cultures see Sabrina Ragone and Guido Smorto, 'Legal Traditions' in Sabrina Ragone and Guido Smorto (eds.) *Comparative Law: A very short introduction* (2023 Oxford University Press)

⁴ Eduardo Gudynas, 'Buen Vivir: Today's Tomorrow' (2011) 54 *Society for International Development* 441

⁵ Silvia Bagni and Adriana Rodríguez Caguana, 'Legal Pluralism and Intercultural Justice: A Comparative Case Study Among Bolivia, Ecuador and Colombia' (2022) 31 *Revista General de Derecho Público Comparado* 1

of interculturality and plurinationality will be used to critically examine the application of the *buen vivir* into constitutional law. In doing so, the thesis seeks to answer the following research question: **To what extent has the indigenous cosmovision of the *buen vivir* found concrete implementation through the concepts of plurinationality and interculturality recognised in the constitutions of Ecuador and Bolivia?**

Theoretical Framework

This thesis is focused on the *buen vivir* as a legal normative outcome to the plurinational and intercultural nature of Latin American society, specifically looking at the cases of Bolivia and Ecuador. As a result of colonization there has been a strong segregation between the mestizo and indigenous population in the countries of the region. Indigenous peoples in Latin America have been largely discriminated against and marginalized through the last five centuries regardless of the fact that they can make up for up to 41% of the population in a country like Bolivia.⁶ As part of the systemic discrimination that they face indigenous nations have largely been left out of governmental and legislative matters.

Their political seclusion is largely associated with the fact that up until 2008 in Ecuador and 2009 in Bolivia the constitution did not recognize the plurination and interculturality within these States. According to Bagni, the importance of recognizing interculturality as a guiding principle lies in its capacity to influence the organization of the government and the interpretation of the law.⁷ Within the context of Latin America placing interculturality within the constitutional framework advances the recognition of indigenous collective rights and ethno-national autonomy of indigenous nations. It is intended that through these developments the ethnic cleavage in terms of rights between indigenous and mestizo populations is bridged at a State level.

On the other hand, plurinationality plays a role in deconstructing the liberal interpretation of the form of State and this institution's claim as sole source of sovereign power. The nineteenth-century modernist notion of the nation state as the sole source of law dominated, whereby only state law and not normative orders deserved to be labeled as law, as the codified,

⁶ IWGIA, 'Indigenous peoples in Bolivia' (IWGIA n.d.) <<https://www.iwgia.org/en/bolivia.html>> accessed 25 October 2024

⁷ Silvia Bagni 'Interculturalism: Understanding the concept from a comparative perspective' [2023] CALUMET 118

differentiated, institutionalized and legitimized expression of the state sovereignty and monopoly of power.⁸

Incorporating plurinationality in the constitution of Latin American countries breaks with the myth of legal monism as it implies the acknowledgement of indigenous normative orders as part of the national legal system.

After the independence movements in the early 19th century most Latin American constitutions were created with the European model of constitutionalism as a referent.⁹ The classic liberal constitutional model, which served to legitimize the newly independent States, is characterized for being intended for a homogenous nation. This was the result of the rise of the secular State in Europe leading to the formation of national identities on the basis of the political entity. However, modern states are often not composed of a single nation, which is an ethnic-cultural category, contrary to the political nature of the first.¹⁰

As a result, the European model of constitutionalism that has been exported to most modern States around the world is not sensible to the socio-cultural, economic and political realities of Latin America and other regions of the global south. *Buen vivir* was coined as an alternative to ideas of Western development, including the constitutional framework. This umbrella term puts forward the radical deconstruction of the legitimacy and institutional frameworks of development by prioritizing more holistic values common to diverse indigenous cosmovisions.¹¹ Gudynas suggests that in Ecuador the phrase in Quechua *sumak kawsay* is used to refer to a life of fullness in a community, encompassing other people and Nature. And in Bolivia a similar idea is depicted through the aymara concept of *suma qamaña*.¹²

According to Villalba, *buen vivir*, or even more specifically *sumak kawsay* for the Andean tradition, contradicts the western ontology of development due to its basis on relationality and reciprocity.¹³ World views of indigenous nations in South America highlight the importance of understanding community as made up by all forms of life, not just human ones.

⁸ Keebet Von Benda-Beckmann and Bertram Turner, 'Legal pluralism, social theory and the state' (2018) 50 The Journal of Legal Pluralism and Unofficial Law 255, 262

⁹ Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (Oxford University Press 2013)

¹⁰ Alt Willem Heringa, *Constitutions Compared: An Introduction to Comparative Constitutional Law* (7th ed., Eleven 2023)

¹¹ Eduardo Gudynas, 'Buen Vivir: Today's Tomorrow' (2011) 54 Society for International Development 441

¹² *ibid.*

¹³ Unai Villalba, 'Buen Vivir vs. development: A paradigm shift in the Andes?' (2013) 34 Third World Quarterly 1427

Simultaneously, they recognize that within this system of life humans interact with Mother Earth, or *Pacha Mama*, contrary to the Western dualism set between humans and Nature. It is through its novel interpretation of societal, economic and political issues that the notion of the *buen vivir* has opened up the space for interculturality and plurinationality to be recognized at a constitutional level in Ecuador and Bolivia.

The creation of the idea of the *buen vivir* and the popularization of similar post-development positionings in Latin America can be traced back to growing indigenous movements towards the end of the 20th century. These movements were characteristic for being organized in ethnic lines, claiming the recognition of rights of particular importance to indigenous nations, such as claims to ancestral land, juridical autonomy, and recognition of their ethno-national identity within the plurination.¹⁴ From this moment onwards a greater relevance has been attributed to the recognition of legal pluralism within the constitutional frameworks of the region.

At the same time, the ILO Convention 169 on Indigenous and Tribal Peoples' Rights of 1989 served as a landmark development in International Law by recognizing the rights of indigenous people and nations to participate in decision-making processes.¹⁵ This Convention helped to legitimize the autonomy claims being presented by indigenous movements and broaden the conversation about indigenous participation and representation at governmental and constitutional levels. The impact of the ILO was further embodied by the *Nuevo Constitucionalismo Latinoamericano*, a legal positioning that for the first time incorporated the State recognition of collective rights for indigenous nations and their chthonic legal traditions.¹⁶

In essence, the *Nuevo Constitucionalismo Latinoamericano* (NCL) has created a critical undertaking on constitutionalism in Latin America by presenting the idea of creating a legal framework particular to the region, which adapts to the socio-cultural context by incorporating indigenous epistemologies.¹⁷ According to Gargallera, the constitutional history of Latin America can be divided into four stages: experimental constitutionalism in the early 19th century, concerned with the consolidation of independence; the foundational one from mid 19th

¹⁴ Deborah J Yashar, *Contesting Citizenship in Latin America: the rise of indigenous movements and the postliberal challenge* (Cambridge University Press 2005)

¹⁵ Indigenous and Tribal Peoples Convention 1989, C169

¹⁶ Svetlana Inés Jaramillo Doniush, 'El nuevo constitucionalismo y los rezagos de la ciencia del derecho constitucional latinoamericano' (CLACSO 2013)

<<https://biblioteca-repositorio.clacso.edu.ar/bitstream/CLACSO/10743/2/jaramillo>> accessed 25 October 2024

¹⁷ Roberto Viciano Pastor, *Estudios sobre el nuevo Constitucionalismo Latinoamericano* (Tirant 2012)

to early 20th century, which was mainly focused towards economic development; the social constitutionalism (1917-1980), focused on the forgotten social welfare; and the human rights constitutionalism from the 1980's onwards.¹⁸ The NCL falls under the last category as it seeks to reassess the way in which collective rights have been framed in the Constitution.

As part of the NCL current countries like Ecuador and Bolivia decided to rewrite their constitutions with their social context at the forefront of the constitutional concerns. With this they have become the representative examples of the new Latin American constitutionalism, which for the first time seeks to acknowledge the autonomy and legal traditions of indigenous nations. The Constitutions of these States have incorporated in different but practical manners the *buen vivir*, which embodies ways of thinking of the respective indigenous nations into constitutional values and rights.

Methodology and Structure

The theoretical framework of this thesis consists of legal theory related to constitutionalism and dogmatic sources, such as the constitutions and the jurisprudence of Ecuador and Bolivia. This will be substantiated by scholarly sources of political, sociological and historical disciplines.

In this thesis the effectiveness and impact of the *buen vivir* will be examined in order to understand the social implications of recognizing the plurination and the intercultural State after more than a decade of the instauration of two of Latin America's newest and more innovating constitutions. In order to do so, chapter 1 will be dedicated to a presentation of literature on constitutionalism and the integration of the *buen vivir* as an alternative to the liberal configuration. This will be followed by the introduction of the constitutions of Ecuador and Bolivia together with two cases from each country that relate the elements of the paradigm. Chapter 3 will consist of the analysis and discussion of the primary sources presented in chapter 2 while considering the relevant literature in order to draw conclusions on the scope of the *buen vivir*.

¹⁸ Roberto Gargarella, 'Sobre el "Nuevo constitucionalismo latinoamericano"' (2018) 27 Rev. Urug. Cienc. Polít.109

Chapter 1. Challenging liberal constitutionalism through the *buen vivir*

This chapter will dive into the formation of the *buen vivir* and its relevance as a framework against western modernity and development. The first section of the chapter will look into the reasons why liberal constitutionalism is not an ideal model considering the social reality of Latin America. This will be followed by the presentation of the *Nuevo Constitucionalismo Latinoamericano* as an alternative formulation of the legal doctrine. Then, interculturality and plurinationality will be presented as the embodying elements of the *buen vivir*. And finally, considering the above, the paradigm will be introduced more in detail in the last section. It will be examined how its critical post-developmental positioning has widened the understanding of constitutionalism in Latin America as part of the NCL.

1.1 Issues with liberal constitutionalism in the context of Latin America

In order to understand the clashes of liberal constitutionalism with the social reality of Latin American it is first necessary to contextualize the political phenomenon. In a nutshell, constitutionalism is the legal outcome of the philosophical doctrine of the late 17th and early 18th centuries. The principle saw its rise with the liberal revolutions of the Modern Age that intended to break with the *ancien régime* accordingly with the interests of the growing bourgeoisie social class.¹⁹ Thus, when examined from a historical perspective, constitutionalism served the political goals of shattering the legitimacy of monarchical absolutism and securing the recognition of each individual's rights in the face of a rising new democratic order.

Consequently, this doctrine consists of two fundamental elements: the separation of power between the government's bodies, and the protection of individual rights. Considering the historical context, the second component developed from the notion that individuals are equal in regards to fundamental rights and therefore, the state has the responsibility to guarantee those rights to each person. For this, it is necessary to separate governmental power between the executive, legislative and judiciary, and avoid its monopolization within the state in order to reassure the protection of citizens.²⁰ The philosophical background of this formulation is largely

¹⁹ Andrea Buratti, *Western Constitutionalism: History, Institutions, Comparative Law* (2nd edn, Springer 2019)

²⁰ *ibid*

influenced by ideas of the social contract where citizens give power to the state in exchange for protection but in case this is abused they have the capacity to seize their endorsement.²¹

For the purpose of this thesis the focus of critiques will be on the element of protection of individual rights, as it is the component of constitutionalism that causes a greater clash with the social context of Latin America. To begin with, constitutionalism institutionalized individualism as the standard form in which rights are framed.²² This largely inhibits the need for acknowledgement and protection of indigenous rights, which are better understood from a collective perspective. Because indigenous peoples' claims on rights develop from their recognition of autonomy they mostly comprise third generation rights.²³ However, constitutionalism's formulation is not comprehensive of these natural rights that differ with the liberal interpretation. Likewise, indigenous autonomy conflicts with other liberal, modern constructs such as the idea of the nation-state and legal monism, which will be presented later on.

It is important to consider that indigenous nations in America had established strong political organizations long before colonization, however the colonial rule completely diminished these social institutions to legitimize its power. As a consequence, the modern nation-state projects of Latin America have been a result of the artificial geopolitical divisions created during the colonial period.²⁴ The autonomy of indigenous nations was largely denied and therefore they were categorized as part of these political projects. Even after independence movements in the region, because the predominantly powerful population was mainly composed of the descendants of European families, indigenous autonomy was largely neglected.²⁵

Therefore, when contextualized, the relevance of the recognition of these collective, autonomy-based rights should be a priority in the rights framework of Latin America. With this, indigenous peoples are seeking to achieve political representation at state level, ancestral land recognition, native language protection, among others. Overall, these rights intend to protect a collective identity that is wrongly construed when analyzed from an individual perspective. Consider for example, the recognition of ancestral land. This natural right of indigenous nations

²¹ Yasuo Hasebe and Cesare Pinelli, 'Constitutions', in Mark Tushnet, Thomas Fleiner, and Cheryl Saunders (eds.), *Routledge Handbook of Constitutional Law* (Routledge 2013)

²² Andrea Buratti, *Western Constitutionalism: History, Institutions, Comparative Law* (2nd edn, Springer 2019)

²³ Nancy Grey Postero, *Now We Are Citizens: Indigenous Politics in Postmulticultural Bolivia* (Stanford University Press 2007)

²⁴ Deborah J Yashar, *Contesting Citizenship in Latin America: the rise of indigenous movements and the postliberal challenge* (Cambridge University Press 2005)

²⁵ Universidad Diego Portales, 'Cátedra "El Nuevo Constitucionalismo Latinoamericano" con Roberto Gargarella' (YouTube, 5 May 2017) <<https://www.youtube.com/watch?v=ntJQf7k8BBc>> accessed 29 October 2024

goes against the liberal formulation of property that is based on individual ownership, when according to indigenous cosmovisions humans do not own but rather co-exist with Nature, creating a sacred connection between them.²⁶ It is based on this connection that the right is claimed.

Furthermore, the equal protection of rights that liberal constitutionalism poses is hindered by deeply rooted social inequalities in Latin American societies. As previously mentioned, with colonization and ever since, indigenous peoples have become marginalized groups due to the cultural and ethnic differences imposed with the majority of mestizo population. Yashar suggests that states influence public identities by institutionalizing and privileging certain national political identities.²⁷ In Latin America this is the case with the mestizo population, which is favored by the state due to how, more generally, this group has been influenced by eurocentric standards. This means that cultural, language, epistemic and normative frameworks that escape the westernized preferences of the state are more likely to be neglected, this being the case with indigenous nations.

The social inequalities in the region can be understood as an ethnic cleavage where the hierarchization of european standards during colonization left the mestizo, urban population with more political and socioeconomic power.²⁸ In addition, it must be considered that indigenous populations tend to not be well integrated into the socioeconomic systems due to their marginalization. According to Vogt, the result of such conditions is the development of different sub-societies living within the same polity with a lopsided distribution of power.²⁹ In this case, the state has been shaped according to the social reality of only one of the sub-societies, that being the mestizo one.

In the past, political attempts to decrease the negative implications of the ethnic cleavage in terms of rights have proposed a social equality discourse, which highlights the inherent equal dignity of indigenous people. However, this approach has been contested since it limits the understanding of indigenous rights to mainly first and second generation rights that avoid addressing the autonomy issue. On the other hand, Yashar considers the positionality of

²⁶ Eduardo Gudynas, 'Buen Vivir: Today's Tomorrow' (2011) 54 *Society for International Development* 441

²⁷ Deborah J Yashar, *Contesting Citizenship in Latin America: the rise of indigenous movements and the postliberal challenge* (Cambridge University Press 2005)

²⁸ *ibid*

²⁹ Manuel Vogt, 'A Theory of Ethnic Cleavages, Group Mobilization, and Conflict in Multiethnic States' in Manuel Vogt (ed.), *Mobilization and Conflict in Multiethnic States* (Oxford University Press 2019)

indigenous nations as a historically disadvantaged and discriminated group, for which it is crucial to recognize a special set of rights that is relevant to this contextualization³⁰. As a result, it is seen that equal protection of rights is disrupted by the sub-society implicit in the state-making within this social context, and the limited framework that rights are understood under liberal constitutionalism.

Last but not least, liberal constitutionalism establishes legal monism as the only legitimate configuration of legal power. The constitution of a country stands as the ultimate source of power within a state according to the liberal interpretation.³¹ No other normative frameworks may come above or at the same level of the constitution according to this configuration. However, diverse societies, specially in those where plurinationality and interculturality may be relevant, its members will answer to a variety of normative frameworks. In this sense liberal constitutionalism ignores the inherent pluralist nature of law in Latin America that stems from diverse existing legal traditions. The legal monism of constitutionalism does not only neglect other sources of indigenous law but also inhibits the adequate protection of indigenous individuals that reach for resolutions through these frameworks.

Considering the above, it can be concluded that classic constitutionalism results inadequate to the social reality of the region and even acts as an enhancer for social inequalities. By focusing the protection of rights on the individual it intrinsically endorses the rejection and diminishing of collective rights, making their implementation more contested. Additionally, this has resulted in an impediment for imperative social change in Latin America. Although Novoa Monreal was the first to propose this idea regarding the dominance of liberal economic development,³² the same applies for the integration and recognition of rights of indigenous peoples.

1.2 Constitutionalism in Latin America and the *Nuevo Constitucionalismo Latinoamericano*

In Latin America the decolonial context against which constitutionalism developed played an important role in determining the approach with which rights and development were framed at a state level. Considering that constitutionalism served as a legitimizing instrument for

³⁰ Deborah J Yashar, *Contesting Citizenship in Latin America: the rise of indigenous movements and the postliberal challenge* (Cambridge University Press 2005)

³¹ Andrea Buratti, *Western Constitutionalism: History, Institutions, Comparative Law* (2nd edn, Springer 2019)

³² For further reference see Novoa Monreal, *El derecho como obstáculo al cambio social*

the new sovereign states in the region this process was not taken lightly. According to Gargarella, within the constitution-making process constitutionalists paid close attention to the material conditions necessary for the new charters to succeed in asserting independence.³³ At the time the public opinion supported the idea that political independence could only be achieved in hand with economic independence from the previous colonial ruler, for which the liberal and conservative elites favored the already wealthy, large property owners.³⁴ As a result, from their early configuration, constitutions in Latin America have exacerbated social inequalities and privileged a liberal economy focused development framework.

The formulation of Latin American Constitutionalism has been characterized by the compromising between conservative and liberal factions of the political elites.³⁵ This has led to an accumulation response in terms of constitution-making, where contradicting clauses are incorporated to the normative text for the sake of accepting tensions in political stances between such actors.³⁶ As a result there has been a historic tendency throughout the 200 years of constitutional history towards hyper-presidentialism, diminishing the checks and balances system between the state powers. At the same time and contradictingly, especially starting in the 20th century, Latin American constitutions saw the rise of social rights tenfold in constitutional texts.

The *Nuevo Constitucionalismo Latinoamericano*, or New Latin American Constitutionalism in English, is considered to be the most recent legal and academic stream of constitutional law which developed against the context of the late 20th and early 21st centuries. NCL generally represents a wave of constitutional reforms in various countries of the region following a common framework. Uprimny suggests that these shared elements include changes in the understanding of national unity, implementation of special rights for marginalized groups, specially indigenous and Black communities, as well as the recognition of multiculturalism.³⁷ Examples of such a trend of constitutional changes can be seen in the new constitutions of Brazil (1988), Colombia (1991) and Paraguay (1992), as well as through the constitutional reforms of Costa Rica (1989), Mexico (1992) and Argentina (1994).

³³ Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (Oxford University Press 2013)

³⁴ *ibid*

³⁵ Universidad Diego Portales, 'Cátedra "El Nuevo Constitucionalismo Latinoamericano" con Roberto Gargarella' (YouTube, 5 May 2017) <<https://www.youtube.com/watch?v=ntJQf7k8BBc>> accessed 29 October 2024

³⁶ *ibid*

³⁷ Rodrigo Uprimny, 'The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges' (2011) 89 Texas Law Review 1587

Nevertheless, the new constitutions of Ecuador (2008) and Bolivia (2009) have received special attention within the NCL framework because of their approach to the multicultural and plurinational elements. These two countries have opted for an explicit incorporation of multiculturalism and plurinationality into their constitutions, contrary to a less direct approach taken by other countries in the region. The two new features challenge the supremacy of constitutionalism, as multiculturalism upholds the competence of indigenous jurisdictions, and plurinationality recognizes inherent differences that exist within the population of the state. Overall, the new constitutional framework of Latin America seeks to breach the gap between constitutionalism and the previously neglected social context of the region by addressing inequalities from a more comprehensive perspective and leaving behind a simplistic equality discourse.

In this light, NCL has been praised as a refreshing approach to constitutional law in Latin America by legal scholarship. Among those who support it, there is an overall consensus that the new constitutionalism has given a much needed recognition to indigenous nations and worked on their political integration. It has been suggested that in doing so, constitutions of the NCL are promoting epistemic justice for indigenous communities,³⁸ where indigenous jurisdictions have achieved state recognition and central values from indigenous cosmovisions have been integrated into the constitutional text. Additionally, the *Nuevo Constitucionalismo* has institutionalized at state level an effort to democratize decision-making that departs from the elitist structure concerned only with the interests of the conservative and liberal groups.³⁹ And with its focus on amending social negligence towards the indigenous populations NCL has also introduced a much-needed alternative to neoliberal development.⁴⁰

Of course, these remarks stem from general observations and do not apply to the same degree in all countries where the new constitutionalism has served as a framework of reform. In fact, a more nuanced view on the *nuevo constitucionalismo* acknowledges the innovative approach to constitutionalism that the framework provides while also recognising the complications for its application to achieve the desired goals. Firstly, it has been noted that NCL's effective implementation at an institutional level largely depends on the stance of the

³⁸ Boaventura de Sousa Santos, *Epistemologies of the South: justice against epistemicide* (Routledge 2014)

³⁹ Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: the Engine Room of the Constitution* (Oxford University Press 2013)

⁴⁰ Sarah A. Radcliffe, 'Development for a postneoliberal era? *Sumak kawsay*, living well and the limits to decolonisation in Ecuador' (2012) 43 *Geoforum* 240

government and its capacity to carry out this process.⁴¹ Different states have demonstrated to have different economic and institutional capacities and face different challenges in their attempts to implement the NCL.⁴² More specifically, one of the challenges that has been generally identified is how the established political structure may undermine indigenous autonomy and participation.⁴³ This will be further discussed in chapters 2 and 3.

More critical scholarship has also presented a reserved posture towards NCL as it is argued that this framework does not provide the necessary institutional and legal changes to achieve the desired social improvement. According to leading scholar Roberto Gargarella, the ‘new’ constitutionalism resembles too much the ‘old’ constitutionalism of the region, where a fixation on presidential power prevails, showing the need for institutional reform and not just a higher concern for the granting of constitutional rights.⁴⁴ It is argued that the supremacy of the state power continues to undermine the autonomy of indigenous nations and their political participation.⁴⁵ In terms of multiculturalism it has even been concluded that the recognition of indigenous rights is a superficial act that is framed to benefit the state’s neoliberal interests.⁴⁶

Within the framework of the new constitutionalism Ecuador and Bolivia have integrated the idea of the *buen vivir* to their constitutions, which as previously mentioned, stems from indigenous cosmovisions and is implemented through the elements of multiculturalism and plurinationality. These new constitutional values although have served to legitimize legal pluralism and the recognition of indigenous jurisdictions are not exempt from the above critical analysis. Theoretical limitations and challenges of the *buen vivir* will be discussed in detail in the following sections. And the drawbacks of the *nuevo constitucionalismo* in the constitutions of Ecuador and Bolivia will be analyzed in the next chapter.

⁴¹ Donna Lee van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* (University of Pittsburgh Press 2000)

⁴² Almut Schilling-Vacaflor and Detlef Nolte, *New Constitutionalism in Latin America: Promises and Practices* (1st ed, Routledge 2012)

⁴³ Romina Green Riojas, Roger Merino and Nayla Luz Vacarezza, ‘Pluralinationalism from below’ (2024) 56 *NACLA Report on the Americas* 233

⁴⁴ Universidad Diego Portales, ‘Cátedra “El Nuevo Constitucionalismo Latinoamericano” con Roberto Gargarella’ (YouTube, 5 May 2017) <<https://www.youtube.com/watch?v=ntJQf7k8BBc>> accessed 29 October 2024

⁴⁵ Romina Green Riojas, Roger Merino and Nayla Luz Vacarezza, ‘Pluralinationalism from below’ (2024) 56 *NACLA Report on the Americas* 233

⁴⁶ Skye Niles, Shawhin Roudbari and Santina Contreras, ‘Neoliberal Multiculturalism and Changing Colonial Racial Hierarchies in International Development’ (2023) 10 *Sociology of Race and Ethnicity* 249

1.3. The Implementation of Interculturality and Plurinationality in the Constitution

Interculturality and plurinationality were introduced in the constitutions of Ecuador and Bolivia through the framework of the *buen vivir* and as part of the current of the *Nuevo Constitucionalismo*. Their relevance in the Latin American social context has already been touched upon, however, the aim of this section is to go into detail about their importance and legal meaning. Both of these concepts have a strong social connotation and what they represent from an sociological perspective should not be neglected in order to achieve a well rounded interpretation of their implementation at a constitutional level.

For itself, interculturality refers to a permanent ongoing process of communication and cooperation between two or more individuals, communities or nations from different cultures, which takes place through a horizontal interaction with intentions of reciprocity and appreciation.⁴⁷ I have chosen such a specific definition because this portrays the way that interculturality is more than the interaction between cultures for the region. Latin America has long been a melting pot of ethnicities and cultures; however, this definition centers around aspects of respect and equity rather than just coexistence. The purpose of this concept is to overcome the ethnic cleavage and the hierarchization of the dominant Western culture.

Legal cultures or traditions stand for the historically and contextually influenced perceptions that people have towards the role of the law in society.⁴⁸ In Western legal traditions, as is the case with the use of civil law in Ecuador and Bolivia, the state is the ultimate holder of legal power. However, the chthonic legal culture of indigenous nations recognize other normative sources that interculturality has legitimized.⁴⁹ The horizontality between the Western legal culture of the state and the chthonic legal tradition of indigenous peoples that this value implies is radical because it breaks with legal monism that is so prevalent in the classic formulation of constitutionalism.

Overall, when integrated into the constitution of these countries, interculturality served as a strong point of reformation that acknowledges indigenous jurisdictions and with it

⁴⁷ Universidad de las regiones autónomas de la costa caribe Nicaragüense, *Guía de articulación para la gestión institucional intercultural* (White Paper) ch 5 Valores, principios y características de la articulación, *Principios Institucionales* (Ordinary session no.3 2018) para. 5.2

⁴⁸ Sabrina Ragone & Guido Smorto, 'Legal traditions' in Sabrina Ragone & Guido Smorto *Comparative law: A very short introduction* (Oxford University Press 2023)

⁴⁹ Boaventura de Sousa Santos, 'The Law of the Excluded: Indigenous Justice, Plurinationality and Interculturality in Bolivia and Ecuador' in Boaventura de Sousa Santos, Sara Araújo, & Orlando Aragón Andrade (eds.) *Decolonizing Constitutionalism* (Routledge 2023)

institutionalized legal pluralism. Both in Ecuador and Bolivia communal bodies of indigenous law enforcement have been established or reinforced with the new constitutions. Similarly, the legal and other normative frameworks of indigenous nations have been recognized in the new constitutions as legitimate sources of law for conflict resolution within indigenous parties.⁵⁰ This shows an interest from the state to not overstep on the chthonic tradition and instead legitimize its practice. With this the state officially recognizes that it is not the only source of normative power and acknowledges the interaction of different legal systems within the constitution.

Although this recognition may be relevant for the functioning of indigenous law enforcement institutions, it is important to highlight that such systems have been in place for centuries regardless of the recognition of the state. Constitutional acknowledgement of interculturality, and with it indigenous jurisdictions, only contributes to the institutional perspective of this normative tradition and does not impact whether it continues to be practiced as an integral part of indigenous culture. Furthermore, legal pluralism as put forward by the state has been criticized for not intending to equitably balance the reach of state power and indigenous legislation by prioritizing the first.⁵¹ In the next chapter the conflict between these legal systems will be presented through the cases of jurisprudence from Ecuador and Bolivia.

Moving forward, the recognition of plurinationality is particularly important in postcolonial countries because this often represents the internal acknowledgement of autonomy of indigenous nations. This concept is defined as the coexistence of several nations within the bounds of one state.⁵² More specifically, in the context of Latin America, there has been a particular focus on the recognition of indigenous nations. As previously mentioned, state and nation differ in their political meaning although they are often erroneously used interchangeably. However, it is important to highlight that even if nations refer to an ethno-cultural unity, such associations may develop political interests, as is the case for a vast majority of indigenous nations in the region.⁵³

⁵⁰ Bolivia (Plurinational State of)'s Constitution of 2009; Ecuador's Constitution of 2008 with Amendments through 2021

⁵¹ Keebet Von Benda-Beckmann and Bertram Turner, 'Legal pluralism, social theory and the state' (2018) 50 *The Journal of Legal Pluralism and Unofficial Law* 255

⁵² Roger Merino, 'Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalisms in Latin America' (2018) 31 *Leiden Journal of International Law* 773

⁵³ Deborah J Yashar, *Contesting Citizenship in Latin America: the rise of indigenous movements and the postliberal challenge* (Cambridge University Press 2005)

Due to their marginalization, indigenous peoples have persistently continued to claim the recognition of their autonomy. Plurinationality appeared as a response to the condemnation of the state for historically dismissing indigenous nations as irrelevant socio-political entities. In doing so, countries like Ecuador and Bolivia have acknowledged through their constitutions that their population is not homogeneous and that different groups have experienced social, political and economic disadvantages specifically construed to their identity, as is the case of indigenous nations. Such understanding calls for the recognition of special, third generation rights, that similarly to interculturality, help to move away from simplistic interpretations of equality.⁵⁴ Instead, these rights require a contextualization of who enjoys them from an individual and collective perspective.

Plurinationality as a constitutional value breaks with the one-nation scheme under which constitutionalism operates. The recognition of a diverse group of nations within the state, each with its own specific interests, promotes the political participation of the otherwise neglected groups.⁵⁵ In the case of indigenous peoples, a stricter involvement of their participation in decision-making processes at state level would be beneficial for the protection of collective rights and shifting the economic development goals of the government into a more sustainable framework. Plurinationality also implies that the political ideals and cosmovisions of a section of society must not be given preference by the state, and instead all nations should be given an equal treatment, helping to move indigenous epistemologies away from the margins of legality.

One of the main drawbacks that is found at a practical level for plurinationality is that states keep privileging neo-liberal oriented economic development. Both in Ecuador and Bolivia governmental institutions have been accused of undermining the participation of indigenous representatives and even infringing constitutional rights of consultation for the exploitation of natural resources.⁵⁶ These attitudes weaken the balance of participation within the nations of the state and continue to marginalize the knowledge and political stances of indigenous nations. Consequently, indigenous autonomy is also threatened. For these nations self-determination is deeply intertwined with the right to land, therefore the interference with their participation in decision making results in a negative domino effect.

⁵⁴ Deborah J Yashar, *Contesting Citizenship in Latin America: the rise of indigenous movements and the postliberal challenge* (Cambridge University Press 2005)

⁵⁵ Antonio Carlos Wolkomer, 'Rethinking Practices of Legal Pluralism in Latin America' [2023] *Revista Crítica de Ciências Sociais* 27

⁵⁶ Donna Lee van Cott, *Radical Democracy in the Andes* (Cambridge University Press 2012)

1.4 The *buen vivir* and its challenges

As part of the theoretical foundations of this thesis the *buen vivir* will be understood as a paradigm that the new constitutions of Ecuador and Bolivia implement into the legal foundation of the state in order to reconcile legal and social diversity. As previously mentioned, the paradigm does not represent a static idea but instead it is the broad translation of a good way of living shared among Andean indigenous cultures. It is a holistic examination of life from a collective perspective, where respectful relationships between diverse social groups and a reciprocal human interaction with Nature are placed as central to achieving a good life. As this paradigm developed from indigenous cosmovisions it serves to implement new frameworks of social cohesion that honor the intercultural and plurinational character of the state. In doing so, the *buen vivir* acts as a post-developmental theory that intends to counteract the social damage that modernity has inflicted through narratives of development.

Considering the above, *buen vivir* consequently acts as a counteracting element to the neoliberal developmental framework that it has institutionalized through modernity. In this sense, the mainstream perception of development has been equated to economic growth, which is often not well distributed but rather concentrated within a privileged minority due to the capitalist structure.⁵⁷ Particularly in the global south, where greater social inequality gaps exist compared to the global north, paradigms like the *buen vivir* have gained relevance based on their novel and innovative proposals regarding development. This section will contextualize what the *buen vivir* means and its relevance in the context of Latin American societies. Additionally, the challenges that the framework faces will be considered in order to better understand the reach of the paradigm.

Economic inequality in Latin America is extremely high compared to other regions of the world. In recent years it has been calculated that around 29% of the population in the region lives under conditions of poverty.⁵⁸ On repeated occasions and most recently with the COVID-19 pandemic, it has been seen that it is the most vulnerable part of the population that bears the burden of crises and unequal wealth distribution in general. However, different socio-economic

⁵⁷ Unai Villalba, 'Buen Vivir vs Development: a paradigm shift in the Andes?' (2013) 34 Third World Quarterly 1427

⁵⁸ ECLAC United Nations, 'Poverty in Latin America returned to pre-pandemic levels in 2022, ECLAC Reports With an Urgent Call for Progress on Labour Inclusion' (CEPAL 23 November 2023) <<https://www.cepal.org/en/pressreleases/poverty-latin-america-returned-pre-pandemic-levels-2022-eclac-reports-urgent-call>> accessed 6 November 2024

groups are interdependent, making it crucial to introduce policies that make a resilient society by first and foremost looking after the wellbeing of its most vulnerable members.⁵⁹ This has become significantly harder with the rise of populism and weak democratic institutions that result from the same inequalities.⁶⁰ In addition, social analysis on the region suggests it must be considered that economic inequalities do not exist detached from other social inequalities, instead they often intersect with issues of urban segregation, discrimination, access to healthcare and education, as well as unequal exposure to natural and environmental disasters.⁶¹

With the rising tendency of neoliberal political agendas in Latin America these inequalities are being exacerbated, which is why frameworks that consider alternatives to normative development are so important to overcome social injustice. As explained in section 1.1 liberal constitutionalism favors economic growth as development for the state and its citizens. Instead, the reformations that the paradigm of the *buen vivir* offers suggest that economic growth can only come hand in hand with quality living conditions for all. Although previously mentioned, this paradigm refers to a notion of well-being that encompasses the community, challenging western views of modernity.⁶² Its relevance to the Latin American context is undeniable as it developed from ethical principles based on indigenous cosmovisions and evolved to become a regulatory framework institutionalized through the constitution in Ecuador and Bolivia.⁶³

At a social level, the institutionalization of the *buen vivir* reflects an act of historic reflection and revaluation of indigenous peoples and their epistemologies. Adébísi argues that “Euro-modern legal epistemologies, in particular, have produced the ontology of the world and of the discipline [law] that reproduces the order and normativity of the world”.⁶⁴ The normative legal structures, like classic constitutionalism, have been institutionalized all over the world through the forced assimilation of western worldviews made normative through colonialism and

⁵⁹ Matías Busso and Julián Messina, ‘La Crisis de la Desigualda: América Latina y el Caribe en la Encrucijada’ (Research Report BID 2020)

⁶⁰ Diego Sánchez-Ancochea, *The Costs of Inequality in Latin America: Lessons and Warnings for the Rest of the World* (Bloomsbury 2021)

⁶¹ Matías Busso and Julián Messina, ‘La Crisis de la Desigualda: América Latina y el Caribe en la Encrucijada’ (Research Report BID 2020)

⁶² Eduardo Gudynas, ‘Buen Vivir: Today’s Tomorrow’ (2011) 54 *Society for International Development* 441

⁶³ Unai Villalba, ‘Buen Vivir vs Development: a paradigm shift in the Andes?’ (2013) 34 *Third World Quarterly* 1427

⁶⁴ Folúkè Adébísi, *The Law School: Colonial Ground Zero - a Colonial Convergence in the Human and Space-Time’ in Folúkè Adébísi Decolonisation and Legal Knowledge* (Bristol University Press 2023) 130

imperialism. In this way, indigenous knowledge and cosmovisions have been discredited and relegated out of state matters by implying that they escape the norm.

The social importance of the *buen vivir* is better appreciated when having understood that normative legal instruments are not objectively construed. Instead, they reflect global power structures in terms of what is claimed to be true, right or real regarding knowledge. Considering that constitutionalism is a fundamental organizing principle of society, that as part of the law of the state ensures social cohesion,⁶⁵ it is important that its reformation in Latin America is comprehensive of indigenous cosmovisions. By embodying indigenous frameworks of the understanding of the world the constitutions of the *buen vivir* are deconstructing how indigenous individuals and communities have been othered through the project of the modern state and its normative framework, the constitution.

However, the use of the *buen vivir* has also been contested when given a too general interpretation. What the Andean concepts of *Sumak kawsay* and *suma qamaña* embody transcend their Spanish translation in terms of relationality of humans with Nature, the meaning of fullness, among others.⁶⁶ This has led to a weak interpretation of the *buen vivir* that is tainted by Euro-modern influences. A strong critical analysis of the concept suggests that it has been assimilated and implemented alongside ideas of western development that weaken its intended meaning and relevance.⁶⁷ Consider for example how having a strong stance in the world economy is considered as part of the western conception of well-being. In the next chapter it will be seen through the examples of Ecuador and Bolivia how even within the framework of the *buen vivir* economic development, as understood under the capitalist order, is prioritized within the structure of the state.

Overall, the adoption of the *buen vivir* at constitutional level implies a break with the anthropocentric view of the west that most Latin American countries maintain, causing a complex tension between what the state aspires to be in terms of values and the institutional and structural changes that it is willing to make. One of the most significant challenges that the implementation of the paradigm faces is its contradiction to liberal economic policies that align to the Euro-modern ontology. Both in Ecuador and Bolivia where the *buen vivir* was

⁶⁵ Keebet Von Benda-Beckmann and Bertram Turner, 'Legal pluralism, social theory and the state' (2018) 50 The Journal of Legal Pluralism and Unofficial Law 255

⁶⁶ Unai Villalba, 'Buen Vivir vs Development: a paradigm shift in the Andes?' (2013) 34 Third World Quarterly 1427

⁶⁷ *ibid*

implemented to the constitutional frameworks there has been a clash between the rights of Nature that the principle promotes and the extractivist activities that dominate the economy of these countries.⁶⁸

As a contesting idea to the existing legal and economic order the *buen vivir* requires a resilient system of implementation to make sure that its constitutional value does not stay simply symbolic. Walsh argues that constitutional changes that implement the *buen vivir* require a structured and compelling institutional backing that make sure that the changes on paper are not overstepped by governmental action influenced by economic interests.⁶⁹ In this sense, political will plays a fundamental role in determining the outcome of the paradigm's implementation, as different political approaches with governmental changes can affect the way in which this is prioritized and addressed.⁷⁰

Chapter 2. The Implementation of the Buen Vivir in the Constitutions and Jurisprudence of Ecuador and Bolivia

In this chapter the cases of Ecuador and Bolivia will be presented in detail as the leading examples of the *nuevo constitucionalismo latinoamericano* and the constitutional implementation of the *buen vivir*. The first subchapter will look into the constitution of Ecuador and relevant jurisprudence in order to understand the status of the new constitutional elements and their concrete application. The same information will be presented for Bolivia in the second subchapter. For both countries two landmark cases within their jurisprudence will be presented, one of which aims to reflect on the situation of indigenous rights and juridical autonomy, and a second one related to the rights of Nature and indigenous territoriality. It is important to note that for the second category no cases have been heard yet by the Constitutional Courts, which is why no court cases have been chosen for this purpose.

2.1. Ecuador

Ecuador's constitutional history begins with the country's independence from Spanish rule in 1830 when the first constitutional text accerting the sovereignty of the country was

⁶⁸ Eduardo Gudynas, 'Buen Vivir: Today's Tomorrow' (2011) 54 Society for International Development 441

⁶⁹ Catherine Walsh, 'Development as Buen Vivir: Institutional arrangements and (de)colonial entanglements' (2010) 52 Development 15

⁷⁰ Arturo Escobar, 'Latin America at a Crossroads: Alternative modernizations, post-liberalism, or post-development?' (2010) 24 Cultural Studies 1

written. After that, new constitutions have developed through drastic political changes in the country and the new constitution of 2008 is not an exception. The state's previous constitution of 1998 was already considered to be part of the *nuevo constitucionalismo*, however, it was not until 10 years later that Ecuador would fully embrace the plurination state and interculturality as fundamental elements of its constituent text. Ecuador's constitution of 2008 is considered a pioneer in counter-liberal constitutional rhetoric by becoming the first country to recognize and protect the rights of nature and the autonomy and participation of indigenous nations.

Ex-president Rafael Correa played an important role in the creation and establishment of the 2008 constitution as he ascended to the presidency in 2007 thanks to his call for constitutional reform.⁷¹ Later the same year a constituent assembly was established through a national referendum and almost a year and a half later its draft was approved in a consequent referendum to become the official new constitution.⁷² Correa took office during a period of strong political instability but his 'reformist agenda', which included increasing agricultural subsidies and the budget for social programs related to education and healthcare, was popular amongst the Ecuadorian population.⁷³ This same focus on social protection is projected in the 2008 constitution, however the economic interests of the government have not been well aligned with these constitutional principles.

In 2014 it was revealed that the Ecuadorian government had been secretly negotiating with Chinese corporations to exploit oil deposits in the Yasuní National Park, while at the same time Correa had been lobbying to gather funds in order to prevent oil drilling in the park.⁷⁴ Although the case of Yasuní will be discussed in detail in section 2.1.2, it is important to consider the reality that this reveals. As previously mentioned, governmental interests, especially economic ones, are one of the biggest drawbacks on the adequate implementation of rights of Nature and indigenous autonomy, which are both related to achieving the *sumak kawsay*, or good living, that the constitution seeks to achieve.

The following subsection will lay out the most important aspects of the new constitution of Ecuador related to the *buen vivir* and associated with interculturality and plurinationality.

⁷¹ The Editors of Encyclopedia Britannica 'Rafael Correa' (*Britannica*, 9 October 2024) <<https://www.britannica.com/biography/Rafael-Correa>> accessed 15 November 2024

⁷² International Idea 'Constitutional History of Ecuador' (*Constitutionnet*, n.d.) <<https://constitutionnet.org/country/constitutional-history-ecuador>> accessed 15 November 2024

⁷³ The Editors of Encyclopedia Britannica 'Rafael Correa' (*Britannica*, 9 October 2024) <<https://www.britannica.com/biography/Rafael-Correa>> accessed 15 November 2024

⁷⁴ *ibid.*

Section 2.1.2 will consequently present two cases within the country's jurisprudence to examine the state of affairs in terms of application of these principles. As a result, this subchapter intends to define the reality of the *buen vivir* in Ecuador as a constitutional principle in order to later compare it to the case of Bolivia.

2.1.1. Elements of the *buen vivir* in the Constitution of Ecuador

The 2008 constitution of Ecuador starts by recognizing in its preamble the relationship of its people with Pacha Mama, moving away from the anthropocentric, liberal take on constitutional law. In doing so it recognizes the diversity of peoples, or nations, that make up the Ecuadorian population and the importance of preserving their cultures in order to achieve the good way of living, *sumak kawsay*.⁷⁵ In this way, the *buen vivir* is presented as an aspiration for the country to achieve. The essence that is given to the paradigm makes it a governing principle as to what the content of the constitution must seek to achieve for the peoples of Ecuador, their environment and the government.

Plurinationality is initially implicitly recognized as a principle of the state by acknowledging the origin of Ecuadorians from diverse peoples. This is tied to an idea of unity in diversity, common respect and mutual progress. At the same time the idea of the plurination in Ecuador is closely tied to the recognition of interculturality that values the cultural, legal and ontological contributions of its plural population in creating a harmonious coexistence. Overall, the preamble of this constitution presents the importance of the formation of a holistic socio-political system that serves the sacred balance of Nature, with the people of Ecuador as part of the natural system.

In order to understand how the constitution implements the elements that it promises in its preamble the following aspects will be addressed: the presentation of constitutional rights, the legal personality given to Nature, and the delimitation of indigenous autonomy and participation. All of these aspects are central to achieving the *sumak kawsay*, therefore it is important to consider that they may often overlap.

Recalling that the *buen vivir* is not a set concept but rather an umbrella term under which a broad spectrum of holistic interpretations of good living are broadly classified, it is key to consider that the constitution of Ecuador gives its own definition of what the state understands as

⁷⁵ Ecuador's Constitution of 2008 with Amendments through 2021, preamble

a good way of living. According to article 340, under Title VII, *The Good Way of Living System*, this is enshrined in the Constitutional rights. It is relevant to say that Ecuador's constitution recognizes a broad set of rights that escape the liberal individual conception. Chapter 2 of Title II, *Rights*, is dedicated to the rights of the good way of living, which comprise water and food; healthy environment; information and communication; culture and science; education; habitat and housing; health; and labor and social security.

In this light the *buen vivir*, or *sumak kawsay*, is presented as a complex matter that addresses all aspects of social life. What many of the right of the good way of living have in common is that they promote a balanced coexistence between different nationalities, and between peoples and Nature. For instance, consider the right to "safe and permanent access to healthy, sufficient and nutritional food, preferably produced locally [...] in keeping with various identities and cultural traditions".⁷⁶ The way in which the good way of living understands that people are naturally entitled to food is more than simply avoiding starvation. Instead, it is framed as a social process, rooted in culture and that later the state ties to autonomy by promoting its food sovereignty plan.

A similar structure is found in the presentation of other rights, where the constitution promotes sovereign systems of sustenance for the country in order to secure their access. The development structure proposed by the constitution can be found under Title VI. In here food and economic sovereignty are framed as part of the backbone of this plan which seeks an organized, sustainable and dynamic group of systems that support the *buen vivir*.⁷⁷ This reveals that the state understands the importance of having autonomy over its systems of production at a national level to secure the rights of its citizens. And at the same time, this higher structural level of autonomy is understood to be possible only through the recognition of autonomy of peoples and their own micro level systems of production. An example of this is how *campesinos* are entitled to equitable access to land.⁷⁸

⁷⁶ Ecuador's Constitution of 2008 with Amendments through 2021, art. 13

⁷⁷ *ibid*, art. 275

⁷⁸ *ibid*, art. 282

Campesino is a term used to refer to people who live in rural areas that often dedicate themselves to agricultural work for their own sustenance. The work that they perform is often of high intensity, especially since more and more people leave for the cities and suburbs in search of a "better life and jobs" that allow them to insert themselves into the liberal economy. Because of the negligence that campesinos have historically faced from the state their agricultural work is small-scale and in good cases, where access to land, water and resources are not looked down by the authorities, might even prove profitable for exchange of produce and local market distribution. The agricultural systems used by campesinos rely on generational knowledge of the land and products that they farm contrary to

Securing the constitutional rights is seen as the ultimate form to achieve the *sumak kawsay*, which also means that these rights have been formulated in a way that they reassure sustainability and reciprocity with Nature, cultural sensitivity and respect the plurination. Take for example the right to education. Article 26 is a positive right that frames the provision of education as a duty of the State but also as a responsibility for individuals and communities to take part in. However, the right to education is made broader through a negative obligation of the state to not limit or interfere with culturally relevant forms of this practice, which is related to the right of academic freedom, recognized by the constitution.⁷⁹ In this way, it can be seen how a right that is often framed in a straightforward manner, for the individual and separated from cultural context, can be construed in accordance with interculturality and plurinationality.

Furthermore, within the framework of rights an innovative approach of this constitution was the provision of legal personality to Nature and its elements. Ecuador breaks with the western philosophical premises of Nature being something to be appropriated by making Pacha Mama a subject of rights, which include the integral respect of its existence and the maintenance and regeneration of its life cycles, structure and evolutionary processes.⁸⁰ The provision of legal personality respects the cultural personality given to Nature by indigenous cosmovisions and further promotes a holistic relationship between humans and Mother Earth. This recognition helps to change the anthropocentric character of law and move towards an ecocentric narrative, where it is recognized that people are part of Nature, and with it vulnerable, and not superior to it.

The concession of the rights of Nature that allows for the shift to an ecocentric approach is a crucial element within the implementation of the *buen vivir*. Not only does the recognition of legal personality helps to harmonize the chthonic legal culture into the legal framework of the state, but also, making Nature a holder of rights and claims equitable to those humans are entitled to⁸¹ helps to advance environmental protection. Although Ecuador does not designate a specific entity to act on Nature's behalf and claim its rights, the constitutional framework in this matter opens the possibility for any individual to plead in her favor. This also signals the general lack of

industrialized systems. Therefore, their work plays an important role in the conservation of scientific knowledge, sustainable food production and security for rural areas, as well as the protection of the land. Several indigenous peoples have integrated to or organized in *comunidades campesinas*, for which rights such as the above intersect with the protection of their ancestral sustainable practices and Nature.

⁷⁹ Ecuador's Constitution of 2008 with Amendments through 2021, art. 29

⁸⁰ *ibid*, art. 71

⁸¹ *ibid*, art. 10-11

national legislation to support the framework of the rights of Nature presented in the constitution. One of the most important elements to consider in this regard is the lack of a specific mechanism that allows for the preventive protection of Nature and its elements.

Another important aspect to consider is the role given to indigenous jurisdictions. The Judicial Branch in Ecuador is separated into two spheres of jurisdiction, the ordinary justice system and the indigenous justice system. Although no article in the constitution explicitly recognizes legal pluralism, the division of jurisdictions implicitly indicates a division of legal rule and power between the legal cultures present within the state. Within the indigenous justice local authorities shall enjoy jurisdictional duties corresponding to their nations' ancestral traditions to settle internal disputes.⁸² It is established that mechanisms of coordination and cooperation can be defined with the ordinary system, however the indigenous justice is only subordinated to the constitutional court.⁸³ This demonstrates the equal positions in terms of judicial power that the ordinary and indigenous systems enjoy in Ecuador before the highest court of the country, revealing a pluralist system. However, it is important to consider that constitutional law is part of the same legal tradition as ordinary justice. The relevance of their proximity will be further analyzed in the coming sections.

Furthermore, the constitution recognizes a set of rights for indigenous peoples to assert their autonomy as part of the plurination. This include the right to hold as a community their ancestral lands,⁸⁴ decide over them, and promote ancestral practices of managing biodiversity.⁸⁵ As well as political rights such as the right to consultation for the exploitation of the land and resources found in their territories,⁸⁶ the right to uphold their own political organizations,⁸⁷ and to participate in governmental establishments.⁸⁸ This concise list of entitlements that the constitution grants the indigenous peoples of Ecuador and the recognition of their legal autonomy provided by the indigenous jurisdiction stands as a strong base on paper for the implementation of the paradigm of the *buen vivir* in terms of going beyond the normative eurocentric constitutional configuration.

⁸² Ecuador's Constitution of 2008 with Amendments through 2021, art. 171

⁸³ *ibid*

⁸⁴ *ibid*, art. 57.4-5

⁸⁵ *ibid* 57.8

⁸⁶ *ibid* 57. 7

⁸⁷ *ibid* 57.15

⁸⁸ *ibid*. 57.16

2.1.2. Jurisprudence of Ecuador

This section will present two relevant cases from the Ecuadorian jurisdiction in order to understand how the principle of the *buen vivir* and the intercultural and plurinational values present in the constitution of the country translate into practice. These two cases relate to two different spheres, one being related to interculturality and indigenous juridical autonomy and the other one being related to the rights of Nature and indigenous rights to land. The first case to be presented is *La Cocha II*, where challenges to indigenous autonomy will be discussed. This will be followed by a presentation of the cases related to Yasuní in order to examine the scope of rights of Nature and the challenges to the recognition of indigenous territoriality.

The case known as La Cocha II was brought to the Constitutional Court of Ecuador as a last resort appeal against the decision of the indigenous justice of La Cocha of the Panzaleo people regarding the murder of Marco Antonio Olivo Pallo. His brother, Mr. Víctor Olivo Pallo, presented an extraordinary protection action of which the Constitutional Court issued a ruling in 2014.⁸⁹ This case raised constitutional concerns related to the interpretation of fundamental rights from the side of the authorities. This is related to the perceived legitimacy of juridical processes undertaken by the indigenous justice of La Cocha and the impact that this has on the legal autonomy of said system.

In its ruling the Constitutional Court addressed whether the Indigenous Justice of La Cocha could solve the case of the murder of Mr. Olivo Pallo. This inherently means that the Court would decide on the scope and limits of the La Cocha justice. In order to do so the question raised by the Court was related to the way in which the right to life was interpreted by the indigenous jurisdiction. It concluded that this is perceived from a communal dimension, where the conflict impacts the families of the parties involved as well as the greater community, for which the goal is to restore the harmony between parts.⁹⁰

The interpretation of the La Cocha authorities contradicts the individual interpretation through which the right to life is construed in the Constitution. Bagni and Rodríguez Caguana argue that the conclusion of the Court shows distrust of communitarian forms of conflict resolution given that it assumes that the collective interest subjects individual freedoms.⁹¹ As a

⁸⁹ [2014] Sentence No. 113-14-SEP-CC (Corte Constitucional de Ecuador)

⁹⁰ *ibid*

⁹¹ Silvia Bagni and Adriana Rodríguez Caguana, 'Legal Pluralism and Intercultural Justice: A Comparative Case Study Among Bolivia, Ecuador and Colombia' (2022) 31 *Revista General de Derecho Público Comparado* 1

consequence, the subjective individual dimension is superimposed over the community dimension. Regardless of the Court's attempt to recall the values of interculturality and plurinationality in its ruling, the decision that it concluded with shows how the ordinary justice system still carries a profound misunderstanding of the role of the community in Indigenous systems of justice.

Indigenous justice tends to resemble restorative models of justice where the main goal is to restore a balance within the community by giving a space for the victim's needs to be heard and for the perpetrator(s) to be accountable for their actions.⁹² These practices are protected as part of juridical autonomy of indigenous peoples (art. 171) and the juridical equality between the indigenous and ordinary legal systems that is established in the constitution (art.54). Nevertheless, the case of La Cocha II served as a precedent to limit the power of Indigenous Justice, where the Constitutional Court subordinated the duty of the indigenous justice to the ordinary justice's understanding of the right to life. With it, the constitutional right to jurisdictional autonomy of the Panzaleo people was violated. This reveals a gap between the intended goal of interculturality as presented in the constitution, where it promotes, to a certain degree, legal pluralism and legal autonomy, and the reality of subordination that indigenous justices face.

The second case to be discussed is related to the Yasuní National Park. Yasuní is part of the Ecuadorian Amazon and therefore the habitat of rich biodiversity and dense forestry. Several Indigenous nations, including some in voluntary isolation, live within the Ishpingo-Tambococha-Tiputini (ITT) block, where the Ecuadorian government decided to exploit oil reserves back in 2013. This decision was taken following what was considered the failure of the trust fund established in collaboration with the UNDP to raise US\$ 7.2 billion in order to keep oil underground in the park. Nevertheless, the oil extraction projects endorsed by the Ecuadorian government heavily contradicted the rights of Nature and of territorial autonomy for indigenous peoples recognized in the constitution (arts.71 and 57.4). For these reasons, the Yasuní ITT case became known worldwide by environmental activists as a landmark example of how the government oversteps the law according to its interests.

⁹² Courtney Marsh, 'Honoring the Global Indigenous Roots of Restorative Justice: Potential Restorative Approaches for Child Welfare' (*Center for the Study of Social Policy*, 1 November 2019) <<https://cssp.org/2019/11/honoring-the-global-indigenous-roots-of-restorative-justice/>> accessed 19 November 2024

Extractivist activities have been held in the Ecuadorian Amazon for over five decades, having a strong negative impact on the rural livelihood of indigenous peoples and their autonomy, as well as resulting in the fast degradation of biodiversity.⁹³ However, the Ecuadorian government has reiterated its interest to continue the development of the extractivist industry, especially in Yasuní. This is an example of how there is a gap between the national jurisprudence and the practical implementation of the values related to the *buen vivir* as expressed through the Constitution that the state is not ready or willing to address. As a result, the government received significant internal and external contestations concerning the right of Nature to be preserved and that of indigenous nations to be sovereign over their lands. In 2023, this led to the approval of a referendum proposal, where citizens voted to stop extractivist activities in the ITT block of Yasuní.

2.2 Bolivia

The Plurinational State of Bolivia, as declared in the country's constitution of 2009, went through a convulsive constitutional process in order to achieve its most recent charter. Similarly to other countries in the region, Bolivia went through strong waves of political and civil unrest as a result of the U.S. imperialist project of the late 20th century in Latin America and the rise of indigenous social movements. As a result, the early 2000s were still characterized by political clashes between the population and instability within the government. It is important to consider in this light that part of the confrontation of interests between the population are the result of indigenous peoples of Bolivia having been neglected by the state in terms of participation, social welfare and autonomy.

Bolivia holds the second place in Latin America with the largest population of indigenous peoples after Guatemala.⁹⁴ 48% of the population of the country above the age of 15 self-identifies as indigenous.⁹⁵ However, the remaining majority, which is mainly *mestizos* and people of european descent, have historically kept the political power and control of

⁹³ International Rights of Nature Tribunal, 'Yasuni ITT case' (*International Rights of Nature Tribunal*, n.d.) <<https://www.rightsofnaturetribunal.org/cases/yasuni-itt-case/>> accessed 19 November 2024

⁹⁴ Statista Research Department, 'Share of indigenous people in selected Latin American countries as of 2021' (*Statista*, 5 July 2024) <<https://www.statista.com/statistics/1340373/percentage-indigenous-population-latin-american-countries/>> accessed 19 November 2024

⁹⁵ IWGIA, 'Bolivia: Indigenous peoples in Bolivia' (*IWGIA*, n.d.) <<https://www.iwgia.org/en/bolivia.html>> accessed 19 November 2024

governmental institutions. This has meant that the state's interest has revolved around the integration of the country into the global capitalist economy and the development of the metropolitan areas at the expense of the rural and indigenous peoples.

Yet in 2005 the political sphere of the country took an unprecedented turn with the election of socialist leader Evo Morales as president. Morales was the first ever president of indigenous origin in the history of Bolivia.⁹⁶ His ethnic and social background had an important impact on his project to promote the convening of a Constituent Assembly for the writing of a new constitutional text. One of the central goals of this new charter was to end social injustice and inequality for indigenous peoples through the recognition of a plural Bolivia.⁹⁷ Even if this was an idea that resonated with a large portion of citizens it was not easily welcomed.

It took almost 3 years, between 2006 and 2009, to complete the drafting and approval through referendum of the new constitution of Bolivia.⁹⁸ In the meantime, conservative groups, especially of European descent, criticized Morales' take on redistribution policies and focus on indigenous epistemologies under the accusation that communitarian values threatened their capitalist business model.⁹⁹ The strong polarization within the population even led to violence between those supporting the government's stance and the opposition. And although this delayed the referendum to approve the new constitution, the new text still received the approval of 64% of the population in January 2009.

In this way, the new constitution of Bolivia generated great division between the population, even to the point of five states of the eastern plains of the country rejecting the charter.¹⁰⁰ A constitutional text, as the highest form of the law of the state, is meant to generate a sense of cohesion between the peoples of a country. However, such a polarizing text, which's legitimacy is even questioned, sets a social background where the goals of its application may be unattainable. Part of a constitution's success is achieved through the endorsement of the people. In such a radical context, it is necessary that citizens find themselves represented in the constitution so that they support the actions proposed by the state in order to make

⁹⁶ The Editors of Encyclopaedia Britannica, 'Evo Morales: president of Bolivia' (*Britannica*, 13 November 2024) <<https://www.britannica.com/biography/Evo-Morales>> accessed 19 November 2024

⁹⁷ International Idea, 'Constitutional History of Bolivia' (*Constitutionnet*, n.d.) <<https://constitutionnet.org/country/constitutional-history-bolivia>> accessed 19 November 2024

⁹⁸ *ibid.*

⁹⁹ Matthew Taylor, 'Evo Morales hails 'new Bolivia' as constitution is approved' (*The Guardian*, 26 January 2009) <<https://www.theguardian.com/world/2009/jan/26/bolivia>> accessed 19 November 2024

¹⁰⁰ *ibid.*

plurinationality and interculturality tangible principles of the country and not just ambitious values.

2.2.1 The *buen vivir* in the constitution of Bolivia

This following section will present the most relevant parts of the 2009 constitution of Bolivia in relation to the *buen vivir* and how this paradigm promotes plurinationality and interculturality within the constitutional framework. In Bolivia the *buen vivir* is better interpreted through the aymara concept of *suma qamaña* that means a good life and is interpreted as a “corrective to a life that has become excessively linear and mechanical, individualistic, and self-referential.”¹⁰¹ In its preamble the Constituent Assembly emphasized on how Bolivia is made up of a diverse group of peoples, making plurinationality the central premise around which the constitution is developed and the *suma qamaña* can be achieved.

The preamble centers around a pluralist interpretation of the state and sets a goal of what the country aspires to be under the premise of a diverse society. It recalls the country’s history as part of colonial and imperialist projects and how these brought inequality, such as deeply ingrained racism, in order to set a break with the past. Respect and equality are framed as central to the plurination and the achievement of a good life for all, which encompasses personal and communal dignity. The Bolivian constitution of 2009 prides itself on the search for a new, more just and inclusive state as it claims: “We have left the colonial, republican and neo-liberal State in the past”.¹⁰² Up next, this section will delve into how these ideas are proposed through the constitution.

Bolivia is a unitary state with centralized governmental powers, however in order to achieve national integration it recognizes degrees of decentralization and autonomy, specially at municipal and communal levels, as well as for indigenous nations.¹⁰³ Recalling the situations of discrimination and social negligence towards indigenous peoples in Bolivia as mentioned in the previous section, this acknowledgement of autonomy in terms of governance and internal affairs plays an important role in dignifying these communities through recognition. The state does not see the diversity of its population as a threat to be controlled through legal acculturation but

¹⁰¹ Hanz Gutierrez, ‘A Peruvian “Suma Qamaña” Eschatology’ (Spectrum Magazine, 13 January 2023) <<https://spectrummagazine.org/views/peruvian-suma-qamana-eschatology/>> accessed 21 November 2024

¹⁰² Bolivia (Plurinational State of)’s Constitution of 2009, preamble

¹⁰³ *ibid.*, art.1

instead embraces and promotes intercultural governing practices as a legitimizing instrument of the central power. In this sense, the decentralization that exists in Bolivia is built more complex than a federation and should not be compared to this form of state as it differs in its essence. This will become more clear later with the understanding of how autonomy is recognized.

Autonomy is further asserted under article 2, which recognizes the existence of indigenous nations and peoples prior to colonization, and therefore prior to the national-state project. Such recognition encompasses free determination, rights of autonomy, self-governance, culture, recognition of institutions and territorial entities as guarantees under the unity of the state.¹⁰⁴ In doing so, the constitution takes a step down on its supremacy by acknowledging the existence and enforcement of other normative frameworks within the reach of the state, however without threatening the legitimacy of constitutional law. The relationship that the state intended to create with indigenous institutions and legislations through the constitution is one of equity and reciprocity. Through the analysis of jurisprudence on the next section it will be determined if this reflects in the reality of the country.

The values and principles of the State of Bolivia as presented in the constitution are put forward through the recognition of fundamental rights. Considering the plurination and the intercultural basis of the state, rights are not limited to be exercised by individuals, as also communities are entitled to this practice in a collective form.¹⁰⁵ Rights to be exercised in a collective manner mainly comprise those under Chapter IV. *Rights of the Nations and Rural Indigenous Peoples*. These emphasize on the freedom that indigenous nations and peoples are entitled to in terms of cultural expressions, territoriality, governance and legislation, as well as for the institutions of these communities to be part of the general structure of the state and to participate in other state institutions.¹⁰⁶

The above demonstrates how the fundamental rights established in the constitution help to advance the autonomy of nations within the state. In the case of indigenous peoples this is further supported by the recognition of their independent justice and legal systems as part of the judicial organ of the state. In Bolivia this governmental branch is separated into three jurisdictions: the ordinary, the agro-environmental, and the rural native indigenous. Article 178

¹⁰⁴ Bolivia (Plurinational State of)'s Constitution of 2009, art 2

¹⁰⁵ *ibid*, art. 14.III

¹⁰⁶ *ibid*, art. 30

recognizes legal pluralism as a fundamental principle of the judiciary,¹⁰⁷ which translates into the recognition of legal practices and normative systems outside of the ordinary jurisdiction.

Furthermore, an equal status is attributed to rural native indigenous and ordinary jurisdictions.¹⁰⁸ This shows the interest of the state to establish a relation of equality and mutual respect, especially from the government towards indigenous peoples. In this way the law of the state and the law of nations within it are not placed in confrontation but rather as complementary to different spheres of jurisdiction. The constitution reiterates the autonomy of indigenous systems of justice as part of the rural native indigenous branch and the responsibility of other state institutions of law enforcement to respect its decisions.¹⁰⁹

It is worth noting that the third branch of the judicial organ, the agro-environmental jurisdiction, corresponds to another crucial element for the achievement of the *buen vivir*. Through the Agro-Environmental Court as the highest specialized court within this jurisdiction,¹¹⁰ the branch is responsible to resolve appeals involving agrarian real estate, forestry, environmental, water, rights of use and enjoyment of renewable resources, forests, biodiversity and practices that threaten the ecological system.¹¹¹ Creating a separate branch of the judiciary in order to address cases related to Nature shows how the state is trying to advance and prioritize the protection of the environment according to the plurinational interests. Although this reveals a shift into what could be considered an approach closer to ecocentrism, Bolivia's relation to Nature remains that of protection, reflecting still a human-centered look.

The recognition of the rights of Nature is incorporated in a more subtle way within the constitution. The text recognizes the importance of harmonizing economic and other activities related to human development with the protection of the environment according to the paradigm of the *buen vivir*. Additionally, the charter establishes the *acción popular* or popular action, which creates a duty for all citizens to take legal action in case of a threat to the environment.¹¹² Such an approach reveals how the human relation with Nature is addressed as protection based, which presents an anthropocentric undertaking. Nevertheless, in accordance with the *acción popular* national legislation established the *Defensoría de la Madre Tierra* as an autonomous

¹⁰⁷ Bolivia (Plurinational State of)'s Constitution of 2009, art. 178

¹⁰⁸ *ibid*, art. 179. II

¹⁰⁹ *ibid*, art. 192. I

¹¹⁰ *ibid*, art. 186

¹¹¹ *ibid*, art. 189, 1

¹¹² *ibid*, art. 135

institution in charge of administrative and legal procedures in relation to the protection of Nature.¹¹³ Although this shows support from national legislation to implement the rights of Nature as intended by the constitution, the functioning of the public institutions has been postponed due to the need of further special regulations, which are yet to be ratified.

The above leaves a fragmented protection of Nature and its rights. Despite the coordination between the constitution and national legislation through the formation of a public institution, the inability to fully establish the legal and normative capacity of the latter after more than a decade of its declaration reveals institutional shortcomings. What can be seen then, is that the institutionalization of the ecocentric principle deriving from the *buen vivir* is complicated to incorporate within the western legal culture of the state. In the case of Bolivia the interpretation of the rights of Nature are largely bound to national legislation, making political interest a crucial element to consider when it comes to the implementation of policies. In later sections the relevance of political will will be addressed more in detail.

2.2.2 Jurisprudence of Bolivia

Similarly to section 2.1.2 on Ecuador's jurisprudence, this section will present two landmark cases from Bolivia that represent the reality of the plurination and interculturality as part of the *buen vivir*. As previously mentioned, Bolivia's constitution of 2009 places plurinationality as a central principle of the state, making it the basis of fundamental rights and the functioning of state institutions. In order to evaluate how this is translated into the reality of the country the two cases will be used as a point of reference. First, the Zongo case will be presented in order to explore the power relations between ordinary and indigenous justices in light of the constitutionally recognized legal pluralism. This will be followed by the exploration of the agroforestry practices adopted in the Bolivian Amazon in order to understand the state of affairs of the rights of Nature and its relationship to indigenous land rights.

Considering that legal pluralism is explicitly recognized in the Bolivian constitution (art. 178), the *Zongo Case* has become an emblematic example of this principle. In 2012 Mr. José Oscar Bellota Cornejo filed a criminal complaint against the authorities of the *Central Agraria Campesina* of the Zongo sector for being expelled and evicted from the community. This authority decided on the action in 2010 following a decade long conflict with a mining company

¹¹³ Proyecto de ley de la Defensoría de la Madre Tierra, Cámara de Diputados, PL-136-20 (BO)

that misappropriated Zongo land, contaminated a local river through its labor, and abused the laboral capacity of community members. Mr. Bellota Cornejo being the representative of the company was naturally held liable through the local customs and found guilty, resulting in his expulsion.

The complaint presented by the plaintiff at a lower court in El Alto included the presumption of crimes such as aggravated robbery, qualified damage, criminal association, home invasion, threats and injuries. However, the case was forwarded by the Court of Justice of La Paz to the Plurinational Constitutional Court to secure constitutional control given the relevance of indigenous legal autonomy in this case. The Constitutional Court developed its analysis of the case based on self determination and respect for the exercise of autonomous political and legal systems that are embodied in the constitution in light of the UN Declarations on the Rights of Indigenous Peoples and the ILO Convention 169.¹¹⁴

In its resolution, the Court endorsed the decision of the authorities of the Zongo sector to expel Mr. Bellota Cornejo under the reasoning of restoring harmony within the communities affected by the company's activities.¹¹⁵ In this case, the plaintiff's claim that the Zongo community's jurisdiction did not reach him, and therefore its actions represented criminal offenses, was dismissed regardless of the Jurisdictional Demarcation Law, which restricts indigenous jurisdiction to community parties only. The Constitutional Court argued that it must be understood that the Zongo legal authorities had carried out a justice process for an exceptional case that had disrupted the balance of the community. The sentence given in SCP 0026/2013 served as a supporting element, given that this case opened the possibility for judging people outside of indigenous jurisprudence in cases of, for example, territory occupation, in which moment the outside party would be implicitly accepting the jurisdiction of the community.

The remarks of the Plurinational Constitutional Court in this case served to legitimize the legal pluralism presented in the constitution and consequently the authority of indigenous jurisdictions. This has a positive impact at state level for the recognition of the capacity and scope of indigenous justice systems. However, a somewhat contradicting aspect is also revealed through this process. The Constitutional Court had to endorse the decision of the Zongo Justice for it to be recognized as legitimate, being compared to the ordinary Justice in the process. In this

¹¹⁴ Jurisdicción Indígena Campesina de Zongo v Juez Primero de Instrucción en lo Penal de El Alto [2014] Case SCP 0874/2014 (Tribunal Constitucional Plurinacional)

¹¹⁵ *ibid.*

sense, Indigenous Justice does not have an inherent capacity in the face of the state but rather requires the recognition of its institutions to be considered valid. This leaves us to think how balanced and equitable the relationship between indigenous and ordinary justice really is, or if the first is just a subordinate to the second in the constitutional system presented by the state.

The above raises concerns of a gap between the degree of interculturality that the state claims by recognizing itself as plurinational and the real-life power dynamics that dictate the extent to which indigenous justice is considered legitimate within this framework. A similar matter should be considered in terms of the rights to ancestral land that indigenous peoples hold according to the constitution. Indigenous peoples practice holistic relationships with Nature because of the ecocentric principles surrounding their cosmovisions, for which they generally act as protectors of biodiversity and ecosystems. Thus, the rights to ancestral land are inherently related to the protection of the environment and rights of Nature, although the determination of their scope is mainly tied to political and economic interests.

Following the rights of self determination and territoriality stated in the constitution (arts. 2 & 30), the system of *Autonomía Indígena Originaria Campesina* (AIOC) was established as a way of recognizing the autonomy of indigenous communities in relation to their ancestral territories. The AIOCs are put in place at the request of the community and reviewed by the Plurinational Constitutional Court. The work of the National Institute of Agrarian Reform (INRA) is crucial for the AIOC, as it is the organ that supervises relevant procedures for the recognition of land autonomy such as the redistribution of expropriated lands, legal recognition of indigenous land, titling, and ensuring the sustainable use of indigenous territories.¹¹⁶

AIOC and INRA have collaborated in the implementation of sustainable agroforestry practices in the Bolivian Amazon, with which they achieved an improved soil fertility in the forest and the provision of tenable sustenance for the communities involved.¹¹⁷ However, this combination of environmental and socioeconomic resilience has been obstructed by the interest of the extractivist economy posed by the Bolivian government. The Qhara Qhara Nation has been strongly vocal about the expropriation and exploitation of their land for over two decades now, presenting appeals to local and the Constitutional courts, and even the Inter-American

¹¹⁶ Xavier Albón, 'Suma Qamaña = el buen vivir' (2009) 4 OBETS 25

¹¹⁷ Fikret Berkes, *Sacred Ecology* (4th ed, Routledge 2018)

Commission on Human Rights against mining and agricultural companies that have trespassed their autonomy over their land.

This Andean Nationality is located between Potosí and Chuquisaca, areas which have been exploited since the colonial settlement. In more recent years this has been extenuated by the Bolivian government by enacting policies that protect the exploitation of non-renewable and invasive renewable resources in areas with dense forests and rich biodiversity, which are often part of indigenous lands.¹¹⁸ The Qhara Qhara Nation, together with many other indigenous nationalities, have experienced negligence and performative actions by the state that hinder their autonomy and the rights of Nature recognized in the Constitution. In this way, the AIOCs, although with a promising capacity for sustainability, are dependent on the positionality of the state that is deeply interconnected with economic motivations.

2.3. Concluding remarks for the chapter

The constitutional frameworks of Bolivia and Ecuador have instaurated a thorough implementation of the *buen vivir* and its elements. As the leading examples of NCL there is no doubt that these countries have taken a critical approach to the foundation of constitutionalism through the paradigm. From the decentralization of the unitary state, to the recognition of the rights of Nature, and the division of judiciary powers, these constitutions have commonly sought to adapt the legal framework to their countries' social reality. Within these changes, plurinationality and interculturality have served as legitimizing elements of the restructuring of rights, values and the division of legal and political power.

As for the cases chosen from each country, these reveal that the new constitutional elements that developed from the implementation of the *buen vivir* find some practical restraints. In the next chapter the limitations to the pluralist system, indigenous autonomy and rights of Nature will be analyzed from a comparative perspective.

¹¹⁸ Thomas Graham, 'Power to the people? Bolivia's hunt for gas targets national parks - and divides communities' (The Guardian, 10 April 2024) <<https://www.theguardian.com/global-development/2024/apr/10/bolivias-hunt-for-gas-targets-national-parks-and-divides-communities-tariquia>> accessed November 28 November 2024

Chapter 3. Analysis and Discussion

This chapter consists of the interpretation of the *buen vivir* and its practical implementation. The first section will be dedicated to a comparative analysis. The aim of this evaluation is to draw on the different ways in which the *buen vivir* has been implemented at constitutional level but also how this reflects on the reality of the countries. The findings of this analysis will be the base of the discussion in section 3.2. This last section will be dedicated to the consideration of practical limitations for the concrete application of the paradigm.

3.1. Comparative Analysis

3.1.1. Constitutions

The new constitutions of Ecuador and Bolivia certainly came as a result of shared social struggles and concerns, and in a time where their novel take on constitutional law was crucial in asserting their reception. This thesis takes as a central point of comparison the paradigm of the *buen vivir*, for which its elements, such as interculturality, plurinationality and the recognition of the rights of Nature, will be addressed in the relations drawn in this section.

Using the *buen vivir* as a point of departure, it can be seen that both in Ecuador and Bolivia this paradigm has been implemented as the *sumak kawsay* and the *suma qamaña* respectively. Both constitutions use the embodiment of indigenous cosmovisions of a balanced and harmonious life in order to justify a new take on constitutional law that departs from the liberal interpretation. With this, both countries have prioritized a more comprehensive social understanding of their societies and contextualized their history, setting a break with normativities of the past, such as discrimination and exclusion. Overall, the application of the paradigm calls for a new interpretation of state institutions and the law, as responsible elements for promoting this way of living.

However, the role given to the *buen vivir* differs in both constitutions. For its part, Ecuador presents the *sumak kawsay* in the preamble of the constituent text as its core, making it the key element for determining the values of the country and a right in itself. Thus, because of the paradigm the constitution recognizes the plurination, interculturality, reciprocity and respect between humans and with Nature. And at the same time it understands a good life as a tangible goal, as a compound right of the people, to be achieved through the recognition of fundamental

rights, such as education and health. In this sense, the good way of living is construed as a complex entitlement of the Ecuadorian population, where each right of the *buen vivir* serves as a building block to achieve a more sustainable and harmonious living.

For Bolivia the Aymara counterpart, *suma qamaña*, acts more as a supplementary value to plurinationality. In this case the search for a good life is presented in the preamble of the constitution as a goal based on economic, legal, political and cultural pluralism. Other than that, *suma qamaña* stands as a principle of the plural society together with other ethical principles stemming from indigenous cosmovisions.¹¹⁹ In this case, the *buen vivir* is moved to the sidelines in comparison to the centrality that it takes in the Ecuadorian Constitution. Therefore, in the case of Bolivia certain elements of the paradigm, such as ecocentrism, do not have a strong impact on the way in which fundamental rights are presented. This can be seen in the more subtle take on elements of rights of Nature and the delegation of this framework to national legislation.

Furthermore, plurinationality is embodied in the constitutions through three elements that defy the liberal interpretation of constitutionalism. First, being the core of the Bolivian constitution and a pivotal principle in the Ecuadorian text, plurinationality is implemented through the recognition of a special set of rights for indigenous peoples. Both constitutions share a similar package of rights that were commonly inspired by the ILO Convention 169 and the UN declaration on the rights of Indigenous peoples.¹²⁰ These include rights of self determination, legal and political autonomy, rights to the recognition of ancestral lands, cultural rights, political participation at state level, right to consultation for activities that may impact their communities, and others within these lines. The recognition of these special rights contradicts the equality premise of constitutionalism, however, the social issue of marginalization of indigenous peoples can be rectified by granting relevant benefits that secure equity in relation to the non-indigenous population.

It is important to consider however, that although both countries take a critical stance on constitutional guarantees by implementing the recognition of third generation, community rights, contrary to the focus on individual ones taken by liberal constitutionalism, this western interpretation may undermine the innate value of chthonic tradition. The problem behind this language of rights is that the state holds the capacity to grant and take away what individuals and

¹¹⁹ Bolivia (Plurinational State of)'s Constitution of 2009, art. 8

¹²⁰

collective groups are entitled to. In the specific case of indigenous nations and peoples this represents a subordination to the state and the global political order based on the nation-state system. This results contradicting the aimed equity that plurinationality pertains between the historic ethnic elites and indigenous nationalities.

Secondly, the form of state established in the Constitutions of these countries is another common element that is used to sustain plurinationality as a principle. Both Bolivia and Ecuador are unitary states, although they recognize levels of legal and governmental decentralization, especially for indigenous peoples. How this works is that the centralized government serves as a unifying element of the diverse nationalities that the population is made up of. The decentralization, mainly concerning local governments and the use of chthonic legal traditions by indigenous communities, serve to legitimize the autonomy of intercultural political and legal practices. However, in the Constitutions this autonomy is once again dependent on the recognition of the state, which problematizes the idea of the legitimacy of indigenous institutions being tied to the acknowledgement provided by the normative geo-political entity.

A final common element related to the principle of plurinationality in the constitutions of Ecuador and Bolivia can be found in their recognition of indigenous jurisdiction. Both states establish a difference between ordinary and indigenous jurisdictions, where Indigenous Justice systems tend to have a legitimate rule over cases between members of their communities. The Bolivian text even takes it a step further and explicitly recognizes legal pluralism within its framework (art. 178), compared to Ecuador where this is rather implicit given the recognition of indigenous legal autonomy. The division of jurisdiction shows an intercultural understanding of legal systems within the state supported by the equity that is stated between the two branches. On the one hand, the acknowledgement of legal autonomy foment the legitimacy of indigenous legal systems at a state level. Nevertheless, it can not be ignored that once again this autonomy is bound to the constitution, a part of the ordinary legal system.

Overall, plurinationality seems to be implemented through intercultural principles in the case of both constitutions. Given their framing as part of a construct of the western legal system - the constitution - fully intercultural governing practices seem to encounter challenges with the subordination element inherent of constitutionality. Although this will be further discussed in the next section, it is relevant to mention how such a contradiction rises already between the intended principles and the scope allowed to them within the Constitutions.

Besides the above, the *buen vivir* finds an implementation through the rights of Nature recognized by Bolivia and Ecuador. In this case the take of both countries differs, with the second taking a more radical approach. The idea of granting legal personhood to Nature is in itself a shift to an ecocentric view, inspired by a balanced livelihood stemming from the *sumak kawsay* in Ecuador. The constitutional approach taken by Bolivia still resembles more simplistic, western ideas of conservation where humans should mitigate environmental damage.¹²¹ The wider framing of rights of nature is delegated to national legislation in this country.

The above is representative of the role given to jurisprudence in the advancement of the rights of Nature in Bolivia. Another important example of the role of jurisprudence and institutions has been the *Defensoría de la Madre Tierra*, although its delayed implementation raises concerns of tangibility. In this way Bolivia has used its constitution in relation to the shift into an ecocentric approach as a supporting element for the development of policies. Meanwhile, Ecuador placed the rights of Nature as a central element to its new constitution without focusing on the institutional and jurisprudencial support of these elements.

In both countries the significance given to a reciprocal relationship with Nature is also addressed in terms of economic development given that this clashes with the liberal economy model traditionally proposed by constitutionalism. Ecuador proposes in its constituent text food and economic sovereignty as pillars of a sustainable sustenance that is capable of existing in harmony with Nature. For Bolivia, the importance of sustainability is still addressed in relation to economic development, however the interest that is placed on economic growth opens space for contradictions to rise between the importance of sustainability and the economy. Regardless of the base of the approach both countries leave a gap to the understanding of whether Nature's rights are subordinated to the economy.

3.1.2. Jurisprudence

For both countries two cases were presented in the respective sections, where one was related to themes of pluralism and self determination of indigenous peoples, and another one presented the state of affairs in terms of rights of Nature and environmental protection. The first category was considered pertinent in regards to how plurinationality and interculturality have the capacity to embody the significance of the *buen vivir* in diverse societies. For the second one, the

¹²¹ Bolivia (Plurinational State of)'s Constitution of 2009, art. 347

legal understanding of Nature that these constitutions present deviates from the global capitalist order, making it relevant to understand the reality of the ecocentric principles.

Although both Bolivia and Ecuador recognize Indigenous Justice and its jurisprudence through their Constitutions, what is seen through La Cocha II and Zongo cases are two very different realities of how legal autonomy is interpreted. In theory, intercultural justice translates into a comprehensive approach to legal issues, where cases are allowed to be interpreted by the legal culture that they better correspond to. La Cocha II revealed that Indigenous Justice in Ecuador is subordinated to ordinary, individualistic, interpretations of rights that resemble those used by the ordinary justice that the constitution is part of. While what is seen in Bolivia with the Zongo case is that the authority of Indigenous Justice is highly regarded by the Constitutional Court when it comes to the safety of the communal structure.

The role of the Courts will be the point of comparison in the following analysis. It is true that the two cases differ in material elements, yet they converge in their relationality to the plurination. The relevant Constitutional Courts had to commonly decide on the scope of the indigenous jurisdictions and the jurisprudence vested on the respective authorities. The court in Bolivia determined the constitutionality of the ruling of the Zongo authorities basing itself on the ideas of intercultural justice and legal pluralism in order to stretch the jurisdiction of the local authorities to non-indigenous people in close proximity to the community. In contrast, in La Cocha II the same principle of interculturality was used to dismiss jurisdiction by asserting the role of the Constitution in determining the correct interpretation of fundamental rights to settle nuances between legal traditions.

In both instances the respective offenses hindered the integrity of the communities, which the Indigenous Justices looked into restoring through culturally-relevant systems. Although, the Constitutional Courts differed on the constitutionality of the interpretations given by the Indigenous Justices depending on the impact their ruling could have on the supremacy of constitutional law. For the Zongo case, it was convenient for the Bolivian Constitutional Court to rule in favor of the decision of the indigenous justice as this strengthened the country's stance on intercultural justice and dignifying the decisions of the rural native indigenous jurisdiction, which other national institutions are obliged to do according to the Constitution.¹²² While in La Cocha II, for the Ecuadorian Constitutional Court to endorse the understanding of the

¹²² Bolivia (Plurinational State of)'s Constitution of 2009, art. 192

transgression to the right to life as a harm inherent to the community, rather than only to the individual, would have involved going against the understanding of one of the most basic rights. Life being one of the most highly regarded entitlements for the state to protect for its citizens, a change in its conception was regarded as a threat to the preeminence of the State's narrative on what the right entails and therefore its responsibilities in relation to it.

At a practical level, these cases reveal the extent to which the recognition of indigenous legal autonomy as an element of self-determination is bound to the primacy of constitutionalism. The authority vested in constitutional law should not be interpreted with a negative connotation in relation to indigenous legal autonomy, as this ensures the protection of fundamental rights and public order. Instead, the considerations in relation to these cases should be where constitutional law stands as a harmonizer between the two jurisdictions. After all, constitutionalism is central to the proper implementation of legal pluralism in this context, where two legal cultures need to be reconciled. The larger critique on subordination of indigenous jurisdiction is then focused on whether the constitutions suitably incorporate the notion of the pluralist interpretations proper of the paradigm of the *buen vivir*.

Within this line the importance of the positionality of the magistrates should not be ignored. The apathy that the use of reason in the field of law calls for in its professionals often serves as a justification for them to lack connection with the cases that they hear,¹²³ especially when these come from a different legal culture. Taking all of the above into consideration, it should be noted that the Bolivian Constitutional Court will not always have a more positive stance towards indigenous jurisdiction, while its Ecuadorian counterpart will also not take a negative stance in every occasion. Instead, the positionality of the High Courts in regards to cases related to plurinationality derive from a complex combination of factors encompassing, but not limited, to the ones already presented.

Moving on with the second set of cases, it can be seen that the relationship of Ecuador and Bolivia with extractivist activities is a common issue that is detracting these countries from implementing the proposed frameworks of indigenous territoriality and rights of Nature stated in their constitutions. Although the cases of Yasuní in Ecuador and the AIOCs in Bolivia are less concrete than the ones related to plurinationality, they still reflect the attitude of the state towards the relevant issues and the impact this has in relation to their capacity to fulfill their

¹²³ Emma Jones, *Emotions in the Law School: Transforming legal Education Through the Passions* (Routledge 2020)

constitutional duties. The two states have found themselves in a contradiction when it comes to fulfilling promises of new, sustainable economies, distanced from the neoliberal structure given the extent to which their financial stability is dependent on these detrimental practices.

The Amazon rainforest extends through multiple countries of the northern and central regions of South America, with it being popularly denominated as the lungs of the Earth. Back in the 1970s oil reserves were first found in the Brazilian Amazon and since then the exploitation of this non-renewable resource has been on the rise in all countries of the region as a profitable activity. In the span of a few decades, both Ecuador and Bolivia have become highly dependent on oil and natural gas extraction, problematizing the idea of economic sovereignty. Considering this, the analysis of the cases will be focused on the role of the state in addressing the discrepancies between development and sustainability. This includes the way that national institutions and legislation are used to bypass the indigenous rights of territoriality and the rights of Nature.

The cases being analysed in this section display how Bolivia and Ecuador have respectively excused the extraction of natural resources and deforestation on the stability of the national economy. For instance, the Ecuadorian government permitted oil extraction in the ITT block of Yasuní by claiming economic distress after the failed trust fund established with the UNDP. Similarly, Bolivia has set jurisprudence that supports extractivist activities by arguing on the importance of the stability of economic development in the country. The fact that these governments have faced little constitutional backlash in these processes that clearly interfere with the *buen vivir* reflect how constitutional values and rights in both countries are hierarchized through the will and interests of the state.

Regardless of the fact that indigenous nations and environmental activists have attempted to derogate the extractivist projects through national and international jurisdictions claiming constitutional entitlements and rights treaties, the Bolivian and Ecuadorian governments have managed to prioritize their monetary interests over the rights of Nature and territorial sovereignty of indigenous peoples. Thus, both states have taken an anthropocentric approach contrary to the principles presented in both constitutions. The way in which these breaches have stayed within the lines of constitutionality reflect how ideas of modern development and legality supersede the intercultural and plurinational values and principles of the *buen vivir* when considered necessary by the state.

Undeniably, the 2023 referendum in Ecuador to keep oil underground in Yasuní is a landmark of how constitutional principles can also work in favor of the rights they claim to preserve in this case. However, collective protection to peoples and Nature should be a guarantee that is not weighted in contrast to other rights but rather, as the ecocentric approach proposes, should be recognized as innate elements of social cohesion within the framework of the *buen vivir*. In light of a context where extractivist activities are the backbone of the national monetary structure, the self-sufficiency of the economy can not be preserved in hand with a sustainable relationship with Nature and its elements as proposed in the constitutions. These two goals are incompatible through the approaches taken by Ecuador and Bolivia. And more importantly, prioritizing what would be considered as a more self-sufficient economy through extractivism jeopardizes the critical foundations of the relevant constitutions through the hierarchization of rights.

3.2 Discussion

Now that the theoretical framework, the relevant Constitutions and the jurisprudence that represents how the elements of the *buen vivir* are materialized have been presented, this section aims to draw on the concluding remarks. It has been presented until now how the paradigm, in the form of the *sumak kawsay* and *suma qamaña*, represents a significant break with the elements of European legal thought present in the liberal conception of constitutionalism that do not fit within the context of Latin American society. Nonetheless, there are drawbacks when it comes to the interpretation and application of the paradigm. Consequently, it will be addressed how the *buen vivir* finds a concrete implementation in the new Constitutions of Bolivia and Ecuador to determine its relevance.

Interculturality and plurinationality have served as the major elements through which the paradigm has manifested itself and reshaped constitutionalism in Ecuador and Bolivia. The first principle has served as a contextualizing element that promotes constitutionalism to be built on a culturally-relevant framework that is respectful of social diversity. While the second, has helped to reshape social hierarchies within the legal sphere, propitiating the equity that constitutionalism aspires to establish between the citizens. It is important to note that in reality these two elements are complementary and work hand in hand, supporting the successful implementation of each

other. The ways in which interculturality and plurinationality have been implemented will be discussed below.

The idea of interculturality as a constitutional principle in the new charters of Ecuador and Bolivia served to enact the rights of Nature. This represents a radical departure from the anthropocentrism of liberal constitutionalism where humans are the only ones entitled to rights. The broader understanding of whose rights ought to be protected by the state was shifted in order to honor indigenous epistemologies that view humans' interaction with Nature as a holistic act, instead of one of ownership. The attributed legal personality to Nature acted as a bridging element between the western legal culture of the state and the chthonic legal culture of indigenous peoples. In this way, interculturality implements the *buen vivir* through the shift to an ecocentric approach on the constitutional texts of Ecuador and Bolivia.

However, despite the above, the Bolivian and Ecuadorian governments have yet to reconcile at a practical level the opposing nature of these legal cultures. As seen through the cases of Yasuní and the AIOCs, the governments of these countries take advantage of the bureaucratization typical of western culture in order to superpose economic growth over the rights of Nature. And although each country has a different approach to the framing of these rights, the governments equally play a role in diminishing their importance and setting the prevalence of a competent economy. Thus, the ecocentric shift that interculturality pertains as part of the *buen vivir* has been largely reduced to a theoretical subjectivity, where political will stands as the principal determinant of its concrete application.

Nonetheless, interculturality introduces legal pluralism as another component of the materialization of the *buen vivir*. With this, the monistic supremacy of the law of the state - that established through the constitution - is deconstructed through the legitimization of diverse normative frameworks, such as the indigenous legal systems. The division of jurisdiction between ordinary and indigenous justices that both countries recognize serves as an example of the decentralization of legal authority. This division of the law has fostered the development of social justice through more comprehensive juridical instruments for different legal cultures that interact within the countries. As a result, legal pluralism and the recognition of indigenous jurisdictions manifest the *buen vivir* by upholding within the state framework comprehensive intercultural justice.

Of course, these elements have also come across certain limitations when it comes to their concrete application. The most obvious one being that indigenous justices and jurisdictions are still bound to the constitutional order, setting a hierarchy of dominance. Through the cases of *La Cocha II* and *Zongo* it can be seen that the Constitutional Courts of Ecuador and Bolivia play a crucial role in setting precedents to determine the scope of Indigenous Justices. This exemplifies how institutions that should enjoy autonomy over their affairs are still constrained to the recognition given by their state counterparts, which inherently recognizes the superiority of the second. Contrary to the rights of Nature, these elements have found a more concrete application, as Indigenous Justices have been systematized within the state institutional structure, however the practical implementation of the *buen vivir* is limited in terms of the extent that the eurocentric legal tradition is still placed center-front.

Building on the idea of distancing from eurocentric epistemologies, plurinationality facilitates decentralization as an element that gives legal and political power to local and indigenous institutions. The impact of the decision on the form of state in both countries as unitary but decentralized political units helps to legitimize other forms of organization beyond the nation-state. The break of the constitutional frameworks with state models circulated from the European scheme sets a precedent in implementing state configurations that are culturally relevant to the context of the state. Hence, the *buen vivir* is materialized through decentralization as an element related to plurinationality.

As a final element discussed in this section, plurinationality propitiates the recognition of indigenous autonomy, which helps to substantiate the *buen vivir* in the constitutions of Ecuador and Bolivia. This element is closely related to legal pluralism and decentralization as it involves the recognition of local political institutions set by indigenous nationalities and self-determination. In this way it can be seen how interculturality and plurinationality interact and support each other as transformative elements of the new constitutions. The political and territorial autonomy of nations within the state is the most direct implementation of plurinationality in the constitutions that makes the paradigm concrete through the alternatives to governance and power distribution.

What is generally seen then, is that the paradigm of the *buen vivir* does find concrete implementations through interculturality and plurinationality in the new constitutions of Bolivia and Ecuador, however the effective execution of the relevant elements is limited by diverse

factors. A common denominator that detracts from the transformative capacity of these elements is the prevalence of the western legal culture as the dominant one within the state. This legitimizes the demise of the chthonic tradition, its scope and the structural formulations that may stem from it, such as the recognition of the rights of Nature.

In fact, what is seen almost 15 years since the enactment of the new constitutions of Ecuador and Bolivia is that the constitutional model of the *buen vivir* has not further circulated within the wave of the NCL. A clear example was the rejection of the proposed new constitution of Chile in 2022, where the electorate voted against the proposed text after the surge of social uprisings that demanded the change of the 1980 text established during Pinochet's dictatorship. The draft of the constitution included elements related to the paradigm such as the recognition of Chile as a plurination and the acknowledgement of the rights of Nature, which became grounds of strong polarization between the population.¹²⁴ But perhaps the most striking fact in this process was that the regions of the country with higher indigenous populations reflected the strongest rejection for the new text.¹²⁵ This raises the question of whether the Mapuche people, together with other indigenous nations in Chile, and with consideration to the tangible result in Bolivia and Ecuador, do not see the implementation of the *buen vivir* constitutional model as a relevant break with the eurocentric legal culture that promotes discrimination and inequality within the state structure.

Recalling Gargarella's critique of the NCL, it can be seen that the constitutional model of the *buen vivir* finds its limitations in the concrete application of the paradigm. The new constitutions of Ecuador and Bolivia introduce the model mainly through a system of rights, which due to a lack of mechanism to secure their protection and implementation, often remain as theoretical pursuits of the state. This is the result of the lack of a steadfast system of execution that binds the government to act according to the principles set in the constitution. And consequently, as long as a substantial institutional reform that reinforces the elements introduced through the paradigm is not enacted, the lack or shift of political will will continue to determine the relevance of the paradigm.

¹²⁴ Javier Couso, 'Chile's Failed Attempt to Get A New Constitution: Or the Challenges of Constitution Making in a Polarized Era' (2024) 30(1) Southwestern Journal of International Law 1

¹²⁵ Katherine Becerra Valdivia, 'Rejecting Plurinationalism: Indigenous Peoples and the (Almost) New Constitution in Chile' (*Starting Points*, 30 November 2022) <<https://startingpointsjournal.com/rejecting-plurinationalism-indigenous-peoples-and-the-almost-new-constitution-in-chile/>> accessed 02 December 2024

Conclusion

In order to answer the research question posed in the introduction, this thesis looked at the theoretical and historical foundation of liberal constitutionalism and the *buen vivir* as a counteracting element to its social limitation in the context of Latin America (Chapter 1). This was followed by the assessment of the constitutions and cases from Ecuador and Bolivia (Chapter 2), and finally the drawing of a comparative analysis of the ways in which the paradigm is implemented (Chapter 3).

The findings of Chapters 2 and 3 suggest that the implementation that the *buen vivir* achieves through the elements of plurinationality and interculturality is limited. At a theoretical level, the paradigm and its elements have taken a vital position within delimiting the principles, values and even the rights of the constituent texts of Ecuador and Bolivia. In both countries their implementation into the legal framework has resulted in an advanced social recognition and appreciation of a diverse society. This includes the recognition of indigenous autonomy and the rights of Nature as loud manifestations of a critical look on the liberal foundations of constitutionalism.

However, the reality that the application of the constitutional frameworks of the *buen vivir* presents through the analyzed cases is distant from what the constitutions propose. Two main drawbacks were identified for achieving a concrete application of the *buen vivir*. The first concerns the ecocentric approach of the paradigm. It has been found that the rights of Nature and indigenous territoriality are complicated to materialize given the centrality of extractivist activities in line with the neoliberal economy model followed by both countries.

In part, the prioritization of economic development through extractivist activities is the result of political interests. The enactment of bills and national legislations that support said activities reveals the strength of governmental and political positionality. This is the second drawback that was identified through the analysis. It was found that political will plays a crucial role in determining the extent to which the *buen vivir* is concretely applied. And with it, indigenous autonomy tends to be limited according to the states' interests.

These two limitations to the concrete implementation of the paradigm are the result of a lack of juridical tools and institutional support that uphold the new constitutional values and rights. The aforementioned reveals that simply establishing the paradigm as a normative principle through the constitution results insufficient given the dissonance between the chthonic

foundations of the *buen vivir* and the western character of state institutions and national jurisprudence. It is relevant to conclude that the establishment of the *buen vivir* as a constitutional framework requires the enactment of more concrete mechanisms, such as institutions, and the support of national legislation in order to fulfill the exhaustive potential of its application.

Considering the above conclusion on the application of the *buen vivir* in Ecuador and Bolivia, it would be pertinent to contemplate ways of correcting the impediments for the paradigms practical implementation. The analyzed constitutions revealed that as a theoretical foundation the *buen vivir* proved to incorporate smoothly into the national constitutional frameworks. Therefore, further research can be conducted on the ways to systematize the paradigm within national legislation and legal institutions. This would be most relevant considering that a concrete ruling on the *Defensoría de la Madre Tierra* will be concluded within the coming months, finally establishing its proper functioning as the first institution to materialize the paradigm.

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Appendices

Appendix 1. Learning Contract

Student Name: Adriana Salazar S.

Student Number: 2105979

Start Date: 09/09/2024

Research Area: Comparative Constitutional Law

Supervisor Name: Maria Cavalcanti

Supervisor Contact:

m.f.cavalcanti@tilburguniversity.edu

Proposed Date of Completion: 09/12/2024

General agreements:

- Make a clear time plan.
- Produce work at agreed intervals and work steadily towards finishing the thesis in the period agreed upon with the supervisor.
- Communicate about questions, blocks, problems and scheduling meetings through email.

For each meeting:

- Make a short summary about what was discussed in our meeting.
- Communicate in advance what we want to discuss in the meeting.
- Make a list of specific questions for each meeting.
- Send work to be discussed in advance.
- Pages to be read: approximately 15 in total.

During the meeting:

- Take notes during the meeting to process feedback given by the supervisor.
- Be open to critical but constructive feedback.

Appendix 2. Time plan

23 September: first online meeting to discuss the thesis proposal.

8 October: Sending the table of contents, research question, and sub-questions to the supervisor.

10 October: Feedback from the supervisor on table of contents, research question, and sub-questions to the supervisor.

15 October: second online meeting to discuss feedback and first chapter.

12 November: Sending the first part of the thesis to the supervisor.

14 November: Feedback on the first part of the thesis.

15 November: third online meeting to discuss the feedback on the first part of the thesis, question and discussion about the second part.

3 December: fourth online meeting to discuss and feedback on the second part of the thesis.