

Ecuador: the bifurcation of modernity and *good living*.

Carlos E. Gallegos-Anda

Abstract: In 2008 Ecuador reformed its constitution where a new dimension of rights and language associated to them was enshrined. The new text outlaid a hybrid depiction of social, political and economic objectives through law. Intended as an “epistemological leap” the reform depicts a moment of bifurcation between *good living* and modernity. Since the 1990s Ecuador has experienced systemic and continual periods of chaos, a direct result of which was the enactment of a new constitutional text. However the perils and constraints, both epistemological and institutional that the new Constitution faces are mounting and the possibility of an alternate epistemological approach to social, political and economic interactions to emerge may slowly be truncated, turning what was intended to be operational clauses into a dormant text.

The essay before you will address the changes that have taken place in Ecuador since 2008 through the constitutional reform that ensued a new legal frame where rights (individual and collective) were to take centre stage in the outlaying of social, political and economic objectives. It will present the reader with the overall context in which these policy and normative developments were enshrined, in an attempt to expose the “epistemological leap” that was crystallized in 2008 and how it led to a bifurcation between *good living* and modernity and how it was forged through the systemic chaos that preceded it.¹

• The Conceptual Understanding of Good Living

Within the realm of alternative views toward development one may identify a plethora of theoretical underpinnings such as the capability approach,² eco-feminism³ or biocultural rights⁴. *Good living* as a conceptual framing posits a new approach, not of development but of societal wellbeing, which differentiates itself not only due to its epistemological origins but also to the enforceability that it may commandeer within the Inter-American system. However we must first “ground” the theoretical construction of *good living* in order to comprehend where it comes from and where it is headed.

¹ R. A. Thiétart and B. Forgues, *Chaos Theory and Organization*, Organization Science, Vol. 6, No. 1, Focused Issue: European Perspective on Organization, (Jan. - Feb., 1995), (19-31), 21

² F. Comim, M. Qizilbash, and S. Alkire (eds.) *The Capability Approach: Concepts, Measures and Applications*, Cambridge, Cambridge University Press, 2008.

³ J. Sydee and S. Beder, 'Ecofeminism and Globalism', *Democracy and Nature*, July 2001, 281.

⁴ G. Sajeve, 'Rights with Limits: Biocultural Rights – between Self-Determination and Conservation of the Environment', *Journal of Human Rights and the Environment*, vol. 6, no. 1, March 2015, 30–54.

*Buen Vivir*⁵ (translated as Good or Plentiful Living) as a constitutional principle has taken centre stage in Ecuador's development objectives,⁶ one need only review the various government documents prompted since 2008 to discover that good living is an all-encompassing concept that according to some authors has been transformed into a "one size fits all" motif,⁷ a vague and uncomprehended concept that is utilized to legitimize the gargantuan activities and media orchestrated discourses of the state. Regardless of the validity of such criticisms, one must not overlook the historical and epistemological significance of enshrining such a precept within the historical struggle of including critical thinking of indigenous, African Ecuadorian and mestizos in Ecuador.⁸

Decolonial scholarship also provides further arguments towards the significance of this legal triumph, as it is nothing short of a recognition of the political and social aspirations of what Mignolo has labelled as the damnés or those who are racially defamed and politically, economically and spiritually dispossessed.⁹ Hence the legal triumph of 2008 could very well constitute a first (national) step towards recovering the emancipatory nature of law as conceptualized by Boaventura in his oppositional postmodernism,¹⁰ but also harbour within it the conceptual seeds that will lead the way in the bifurcation of modernity and *good living*.

Taken from the Kichwa *Sumak Kawsay* the concept has its origins (according to some scholars) as an indigenous epistemological Cosmo-livelihood that was created and practiced through custom rituals that predate the arrival of Europeans to the Americas.¹¹ This rather metaphysical presentation must however be correlated with what some have argued is a Western idealization of the rural Andes, where a time warp of sorts has engulfed communities preserving them in a monolithic,

⁵ *Constitution of the Republic of Ecuador*, art. 1, 10, 14, 57, 71-74, 177, 275, 276 (4), 277.1, 277.6, 278.2, 322, 385, 395.1, 400

⁶ The National Development Plan mandated in article 272 of the Constitution has received the political appellation of "National Plan for Good Living".

⁷ V. Bretón, D. Cortez and F. García, 'In Search of Sumak Kawsay Introduction to the Dossier', *FLACSO-Revista de Ciencias Sociales*, vol. 48, January 2014, 11.

⁸ C. Walsh, 'Shifting the Geopolitics of Critical Knowledge: Decolonial Thought and cultural studies in 'others' in the Andes', in Walter D. Mignolo and Arturo Escobar (ed.), *Globalization and the Decolonial Option*, Hoboken, Taylor and Francis, 2013, p. 86.

⁹ W. D. Mignolo, 'Delinking: The rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality' in Walter D. Mignolo and Arturo Escobar (ed.), *Globalization and the Decolonial Option*, Hoboken, Taylor and Francis, 2013, 310.

¹⁰ B. Sousa Santos, 19.

¹¹ A. O. Freire, 'Ruptura de dos Paradigmas: una lectura de la Izquierda desde la Filosofía Tetrádica Andina' in Atawallpa Oviedo Freire (ed.) *Bifurcación del Buen Vivir y el Sumak Kawsay*, Sumak, Quito, 2014, 142.

homogenous and a temporal reality that negates simple facts such as the considerable amount of urban dwelling indigenous peoples.¹²

Such criticisms are of course compounded when we attempt to pinpoint the origin of the concept. Historiographical as well as ethnographical research calls into question the “mystical origins” of the concept, as there is no trace of it within colonial diaries or in indigenous communities prior to the current debates.¹³ Surprisingly enough good living as the concept we know today in the Constitutions of Ecuador and Bolivia, makes its “conceptual debut” in a convention sponsored by the German Technical Cooperation Office (GTZ) and the Goethe-Institut in 2004 in Bolivia, an encounter that gathered intellectuals, community leaders and experts that would discuss (amongst other things) the current situation of the Andean *ayllu* (rural communities) and pluriculturality.¹⁴ This of course contrasts with the romanticized and idealized ‘hyper-real indigenous’ or what Viola has labelled as the postmodern version of the rousseauian noble savage.¹⁵

In any case a synthesized (and by no means complete) lecture of the constitutional principle gives an outline of various understandings that must be taken into consideration if we are to develop the concept of *good living* further. Some of the first theoretical constructions presented to us delineate a concept that could form part of an indigenous or possibly Andean philosophy, others associate it with the mystical relationship indigenous communities have with nature. Indigenous scholars however present readers with a cosmic vision, Andean knowledge or ancestral science that complements any theoretical construction.¹⁶ Good living as a process is viewed as a holistic wellbeing with ones’ social (community), ecological (nature) and supernatural (spiritual) spheres.¹⁷

Whatever the construction that underpins each epistemological current, one thing is certain: *good living* as a constitutional principle has sparked an interesting and novel debate between disciplines and intellectual, political, and ethical projects that search for new ways of understanding the World.¹⁸ The former President of the

¹² A. V. Recasens, “Pachamamista” Discourses versus Development Policies: The Debate over Sumak Kawsay in the Andes’ in Dossier: En busca del Sumak Kawsay, *FLACSO-Revista de Ciencias Sociales*, 48, 2014, 65.

¹³ V. Bretón, D.Cortez and F. García, 14

¹⁴ *Ibid*, 16.

¹⁵ A. V. Recasens, 64-69.

¹⁶ V. Bretón, D.Cortez and F. García, 14-15.

¹⁷ A. V. Recasens, 58.

¹⁸ C. Walsh, 87.

Constitutional Assembly of 2008 has stated that in order to crystallize *good living* as a concept we will have to construct and reconstruct it simultaneously if we are to fulfil its mandate.¹⁹ This of course resonates with the necessary legal interpretations that such a concept must undergo via Ecuador's Constitutional Court²⁰ in the present and future if it is to mature into an enforceable legal mandate.

Good living holds a new and interesting place in Ecuador's legal system, one cannot easily dismiss the legal implications having such a constitutional precept entails. Current academic research has vaguely taken upon itself completing the "next stage" in the constitutional development of *good living*, its conceptual transformation into an enforceable legal principle that permeates public policy and societal aspirations of balanced coexistence. If *good living* as a principle was enshrined to encompass the unsatisfied social, legal and economic aspirations of Ecuador's social movements²¹ after the traumas and shocks of the "chaos period" that ended the last century, then we must also accept that the principle as it stands is also an attempt at bringing equilibrium amongst complementary (and often contested) forces such as race, privilege, communal rights, private negative rights, religion, secularism, traditions, the market, ancestral knowledge, global warming and the preservation of nature.²²

By granting *good living* constitutional recognition and integrating it to the Western traditions of hypothetical basic norms²³ the step taken in 2008 has generated further questions regarding as to what exactly has been accomplished by the integration of such a precept. Furthermore has the paper recognition of these societal aspirations amounted to little more than a pyric victory of the masses? Is good living an abstract ethereal aspiration that lacks concrete material effects, much like the 'pursuit of happiness' in the United States Declaration of Independence? How does good living merge with the countries development objectives? If this merger is at all possible how can it be enforced as a legal mandate?

Of course one of the first debates that surfaces is in regards to the "added value" that its inclusion brings. This is comprehensible; as the "advances" within human rights

¹⁹ B. S. Fernandez, L. Pardo and K. Salamanca, 'Buen Vivir en Ecuador: Political Marketing or Project in Dispute? A Dialogue with Alberto Acosta' in Dossier: En busca del Sumak Kawsay, *FLACSO-Revista de Ciencias Sociales*, 48, 2014, 102.

²⁰ Constitution of the Republic of Ecuador, Art. 429: Organic Law of Constitutional Control and Guarantees [Ecuador] Art. 76.

²¹ M. Espinoza, 'La Sociedad Ecuatoriana en Movimiento: 1970 – 1984', in Carrasco Vintimilla (et. A.l), *Estado Política y Democracia en el Ecuador*, Editorial, El Conejo, Quito, 1988, 223.

²² O. Freire, 144–145.

²³ H. Kelsen, *General Theory of Law and State* (2007), 396.

and development discourse have sought to create linkages that in many ways present a similar discourse. However a brief overview of the origins of the human rights and development discourse presents us with an incestuous relationship that rather than advance the possible interests of the Global South reinforce the epistemological positions of the West towards the rest. Hence innovative approaches that can ground foreign concepts under “native” interpretations are needed, for this reason *good living* carries within it the promise of doing so.

- **The Constitutional Change of 2008**

Ecuador’s 2008 Constitution enshrined a development model that sought to redirect public policy through the aspirational materialization of *good living* (Buen Vivir)²⁴. This novel constitutional precept epitomized the triumphs of indigenous as well as other grass roots social movements, through the tangible assertion of collective rights²⁵, environmental sustainability²⁶ and intergenerational responsibility.²⁷ All of which were to be clustered in a development model set out to achieve ‘organized, sustainable and dynamic groups of economic, political, socio-cultural and environmental systems which underpin the achievement of the good way of living’.²⁸

Implementing a new legal framing that incorporates the social aspirations of various and often silenced social movements within Ecuador can be understood as the first step towards the construction of a new epistemological position regarding law, civil society and the State. The attempt at forging an alternate epistemological approach to the power relationships that have been traditionally manifested through the inherited colonial legal system, supposes not only a vindication of an endogenous alternative to societal interaction, but also a thought out attempt at overcoming the parochial and preordained structural relationships that were forged and later inherited from the colonial institutional legacy of yester years.²⁹

An oppositional alternative as the one depicted in the 2008 constitution carries with it a discourse of indigenous, African Ecuadorian and economically marginalized segments of society that have in different, yet in no way minor degrees, suffered the

²⁴ *Constitution of the Republic of Ecuador 2008*, art. 3 (5).

²⁵ *Idem*, art. 10.

²⁶ *Idem*, art. 14.

²⁷ *Idem*, art 317.

²⁸ *Idem*, art. 275.

²⁹ Go Julian Arjomand and Amir Said, Ed. *International Comparative Social Studies : Constitutionalism and Political Reconstruction*. Boston, MA, USA: Brill Academic Publishers, 2007, 92.

continuous impacts of Spanish colonial heritage and the international project of “breeding in modernity” that began with the inaugural 1949 visit of the International Bank for Reconstruction and Development to the region.³⁰ This oppositional and alternate discourse exemplifies how traditionally marginalized and excluded groups have begun wielding the borrowed weapons (of concepts and language) of modernity to secure their own aspirations for societal cohesion.³¹ Clear example of this is the inclusion of the concept of Pachamama³² as a bearer of rights in Ecuador’s European inspired constitutional model, a clear example of the hybridity that has historically characterized the region.

Grafting an oppositional language into the Constitution may very well be a contestation to the failed promises of modernity regarding liberty, equality, peace and the domination of nature, all of which have been increasingly transformed into mounting problems with no solution in sight.³³ The failure of such promises in Ecuador led the country to periods of chaos and a societal implosion that yearned for an epistemological leap that could re-configure and subdue the economic priorities that were dictated from the West to the rest, in an effort to secure not only the anthropogenic elements of society but also the vital cycles and evolutive processes of nature.

In an effort to wield the borrowed weapons of modernity legal efforts have been directed at generating a regional language of rights that reimagines and reconfigures the way law entangles the various dimensions of rights inherited from the West. Through direct application of international human rights treaties by domestic civil servants as well as the *ex post* control of the Inter-American Court of Human Rights (IACHR)³⁴ a window of opportunity has opened towards the development of a constitutionality block that permeates a regional system where the progressive development of rights may be vested on the objectives of the Pact of San Jose³⁵ but also the normative aspirations of hybrid societies. Multilevel

³⁰ Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World*. (2012) Princeton University Press, 24.

³¹ B. de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide*, London, Paradigm Publishers, 2014, p.14.

³² Constitution of the Republic of Ecuador, art. 71.

³³ B. Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, Cambridge, Cambridge University Press, 2002, p. 13

³⁴ L. Burgorgue-Larsen, 'La Corte Interamericana de los Derechos Humanos como Tribunal Constitucional', *Working Papers on European Law and Regional Integration*, 22, 2014, p. 21

³⁵ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, art. 26.

constitutional control is thus a borrowed weapon through which *good living* may be interpreted by local authorities and further enforced by the IACHR as a novel constitutional right the transects all basic human rights.

To this regard *good living* within the Inter-American system can be crystallized as a domestic disposition that further enhances the protection of human rights. As shall be explained in the paragraphs that follow collective rights, environmental sustainability and intergenerational responsibility form the corner stone of this new oppositional language that is to give way to a “hybrid system” where the institutions and legal structures positioned by West meet the local aspirations and social reclamations of the rest.

- **Chaos and Opportunity**

In order to comprehend the inclusion of *good living* as a constitutional precept, one must first review the state of social, political and economic chaos that demanded alternative perspectives towards development. From 1995 onwards Ecuador has been submerged in a state of constant chaos that had amongst its direct political casualties seven presidents, the collapse of the country’s financial system, two Constitutions and continual social instability.

The countries historically marginalized political groups had long been contesting the asymmetrical distribution of wealth that plagued the country throughout its history,³⁶ the constant and escalating environmental degradation and collective rights violations left by oil exploration in the Amazon,³⁷ as well as the intergenerational consequences that would be faced do to a lack of investment in social welfare (as a result of servicing a foreign debt which in 1998 reached 84% of GDP).³⁸

Amongst the most severe consequences experienced during “the period of chaos” is the collapse of Ecuador’s financial system at the end of the 20th century. A collapse that can be attributed to the oligopolistic economic development model inherited from the colony and its further exacerbation through structural reform programs embedded during the 1980s and 1990s.³⁹ Economic and legal reforms that

³⁶ W. M. Grijalva, *Breve Historia Bancaria Del Ecuador*, Quito, Corporacion Editora Nacional, 2008, p. 264.

³⁷ *Pueblo Indigena Kichwa de Sarayaku vs. Ecuador* (Sentence), Inter-American Court of Human Rights Series (27 June 2012) [125].

³⁸ W.M. Grijalva, p. 269.

³⁹ *Ibid*, p. 250.

liberalized the financial sector permitting the abuses that led to its ulterior demise. A brief overview of the country's economic performance during this period presents a Dantean scenario where 70% of the population faced poverty; the state nationalized private financial losses estimated in 2007 at 8.072 billion dollars⁴⁰ (around 11% of GDP in 2011)⁴¹ and public institutions were captured by financial elites that prompted the most severe economic crisis in the history of Ecuador, leaving a total loss of 17% of GDP in 1999.⁴²

However crisis periods as the one mentioned have not been uncommon in Ecuador. Their effects on the population however have varied, as they have traditionally been undemocratic in the distribution of economic surpluses and strikingly democratic in the immiserating of "the damnés". Examples of this are unfortunately abundant in the countries republican history, where for example the 1950's banana boom⁴³ made land-holding elites in the coast rich but also translated to a general life expectancy age of 30.⁴⁴

Deplorable social welfare indicators as the one previously mentioned have traditionally condemned those who did not fit the colonial structures of power that were granted through racial attributes. For such reasons it is unsurprising that Tamayo depicted the Ecuador of the 1950's as a place where 'racial prejudices are present in all walks of social life (...) with particular prominence in Quito, contempt towards everything indigenous is pronounced and there are even those who dare to consider the aboriginal population a burden that impedes and hand ties the possible outcome of the country. Amongst the peasantry, the curious traveller finds that they have been resigned to a patient and fatalist attitude'.⁴⁵

The confluence of the structural discrimination that was carried from the 1950's onwards as well as the variables present in 1999 generated a series of counteracting influences⁴⁶ that subsequently spawned a bifurcation in the history of Ecuador. This

⁴⁰ Ibid, p. 267.

⁴¹ A. Acosta and F. M. Mayoral, (eds). *Situación Económica Y Ambiental Del Ecuador En Un Entorno de Crisis Internacional*, Cuadernos de Trabajo, Quito, FLACSO, 2013), p.13.

⁴² W.M. Grijalva, p. 257-269.

⁴³ Primary resource exports quadrupled during 1939-1944. This was further prompted by the reconversion of former cacao haciendas into plantations. Monetary reserves in the contrary also had a steep rise as the went from 79 million to 591 million, making 1952 the year that most foreign currency reserves were held by Ecuador in all of its financial history. This also highlights the countries historical dependence on primary resources, as by 1958 banana represented 50% of the countries export revenue. R. Q. Lopez and E. S. Charvet, *Ecuador: Una Nacion En Ciernes*, Tomo 1, Quito, Abya Yala, 2013, p.465-468.

⁴⁴ Ibid, p. 470.

⁴⁵ Jorge L. Tamayo, (1951:47) in Lopez and Charvet, p.470.

⁴⁶ R. A. Thiétart and B. Forgues, 'Chaos Theory and Organization', *Organization Science*, Vol. 6, No. 1, Jan. - Feb., 1995, p. 21

“splitting of the road” as understood through the bifurcation analogy capsuled within chaos theory would suggest that Ecuador’s prior “equilibrium” had undergone a series of periodic and chaotic behaviours that increased negative variables such as social, economic and political instability, variables that ultimately led to the “chaos” period⁴⁷ that began in 1995 and is still underway.

From this chaotic period the Constitution of 2008 holds special significance. One of the main objectives of the constitutional project was to “refundar la patria” (the refunding of the nation), a project epitomized by the ‘left turn’⁴⁸ the country and region was and still is experiencing. It would of course be naïve to believe that the legal inscription of aspirations is sufficient for them to be materialized into enforceable rights. However as shall be explained further on, the possibility of creating a constitutionality block that underpins these aspirations within the legal system of Ecuador and possibly the region, is a yet unexplored terrain that may very well promise to reinstate what Boaventura de Sousa Santos has labelled as an ‘oppositional postmodernism that harbours the emancipatory potential of law’.⁴⁹

As a conceptual undertaking, *good living* may also be understood through the lens of ‘communicative action’, where a societal response of maturity has paved the way for an accumulation of insight in respect of the problems and priorities that have traditionally affected “the damnés” of Ecuadorian society. Societal maturity on these issues has been attained and elevated to constitutional normative abstraction,⁵⁰ through the long process of traumas caused by Ecuador’s 1990s “shock period” which ultimately led to constitutional reform. This period encouraged social movements, ethnic minorities and civil society in general to reshape the substantive provisions that had reigned within postcolonial constitutions.⁵¹ A reshaping that may be witnessed in the 2008 Constitution with the inclusion of an extensive plethora of collective rights, the rights of nature and novel policy dictums such as good living.

Through the communicative action process the emancipatory potential of Ecuador’s Constitution could possibly be regained and cemented on aspirations of social

⁴⁷ Ibid, p.20

⁴⁸ S. Levitsky, ‘A surprising Left Turn’ (22) *Journal of Democracy*, 4, October 2011, 92

⁴⁹ B. Sousa Santos, p.12

⁵⁰ P. Johnson, *Habermas: Rescuing the Public Sphere*, Sydney, Routledge, 2006, 43.

⁵¹ Go and Said, 92.

inclusion, redistribution of wealth, environmental sustainability,⁵² reclaiming of national sovereignty and a comprehensive reengineering of the state and its organs around good living⁵³. The major epistemological leap may however be traced to the consolidation of scattered approaches towards societal objectives through the evocation of good living (or good way of living).⁵⁴ A new policy objective that permits an oppositional interpretation of the role law, state and society must play with each other.

The inclusion of good living within the constitutional text allows for it to reside within it as a dormant clause⁵⁵ that awaits the opportunity of implementation, however transforming legal wording into effective legal enforcement may prove to be a challenging hurdle to overcome. Latin American countries that underwent considerable constitutional reform in the past have lived through the hardships of successfully passing such hurdles. Gargarella for instance has repeatedly stressed how Latin American judges (of the time) considered new constitutionally incorporated social rights as nonenforceable or mere programmatic rights.⁵⁶

However, if the process of constitutional development in Ecuador (as well as the region) reflects a communicative action that has fed, bred and nurtured the concept of *good living*, then we are surely before a new constitutional design. A novel design that seeks to include rather than exclude alternate imaginings of society by leveraging on the minimal constitutional changes that were posited at the moment of bifurcation and that hold within them the potential of creating qualitative changes to the system as a whole in an unpredictable form and fashion.⁵⁷

The emancipatory potential of law would thus be substantially regained, as the incorporation of cultural differentiation⁵⁸ in the application and interpretation of the reaches and breaches of rights could be contextualized to the priorities set within the 2008 Constitution. More importantly an expanded yet contextual constitutional interpretation of “universal rights” in Ecuador forwards ‘a means through which individuals could test their world view from a number of points of view, permitting the harmonisation of priorities and subsequent action on the basis of common

⁵² Constitution of the Republic of Ecuador, Art. 66(15).

⁵³ Idem, Art. 3 (5).

⁵⁴ Idem, Art.11 (3)

⁵⁵ Gargarella, 144.

⁵⁶ Idem.

⁵⁷ B. Sousa Santos, *Epistemologies of the South*, 82.

⁵⁸ P. Johnson, *Habermas: Rescuing the Public Sphere*, Sydney, Routledge, 2006, 43, 47.

situation definitions'.⁵⁹ Such a process demands a rediscovery of the emancipatory potential of law as well as the necessary conceptual construction of *good living*.

The following sections will elaborate on *good living* as a concept, how it relates to the realities faced within the legal and policy debates in Ecuador and the region and what significance (if any) it holds in the region and Ecuador's constitutional present and future.

- **The Conflict Between Human Rights, Development and *good living***

How are we to position human rights within the development discourse? Such a query is of unquestionable significance in Ecuador's restructuring of its constitutional model, a reform that carries with it the necessary rethinking of how institutions interact, civil society responds and international obligations are met. Amongst these interactions the role of human rights in promoting, contracting or legitimizing development must be further scrutinized if we are truly to conceptualize the scope and applicability of *good living* as a constitutional prerogative that commandeers societal aspirations in one path or another.

Martí depicted Latin America as a place of mixed roots, endowed of infinite complexities. Simón Bolívar described the region as a "miniature humankind"⁶⁰ that encapsules the various facets, traditions and forms that make up humanity, a melting pot of sorts. If one is to hold these words true then one can also accept that Latin America (and Ecuador) is a hybrid composite of various epistemological positions, societal traditions and aspirations. Hence it should not be surprising to find a Constitution such as that of Ecuador or Bolivia where indigenous, rural and economic disadvantaged groups have laid claim to their aspirations within an instrument (the Constitution) that was inherited from West to the rest and utilized to maintain the parochial structures of power that emerged during colonial rule and survived in the post-colonial world.

Academic theory and state practice (to a greater or lesser degree) has applauded the advancement of a "hard core" of human rights. A core that depicts its self as

⁵⁹ Ibid, 48.

⁶⁰ José Martí in B. Sousa Santos, *Epistemologies of the South*, 52; Simón Bolívar in B. Sousa Santos, *Epistemologies of the South*, 52.

‘universal, indivisible, interdependent and interrelated’,⁶¹ a snapshot that presents to us an inseparable balance of civil, political, economic, social and cultural rights.⁶² Advancing these core rights is in many ways the final objective of modernity, as the securement of a democratic, contractual and homogenising thrust has been dictated as the necessary development path for the Global South. Objectives that promised and heralded democratic peace to the Global South a peace that would be formed through economic development and human rights.⁶³ A democratic system that would lead to the coveted perpetual peace prophesied by Kant, even if such a peace depicted the other as the bearer of an ‘inferior humanity that at the same time affirmed the superior humanity of the tolerant European self.’⁶⁴

By triangulating the relationship between human rights, development and modernity we may illustrate how their shortcomings demand alternate visions of the future from the Global South. Visions that emerge from silence and permit us to overcome the myths of Western philosophy which have traditionally covered up the ‘epistemic location’ of he who speaks and what compels him or her to do so.⁶⁵ Or if on the contrary we remain within an epistemic location where human rights and the development discourse (which are parallel to each other) permit international law, constitutional law and development practices to turn a blind eye to the inherent violence that economic advancement has legitimized in the last hundred years.

This legitimized violence within certain arenas, poises serious questions to the *conditio iuris* between development and human rights as tangible and complementary objectives that are to be ascertained in the Global South’s idealized version of modernity. One does not need to stray far from mainstream debates surrounding international law to find how the exemptions of human rights protections within the area of domestic affairs of a state has masked acts of violence.

Human rights have been lauded and integrated into the systems of many developing countries. However by fixating on human rights achievements (to the standards of

⁶¹ Alternative Approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms, (16 December 1977) Resolution 32/130, art. 1(a).

⁶² P. Alston and R. Goodman, *International Human Rights in Context: Law, Politics, Morals*, ed. Henry J. Steiner, 3rd Edition Oxford, Oxford University Press, 2007, 263.

⁶³ B. M. Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World*, Princeton, Princeton University Press, 1994), (accessed 25 April 2015).

⁶⁴ N. G. Shiller, ‘Identities: Global Studies in Culture and Power’, 2012 (19: 4), 522 (accessed 16 April 2015) <http://dx.doi.org/10.1080/1070289X.2012.741525>

⁶⁵ R. Grosfoguel, ‘The Epistemic Decolonial Turn: beyond political economy paradigms’ in Walter D. Mignolo and Arturo Escobar (Eds.), *Globalization and the Decolonial Option*, 67.

the West) as a proxy towards societal advancement seems to overlook the epistemological realities of its origins in which violence is not forbidden but simply reprehensible within specific scenarios. An example of which would be the mass deportations of 1.3 million people by the Khmer Rouge in 1975, which were labelled as crimes against humanity in contrast to the mass deportation of 33 million by the Indian government for developmental purposes, which were labelled as a social cost of development. This is not to say that Khmer Rouge committed a lawful act, but rather that economic development may and will supersede the enforceability of human rights.⁶⁶

Creating a social totality approach towards societal wellbeing via *good living* not only legitimizes the social aspirations of various Ecuadorian social movements but in addition overcomes the constant recourse to economic violence that modernity institutionalized through the human rights and development discourse.⁶⁷ This is of special importance in the current debates in Ecuador where the State has taken centre stage as the motor that will herald a new age of science, technology, knowledge and innovation.⁶⁸ A motor that at times must repress its citizens in order to guarantee the coming of modernity, or in other words a guarantor that would gladly sever the head to save the body.

In Guatemala repression of similar characteristics was targeted at the rural poor and indigenous communities as a result of State led land expropriations that left 200,000 dead⁶⁹ in an attempt to further enhance the countries agro-industrial complex which benefitted the economic interests of the ruling elite and in particular those of the United Fruit Company.⁷⁰

Ecuador has also experienced similar “modernising thrusts” in the past, one of which received renowned international attention due to the favourable judicial verdict it obtained before the Inter-American Court of Human Rights. The *Caso Pueblo Indígena Kichwa de Sarayaku v Ecuador* showcased how the modernising thrust of oil

⁶⁶ B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge University Press, January 2004, 195.

⁶⁷ Ibid.

⁶⁸ National Secretary for Planning and Development of Ecuador, *National Plan for Development* [Plan Nacional del Buen Vivir] 2013-2017, 17. (Accessed: 7 August 2013) <http://www.buenvivir.gob.ec>

⁶⁹ ‘Guatemala Recuerda la matanza en la embajada española’ [Guatemala Remembers Killings at Spanish Embassy], RT Actualidad (online) <http://actualidad.rt.com/actualidad/view/6698-Guatemala-recuerda-matanza-en-embajada-espanola-que-dejó-37-muertos>

⁷⁰ Eduardo A. Velázquez Carrera, ‘Decreto 900: entre el mito y la realidad’, *El Periodico* (online) (8 November 2013) <http://www.elperiodico.com.gt/es/20130626/opinion/230188/>

exploration through seismic detonations resulted in the destruction of caves, water sources, underground water ways, deforestation, destruction of native species and food sources of the Sarayaku people.⁷¹ The IACHR found the Ecuadorian state responsible of multiple human rights violations amongst which are personal liberties, life, economic, political, judicial, due process of law, speech, private property, communal land and the right to dignity.

Rajaopala has similarly attributed such a paradox in the human rights discourse (the possibility of ignoring or condoning certain forms of violence) to its 'pathologically wedded model of state in the economy'. A pathology which is expressed by the expansion of the state when progressing specific categories of human rights (in Latin America's case economic and social) but at the same time the retreatment of the state which results in an abortive measure towards the rights that have been gained. This pathology according to Rajagopal is derived from the development discourse,⁷² a pathology which of course does not represent a novel conception within human rights, as the protection of individual negative rights in most cases legitimizes the utilization of state prerogatives, even if such actions further exacerbate human rights deprivations.

The endemic imbalance between the three pillars of regulation (market, state and community) posited by Boaventura,⁷³ favours the market and is best exemplified in the obscene expansion of protective measures that secure private negative rights in detriment of the community. In the Global South this has been played out through the nation building objectives of various governments, and as some scholars have pointed out the legitimizing discourse towards the entrenchment of institutionalized violence that was adopted from the modernization theories that were so popular after World War II as a native 'civilising mission' was put in place between state and society.⁷⁴

Adding to Boaventura's pillars of regulation is Rajagopal's comments on what "human" is to signify within the human rights/development discourse. Rajagopal stresses the notion that "human" is to be understood as the *homo oeconomicus* that

⁷¹ Inter-American Court of Human Rights, *Ficha Técnica: Pueblo Indígena Kichwa de Sarayaku Vs. Ecuador* (Accessed 7 August 2015) http://www.corteidh.or.cr/cf/jurisprudencia/ficha.cfm?nId_Ficha=206&lang=es

⁷² B. Rajagopal, p. 196

⁷³ B. Sousa Santos, 3.

⁷⁴ B. Rajagopal, 199.

operates as a rational decision maker which is to be confined within the ‘moral possibilities of the state and the material conditions of the market’ a conceptualization of humanity that is further aggravated by a prevailing notion of scarcity, which is used to legitimize acts of violence against individuals and communities as ‘necessary forms of governance’.⁷⁵ A notion of humanity and ‘social totality’⁷⁶ that contradicts the premises enunciated in Ecuador’s *good living* principal that seeks to balance relationships between individuals and from the community towards individuals, within the overarching efforts of achieving a ‘subjective wellbeing of tangible and intangible dimensions’.⁷⁷

The notion of scarcity and material relationships could be viewed as conceptual anomalies within pre-Colombian societies. The Inca Empire for example displayed a vast network of food silos and storage facilities called *qollqa* throughout its domains in an effort to secure adequate food distribution to all its peoples.⁷⁸ Through centralized state planning (not to be confused with centralized state production) scarcity was never an issue within the empire. Communal actions as such could also be witnessed today through community safety nets like the *minga*⁷⁹ in Ecuador,⁸⁰ a form of communal reciprocity that does not correlate with the notion of scarcity that defines the actions of the *homo oeconomicus*.

The insidious, unbalanced and dubiously justified relationship between state, market and community has been a prominent feature within the development discourse. In this sense one must also call into question the applauded Right to Development⁸¹ that emerged in the 1980’s as a possible institutional legitimization that sought to further secure the prerogatives of States in the Global South when they attempted to “catch up”. For this reason the necessity of generating alternate visions and paths towards societal wellbeing are necessary, a path that must be experienced through the lens of legal pluralism, multiethnic dialogue and multiculturalism, facets that

⁷⁵ B. Rajagopal, 199.

⁷⁶ Anibal Quijano, ‘Coloniality and Modernity/Rationality’, in Walter D. Mignolo and Arturo Escobar (Eds.), *Globalization and the Decolonial Option*, Hoboken, 31.

⁷⁷ Ramirez (2010:21) in A.L.H. Capitan and A.P. Cubillo-Guevara, ‘Six Open debates on *Sumak Kawsay*’, in *FLACSORrevista de Ciencias Sociales Iconos*, 48, Quito p.31

⁷⁸ R. Alan Covey, *How the Incas Built Their Heartland: State Formation and the Innovation of Imperial Strategies in the Sacred Valley, Peru*, University of Michigan Press, Michigan, 2006 p.173-174.

⁷⁹ Minga: could be conceptualized as the reciprocal exchanges between a household and the community.

⁸⁰ A. J. Faas, ‘Reciprocity and Development in Disaster-Induced Resettlement in Andean Ecuador’*Graduate Theses and Dissertations*, University of Southern Florida, January 2012 (accessed 15 April 2015) in <http://scholarcommons.usf.edu/etd/4317>.

⁸¹ J. A.Guevara, ‘El Derecho al Desarrollo y la Pobreza’ en *Derecho y Pobreza*, Editores del Puerto, Buenos Aires, 2006, p.209.

have escaped, been ignored or undermined in the broad discourses of policy, legal reform and the state.

This of course is not to suggest that the advances in human rights are to be dismissed within the conceptual reconfiguring of how societies define their normative responsibilities to one another, but rather that such “advances” must undergo an endogenous appropriation where hybrid understanding and conceptual cross pollination takes place. Good living presents a possibility to reconfigure societal and normative aspirations that reconceptualization the interaction that rights (both individual and collective) must have with the advances of Western modernity. Such a rethinking or ‘de-linking’⁸² would permit a reconfiguration of national priorities on the basis of an alternate overarching constitutional principle (*good living*) that by means of appropriation of the Western discourse manages to reconfigure it and if possible position it under the limitations of new endogenous priorities. In doing so “the damnés” could exercise a legitimatization of their demands, counteracting the ‘liquidity of modernity’, where people are disembedded from social institutions resulting in a legal and political reality that is incapable of adjusting to sociocultural complexity and its constant transformation.⁸³

The integration of *good living* into the academic discussions surrounding Andean constitutionalism and its interactions with the IACHR could very well create a nexus that vindicates the visions and aspirations of the damnés into “mainstream” discourse. This would ultimately allow for grass roots demands drafted into the 2008 Constitution to transcend the domestic and international barrier inherent to predominant Euro-American legal tradition. Such an objective is achievable by the cross pollination of the *good living* constitutional principles, international human rights law and the special prerogatives contemplated within the Inter-American system that allows for their possible unification within the constitutionality block.

- ***Good Living and Latin American Constitutionalism***

The constitutional process of 2008 must be viewed within the historical socio-economic context that preceded it, as well as the constitutional changes that took

⁸² W. D. Mignolo, 307

⁸³ R. Banakar, ‘Law and Regulation in Late Modernity’, in Reza Banakar and Max Travers, *Law and Social Theory*, Hart, Oxford, 2013, 311.

place regionally in the scope of the last 100 years. Such introspection is necessary if one is to understand the theoretical significance of framing *good living* as a constitutional principle. It is not by coincidence that Ecuador's constitution nests within it novel concepts such as rights of nature, good living or a vast plethora of collective rights. All these legal assertions are a direct contestation to the preceding constitutional model sanctioned in 1998,⁸⁴ but also a progressive development within constitutional drafting that was initiated in 1917 with the Mexican Revolution and the Magna Carta that followed.⁸⁵

Since its independence Latin America's constitutional experiences have swayed between domestic interest and foreign epistemological imports. A fact that is made obvious when we examine the academic debates of the first half of the 19th century where institutional building, legal doctrine and reform was sought within successful foreign models like the United States Constitution or the French Revolution. This outwards perspective was based on the premise that local knowledge and practice should be dismissed if the revolutionary processes were to institute the 'true example of human logic'.⁸⁶

By selecting and adopting the best practices of the West, the rest would hopefully be set on a path that would lead to similar success. Through such a predisposition Latin America entered the 20th century with a constitutional outlay that mirrored the liberal/conservative doctrines of the West. A system that favoured state neutrality and concentrated authority but also negated the possibility of including social clauses that benefitted the most disadvantaged within society or that would privilege widespread political participation.⁸⁷ Such a system underlines the favouritism expressed by Boaventura within the three pillars of regulation, as they have traditionally been inclined at constructing a hyper inflated market in detriment of the community.

However the adoption of foreign constitutional models not only undermined the practices and traditions of Latin America, but also obliterated any possibility of attending issues related to race, ethnicity, social classes and wealth disparity.

⁸⁴ Political Constitution of the Republic of Ecuador, Riobamba, 5th June 1998 – 10th October 2008.

⁸⁵ Roberto Gargarella, 'Latin American constitutionalism: Social rights and the "engine room" of the constitution' in Cesar Rodriguez Garavito (ed.), *Law and Society in Latin America: A New Map*, Hoboken, Taylor and Francis, 2014, 85.

⁸⁶ R. Gargarella, '*Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution*', (2013) Oxford University Press, New York, 62-65.

⁸⁷ *Ibid*, 84.

Unsurprisingly internal tensions within the system soon followed, “tensions” that led to the “first wave” of constitutional changes in the region: Mexico (1917), Brazil (1937), Bolivia (1938), Cuba (1940), Uruguay (1942), Ecuador and Guatemala (1945) and Argentina and Costa Rica (1949). Of all these changes, one aspect is present in all countries, all enshrined a ‘social constitutionalism’ that was first laid down in Mexico and predated the Weimar Constitution of 1919.⁸⁸ For such advances Gargarella has labelled Latin American constitutionalism as specially ‘extensive in social rights’, an advance that goes beyond European constitutionalism and that contrary to critical presuppositions should not be represented as a populist exercise but an attempt at creating minimum social spaces for a traditionally displaced civil society.⁸⁹

Once the first wave had passed, a series of political, social and economic changes once again swept through the region. From a period that roughly expands from 1980 – 2010 a “second wave” of constitutionalism was experienced. However this time around the situations that sparked the change had taken other tones and represented a new social expectation that had mutated from the first wave but maintained its marked social priorities. Two fundamental reasons can be attributed to these changes 1) the oppression the region had undergone since 1973 through different authoritarian regimes and 2) the market orientated structural adjustment programs that were demanded of the region after the 1980’s debt crisis.⁹⁰

The new wave mirrors the substantial failures of post war welfare states in securing the technological, social and ecological conditions that would in turn protect the exercise of basic (human) rights. Such a deficiency has been significantly compounded by the relentless economic globalization that has been underway and the diminishing possibilities of the nation state in securing said rights, in part due to markets driving out politics and the state losing basic elements that define its own legitimacy.⁹¹ A process that underlines the systemic loss of the emancipatory potential of law but also makes evident the cracks within the three pillars of regulation.

⁸⁸ Ibid, 85.

⁸⁹ F. P. Romeo, ‘Constitucionalización de un sistema integral de derechos sociales: De la Daseinsvorsorge al Sumak Kawsay’, in Ramiro Avila Santamaria, Agustín Grijalva y Rubén Martínez (Eds.), *Desafíos constitucionales: La Constitución ecuatoriana de 2008 en perspectiva*, Ministerio de Justicia y Derechos Humanos, Quito, 2008, 46-47.

⁹⁰ Gargarella, 85.

⁹¹ Johnson, 103.

As a natural response to the widespread human rights abuses that were experienced in the past, most countries gave formal recognition to a vast plethora of international instruments that secured human rights. Following suit the constitutions of Brazil (1988), Colombia (1991), Argentina 1994, Venezuela (1999), Ecuador (2008), Bolivia (2009) and Mexico (2011) instituted new approaches to securing human rights through institutions and a system of checks and balances on the state. However from a development side the constitutional changes were an immediate response to the constitutional modifications that had taken place in the region in order to implement the various economic reforms that were demanded by International Monetary Fund.⁹² Constitutional changes that in the case of Ecuador paved the way for institutional, political and economic chaos to flourish.

Paving the way to chaos, Ecuador's 1998 Constitution deepened the economic liberalization that had begun twenty-five years earlier. We can illustrate our point by mentioning that the short lived Constitution eliminated the so called "areas reserved for exploitation of the state" making viable the privatization of various state held sources of income such as natural resources, water, electricity and communications.⁹³ The 1998 Constitution will however be remembered for its nefarious Transitory Disposition 42; a backdoor that opened the way for the Central Bank to salvage the countries private financial sector for a period of two years,⁹⁴ a salvaging that was to be the final capitulation of the country's financial, legal, economic and political structures.

The constitutional reengineering that took place in 2008 should be understood as a societal response that Habermasian thought would attribute to the fact that both neoliberalism and postmodernism have ignored the necessity of re-establishing equilibrium between opening and closing the tendencies that shape modern democracy, openings that in Ecuador's case were continuously expanded for a period of at least 25 years.⁹⁵

Partially responsible for the opening demanded by modern times has been the thrust of human rights embedded within the development discourse imposed on the Global South. This same "thrust" has constrained and shackled the internal elements that

⁹² Ibid,87.

⁹³ J. J. Paz and Mino Cepeda, *Vision historica de las constituciones de 1998 y 2008*, Insitut de Recherché et Debat Sur la Gouvernance (accessed 15 April 2015) <http://www.institut-gouvernance.org/fr/analyse/fiche-analyse-449.html>

⁹⁴ W. M. Grijalva, 259.

⁹⁵ P. Johnson, 102.

permit social totality equilibrium, by imposing priorities that are foreign or lack any forms of societal cohesion. These epochs of unrestrained “openings” have been responsible for the chaos periods that have brought Ecuador on the path between modernity and *good living*, as the necessary formation of national identity through endogenous equilibrium has been averted. Thus the constitutional allegiances that were formed in 2008 attempted to legitimize a political identity within a complex and multicultural society.

Good living as a constitutional concept is Ecuador and Bolivia’s response to such shortcomings, putting forth the internal weights that generate equilibrium within postmodern chaos. For these reasons the 2008 constitutional endeavour is a systemic response that attempts to redefine the collective identity of Ecuador through ‘shared allegiances and legally sanctioned convictions’⁹⁶ that shape a ‘democratic citizenship’⁹⁷ which seeks to enhance collective rights, environmental sustainability and intergenerational responsibility through good living.

This brief historical exercise displays for us three important facts that led to the 2008 Constitution. Firstly that Ecuadorian constitutional reform was not an isolated populist venture, but rather a regional response to systemic dysfunctions, secondly the “landmark achievements” of 2008 were to some degree already present in 1998, and finally, the new constitutional model was a direct contestation to the socio-economic abuses that had preceded it.

One need only compare articles 242 - 244 of the 1998 Constitution with article 275 of the 2008 Constitution. Where the former depicts a ‘social market economy’ that ‘secures competitive markets’ and ‘macroeconomic equilibriums’ the latter defines a ‘development regime’ that is based on ‘the organized conjunction of the organized, and sustainable dynamism of economic, political, socio-cultural and environmental systems that guarantee the realization of good living’. The inclusion of nature within the lexicon of the 2008 Constitution is part of the communicative action that has taken place in Ecuador as society has responded to modernity’s failed attempt to address or resolve the perplexing environmental concerns that surround us, a crisis that Escobar has labelled as the ‘after nature epoch’.⁹⁸

⁹⁶ Ibid, 103.

⁹⁷ Ibid, 104.

⁹⁸ Arturo Escobar, “After Nature: Steps to an Antiessentialist Political Ecology,” *Current Anthropology*, 40, no. 1 (1999): 1–30.

This dramatic shift in language delineates the Constitutions underlying reactionary intention. Much like the 1917 revolution that sought the protection of social rights, the second wave of Latin American constitutionalism is a societal response at a system that deepened social inequality and eliminated welfare safety nets. Such changes must be pointed out in our current discussion for the simple fact that if we are to mindfully conceptualize alternate voices and options towards societal wellbeing, illustrations of the epistemic and historical shifts within the region permits a holistic understanding of what the selected and inscribed constitutional principles sought. For such a reason *good living* as a constitutional principle must not simply be categorised as an incomprehensible, uncompleted or epistemologically diffuse concept, but rather as a concretion of underlying regional and domestic reclamations.

One is tempted to push the conceptual understanding of *good living* to the limits of its interpretations. Much like the first and second wave of Latin American constitutionalism, the 2008 process was a response to domestic and external shocks, *good living* as a conceptual undertaking is thus a conceptual construction that originates from various social movements as well as traditionally excluded groups. For such reasons *good living* should be constructed as an alternate discourse towards societal wellbeing and a new guideline of the relationship between state, society and the economy.

Constitutional mandates such as food sovereignty (art. 13), grassroots solidarity economy (art. 283), use of water through environmental sustainability (art. 282), rights of nature (art. 71), native title (art. 57.4), attention to climate change (art. 414), conservation of biodiversity and inter-culturalism (art. 249) cannot be read *in absentia* of the all encompassing *good living* mandate that demands that state and civil society secure its attainment. What this means is that *good living* far from being an incomplete mandate or a normative statement with no “practical” baggage, is rather the succinct and synthesized conceptualization of the second wave of constitutional reforms that took place in Ecuador and possibly the region.

If we are to build the conceptual bridges that have been forwarded by Decolonial, oppositional postmodernism or critical theory, then we must come to terms with the fact that Latin America is not one, but many realities. A place where pre-Colombian traditions have merged with Western ones. Where kaleidoscopic interpretations and

beliefs have come together to create local interpretations of reality like the Santa Muerte in Mexico or the Mama Negra in Ecuador. One cannot profess the existence of alternate voices, pluriculturality and intercultural communication if we are not to accept the simple fact that Latin America is a place of conceptual hybrids. Were an indigenous can comprehend the reality of a mestizo and vice versa. For these reasons *good living* is far more than a simple legislative nod at the masses, it holds within it the potential to hear the damnés and crystallize their demands. A process that can be conceived through a ‘critical border thinking’ that connects the different experiences of exploitation and brings forth the colonial and imperial differences that have been institutionalized and reproduced for the last 500 years. Thus critical border thinking connects ‘pluriversality into a universal project of delinking from western modern rationality and the building of other possible worlds’.⁹⁹

Alternate epistemic spaces as the one carved out by *good living* must be further analysed. Not only is this analysis warranted do to the various legal considerations it raises and the historical process that made it a reality, but also because the epistemic space is part of a larger multicultural transformation that has been underway since the last decades of the XX century. We are faced with nothing short of an “epistemological leap” that attempts to democratize interethnic relationships through institutional and constitutional change. A leap that interiorizes the contestations of the indigenous and afro-Ecuadorian movement but also gives us the possibility of constructing a hybrid system¹⁰⁰ that allows for cross-pollination of concepts, ideas, aspirations, beliefs and objectives.¹⁰¹

Coming to terms with this hybrid reality, also allows to free ourselves from idealized and romanticized interpretations of indigenous life in the Andes, by breaking these conceptual shackles the Rousseauian postmodern noble savage is forsaken and we can set in motion a dialogue that integrates rather than differentiates.

However *good living* as a “new” concept runs the risk of being transformed into something other than what it was intended to represent. This danger is two fold; first the reformers of the 2008 project fetishized the inclusion of various social rights, but neglected the necessary disruption of traditional forms of vertical power

⁹⁹ Walter Mignolo, 352.

¹⁰⁰ M. Mei-hui Yang, ‘Putting Global Capitalism in its Place: Economic Hybridity, Bataille, and Ritual Expenditure’, *Current Anthropology* (41), August/October 2000, 477-509.

¹⁰¹ P. Hollenstein, *La Reproduccion de la Dominacion Racial: Experiencias de una familia en Quito*, Abya Yala, Quito, 2009, 180.

that lies within the ‘engine room of the constitution’,¹⁰² secondly as any constitutional principle *good living* is a mandate for optimization¹⁰³ that must undergo constitutional interpretation for it to be further developed within Ecuadorian legal *praxis*.¹⁰⁴

A risk that is exacerbated by the ‘competitive authoritarianism’¹⁰⁵ that has taken place in Ecuador as a result of the untouched forms of vertical powers within the engine room, as well as the augmented executive powers granted in the Constitution through article 147. This not only poses a threat for the conceptual flourishing of *good living* but also its deformation into a legitimizing mantra that covers the abuses it was set out to contain. A risk that is best exemplified in the actions taken by the Executive since 2006 in its appropriation, deformation and marketing of *good living*. Not to mention the dubious constitutionality of continuous public policy execution that directly comes into conflict with its realization.

- **The role of the Inter-American Court of Human Rights as a guarantor of *good living***

Despite the possible limitations competitive authoritarianism or the appropriation of *good living* by the Executive may ensue; one important actor must be made present in the consolidation of its constitutional configuration. The Pact of San Jose, which installs the American Convention of Human Rights, also consolidates through article 33 the Inter-American Court of Human Rights.

The Court has amongst various competencies the interpretation and application of fundamental rights that are protected under the Convention as well as the subsequent treaties that are ratified within the Inter-American System. This also allows it to assess the legitimacy of domestic laws of its member states, with the mandates of the Convention. Through such actions it is granted competence to conduct the interpretation of the so-called conventionality block, which is akin to the famous “constitutionality block”.¹⁰⁶

¹⁰² Gargarella, 89

¹⁰³ R. Alexy, ‘El Derecho general de libertad’, en *Teoría de los derechos fundamentales*, Centro de Estudios Constitucionales España, 1997.

¹⁰⁴ R. A. Santamaría, ‘Los principios de Aplicación de los Derechos’, in *Nuevas Instituciones del Derecho Constitucional Ecuatoriano*, INREDH, Quito, 2009, 27.

¹⁰⁵ S. Levitsky and J. Loxton, ‘Populism and Competitive Authoritarianism in the Andes’, *Democratization*, 2013, Vol. 20:1, 121.

¹⁰⁶ L. Burgogue-Larsen, p. 17.

This attribution permits the Court to conduct a wide array of revisions of the coherence of internal policy, legal and constitutional measures in the quest to secure the attainment of human rights (collective and private). Such a characteristic is exemplary of Latin American constitutionalism, where only a few zealous guardians of their sovereign powers refuse to allow such power to a supra national institution.¹⁰⁷

In Ecuador such attributions are further qualified by its Constitution, which states that international human rights instruments will have direct applicability within domestic courts seeking to further *pro homine* principals through non-restriction of rights and open clause provisions.¹⁰⁸ A mandate that is further encapsulated in article 424 which orders that ratified international human rights treaties that grant more favourable rights prevail over any other legal norm or public action. In these lines article 426 also obliges judges, administrative authorities and public servants to apply the constitutional provisions of international human rights instruments if they are more favourable than those expressed in the Constitution, even if the interested parties do not invoke them. This is also broadened in the articles next paragraph, which states that the rights enshrined in the Constitution and international human rights instruments must have direct application and immediate compliance.

Such constitutional guarantees cannot be read as anything else than a widening of conceptual configurations that seek to secure collective and individual rights. In addition to the domestic constitutional frame, the attributions of the Court elevate domestic constitutional proxies to the consolidation of a regional human rights system that checks and balances domestic legal and political actions. For this reason some have argued that the interconnectedness and interrelation between regional constitutional systems and the international human rights *lexis* is a reality.¹⁰⁹

Furthermore the Court also has the possibility of reviewing draft legislation within domestic legal systems an attribute that mimics the functions of a domestic Constitutional Court,¹¹⁰ however it must be pointed out that such attributions are limited to each state derogating which ever law is found to be inconsistent with the Inter-American Human Rights system. In Ecuador however it would be hard to

¹⁰⁷ Ibid, 21.

¹⁰⁸ Constitution of Ecuador, art. 417

¹⁰⁹ L. Burgorgue-Larsen, p. 17.

¹¹⁰ Ibid, 5.

question the validity of any law or public action that has over its shoulders the inherent vice of inconformity to the Inter-American Human Rights Convention as it would lack domestic validity through article 424 of the Constitution.

Even if local authorities refused to implement the mandates of the Court, its pronouncements on such matters would permit domestic constitutional judges the possibility of ordering the judiciary to comply with said mandates, obliging judges to conduct an interpretation that is coherent with the interpretation of the law, the Constitution and the Inter-American system. Consolidating this constitutionality block from the local to the supra national permits human rights to take centre stage, but also to configure itself as part of the second wave of Latin American constitutionalism that sought to put in check the human rights abuses of the 1970 - 1990's.

By creating such a unique system the Inter-American option permits to further advance the progressive development of regional human rights conceptualizations that are in concordance with the societal aspirations of the each country and the region. Such a conceptual leap permits a new epistemology to set in, one that secures collective and individual rights before economic interests. It also attempts to overcome the inherent inefficacies the development and human rights discourse implanted through the conceptual configuration of humanity through the lens of the "rational" *homo oeconomicus*.

This new lens cedes the gates that permit a hybrid understanding of human rights through *good living* to form. The fact that *good living* as a constitutional precept is a work in progress of sorts, holds within it the reclamation of human rights, but also a vindication of a social totality that integrates the damnés into political, social and economic reality. In order to do so both the Inter-American system and Ecuador's Constitution have within in them the mechanisms that reinstate the emancipatory potential of law, shifting from the pillars of market and state towards community.

Shifting the pillars of regulation also opens the door to incorporate alternate understanding of reality that are present in Ecuador and through its vast legal pluralism, product of its multicultural social fabric. Forms of legal pluralism that consolidates indigenous communities right to administer ancestral law under the

specificities of the Constitution.¹¹¹ This finds special coherence with the obligations that were set out in the 169th Convention of International Labour Organization¹¹² and the United Nations Declaration on the Rights of Indigenous Peoples'¹¹³ that stipulate the rights of indigenous and tribal peoples' in independent countries. A trend that is shared by other countries to greater or lesser degrees within their constitutions examples of which can be found in the Constitutions of Venezuela (1999) and Colombia (1991). The Inter-American Court has further qualified these rights through landmark cases such as the *Mayagna Awas Tigni*, which stated the collective right of developing identity, culture and economic activities within their territories. ¹¹⁴

Interpretations such as the one mentioned above have also permitted the Court to ponder the relationship between individual and collective property rights. To this effect the Court has established that it cannot conceive (within the Inter American System) a right to property that is enforceable solely through the most traditional methods of interpretation, but that it should be taken into consideration (by the Court) through its collective significance, permitting to interpret its exercise and use in a form that is in accordance with the cultural specificity of each people.¹¹⁵ Of course such an interpretation is based on the legal conception that indigenous law covers the particular situation of the Other, however an integral and consolidated view of the Inter-American constitutionality block could hardly argue that such advances in the protection of human rights should not be extended to the general population, specially in countries like Ecuador where being indigenous or not is a matter of self identification and not racial categorization. Not doing so would imply that the law that governs indigenous people in Latin America is a construction built to deal solely with the "other", a conceptualization that of course has coherence within a structurally discriminate Western conception of rights, but holds little to no ground in the constitutional regime of Ecuador and possibly the Inter-American system as a whole.

The Court has in other occasions attended matters of Ecuadorian law regarding how constitutional and legal mandates affect the full enjoyment of rights, dispositions

¹¹¹ Constitution, Art. 171.

¹¹² Ratified by Ecuador on May 15th 1998.

¹¹³ UNGA Res 61/295 (10 December of 2007) UN Doc A/Res/61/295

¹¹⁴ L. Burgorgue-Larsen, 'La Corte Interamericana de los Derechos Humanos como Tribunal Constitucional', Working Papers on European Law and Regional Integration, WP IDEIR (22) 2014, 15.

¹¹⁵ *Ibid*, 16.

that are not only relevant within the interpretation and compliance to the Inter-American system¹¹⁶ but that also pose a direct obligation upon the Ecuadorian state to meet such obligations within the confines of domestic and international law. This holds special relevance when we are faced with a new and novel constitutional concept such as *good living*, as it would be fair to induce that Ecuador's *pro homine* principle and the societal guarantees that *good living* bring could be perfectly enforceable on a local and international level if the correct conceptual construction and normative development takes place. This of course is a task that involves the Executive, Legislative and Judicial branched, but above all Ecuador's Constitutional Court who would be the responsible for interpreting¹¹⁷, adapting and harmonising the constitutionality block. This course would of course carry some profound legal connotations with it.

However the reach of the Court is not limited solely to Ecuador's domestic matters. Recently the Mexican Supreme Court has also ruled that all Resolutions of the Inter-American Court are of mandatory compliance by the State. This of course holds special significance as the case that prompted the Supreme Court to pronounce such a verdict would ultimately hold the Mexican State accountable for acts of rape and obstruction of justice committed by the Mexican armed forces.¹¹⁸

Interpretations as the one previously forwarded further demonstrate a possible regional and domestic thrust against the traditional pillars of regulation. In doing so the Court has permitted its interpretations to always include (and not exclude) the socio-political realities of contemporary societies.¹¹⁹ For such a reason *good living* as a constitutional principal that seeks to safe guard the rights of societal totality through collective rights, environmental sustainability and intergenerational responsibility cannot be cast aside as conceptual construction that proposes a new view of development. As such *good living* as part of Ecuador's constitutional and supra national legal reality is constituted as a progressive development within the Inter American Human Rights system. A conceptual framing that seeks to vindicate, secure and exercise the social, political, civil, economic and cultural rights promised by modernity through the societal priorities casted in 2008 and succinctly enclosed

¹¹⁶ *Sarayaku v. Ecuador*, [125].

¹¹⁷ Constitution of Ecuador, art. 423.

¹¹⁸ "Resoluciones de La CoIDH Son Obligatorias: Corte," *EL INFORMADOR* (accessed 26 April 2015) <http://www.informador.com.mx/mexico/2015/587847/6/resoluciones-de-la-coidh-son-obligatorias-corte.htm>.

¹¹⁹ Burgorgue-Larsen, 18.

and enunciated within *good living* permitting it to be applied and developed not only domestically but within the Inter-American system through interpretations and decisions of the Court. For these reasons, *good living* as a constitutional precept is not an idealization of Andean culture or a nod to the masses but a hybrid legal concept that brings the West towards the rest and permits a new development model to be instituted.

- **Bifurcation and the option of *Good Living***

Within chaos theory the possibility of a system reversing is extremely low, as the system will probably not find itself again in the same situation.¹²⁰ Of course such a depiction of systemic chaos demands that the variables that gave way to chaos were so profound that the possibility of the same variables ever surfacing again are unlikely if not impossible.

Such systemic chaos serves as an analogy for the events that took place in Ecuador in the final decade of the XX century. Taking the cue from Gargarella's remarks regarding the second wave of Latin American constitutionalism in Ecuador, the fetishism on expanding social rights has left the "engine room" of the constitution untouched. An engine room that holds within it the traditional forms of vertical power that Ecuador has historically experienced. E

Expansive Executive prerogatives instated into the 2008 Constitution seem to confirm Levitskys' claims that a populist and competitive authoritarianism has taken under its control the judiciary and legislative powers. Furthermore the over extension of such power seems to be legitimized by the apparent economic thrust the Correa government has instituted through a prolonged surplus of oil revenues. Through larger yet publicly funded and sponsored productivity, high public expenditures and low unemployment,¹²¹ have permitted a cognitive dissonance between political powers and democratic principles..

By not reforming the vertical institutions of power that have traditionally aborted societal wellbeing in Ecuador the constitutional project of 2008 and the emancipatory potential of *good living* as a new pillar of law has been aborted or at the

¹²⁰ R. A. Thiétart and B. Forgues, p. 21.

¹²¹ Agencia Publica de Noticias del Ecuador y Suramerica –Andes, '*Presidente Rafael Correa resalta desarrollo de Ecuador en materia social, económica y energética*', (accessed 23 April 2015)

very least detained. This cannot however be equated to it being inapplicable. As has been demonstrated through the Inter-American system and Ecuador's Constitution the legal prerogatives that permit the bifurcation towards *good living* are there to be taken.

However an intellectual, academic, social and individual exercise is required if Ecuador is to present its endemic response to modernity. Such demands from Ecuador's people are not naïve, as can be referenced from the 65% approval the 2008 Constitution was able to secure.¹²² Such a vast and multifaceted source of civil society approval demonstrates the urge for new paths towards the construction of alternate options of societal structuring to be taken. It also underlines the general social discontent the preceding chaos period ensued. How Ecuador emerges from the bifurcation of modernity and *good living* is yet to be seen.

Notwithstanding, the crucial epistemic leap has already been taken by placing *good living* within the Western institutions of law. Although *good living* currently resides within the constitutional text as a mere dormant clause, its inscription as a legal mandate showcases a "window of opportunity" for alternate voices and world to come forth. Such a step presents not only a historical opportunity, but obligation on Ecuador to further develop the hybrid social constructions that were brought together by grass roots social movements, indigenous, blacks, montubios and civil society when they sanctioned *good living* as a vindication of their rights, humanity and effort to remedy their condition as damnés within Ecuador's postmodern, colonial, racial and economically stratified society.

Good living thus holds the possibility of reinvigorating law with the emancipatory potential Boaventura demands. Furthermore the communicative action that took place in Ecuador and Bolivia, must not be left aside as it holds the possibility of presenting a plausible, enforceable and novel path that leads past the bifurcation of modernity, towards not one but many diverse and possible worlds.

¹²² Haroon Siddique and agencies, "Ecuador Referendum Endorses New Socialist Constitution," *The Guardian* (accessed 22 April 2015) <http://www.theguardian.com/global/2008/sep/29/ecuador>

Bibliography

A Book and Journals

Acosta A., and Mayoral, F. M., (eds). *Situación Económica y Ambiental Del Ecuador En Un Entorno de Crisis Internacional*, Cuadernos de Trabajo, Quito, FLACSO, 2013).

Alexy, R., 'El Derecho general de libertad', en *Teoría de los derechos fundamentales*, Centro de Estudios Constitucionales, España, 1995.

Alston, P. and Goodman, R., *International Human Rights in Context: Law, Politics, Morals*, ed. Henry J. Steiner, 3rd Edition Oxford, Oxford University Press, 2007.

Banakar, R., 'Law and Regulation in Late Modernity', in Reza Banakar and Max Travers, *Law and Social Theory*, Hart, Oxford, 2013, 311.

Bretón V., Cortez, D. and García, F., 'In Search of Sumak Kawsay Introduction to the Dossier', *FLACSO-Revista de Ciencias Sociales*, vol. 48, January 2014.

Burgogue-Larsen, L., 'La Corte Interamericana de los Derechos Humanos como Tribunal Constitucional', *Working Papers on European Law and Regional Integration*, 22, 2014.

Capitan, A.L.H. and Cubillo-Guevara, A.P., 'Six Open debates on *Sumak Kawsay*', in *FLACSO Revista de Ciencias Sociales Iconos*, 48, Quito, 2014.

Comim, F. and Qizilbash, M., and S. Alkire (eds.) *The Capability Approach: Concepts, Measures and Applications*, Cambridge, Cambridge University Press, 2008.

Covey, R. Alan, *How the Incas Built Their Heartland: State Formation and the Innovation of Imperial Strategies in the Sacred Valley, Peru*, University of Michigan Press, Michigan, 2006.

Escobar, A., "After Nature: Steps to an Antiessentialist Political Ecology," *Current Anthropology*, 40, no. 1 (1999): 1–30.

Escobar, A., *Encountering Development: The Making and Unmaking of the Third World*. (2012) Princeton University Press.

Espinoza, M., 'La Sociedad Ecuatoriana en Movimiento: 1970 – 1984', in Carrasco Vintimilla (et.al), *Estado Política y Democracia en el Ecuador*, Editorial, El Conejo, Quito, 1988.

Faas, A. J., 'Reciprocity and Development in Disaster-Induced Resettlement in Andean Ecuador', *Graduate Theses and Dissertations*, University of Southern Florida, January 2012 (Accesed 15 April 2015) <http://scholarcommons.usf.edu/etd/4317>

Fernandez, B. S., Pardo, L. and Salamanca, K., 'Buen Vivir en Ecuador: Political Marketing or Project in Dispute? A Dialogue with Alberto Acosta' in Dossier: En busca del Sumak Kawsay, *FLACSO-Revista de Ciencias Sociales*, 48, 2014.

Freire A. O., 'Ruptura de dos Paradigmas: una lectura de la Izquierda desde la Filosofía Tetrádica Andina' in Atawallpa Oviedo Freire (ed.) *Bifurcación del Buen Vivir y el Sumak Kawsay*, Sumak, Quito, 2014.

Gargarella, R., *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution*, (2013) Oxford University Press, New York.

Gargarella, R., 'Latin American constitutionalism: Social rights and the "engine room" of the constitution' in Cesar Rodriguez Garavito (ed.), *Law and Society in Latin America: A New Map*, Hoboken, Taylor and Francis, 2014.

Grijalva, W. M., *Breve Historia Bancaria Del Ecuador*, Quito, Corporación Editora Nacional, 2008.

Grosfoguel, R., 'The Epistemic Decolonial Turn: beyond political economy paradigms' in Walter D. Mignolo and Arturo Escobar (Eds.), *Globalization and the Decolonial Option*, Taylor and Francis, 2010.

Guevara, J. A., 'El Derecho al Desarrollo y la Pobreza' en *Derecho y Pobreza*, Editores del Puerto, Buenos Aires, 2006.

Hollenstein, P., *La Reproducción de la Dominación Racial: Experiencias de una familia en Quito*, Abya Yala, Quito, 2009.

Johnson, P., *Habermas: Rescuing the Public Sphere*, Sydney, Routledge, 2006.

Julian Arjomand, G. and Said, A., Ed. *International Comparative Social Studies: Constitutionalism and Political Reconstruction*, Boston, Brill Academic Publishers, 2007.

Kelsen, H., *General Theory of Law and State*, The Law Book Exchange, New Jersey, 2007.

Levitsky, S., 'A surprising Left Turn' (22) *Journal of Democracy*, 4, October 2011.

Levitsky, S., and Loxton, J., 'Populism and Competitive Authoritarianism in the Andes', *Democratization*, 2013, Vol. 20:1.

Mignolo W. D., 'Delinking: The rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality' in Walter D. Mignolo and Arturo Escobar (ed.), *Globalization and the Decolonial Option*, Hoboken, Taylor and Francis, 2013.

Paz and Mino Cepeda, J. J., '*Vision historica de las constituciones de 1998 y 2008*', Institut de Recherché et Debat Sur la Gouvernance (accessed 15 April 2015) <http://www.institut-gouvernance.org/fr/analyse/fiche-analyse-449.html>

Quijano, A., 'Coloniality and Modernity/Rationality', in Walter D. Mignolo and Arturo Escobar (Eds.), *Globalization and the Decolonial Option*, Hoboken.

Rajagopal, B., *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge University Press, January 2004.

Recasens A. V., '"Pachamamista" Discourses versus Development Policies: The Debate over Sumak Kawsay in the Andes' in Dossier: En busca del Sumak Kawsay, *FLACSO-Revista de Ciencias Sociales*, 48, 2014, 65.

Romeo F. P., 'Constitucionalizacion de un sistema integral de derechos sociales: De la Daseinsvorsorge al Sumak Kawsay', in Ramiro Avila Santamaria, Agustin Grijalva y Ruben Martinez (Eds.), *Desafios constitucionales: La Constitucion ecuatoriana de 2008 en perspectiva*, Ministerio de Justicia y Derechos Humanos, Quito, 2008.

Russett, B. M., *Grasping the Democratic Peace: Principles for a Post-Cold War World*, Princeton, Princeton University Press, 1994.

Santamaría, R. A., 'Los principios de Aplicación de los Derechos', in *Nuevas Instituciones del Derecho Constitucional Ecuatoriano*, INREDH, Quito, 2009.

Sajeva G., 'Rights with Limits: Biocultural Rights – between Self-Determination and Conservation of the Environment', *Journal of Human Rights and the Environment*, vol. 6, no. 1, March 2015.

Shiller, N. G. 'Identities: Global Studies in Culture and Power', Routledge, 2012 (19: 4).

Sousa Santos, B., *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, Cambridge, Cambridge University Press, 2002.

Sousa Santos, B., *Epistemologies of the South: Justice Against Epistemicide*, London, Paradigm Publishers, 2014.

Sydee J. and Beder S., 'Ecofeminism and Globalism', *Democracy and Nature*, July 2001.

Thiéart, R. A. and Forgues, B., *Chaos Theory and Organization*, Organization Science, Vol. 6, No. 1, Focused Issue: European Perspective on Organization, (Jan. - Feb., 1995), (19-31).

Walsh, C., 'Shifting the Geopolitics of Critical Knowledge: Decolonial Thought and cultural studies in 'others' in the Andes', in Walter D. Mignolo and Arturo Escobar (ed.), *Globalization and the Decolonial Option*, Hoboken, Taylor and Francis, 2013.

Yang, M. M., 'Putting Global Capitalism in its Place: Economic Hybridity, Bataille, and Ritual Expenditure', *Current Anthropology* (41), August/October 2000.

B Legislation and Treaties

American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978.

Constitution of the Republic of Ecuador

National Secretary for Planning and Development of Ecuador, *National Plan for Development* [Plan Nacional del Buen Vivir] 2013-2017, 17. (Accessed: 7 August 2013) <http://www.buenvivir.gob.ec>

Organic Law of Constitutional Control and Guarantees

Political Constitution of the Republic of Ecuador, Riobamba, 5th June 1998 – 10th October 2008.

Pueblo Indígena Kichwa de Sarayaku vs. Ecuador (Sentence), Inter-American Court of Human Rights Series (27 June 2012).

UNGA Res 61/295 (10 December of 2007) UN Doc A/Res/61/295

UNGA Res 32/130 (16 December 1977) UN Doc A/Res/32/423

C Internet Sources

Agencia Publica de Noticias del Ecuador y Suramerica –Andes, ‘*Presidente Rafael Correa resalta desarrollo de Ecuador en materia social, económica y energética*’, (accessed 23 April 2015) <http://www.andes.info.ec/es/noticias/presidente-rafael-correa-resalta-desarrollo-ecuador-materia-social-economica-energetica>

Eduardo A. Velázquez Carrera, ‘Decreto 900: entre el mito y la realidad’, *El Periodico* (online) (8 November 2013) <http://www.elperiodico.com.gt/es/20130626/opinion/230188/>

El Informador, “Resoluciones de La CIDH Son Obligatorias”, (accessed 26 April 2015) <http://www.informador.com.mx/mexico/2015/587847/6/resoluciones-de-la-coidh-son-obligatorias-corte.htm>

Haroon Siddique and agencies, “Ecuador Referendum Endorses New Socialist Constitution,” *The Guardian* (accessed 22 April 2015) <http://www.theguardian.com/global/2008/sep/29/ecuador>

Inter-American Court of Human Rights, *Ficha Tecnica: Pueblo Indigena Kichwa de Sarayaku Vs. Ecuador* (Accessed 7 August 2015) http://www.corteidh.or.cr/cf/jurisprudencia/ficha.cfm?nId_Ficha=206&lang=es

RT Actualidad ‘*Guatemala Recuerda la matanza en la embajada española*’ [Guatemala Remembers Killings at Spanish Embassy], (Accessed:8 August 2015) <http://actualidad.rt.com/actualidad/view/6698-Guatemala-recuerda-matanza-en-embajada-espanola-que-dejó-37-muertos>

