Quito, D.M, September 8, 2021

Case Nº 22-18-IN
THE PLENARY SESSION OF THE CONSTITUTIONAL COURT OF ECUADOR, IN EXERCISE OF ITS CONSTITUTIONAL AND LEGAL AUTHORITY, ISSUES THE FOLLOWING

JUDGMENT

Subject: The Court partially accepts the public action proposed to declare unconstitutional several norms of the Organic Code of the Environment and its rules, with regard to mangrove forests, monocultures, the rights of nature, and to regulation of the right to prior consultation and to environmental consultation.

1. Procedural background

1. On June 5, 2018, Coordinadora Ecuatoriana de Organizaciones para la Defensa de la Naturaleza y Ambiente (Coordinator of Organizations for the Defense of Nature and the Environment) and Acción Ecológica (Ecological Action), "the plaintiff", submitted a legal action to declare unconstitutional articles 104(7), 121, 184, and 320 of the Organic Code of the Environment ("COAM" Código Orgánico del Ambiente).

2. On April 3 of 2019, the Constitutional Court admitted the case.

3. On June 25, 2019, petitioners submitted a brief to the Court, reporting that pursuant to executive decree No. 752 of May 21, 2019, the COAM Rules ("RCOAM") were issued, regulating articles 104(7) and 184 of COAM, which have been contested, and requested that its articles 278, 462, and 463 be declared unconstitutional.

4. On April 28, 2021, the plenary session assigned priority to the case considering that mangrove forest ecosystems are important for communities and for the balance of nature.

5. On May 6 and 8, 2021, the President of the Republic (Presidencia de la República) and the National Assembly (Asamblea National) respectively submitted their written arguments.

6. On May 14, 2021, Judge Ramiro Ávila Santamaría was in charge to deliver the opinion for the Court and summoned the respective litigants to a public hearing.

7. On June 8, 2021, a public hearing was held, with the presence of the litigants in the case, several persons, and organizations who submitted *amici curiae*.[1]

8. On June 23, 2021, the Court requested information from the President of the Republic, the Ministry of the Environment, Water, and Ecological Transition (Ministerio de Ambiente, Agua y Transición Ecológica), and Ministry of Agriculture and Livestock (Ministerio de Agricultura y Ganadería –MAG). On July 13, 2021, MAG submitted a brief in response to the Court's request.

II. Jurisdiction

9. The Plenary of the Constitutional Court has jurisdiction to hear and resolve actions of unconstitutionality and to exercise abstract control of the constitutionality of legislative acts.[2]

III Juridical Analysis

10. The litigants seek to declare unconstitutionality of substance of articles 104(7), 121, 184, and 320 of COAM and of articles 278, 462, and 463 of RCOAM. The analysis will be conducted based on the subject matter content of each of the regulations contested: i) mangrove forests and the rights of nature; ii) productive or infrastructure activities in mangrove forests; iii) monocultures in ecosystems; iv) citizen participation and prior consultation; and v) omission of administrative sanction for wood and non-wood products.

i) Mangrove forests and the rights of nature

…she fed my ancestors, kept them safe and sound,
And there it is that I was born.
I am going to the mangrove forest. I am going to collect shellfish …
To the mangrove forest I am going to look for something to fish.
The mangrove forest is our mother, let's stop logging it.
She has so many children and all of them want to kill her.
Paolo Realpe Mina[3]

[1] The following entities submitted *amicus curiae* in order to argue in favor of unconstitutionality of one or several of the articles contested: Confederación de Nacionalidades Indígenas de la Amazonía Ecuatoriana "CONFENIAE"(Confederations of Indigenous Nationalities of the Ecuadorian Amazon), Confederación de Nacionalidades Indígenas del Ecuador "CONAIE" (Confederation of Indigenous Nationalities of Ecuador), José Enrique Valencia, Francis Dykmans, Hugo Echeverría, Hernán Holguer Payaguaje, CÁRITAS Ecuador, Plataforma por el Acceso a la Justicia (Platform for Access to Justice), Earth Law Center, Adriana Rodríguez Caguana, Viviana Morales Naranjo, and Edgar López Moncayo.

[2] Constitution, article 436 (2); Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional ("LOGJCC") (Organic Law on Jurisdictional Guarantees and Constitutional Control), artícles 75, 76, 128 y 129.

[3] Paolo Realpe Mina, in David Lasso, "I left for the mangrove forest", June 6, 2020.

11. Mangrove forests are marine-coastal wetlands[4], tree ecosystems that supply habitats for animals such as crabs, fish, shrimp, crustaceans, mollusks, insects, birds, reptiles, and other wild fauna[5] and that, together, they supply[6] the nutritional basis for millions of people.

12. Seen by one of the inhabitants living close to this ecosystem, a mangrove forest "*is an area that allows us to experience a first-hand enjoyment with nature, of how life is in a natural state, outside of the noise of cities, of cars, of buildings. It is being in touch with what we are as people, with what we represent and what we identify with individually.*"[7]

13. Mangrove forest ecosystems additionally contribute to mitigate global climate change, given that they absorb ten times more carbon than a land ecosystem[8] and because they protect coastal areas: *"intact mangrove forests store enormous quantities of carbon in their trees and soils, their growth being capable of producing high indexes of carbon fixation… they can protect coastal areas against strong winds and tides, provide spawning areas for vertebrate fish and retain sediment…"*[9].

14. During the public hearing before the Court, the statement was made that mangrove forests in Ecuador could be "*a very efficient barrier against tsunamis, Ecuador, and particularly the lower Guayas zone, being very prone to being impacted by a future tsunami, and then the mangrove forest is like a natural barrier."*[10]

15. Mangrove forest ecosystems constitute a source of food for human beings and bring innumerable direct and indirect benefits to human life:[11]

> …*We in our communities basically devote ourselves to collecting many species of fish, as well as shellfish, clams, several mollusks, one type of mollusk referred to as the donkey foot… We also devote ourselves to collecting spices and mangrove trees. We also obtain coal in its natural state. Communities cut the mangrove branches, burn them, then store them, which generates the natural coal, which is sold for activities, such as for example the sale of food, barbecues and many other*

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[4] RAMSAR Convention, article 1 (1).

[5] Constitutional Court, hearing, *amicus curiae*, Francis Dykmans. Document "Fauna Biodiversity Base Line in CALISUR Foundation Reforested Areas". This report documents the enormous diversity of the mangrove forest ecosystem.

[6] United Nations Organization for Nutrition and Agriculture FAO (Organización de Naciones Unidas para la Alimentación y Agricultura FAO). Restoration and management of the mangrove forest ecosystem http://www.fao.org/sustainable-forest-management/toolbox/modules - alternative/mangroves-and-costal-forests/basic-knowledge/es/. Last consulted on July 18, 2021.

[7] Constitutional Court, public hearing, *amicus curiae,* José Enrique Valencia, community expert, native of parroquia Borbón, Eloy Alfaro canton, province of Esmeraldas.

[8] UNEP. Mangrove forests, a great solution against climate change. https://www.uneporg/es/noticias-y-reportajes/reportajes/manglares-una-super-solucion-contra-el-cambio-climatico. Last consulted on July 26, 2021.

[9] United Nations Organization for Nutrition and Agriulture FAO. Restoration and management of the mangrove forest ecosystem http://www.fao.org/sustainable-forest-management/toolbox/modules-alternative/mangroves-and-costal-forests/basic-knowledge/es/. Last consulted on July 18, 2021.

[10] Constitutional Court, hearing, *amicus curiae*, Francis Dykmans.

[11] Constitutional Court, hearing, *amicus curiae*. Francis Dykmans. Document entitled "Direct and indirect benefits of reforestation processes with red mangrove in embankment zones (Beneficios directos e indirectos de los procesos de reforestación con mangle rojo en zonas de embanques" (Fundación CALISUR 2020).

activities. In addition, the mangrove forest also serves as a great promotion of community tourism. Communities organize and do community tourism in the mangrove forest zones…[12]

16. Mangrove forests constitute one of the most productive and valuable habitats on Earth. Approximately 75% of commercial fishing species spend part of their life cycle in these ecosystems, or depend on them for food.[13]

17. Mangrove forests have a special value for communities due to the multiple interrelations that exist between these ecosystems and humans who inhabit their surroundings:

[In Borbón, Esmeraldas] I have developed this intrinsic relationship with nature, to such an extent that I can say that " the mangrove forest is I, and I am the mangrove forest", because that is the relationship that we in rural communities have with nature and with our surrounding environment, our rivers, our forests, and our soils.

For communities, in addition to being a source of income, it is an intrinsic connection between the mangrove forest and communities, from which many products are obtained to carry out cultural activities, such as for example the marimba (drum). *The mangrove forest lives in us, is part of our history, of our culture, of our wealth*[14]

18. Even though they are ecosystems of vital importance for the planet and for communities, mangrove forests have not been valued, and have been contaminated and degraded.

We cannot allow mangrove forests to continue being degraded and continue being contaminated and affected, violated by anthropogenic activity… We cannot deprive Ecuadorians and people the world over of being able to enjoy the tallest mangrove forests on earth, located in the zone of El Majagual.

… if these grounds are invaded and logged due to infrastructure works, mangrove forests will have no way to reproduce, this unique species being lost in our country, these ecosystems which in addition to providing a financial sustenance to our communities which survive on that, allow us to comprehend this joy and enjoyment of knowing the value inherent to nature, which cannot be measured in economic costs, but is the feeling each person has of knowing the peace of mind that nature provides … do not allow these ecosystems, which are so fragile and unique in our country and in the world, to be violated and logged to make room for infrastructure works, which aside from constituting economic development for communities, represent a backward development and destruction of our natural ecosystems, from which we also derive our sustenance…[15]

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[12] Constitutional Court, public hearing, *amicus curiae*, José Enrique Valencia, community expert, Native of parroquia Borbón, Eloy Alfaro canton, Esmeraldas Province.

[13] UNEP. Mangrove forests, a great solution against climate change. https://www.uneporg/es/noticias-y-reportajes/reportajes/manglares-una-super-solucion-contra-el-cambio-climatico. Last consulted on June 26, 2021.

[14] Constitutional Court, hearing, *amicus curiae, José Enrique Valencia,* community expert, Native of parroquia Borbón, Eloy Alfaro canton, Esmeraldas Province.

[15] Constitutional Court, hearing, *amicus curiae, José Enrique Valencia,* community expert, Native of parroquia Borbón, Eloy Alfaro canton, Esmeraldas Province.

19. Intensive extractive activities threaten the life of communities that derive their sustenance from mangrove forests.[16] There are archeological studies that prove that mangrove forest resources have been used for thousands of years, by pre-Colombian civilizations, but that it hasn't been until the last third of the 19th century that we begin to observe a reduction in coverage of these ecosystems, due to deforestation and implementation or other productive activities,[17] mangrove forests being put at risk, but also communities that historically have inhabited them.

20. In Ecuador, in addition to their ecological value, mangrove forests are a major element of coastal culture, permitting reproduction of life (food, raw material for dwellings and energy, and medicinal resources) [18] and its interaction with mangrove forest ecosystems.

> *…When we go to the mangrove forest we feel free… that allows us to preserve all our resources, that makes the resources able to sustain us from generation to generation…the mangrove forest transmits to us so much wisdom and so much humility…When I go to the mangrove forest [I say] 'thank you mother mangrove forest for allowing me to be here and I am going to enter your being asking for your permission and I am going to have everything I need to sustain myself' … and I feel how the mangrove forest opens and I can enter and I can communicate with all the species that exist in the mangrove forest ecosystem, and I can see them, I can hear them, I can feel them…*[19]

21. Mangrove forests are not naturally fragile ecosystems. It is the presence of unsustainable human activity that has turned them into vulnerable ecosystems at risk of disappearing. It is estimated that , since 1980, more than 20% of these forests have been lost worldwide and that the rate of deforestation of forests is 3 to 5 times greater than that of the rest of forests worldwide.[20] For that reason, "*it makes one very sad that we have lost the ability to value that ecosystem that is so important, that has strengthened us and has given us life until now*.[21]

22. Mangrove forest ecosystems require and demand special protection. Hence the importance and necessity to strengthen their care, sustainable use and protection based on the rights of nature consecrated in our legal system. [22]

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[16] Fanny Mina, in David Lasso, "I left for the mangrove forest", June 6, 2020; *"Species are coming to an end. Through destruction comes contamination… Everything falls into the estuary and everything dies. We used to collect shellfish and didn't worry about what we were going to eat…and through all the destruction, nutritional diet was also lost… we collect dead shellfish, we collect them rotten."*

[17] Juliana López-Angarita, Callum M. Roberts, Alexander Tilley, Julie P. Hawkins, Richard G. Cooke, *Mangroves and people: Lessons from a history of use and abuse in four Latin American countries. Forest Ecology and Management*, Volume 368, 2016, page 151.

[18] Adriana Rodríguez Caguana and Viaviana Morales, "The rights of nature in intercultural dialogue: a look at jurisprudence on the Andean moors and Indian glaciers", in *Journal of Human Rights* (Deusto, 2020), No. 6: 99-123.

[19] Paolo Realpe Mina, "Manglar Adentro", *Radio Semilla*, May 17, 2021.

[20] Juliana López-Angarita, Callum M. Roberts, Alexander Tilley, Julie P. Hawkins, Richard G. Cooke, *Mangroves and people: Lessons from a history of use and abuse in four Latin American countries. Forest Ecology and Management*, Volume 368, 2016, page 152.

[21] Paolo Realpe Mina, "Manglar Adentro", *Radio Semilla*, May 17, 2021.

[22] Constitutional Court, hearing, Francis Dykmans, *amicus curiae.*

23. The Constitution establishes that:

1. Nature is a rights-bearing subject and has the right to "*integral respect of its existence and maintenance, and to regeneration of its vital cycles, structure, functions, and evolutionary processes.* " [23]

2. The State has the obligation to "*apply precautionary and restrictive measures to activities that could lead to the extinction of species, destruction of ecosystems, or to permanent alteration of the natural cycles.*"[24]

3. The State *"will regulate conservation, management and sustainable use, recovery, and limitations on dominion of fragile and threatened ecosystems; among others, moors, wetlands, cloud forests, dry and humid tropical forests and mangrove forests, marine and marine-coastal ecosystems.*[25]

24. Recognition of rights is a way to reflect the importance assigned by the Constitution to circumstances experienced by subjects. These circumstances usually reflect problems that must be addressed and overcome. For example, recognition of rights such as water, adequate nutrition, decent housing or prioritized service to pregnant or disabled persons, implies that there are people that have shortcomings that affect their ability to live their good living and their dignity. When these problems become expressed in the language of rights implicitly or explicitly acknowledged, the State can intervene and protect rights holders by means of constitutional guarantees.

25. Regulatory and jurisprudential development of rights clarify their scope and the obligations of the responsible persons and entities. This is the regulatory guarantee of rights recognized in the Constitution.[26] These obligations include, at least, three dimensions: to respect, when the right is exercised; to promote, when the right is exercised in an insufficient manner or with difficulties; and to guarantee or protect, when it is being violated.

26. Nature has been recognized as a holder of rights in the Constitution. Nature is not an abstract entity, a mere conceptual category, or a simple legal formulation. Neither is it an inert or insensitive object. When the Constitution establishes that it is necessary to "*integrally*" respect the existence of nature and recognizes that it is "*where life is reproduced and takes place*", it indicates to us that this is a complex subject that must be understood from a systemic perspective.

27. Nature consists of an interrelated , interdependent, and indivisible set of biotic and abiotic elements (ecosystems[27]). Nature is a community of life. All the elements of which it consists, including the human species, are linked and have a function or role. The properties of each element arise from its

[23] Constitution, article 71. The third subparagraph additionally establishes that: *The State will incentivize natural and juridical persons, and collectives, to protect nature and will promote respect for all elements that make up an ecosystem.*

[24] Constitution, article 73.

[25] Constitution, article 406.

[26] Constitution, article 84.

[27] An ecosystem is a system formed by organisms, habitats (physical environment in which they live) and the biotic as well as abiotic relationships that are established between them. All the beings that inhabit an ecosystem interact among them and with the environment.

interrelations with the rest of the elements and function as a network.[28] When one element is affected, the operation of the system is altered. When the system changes, it also affects each of the elements.

28. The elements of nature make the existence, maintenance, and regeneration of the vital cycles, structure, functions and evolutionary processes possible.

29. In order to be able to understand the content and scope of recognition of the rights of nature in the Constitution, we can address the function and role of each of the ecosystems and elements of which it consists. Similarly, when we address violations of the rights of nature, we can appreciate the signs that tell us how nature's elements have been affected or altered in order to determine if her rights have been violated.

30. The vital cycle of water, for example, implies the possibility of continuity of its stages (evaporation, condensation, precipitation, and more). Alteration of the elements of each of these stages due to issues like contamination or global warming would affect the vital cycle and could constitute a violation of the rights of nature.

31. Another example in terms of structure and functions was pointed out by the Court in the matter of rivers. An element such as the flow rate defines morphology, biological diversity and the eco-systemic processes of a river. A piece of infrastructure work which affects the flow rate could interrupt the connectivity between the elements and biodiversity and violate the rights of nature.[29]

32. In terms of evolutionary processes, nature's beings respond to long processes of permanent changes that make adaptation to the environment possible. Rupture of the elements that make an evolutionary process possible would constitute a violation of the rights of nature.

33. Nature, as a whole, and each of its systemic components that act inter-relatedly while enabling existence, maintenance, and regeneration of the vital cycles, the structure, functions and evolutionary processes, are recognized and protected by the Constitution. [30]

34. Therefore, nature and each of the elements that compose it must be respected, promoted, and guaranteed without distinction of any kind.[31] Hence, the State is obligated to respect ecosystems and the elements that they consist of to fulfill their vital cycles, to protect their structure, functions, and evolutionary processes.[32]

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[28] Fritjof Capra and Pier Luigi Luisi, *The Systems View of Life, A Unifying Vision* (New York: Cambridge University Press, 2016, page 66.

[29] Constitutional Court, Judgment N. 32-17-IN/21, paragraph 58.

[30] Constitution, article 71.

[31] Universal Declaration of the Rights of Mother Earth, article 1: "*Mother Earth and all the beings of which it consists are holders of the inherent rights recognized in this Declaration, without distinction of any kind, such as between organic and inorganic species, origin, use for human beings, or any other status*". The Declaration is a project submitted by several countries of Latin America to the United Nations in the year 2017 for discussion and approval (https://www.un.org/sustainabledevelopment/es/2017/04/la-proteccion-de-la-madre-tierra-a-debate-en-la-onu/).

[32] Given the complexity of what is understood by "*nature*", regulatory development, through jurisprudence, must do its interpretation in the light of science and its different branches that study nature, such as physics, biology, ecology, among others.

35. The State, using the jurisdiction of the organs and entities that make it up, has multiple mechanisms to respect, promote, and guarantee the rights of nature. For example, the Executive Function, through the relevant ministries, can declare national parks and reserve zones, as it has done with the Churute Ecological Mangrove Forest Reserve, the Pasochoa (wildlife refuge), or protection areas, such as, for example, the North Water Protection Area (Área de Protección Hídrica del Norte).[33] Similarly, the rights of an ecosystem or of other elements of nature can be jurisdictionally recognized.

36. Jurisdictional recognition of a given ecosystem or of its elements in the cases it hears, could contribute to determine the obligations deriving from holding rights with greater precision in concrete situations and, above all, reinforce guarantees for the protection of rights, thus protecting these more effectively.

37. The practical contribution of expressly recognizing rights of ecosystems is rooted in the possibility of identifying their specific cycles, evolutionary processes or ecosystem elements, which must be protected. Each of these elements fulfills a role in the ecosystem, whence their integral and individual value emanates, without ignoring their value taken together. In other words, the importance of each element of an ecosystem would be valued jurisdictionally due to its systemic importance.

38. In the case of mangrove forests, for example, there is decomposition of fallen leaves, which allows them to store, recycle, and process nutrients, which are the basis of the ecological balance of this ecosystem.[34] Mangrove forests are a type of forest that allows greater sequestration of carbon. Their soil emits low levels of methane, which favors sequestration of carbon dioxide. A single hectare can sequester up to one thousand tons annually. [35] A mangrove forest hosts a high degree of biodiversity, which lives and depends on the mangrove tree and the environment surrounding it, generating a relationship of mutual dependency with far-reaching benefits for life on Earth. Consequently, mangrove forests are ecosystems.

39. Just like the ecological balance of mangrove forest ecosystems depends on harmonious and inter-dependent interaction of the biotic and abiotic elements of which they consist, the ecological balance of the biosphere depends on interactions that occur on a global scale between different ecosystems. The sets of elements that make up mangrove forest ecosystems are in turn part of a larger set which participates in more complex exchanges of nutrients and energy on a regional or including on a global scale[36].

40. Mangrove forests are sensitive ecosystems and their level of influence in ecological balance fully justifies a particular recognition that will allow for their effective protection.

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[33] COAM, article 41. Several categories of environmental management are established for protected areas: national park, wildlife refuge, fauna production reserve, national recreation area; and Marine reserve.
Organic Law on Water Resources.(Ley Orgánica de Recursos Hídricos). Uses and Exploitation of Water,(Usos y Aprovechamiento del Agua) article 18 (c).

[34] Torres V, Jony R, Infante-Mata, Dulce, Sánchez, Alberto J. Espinoza-Tenorio, Alejandro, & Barba, Everardo, (2018). Breakdown of fallen leaves and contribution of mangrove forest nutrients in the Mecoacán Lagoon, Gulf of Mexico (Degradación de hojarasca y aporte de nutrientes del manglar en la Laguna Mecoacán, Golfo de México), *Revista de Biología Tropical. 66*(2) 892-907, https://dx.doi.org/10.15517/rbt.v66i2.33421

[35] United Nations Program for the Environment (Pnuma) (Programa de las Naciones Unidas para el Medio Ambiente), 'The importance of mangroves: a call to action', 2014.

[36] For example, thawing of the polar cap has effects beyond the North Pole because it affects the ecological balance of the entire world; in the same manner, fires in the Brazilian Amazon region or the logging of trees in a mangrove forest eliminate the plant cover which sequesters carbon, and at the same time release an enormous quantity of greenhouse gases which affect climate a the global level.

41. Being a kind of ecosystem, mangrove forests have vital cycles, a structure, functions, and evolutionary processes, and just like other ecosystems, like moors, wetlands, forests, water basins, they have the right to integral respect of their existence[37].

42. The Court emphasizes that jurisdictional recognition of ecosystems or specific elements in concrete cases does not mean that judicially undeclared subjects lack protection, or that judicial recognition of each ecosystem is necessary for the rights of nature to be effective.

43. In this case, for purposes of providing effective protection for mangrove forests, for the elements and systemic relationships that allow and provide the conditions necessary to sustain their ecological balance, the Court recognizes that these ecosystems are holders of the rights recognized for nature, therefore having the right to *"integral respect of their existence and maintenance and regeneration of their vital cycles, structure, functions, and evolutionary processes."*

ii) Productive or infrastructure activities in mangrove forests

44. Article 104 (7) of COAM establishes:

> *Art. 104.- Activities permitted in mangrove forest ecosystems. Activities permitted in mangrove forest ecosystems, beginning when this law goes into effect, will be the following: …*
> 1. *Phyto-sanitary control, as established in the management plan and other conservation and management instruments for said areas;*
> 2. *Promotion of wildlife;*
> 3. *Tourism and recreation activities which are not destructive of mangrove forests;*
> 4. *Traditional non-destructive mangrove forest activities, such as handling and use of non-wood products;*
> 5. *Transit easements;*
> 6. *Other, non-traditional, scientific, craft-related activities which are not destructive of mangrove forests; and,*
> 7. ***Other productive or public infrastructure activities that are expressly authorized by the National Environmental Authority (Autoridad Ambiental Nacional) and that offer reforestation programs*** *(emphasis added).*

45. Article 278 of RCOAM provides as follows:

> *Art. 278.- Authorization for use of mangrove forest ecosystems. – The National Environmental Authority may grant authorizations for infrastructure of public or productive interest in mangrove forests, by means of a reasoned resolution, subject to a prior technical report.*

[37] Constitution, article 406.

Said authorization will be granted on an exceptional basis, and depending on the case, may include logging or pruning of mangrove forests, as well as productive activities that require permanent maintenance via navigation, risk prevention, opening of transit easements, piers or harbor construction works…

Said resolution may be issued once the proponent has obtained the corresponding environmental administrative authorization, and must contain:

a) Determination of the restoration and compensation area of mangrove forest coverage, based on the type of project, in a mangrove forest proportion of 6 to 1 for each hectare cleared in the totality of the project, within the prioritized restoration areas defined by the National Environmental Authority, who will approve the areas where mangrove forest coverage compensation will take place; and,
b) Proof of payment of monetary compensation, equivalent to the totality of the cost of restoration of the area affected. The funds collected as compensation will be destined for compensation activities through the National Fund for Environmental Management (Fondo Nacional para la Gestión Ambiental). The National Environmental Authority will establish the guides for valuation of ecosystems that will be applied to assess the loss of environmental services.

The requirements for authorization to use a mangrove forest ecosystem for public interest infrastructure and for productive infrastructure will be defined by the National Environmental Authority through the regulation issued for that purpose.

Arguments of the parties

46. Petitioners argue that article 104 (7) violates the principles of non-restriction of the contents of constitutional rights and of progressive development of the content of such rights[38]; that it violates the principle of non-regression because "*the Law on Forests and Conservation of Natural Areas and Wildlife (Ley Forestal y de Conservación de Áreas Naturales y Vida Silvestre), which was previously in effect, considered mangrove forests to be State-owned property, which could only be exploited by concession… the law did not contemplate the possibility of granting permits to carry out infrastructure works, allowing only concessions for productive activities in some cases, and subsistence activities in others, precisely because of the special and fragile environmental characteristics of mangrove forest ecosystems"; that it violates the rights of nature "given that infrastructure works interrupt vital cycles, the structure, and evolutionary processes of ecosystems"* [39]

47. Petitioners request that the Court declare the phrase "*other productive public infrastructure activities that have express authorization from the National Environmental Authority and that offer reforestation programs…"* unconstitutional, or that the Court modulate the article so that the infrastructure works to be constructed within mangrove forest ecosystems occur *"as an exception, if and only when such works, activities or projects do not interrupt the vital cycles, structure, functions, and evolutionary*

[38] Constitution, articles 11 (4) and (8),

[39] Constitution, articles 71, 72 AND 66 (27)

processes of mangrove forest ecosystems, technically demonstrated through the corresponding environmental study."

48. The President of the Republic argued that the regulation does not generate regression in terms of ecosystem protection. Rather, from the point of view of a systematic reading of COAM, [40] it enables the conclusion that it creates a more extensive protection system; that it is constitutional and that *"in the event that numeral 7 now being contested in article 104 is declared unconstitutional, article 275, which speaks of the possibility of productive activity in general and of coastal marine resources, should also be declared unconstitutional"*; that it does not establish that all ecosystems must be kept unaltered because all human activities have an environmental impact. With these regulations, COAM wants to guarantee the right to carry out productive activities[41], all interpretations of the rights of nature being subject to weighting between these rights and the right to carry out productive activities.

49. The National Assembly (Asamblea Nacional) claims that petitioners have not provided clear and specific arguments on unconstitutionality of the contested regulations, reason for which the Court should apply the principle of presumption of constitutionality of the laws in effect.

50. The Office of the Attorney General of the State (Procuraduría General del Estado, ("PGE") argues that petitioners do not establish in a clear, specific, and pertinent way unconstitutionality of the contested regulations; that COAM must be interpreted in an integral manner and reading of the regulations must not be partial; that construction of infrastructure and public services in sectors where there are mangrove forests is not necessarily regressive, since it is also the responsibility of the State to provide the population with those; that the argument around supposed unconstitutionality of the regulation is founded on assumptions that could become reality and that the same are not the subject of public action of unconstitutionality; that article 406 of the Constitution *"does not prohibit execution of public infrastructure works in mangrove forests and other types of ecosystems, the provisions being that the State must regulate conservation, management and sustainable use, recovery, and limitations on ownership of fragile and threatened ecosystems…".*

Constitutional Analysis

51. Petitioners develop their argument around a presumed regression of rights. However, the Court verifies that the Forest Law (Ley Forestal) regulation has been reproduced in its totality in COAM[42]. In spite of this, and given that petitioners argue that the rights of nature could not be developed or guaranteed pursuant to what is established in the Constitution,[43] by virtue of the *iura novit curia*

[40] The President argues that article 104 (7) must be interpreted jointly with articles 94 and 275 (2,4 and 5) of COAM.

[41] Constitution, article 66 (15).

[42] COAM, article 103.

[43] Among the arguments in the lawsuit filed by petitioners are the following: *"…COAM provides the authority to execute public infrastructure works within mangrove forest zones, as well as to carry out "other productive activities" without considering that the foregoing violates a series of constitutional principles and rights … it is necessary to consider that public infrastructure works constructed in this type of area, which is considered to be of fragile and threatened ecosystems, systematically violate the rights of nature, especially in the case of permanent infrastructure works. This violation occurs given that an infrastructure project interrupts the vital cycles, structure and evolutionary processes of the ecosystem, contravening what Is determined in article 71 of the Constitution, through which the right to integral respect for existence, and maintenance and regeneration of … its vital cycles, structure, functions, and evolutionary processes…" are recognized for nature or Pachamama.*

principle, the Court finds it necessary to re-channel petitioner's arguments in order to analyze a possible violation of the right to juridical certainty and to legal reserve.

52. Juridical certainty *"is founded on respect for the Constitution and the existence of prior, clear, public legal norms applied by competent authorities"*[44]. The court has indicated that said right contains three elements: reliability, certainty, and impartiality. *Reliability is guaranteed via generation of regulations, in other words, applying the principle of legality. With regard to certainty, citizens must be sure that the rules of the game are not being changed, purposes for which it is necessary to have stable and coherent legislation, as well as a set of regulations that allow the people to avail themselves of their rights. And, finally, possible arbitrariness on the part of administrative and jurisdictional entities in application of legal precepts must be avoided".*[45]

53. The Constitution recognizes nature, and in the case under discussion, the right of mangrove forest ecosystems to have *"their existence, maintenance, and regeneration of their vital cycles, structure, functions and evolutionary processes integrally respected."*[46]

54. The legal measure under analysis is allowing *"other productive or public infrastructure activities, provided they are authorized by the National Environmental Authority, and offer reforestation programs."* The measure will be analyzed in two parts. First, everything relating to "other productive activities". Second, permission of *"public infrastructure"*.

55. The regulation being contested seeks to permit expansion of the margin of exploitation of mangrove forests to *"other "*activities, additional to the ones already specified in article 104 of COAM (phyto-sanitary control, promotion of wildlife, tourism and recreation activities, traditional activities, transit easement, scientific or crafts-related activities).

56. The legislator has determined the productive activities that could be allowed with clarity and in a restrictive manner in numerals 1 to 6 of article 104 of COAM, such as tourism and traditional and crafts-related activities that do not affect mangrove forests. However, when including *"other productive activities"* without adding, as is done in numerals 3 and 6 of the same article, *"not destructive to the mangrove forest"*, the possibility of productive activities that could affect mangrove forest ecosystems is being allowed.

57. COAM, when restrictively allowing that persons, peoples, and communities carry out productive activities in mangrove forests, such as exploitation for purposes of subsistence, exploitation and marketing of fish, mollusks, crustaceans, and other species that develop in this habitat,[47] or when allowing productive activities such as tourism, handling and use of non-wood products, scientific and craft-related activities to be carried out, [48] establishes which are the productive activities that

[44] Constitution, article 82.

[45] Constitutional Court, Judgment No. 22-13-IN/20.

[46] Constitution, article 71.

[47] COAM, article 103.

[48] COAM, article 104 (2, 4, and 6).

harmonize with protection of mangrove forests, and maintains the level of protection previously established by the repealed Forest Law (Ley Forestal). [49]

58. According to the words of a person who lives close to a mangrove forest, the productive activities that are already carried out in the mangrove forest have to do with subsistence and this person also warns about activities that could imply extending the agricultural frontier:

> *…they devote themselves to specific economic activities, yes, but carrying out the same is contaminating the mangrove forest, …in order to enter, these companies first log the mangrove forest, large areas of mangrove forest are logged and burned, the right of communities to enjoy the mangrove forest and also obtain an economic resource from the same being thereby curtailed. And now we have the expansion of the agricultural frontier, and of the livestock raising frontier. Many people are also using mangrove forests to carry out these activities because it is a zone that is very rich and soils around the mangrove forest are very productive…*[50]

59. The category *"other productive activities"* is generic and indeterminate. This high and extensive degree of vagueness entails the risk of being understood as any activities, industrial and extractive, being excused by being production activities. These *"other productive activities"* would be defined at the regulatory level by the executive branch, and the possibility of carrying out activities that could be destructive of mangrove forest ecosystems, such as intensive exploitation of timber and animal species, or excessive use of water, would open up.

60. Given the above, including the term *"other productive activities "* in the regulation, puts mangrove forest ecosystems indefinitely at risk. Besides, there are other alternatives that guarantee the execution of productive activities in mangrove forests without putting these ecosystems indefinitely at risk.

61. Even though the regulation seeks to qualify its indeterminate character requiring authorization from the environmental authority and a reforestation program, these measures do not take into account the high economic, environmental, and social value that these ecosystems have in the present and do not correct the regulatory vagueness which additionally allows a large dose of discretion to permit *"other productive activities."*

62. The rights of nature of mangrove forest ecosystems are not absolute rights. Even though mangrove forest ecosystems demand protection, they are not untouchable. Therefore, productive subsistence activities or those that do not have negative consequences for these ecosystems are permitted.

63. On the other hand, as already established, the mangrove forest ecosystems have the right to have their existence, maintenance, regeneration of their vital cycles, functions and elements integrally respected.

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[49] Law on Forests and conservation of natural and wildlife areas, article 1. Repealed by COAM.

[50] Constitutional Court, public hearing, *amicus curiae*, José Enrique Valencia, community expert, native of parroquia Borbón, Eloy Alfaro canton, province of Esmeraldas.

64. The economic value of preserving the integrity of mangrove forest ecosystems surpasses that of their exploitation or that of replacing them with *"other"* productive activities.

> *mangrove forests offer the nutritional base for animals such as crabs, clams, oysters, other species of shellfish/mollusks and other vertebrate fish which, altogether, feed millions of people..*
>
> *… the combined direct and indirect benefits of intact mangrove forests are much greater than the financial benefits of timber exploitation.*
>
> *at the global level, the total economic value of only shrimp, crabs, and mollusks of mangrove forests is calculated at more than 4 billion USD annually."*[51]

65. In addition, the ecological value of mangrove forests cannot be quantified. They protect coasts from flooding, help to mitigate the effects of climate change, and store carbon in their trees. [52] In terms of quantification and from the community point of view:

> *…the enjoyment we have of nature, that has no price, has no name, and will not in any way be substituted, because we, even having potable water, will continue going to the river. We may have the best parks, the best buildings, but people will continue going to be in the forests for the peace given to them by the trees, the birds, the fish.* [53]

66. The ecological value of mangrove forests is of immediate use in order to prevent what today is already a climate emergency. A reforestation process as a condition to allow "other productive activities", would not allow the timely sequestration of carbon by mangrove forest ecosystems.[54] The safeguards established in the regulation to permit "other productive activities" and achieve a future remediation of the harm that the permission might cause do not take into account the present value of these ecosystems for the planet.

67. Besides, the mangrove forest ecosystem is part of a cultural relationship with the communities and peoples that live in its ecosystem: *"the mangrove forest lives in us, is part of our history, of our culture, of our wealth."*

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[51] United Nations Organization for Food and Agriculture FAO. Restoration and management of mangrove forest ecosystems http://www.fao.org/sustainable-forest-management/toolbox/modules-alternative/mangroves-and-coastal-forests/basic-knowledge/es/.

[52] United Nations Framework Convention for Climate Change (Convención Marco de las Naciones Unidas para el Cambio Climático), preamble: *Recognizing that the changes in Earth's climate and their adverse effects are a common concern for all humanity; Aware of the function and importance of sinks and natural greenhouse gas deposits for land and marine ecosystems.*

[53] Constitutional Court, public hearing, *amicus curiae*, José Enrique Valencia, community expert, native of parroquia Borbón, Eloy Alfaro canton, province of Esmeraldas.

[54] OpenMind BBVA. Planting trees, a contentious strategy to combat climate change, https://www.bbvaopenmind.com/ciencia/medioambiente/plantar-arboles-una-estrategia-controvertida-contra-el-cambio-climatico/, Last consulted on August 19, 2021: *Veldman and co-authors wrote that ecological restoration can help, but that it "does not substitute for the fact that most emissions of fossil fuels must stop", and that it would be better to "prioritize conservation of biodiverse and intact ecosystems, regardless of the fact that they contain many trees".*

68. Mangrove forest ecosystems require special protection, our Constitution says so[55] and thus the State has obligated itself to act accordingly when it ratified international conventions such as the Convention on Wetlands of International Importance (Convención sobre los Humedales de Importancia Internacional – RAMSAR).[56] The ecological, cultural, and economic value which mangrove forest ecosystems must conserve is much higher than that of exploitation which its land or timber may generate. [57]

69. If we add to this the prevention principle as referred to the environment, which dictates the adoption of timely measures that can avoid and prevent negative environmental impacts [58], the weight of the scales tips in favor of restriction on *"other productive activities"* unrelated to those of subsistence and marketing of the peoples and communities that live off mangrove forests, provided these are sustainable and do not endanger the mangrove forest. [59]

70. The high degree of vagueness of the expression "other productive activities" allows the environmental authority to be the one to define this concept absolutely and to establish the boundaries considered for protection of the rights of mangrove forests.

71. The contested regulation, given its lack of determination, failing to define which would be the *other productive activities,* ceases to provide certainty. In addition, delegating its definition to the environmental authority, a degree of discretion is allowed that is contrary to the nature of the constitutional regulation that protects the rights of nature and its fragile ecosystems. Protection of mangrove forest ecosystems requires certainty, because they hold rights and because the Constitution defines them as fragile ecosystems.

72. Additionally, the rights of nature are constitutionally recognized rights. To open up the possibility that fragile ecosystems, namely mangrove forest ecosystems, be intervened by means of an indeterminate category such as *"other productive activities"* that would be defined by an administrative authority, is contrary to the principle of legal reserve [60], which establishes that rights must be developed by means of an organic law.[61]

73. Given the above, the Court considers that the term *"other productive activities"* established in article 104 (7) of COAM is contrary to the right to juridical certainty, reason for which this phrase must be expelled from the regulation and the legal system.

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[55] Constitution, article 406.

[56] Constitutional Court, Judgment No. 0507-12-EP. The Court already recognized the need to protect fragile ecosystems such as mangrove forests from certain productive shrimp fishing activities.

[57] Constitution, article 425. *The hierarchical order of application of regulations will be the following: The Constitution; the international treaties and agreements; organic laws; ordinary laws; regional norms and district ordinances; decrees and regulations, ordinances; agreements and resolutions; and other acts and decisions of public branches of power*.

[58] Constitution, article 73 and 396.

[59] The precautionary principle is not a conditioned authority or option, but a constitutional obligation derived from intrinsic valuation granted by the Constitution to the existence of species and ecosystems through the rights of nature.

[60] Constitution, article 133.

[61] Constitutional Court, Judgment No.33-20-IN/20 and those accumulated, paragraphs 99 and 101.

74. The President stated that in the event that the article analyzed is declared unconstitutional, that could affect the regulation that regulates coastal marine resources (article 275 of COAM).[62] The regulation on coastal marine resources has not been contested and the scope of the Court's interpretation pertains exclusively to mangrove forest ecosystems.

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75. Regarding the term that refers to construction *"of public infrastructure"* as an activity permitted in mangrove forests, we must determine whether that activity guarantees the right to juridical. To that end, we will analyze whether the phrase is in compliance with the elements of the right to juridical. [63]

76. the President pointed out the need for infrastructure in order to guarantee public services.[64] The question coming from society was: *"how long are we going to allow exploitation of mangrove forests with infrastructure works which have failed to benefit communities? They have harmed mangrove forests, and every day we see how mangrove forests are deforested, are logged, are whittled away."*[65]

77. The phrase *"public infrastructure"* is a term that refers to works or structures that make provision of public services possible.

78. The guarantee of delivery and access to public services is backed by the constitution. In order to make good living possible, the State, according to the Constitution, must *"produce goods, create and maintain infrastructure, and provide public services"*[66]. Therefore, allowing construction of public infrastructure in mangrove forests is an activity permitted by the Constitution.

79. In this sense, public infrastructure that does not have the purpose of providing public services could infringe upon constitutional protection of mangrove forest ecosystems. Not all public services enable attainment of good living in the community located in the vicinity of public infrastructure. A school, a water treatment plant, or an electrical tower serving to guarantee the right to education, to water, and to a public household service[67] which promote good living, are types of infrastructure that are permissible provided they are sustainable and do not endanger the mangrove forest.

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[62] During the hearing before the Court, the President requested that in the event that instances of unconstitutionality were found in article 104 (7) of COAM, article 275 should also be declared unconstitutional.

[63] Constitutional Court, Judgment No. 22-13-IN/20.

[64] Constitutional Court, public hearing, Jossueth Almeida, the President of the Republic: *"the article allows creation of infrastructure, infrastructure which many times is necessary for purposes of providing public services, that being a constitutionally recognized jurisdiction of the institutions of the State. …There is the condition of authorization from the national environmental authority, which at the moment of granting the authorization makes the principles of precaution, the principles of remediation and, in general, the principles of protection of the rights of nature tangible."*

[65] Constitutional Court, public hearing, *amicus curiae*, José Enrique Valencia, community expert, native of parroquia Borbón, Eloy Alfaro canton, province of Esmeraldas.

[66] Constitution, article 277 (4).

[67] The Organic Law on Consumer Protection (Ley Orgánica de Defensa del Consumidor) defines public household services, article 2: *Public Household Services.-Public household services are understood to be those rendered directly in consumer households, either by public or private suppliers, such as the electricity service, conventional telephony, potable water, or other similar services.*

80. On the other hand, infrastructure works must guarantee access to public services by communities inhabiting the mangrove forest ecosystems, provided there is no possibility of constructing them in a different space where there is no mangrove forest, and always attempting to have the least possible impact.

81. To allow construction of any type of public infrastructure, or to construct the same in an unsustainable manner, [68] is to open up the possibility to undertake any kind of work, which could affect mangrove forest ecosystems and violate constitutional norms that mandate restriction of activities that may lead to destruction of ecosystems or permanent alteration of natural cycles, [69] and which make it obligatory to use wetlands and mangrove forests in a sustainable way.[70]

82. In that sense, and provided that it complies with environmental and sustainable principles to prevent negative environmental impacts, respecting the vital cycles of mangrove forest ecosystems, construction of public infrastructure will be considered necessary.

83. In order to correctly interpret the contested regulation[71], the term *"public infrastructure"* of article 104 (7) of COAM will be constitutional provided construction of public infrastructure guarantees access to public services to communities in or next to mangrove forest ecosystems, and it is demonstrated that said infrastructure does not interrupt the vital cycles, structure, functions, and evolutionary processes of the mangrove forest ecosystem.

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84. In the case of article 278 of RCOAM, petitioners alleged that this legal text ratifies the instance of unconstitutionality exposed in 104 (7) because it transcribes to a great extent what is established in COAM, considering it necessary that the Court also declare it unconstitutional.

85. The reasons to declare article 104 (7) of COAM unconstitutional are the same as those to be used to request unconstitutionality of the regulation. This Court, however, by virtue of the authority granted by law, [72] considers it necessary to clarify the sense and scope of the regulatory norm.

86. Article 278 of RCOAM grants the national environmental authority the power to issue authorizations *"for infrastructure of public or productive interest in mangrove forest ecosystems, by means of a reasoned resolution, subject to a prior technical report"*. The regulation adds that this authorization will be exceptional and that it may include *"logging or clearing of mangrove forests, as well as*

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[68] Construction of public infrastructure may be undertaken in several ways. It can, for instance, be constructed using old-fashioned techniques, which do not take into account the importance of the ecosystem or its rights, or it can be undertaken sustainably and taking into account the fragility of the natural surroundings and its impacts on the same. Public infrastructure constructed in a way that does not preserve the rights of mangrove forest ecosystems would be prohibited.

[69] Constitution, article 73.

[70] Constitution, article 406.

[71] LOGJCC, article 76 (5)

[72] LOGJCC, article 76 (9:a): *"Abstract control of constitutionality will be governed by the general principles of constitutional control provided by the Constitution and constitutional norms, jurisprudence, and doctrine. In particular, it will be governed by the following principles: a) When the provision in question or its content are reproduced in other non-contested regulatory texts;"*

productive activities that require permanent maintenance for navigation, for purposes of risk prevention, opening of transit easements, docks or harbor works."

87. The Court has distinguished between activities or acts to promote rights and to restrict them. Promotion and protection of a right can be undertaken by any public entity using any mechanism within its authority. Restriction of rights, on the other hand, requires a legislative norm due to the principle of organic legal reserve: *"no authority (other than the organic legislator) may introduce justified limitations into the legal system as part of the indicated authority of configuration or regulation This constitutes an institutional guarantee of fundamental rights and guarantees."*[73]

88. In order to determine if the principle of organic legal reserve has been disrespected, it is necessary to analyze whether the provisions contained in the body of rules promote or restrict rights beyond what is established in the Constitution and the law.

89. The contested regulatory norm establishes some conditions without which mangrove forests may not be intervened in any way: i) authorization by the competent authority, ii) existence of a prior technical report, iii) exceptional character of the measure, iv) the reasoned resolution.

90. The regulatory article refers to authorization for activities permitted in article 104 of COAM. In this sense, the body of rules establishes a mechanism to guarantee total compliance with the provisions of the law and could become a mechanism of guarantee.

91. Article 278 of RCOAM indicates the possible productive activities by way of example. It indicates that these activities could refer to *"logging or clearing of the mangrove forest"* or activities aimed at *"opening transit easements"*, among others. This list of examples could only be admissible if it refers to activities permitted by law, provided they are sustainable and do not put the mangrove forest ecosystem at risk.

92. Since the phrase *"other productive activities"* has been considered contrary to the Constitution, the contested regulatory article must not be applied. The phrase *"of public infrastructure"*, validity of which has been conditioned, will be applicable provided it complies with the Court's provisions for this article.

93. Consequently, article 278 of RCOAM may not be applied to authorize *"other productive activities"*, and will be applied subject to conditions in the context of construction of *"public infrastructure"*, provided such construction guarantees access to public services to communities living in or next to mangrove forest ecosystems, and it is demonstrated that construction takes place with the least possible impact, in other words, that it does not interrupt the vital cycles, structure, functions, and evolutionary processes of mangrove forest ecosystems (paragraph 83).

iii) Monocultures in ecosystems

[73] Constitutional Court of Ecuador. Judgment No.4-19-RC, August 21, 2019, paragraph 38.

94. Article 121 of COAM establishes:

> *Monocultures. Monocultures may be established in forest plantations undertaken in areas that are degraded or in the process of desertification as determined in the land management plan.*

Arguments of the parties

95. Petitioners argue that the article directly contravenes the constitutional norm that establishes "*the need to undertake reforestation, replanting, and forestation projects in degraded areas or those in the process of desertification, precisely for the purpose of avoiding monocultures"*[74]; that monocultures have a high environmental cost because they impoverish the soil through depletion of nutrients, causing erosion, compromising near-by water sources, collaborating in rapid spread of plagues and illnesses, impoverishing biodiversity and affecting the balance of ecosystems; that, according to the Constitution, *"in order to guarantee the rights of nature and a healthy environment, reforestation , forestation, and replanting of degraded areas or those in the process of desertification must be implemented, contributing to restoration of the same. COAM, on the basis of the contested article, does exactly the opposite"*; that article 12 of COAM contradicts the provisions of article 409 of the Constitution, generating a contradiction that should be resolved by applying the hierarchically superior norm.[75] They request that article 121 of COAM be expelled from Ecuador's legal system.

96. The President claims that the regulation " … far from promoting monocultures, provides autonomous decentralized governments with an authority, so that within the framework of their jurisdiction on recovery and conservation of nature and maintenance of a (sic) sustainable environment, they can analyze the use of monocultures on soils based on their category … However… we very respectfully request the Constitutional Court to analyze article 121 of COAM and, in the event it is considered necessary, to adjust the same so that it strengthens the policy of conservation of the soil of the State of Ecuador"; that " the constituent's intention was to thereby avoid monoculture on the basis of all the technical explanations given by the attorney for petitioners, with which we agree and which we are certain will be applied in the public policies at all levels of Government, but the constituent does open a margin for the existence of monoculture, particularly in the areas affected by degradation and desertification processes".

97. The National Assembly and PGE argue that petitioners fail to clearly, specifically, and pertinently establish constitutionality of the contested regulations; that COAM must be interpreted integrally and that reading of the regulation must not be partial, that the Court must take into account that COAM was prepared observing international instruments such as the United Nations Convention on the fight against desertification ("Agreement against desertification"- "Convenio contra la Desertificación").

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[74] *Constitution, article 409: "Conservation of the soil is of public interest and a national priority, especially its fertile layer. A regulatory framework will be established for its protection and sustainable use, preventing its degradation, in particular the one provoked by contamination, desertification, and erosion.*
In areas affected by degradation and desertification processes, the State will develop and stimulate forestation, reforestation, and replanting projects that avoid monocultures and preferably use species that are native and adapted to the zone".

[75] LOGJCC, article 3 (1).

98. PGE claims that there is no instance of unconstitutionality in the regulation and that petitioners are doing a partial reading of the same, given that the Constitution does not contain an *"express prohibition but rather provides that the State will develop and stimulate forestation, reforestation and replanting projects that avoid monocultures in areas affected by degradation and desertification processes, preferring the use of that are native and adapted to the zone."* It claims that Ecuador leads in terms of compliance with the obligations arising from the Agreement against Desertification.

Constitutional analysis

99. The charge against the legal norm is that it contradicts article 409 of the Constitution. The pertinent norms establish:

Constitution	COAM
Art. 409: Conservation of the soil is of public interest and a national priority, in particular its fertile layer. A regulatory framework will be established for its protection and sustainable use, preventing its degradation, particularly as caused by contamination, desertification, and erosion. In areas affected by degradation and desertification processes, the State will develop and stimulate forestation, reforestation, and replanting projects that avoid monocultures and preferably use native species adapted to the zone (emphasis added).	Art. 121: Monocultures may be established in forest plantations undertaken in degraded areas or those in process of desertification determined in the land use plan (emphasis added).

100. The Constitution recognizes biodiversity and its natural resources as an essential element of its regimen for good living[76] , and establishes soil conservation, especially its fertile layer, as being of public interest and a national priority. As part of the efforts the State must make in order to protect the soil, the Constitution provides that *"the State will develop and stimulate forestation, reforestation, and replanting projects that avoid monocultures and prioritize use of native species that are adapted to the zone."*[77]

101. Since 1995[78], Ecuador has been part of the Agreement against Desertification. Among the obligations established in the instrument, States must prioritize the battle against desertification and mitigation of the effects of drought, establish public policies designed to attain the Convention's objectives, pay the necessary attention to socio-economic processes that help to cause desertification and establish an efficient regulatory framework to fulfill its objectives.[79]

[76] Constitution, title VII, second chapter.

[77] Constitution, article 409.

[78] Ecuador ratified the Agreement against Desertification on June 9, 1995.

[79] Agreement against Desertification, article 5.

102. Monoculture is one of the ways to provoke soil wear and desertification.[80] Promoting monoculture in degraded zones could provoke greater acceleration of desertification. Mangrove forests, like everything in nature, regenerate better through promotion of diversity and diversification of plant and animal species. In the face of soil degradation and desertification, what needs to take place is reforestation with a variety of species and not monoculture. Monoculture applied to an ecosystem generates an imbalance which could lead to its total destruction.[81]

103. The rights of nature are sustained by, among other principles, that of diversity, by the ability to reproduce (self-regulation or autopoiesis), and by interrelation of the beings that make it up, organic or inorganic.[82] Monoculture affects diversity and, while promoting a single species, makes interrelation between beings impossible.

104. The Constitution establishes the principle of constitutional supremacy and the hierarchical order of norms, by virtue of which a conflict between regulations of different hierarchies will be resolved by means of application of the superior hierarchical norm.[83]

105. In addition, Ecuador acquired international legal and binding commitments to fight against degradation of the soil, desertification, and drought.

106. Based only on comparison of texts, to which one must add the provisions of the Agreement against Desertification, it becomes evident that the Constitution establishes that monocultures must be avoided and COAM establishes that *"monocultures may be established"*.

107. The constitutional norm is obligatory and mandates establishment of actions aimed at avoiding monocultures in desertified or degraded soils. The legal norm is permissive and aimed at promoting monocultures in desertified or degraded soils. The norms then, are opposed and the constitutional norm must prevail.

108. Consequently, article 121 of COAM is unconstitutional because it contradicts article 409 of the Constitution.

iv) Prior consultation and citizen participation

[80] The Agreement against Desertification defines desertification, drought, and degradation of the soil as follows: Article 1 (a)*: " 'desertification' is understood to mean degradation of soils in arid, semi-arid and sub-humid dry zones resulting from various factors, such as climatic variations and human activities; (c): 'drought' is understood to mean the phenomenon that happens naturally when rainfall has been considerably inferior to recorded normal levels, causing an acute imbalance of water which harms the soil's resource production systems; (f): 'soil degradation' is understood to mean the reduction or loss of biological or economic productivity and complexity of agricultural rain-fed soils , irrigated crop land or meadows, pastureland, forests, and wooded land, caused in arid, semi-arid, and sub-humid dry zones, by the soil use systems or by a process or combination of processes, including those resulting from human activities and habitation patterns, such as: (i) erosion of the soil caused by wind or water, (ii) deterioration of physical, chemical, and biological properties or of economic properties of the soil, and (iii) lasting loss of natural vegetation."*

[81] This imbalance which could lead to the disappearance of a system or to its defective functioning is comparable to what happens to a diabetic person who consumes sugar.

[82] Declaration of the Rights of Mother Earth, article 2 (1)(d).

[83] Constitution, articles 424 and 425: LOGJCC, article 3 (1).

109. Article 184 of COAM establishes the following:

> *On citizen participation: The Competent Environmental Authority must inform the population that it could be directly affected by possible execution of projects, works, or activities, as well as by the possible socio-environmental impacts expected and pertinence of action to be taken. The purpose of participation by the population will be the collection of its opinions and observations for purposes of incorporating them into Environmental Studies, provided they are technically and economically viable.*
>
> *If the consultation process referred to results in a majority opposition of the corresponding population, the decision to undertake or not to undertake the project will be adopted by a duly reasoned resolution of the Competent Environmental Authority.*
> *Social participation mechanisms will be provided with environmental facilitators, who will be evaluated, qualified, and registered in the Single System of Environmental Information (Sistema Único de Información Ambiental).*

Arguments of the parties

110. Petitioners assert that article 184 of COAM is contrary to constitutional rights to prior consultation and environmental consultation[84]; that the Court has issued a pronouncement on a similar article contained in the Law on Mining (Ley de Minería), in which conditioned constitutionality of the article on consultation was declared, providing that all extractive activities must the subjected to the process of prior consultation[85]; that the Court established that prior consultation cannot be declared equivalent to environmental consultation, given that these are different juridical institutions; that the Court resolved that prior consultation must be regulated in a specific law and that when insisting on COAM with a similar article there is disregard of what has been resolved; that the norm restricts consultation to an obligation to inform, that the jurisprudence of the Inter-American Court of Human Rights (IDH Court) is being disrespected (Sarayaku Vs. Ecuador case). They request that the court develop principles for adequate application of the environmental consultation;[86] and they propose that the Court eliminate the word *"inform"* and the sentence establishing the *"purpose"* of the consultation process.

111. Petitioners assert that article 462 of RCOAM seeks to regulate the right to prior consultation, which would contradict the Constitution, and that article 463 of RCOAM restricts the right to environmental consultation.

112. The President defends constitutionality of article 184 of COAM, arguing that the environmental consultation established in the Constitution is developed in other articles of COAM,[87] reason for

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[84] Constitution, articles 57 (7) and 398

[85] Constitutional Court, Judgment No. 001-10-SIN-CC, March 18, 2010.

[86] Petitioners request that the Court use international instruments, that standards developed by environmental law, compared law, and jurisprudence of the International Court on Human Rights be applied in the matter of the right to consultation of indigenous peoples and nationalities.

[87] COAM, articles 8 (7), 9 (6), and 184 itself.

which *"there is no contradiction whatsoever, and much less the desire maliciously suggested by petitioners (sic) to regulate prior consultation with counties, communities, peoples and nationalities subject to the same parameters that apply to environmental consultation"*; it argues that prior consultation and environmental consultation are different institutions and that therefore the same principles cannot be applied to both institutions; and that the COAM norm refers exclusively to environmental consultation.

113. PGE argues that petitioners fail to establish in a clear, specific, and pertinent manner that the contested norms are unconstitutional; that COAM must be interpreted integrally and that the norm may not be read partially; that the Court must take into account that COAM was put together observing the IDH Court's judgment in the Sarayaku Vs. Ecuador case; that prior consultation and environmental consultation are being confused; that the same procedures and effects cannot be applied to both institutions, and that the contested norm refers exclusively to environmental consultation.

Constitutional Analysis

114. The contested norm makes no express mention of prior consultation or to environmental consultation. However, this article is in the chapter referring to the instruments of environmental regulation.[88] This chapter refers to the administrative decisions that must be obtained in order to regularize the environmental element of a project that has an environmental impact. Specifically, article 184 refers to citizen participation in administrative decisions that are subject to the rights to prior consultation and environmental consultation.

115. The statement on the part of the President and PGE, that article 184 of COAM refers only to environmental consultation is not sufficient to clarify its scope. Application of the norm can lead to misunderstandings.

116. The Constitution establishes the collective right of counties, communities, peoples, and nationalities to free and informed prior consultation[89], and the right of all persons, without distinction, to environmental consultation.[90] Since it is being argued that the contested norm violates two different constitutional rights, the Court will analyze separately; (1) prior consultation as a right of indigenous peoples, and (2) environmental consultation.

(1) Prior consultation as a right of indigenous peoples

117. The Constitution recognizes and guarantees counties, communities, and indigenous peoples and nationalities de right to

[88] COAM, title II, chapter IV

[89] Constitution, article 57 (7)

[90] Constitution, article 398.

> *(1) Prior, free, and informed consultation, within a reasonable period of time, about prospection, exploitation, and marketing plans and programs involving non-renewable resources located on their lands that may affect them environmentally or culturally; participation in the benefits which those projects yield and the right to receive indemnity for the social, cultural, and environmental harms that the same may cause them. The consultation to be undertaken by competent authorities must be mandatory and timely. In the event that no consent from the community consulted is obtained, action must proceed in compliance with the Constitution and the law.*[91]

118. This right is recognized in international instruments establishing the obligation of the State to consult with indigenous peoples regarding legislative or administrative measures that may affect them directly[92], and also the right to

> *…participate in the adoption of decisions in matters that affect their rights, by means of representatives elected by them in conformity with their own procedures, as well as to maintain and develop their own institutions for adoption of decisions.*[93]

> *…the States must hold consultations and cooperate in good faith with interested indigenous peoples by means of their representative institutions prior to adopting and applying legislative and administrative measures that affect them, so as to obtain their free prior and informed consent.*[94]

119. The IDH Court, in the Sarayaku Vs. Ecuador case, established that the right to consultation is an obligation of the State which it must fulfill *"in all phases of planning and development of a project that may affect the territory where an indigenous community is settled"*, and determined the essential elements of the consultation the State must respect; a) the prior character of the consultation; b) the good faith and purpose of reaching an agreement; c) adequate and accessible consultation; d) the environmental impact study, and e) informed consultation. [95]

120. For consultation in the case of extractive mining activities, the Constitutional Court incorporated the parameters determined in Agreement 169 of the International Labor Organization (Organización Internacional del Trabajo - "OIT") and of the IDH Court judgment in the Sarayaku Vs. Ecuador Case.[96]

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[91] Constitution, article 57 (7).

[92] Agreement 169 OIT, article 6 (a); "*to consult with interested peoples, using the appropriate procedures and in particular through their representative institutions, each time legislative or administrative measures susceptible to affecting them directly are foreseen"*

[93] Declaration of the United Nations of Indigenous Peoples, article 18.

[94] Declaration of the United Nations of Indigenous Peoples, article 19.

[95] IDH Court, Kichwa Indigenous People Sarayaku Vs. Ecuador Case, Judgment of June 27, 2012, paragraph 167; Constitutional Court, judgment 001-10-SIN-CC, March 18, 2010. The Court picked up these elements from the IDH Court. The Court has also issued a pronouncement on this right in other judgments, such as: Saramaka People Vs. Surinam Case, paragraphs 133 and 134; Garifuna Community of Punta Piedra and its members Case Vs. Honduras, paragraph 216.

[96] Constitutional Court, judgment 001-10-SIN-CC; a) flexible character of the consultation procedure; b) prior character of the consultation; c) the consultation must be public and informed; d) consultation is not exhausted by means of mere information or public dissemination of the measure; e) obligation of good faith; f) public dissemination of the process; g) prior and concerted definition of the consultation proceeding; h)prior and concerted definition of the subjects of consultation ; i) respect for the social structure and Authority and Representation systems of

121. Prior consultation as a right of indigenous peoples is important because, just as they expressed during the public hearing before the Court, *"we need to know what we want, if this consultation is good or bad for us. According to that, we can make a decision for our lives, for our future generation… we need to know if it is to our advantage or not."*[97]

122. The rights of indigenous peoples are subject to regulations and scopes that differ from the consultation included in the law and in the contested norm.

123. The comparison of articles made in the comparative table which follows, shows that the Constitution establishes a duty to consult, whereas the law establishes the duty to inform. The Constitution must be understood in the light of international instruments that regulate consultation, and requirements and conditions are established. The law and its regulations establish a simple procedure. The Constitution regulates consultation as a right and the law and its regulations as a ministerial obligation. The Constitution requires a systematic interpretation of the right in the light of international instruments and binding jurisprudence; the law and regulations make reference only to regulations issued by sectorial ministries.

124. If the provisions established in the contested norms are considered to add up to consultation, the right would be reduced to a mere duty to inform[98] and to a bureaucratic procedure. That way, one would run the risk that the consultation turns out to be no more than fraud committed on the constitutional right recognized for indigenous people, thereby being contrary to the good faith that must guide this right, just as has happened and as has already been expressed during the hearing:

> *… they simply transmit what is already being implemented, don't even collect the opinions of communities, and of people, of families and they simply leave and believe they have already conducted the consultation and the activities to be implemented are already being implemented. That, in summary, is the consultation. It has always been nil in the matter of entry into our territory for purposes of carrying out extractive activities.*[99]
>
> *… Since no prior consultation has existed since the beginning of the Ecuadorian Constitution… today we have been discriminated against more than ever. In what sense? Because there has been no prior consultation in terms of environmental matters, in matters of extractivism, in matters of conservation, in the name of ministries…"*[100]

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the people being consulted; j) systematic and formalized character of the consultation; k) the opinion of the people consulted has a special juridical connotation; l) state responsibility for non-compliance with the consultation. Constitutional Court, judgments No. 38-13-IS/19;20-12-IN/20, par. 157.

[97] Constitutional Court, public hearing, version of Nanki Wampankit Juank, leader of the Confederation of Indigenous Nationalities of the Ecuadorian Amazon (CONFENIAE).

[98] Even though Access to information is essential to guarantee this right, consultation is not exhausted by informing. IDH Court, Saramaka People Vs. Surinam case.

[99] Constitutional Court, public hearing, versión of Hernán Holguer Payaguaje, community expert.

[100] Constitutional Court, public hearing, versión of Nanki Wampankit Juank, leader of the Confederation of Indigenous Nationalities of the Ecuadorian Amazon (CONFENIAE).

… sometimes they arrive, establish a space in the community, a table to get the population to understand, to talk with the person in charge who is there, but they simply transmit what is already being implemented. They don't even collect opinions from the communities, from persons, from the families and simply leave believing that they already conducted the consultation and the activities to be implemented are already being implemented. That, in summary, is the consultation. It has always been nil in the matter of entry into our territory to carry out extractive activities.[101]

[101] Constitutional Court, public hearing, versión of Hernán Holguer Payaguaje, community expert.

Constitution	COAM	RCOAM
Art. 57.- Recognizes and Guarantees counties, communities, indigenous peoples and nationalities the following collective rights, in conformity with the Constitution and with treaties, agreements, declarations, and other international human rights instruments, the following collective rights: 7. Free and informed prior consultation, within a reasonable period of time, on plans and programs for prospection, exploitation, and marketing of non-renewable resources located in their lands, that could affect them environmentally or culturally; participation in the benefits obtained from such projects and payment of indemnity for the social, cultural, and environmental harms the same cause them. The consultation to be undertaken by competent authorities will be mandatory and timely. In the event that consent of the community consulted is not obtained, action must be taken in conformity with the Constitution and the law.	**Art. 184.-** On citizen participation. The competent Environmental Authority must inform the population that it could be affected directly by possible execution of projects, works, or activities, as well as of the possible socio-environmental impacts expected and the pertinent action to be undertaken. The purpose of participation of the population will be to collect its opinions and observations for their incorporation into Environmental Studies, provided they are technically and economically viable. If the consultation process referred to above results in majority opposition of the population in question, the decision to implement or not to implement the project will be adopted by means of a duly reasoned resolution of the Competent Environmental Authority. Social participation mechanisms must include environmental facilitators, who must be evaluated, qualified, and registered in the Single System of Environmental Information (Sistema Único de Información Ambiental).	**Art. 462.-** Prior consultation for counties, communities, indigenous peoples and nationalities.- Prior free and informed consultation on prospection, exploitation, and marketing plans and programs involving non-renewable resources located in lands or territories of counties, communities, indigenous peoples and nationalities of afro-Ecuadorian or coastal ethnicity which could affect them environmentally or culturally, stipulated in the Constitution of the Republic of Ecuador, must be undertaken by the corresponding sectorial ministries, in compliance with the regulations issued to that effect.

125. In the present proceeding, the President as well as PGE have argued that article 184 of COAM does not refer to prior consultation as established in the Constitution, reason for which it is not applicable to matters relating to the aforementioned constitutional right. This Court agrees with this point of view and understands that its scope does not include and must not replace prior consultation with counties, communities, indigenous, afro-Ecuadorian and coastal peoples and nationalities.

126. The contested articles will under no circumstances be applied to indigenous peoples, in which case the standards pertaining to the right to prior consultation will apply.

127. With regard to article 462 of RCOAM, this Court points out that purpose of the same is to regulate the right to prior consultation, which is contrary to the principle of organic law reserve[102] and to the provisions contained in the jurisprudence of this Court.[103] It is, in addition, contrary to what is established in article 57 (7) of the Constitution and to the essential elements that the right must include in compliance with the judgment issued in the Sarayaku Vs. Ecuador Case.[104] We are facing a contradiction.

128. Consequently, exercising the authority to undertake comprehensive control,[105] applying the principle of resolution of contradictions[106], and in observation of the precedents formulated by this Organism,[107] the Court declares article 462 of RCOAM to be unconstitutional.

(2) Environmental consultation

129. The Constitution establishes the following:

> *All decisions or authorizations of the State that may affect the environment must be subjected to consultation with the community, which is to be informed widely and in a timely manner. The subject conducting the consultation will be the State. The law will regulate prior consultation, citizen participation, deadlines, the subject being consulted and the criteria for valuation and objection of and to the activity subjected to consultation.*
>
> *The State will evaluate the community's opinion based on the criteria established by law and by the international human rights instruments.*
>
> *If the consultation process referred to results in a majority opposition of the community involved, the decision to implement or not to implement the project will be adopted by a duly reasoned resolution of the corresponding superior administrative instance, in compliance with the law.*[108]

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[102] Constitution, article 133 (1).

[103] Constitutional Court, judgments 38-13-IS and 001-10-SIN-CC.

[104] Constitutional Court, judgment 38-13-IS. In this case the Court already determined that an attempt to regulate the collective right to prior consultation is an act of non-compliance with what is resolved in judgment 001-10-SIN-CC.

[105] Constitution, article 436 (3); LOGJCC, article 76 (1).

[106] LGJCC, article 3 (1).

[107] Constitutional Court, judgment 001-10-SIN-CC.

[108] Constitution, article 398.

130. The Court has determined that constitutional rights of indigenous peoples to prior consultation ("consulta previa") and to environmental consultation ("consulta ambiental") are different and that confusing the two rights constitutes an error.[109]

131. The holders of these rights in the case of prior consultation are counties, communities, and indigenous peoples and nationalities; in the case of environmental consultation, the holders of the rights are people in general that may be affected by any state decision or authorization that may affect the environment. As opposed to the consultations dealt with in article 57, article 398 of the Constitution establishes environmental consultation as a right of any community, independently of its ethnic identification or composition.

132. Regarding the same matter, prior consultation refers to activities that may cause environmental, cultural effects or to any decision that affects the corresponding exercise of rights; environmental consultation deals exclusively with environmental matters.

133. In terms of content and sources to gain understanding of these rights, the right of indigenous peoples is a manifestation of their right to self-determination and includes the standards developed by international human rights instruments, such as OIT Agreement N. 169, the United Nations Declaration of the rights of indigenous peoples, the judgments issued by the IDH Court and by the Constitutional Court on the subject; the environmental consultation is a manifestation of the right to participation and has as its sources the principles of participation of the Constitution[110], and international norms on the environment, [111] in particular, the Regional Agreement on Access to Information (Acuerdo Regional sobre el Acceso a la Información), Public Participation (Participación Pública) and Access to Justice in Environmental Matters in Latin America and the Caribbean ("Escazú Agreement")[112] (Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe) ("Acuerdo de Escazú"), which is based on access to widespread and timely information.

134. Finally, the entity obligated in the case of prior consultation with indigenous peoples is any state entity that undertakes activities that affect said peoples; the entity obligated in the case of environmental consultation is the state entity empowered to exercise environmental authority.

135. There are also similarities between the two rights. The rights seek to involve their holders in the decision-making processes and in the decisions relating to projects that have an impact on the territory or environment, respectively. Therefore, it is important for each of the rights, each with its particular characteristics, that there be constant, free access to information on the projects

[109] Constitutional Court, judgment 001-10-SIN-CC.

[110] Constitution, article 395 (3): *The State guarantees active and permanent participation of persons, communities, peoples and nationalities affected, in planning, execution, and control of any activity that generates environmental impacts.*

[111] The background of environmental consultation is the United Nations Conference on the Environment and Development, during which the Declaration of Environment and Development was signed, principle 10 of which establishes that: *The best way to handle environmental questions is with participation of all interested citizens, at the applicable level. In the national context, every person must have adequate access to information on the environment available to public authorities, including information on the materials and activities that entail danger in their communities, as well as the opportunity to participate in decision-making processes. States must facilitate and promote sensitization and participation of the population by making the information available to all. Effective access to judicial and administrative proceedings, among them indemnity for damages and the pertinent resources must be provided.*

[112] Ecuador signed the Escazú Agreement on September 27, 2018, and ratified it on May 21, 2020.

free of charge, social participation in decision-making, consultation and application of standards that can favor the exercise of rights.

136. The right to environmental consultation is a State authority that cannot be delegated[113], which establishes the obligation, at the different applicable government levels, to consult with the community with respect to any decision or authorization that may affect the environment.[114] Based on the constitutional text, it is understood that this right has two important elements: i) access to environmental information and ii) environmental consultation as such.

i) Access to environmental information

137. The Constitution establishes that the information must be extensive and timely. That information must lead to the community being able to give an opinion on the decision or authorization. Article 184 of COAM only establishes the State's obligation to "inform" and omits the rest of the elements that an environmental consultation in compliance with the constitutional text and international human rights instruments must contain, in particular the Escazú Agreement.

138. The Escazú Agreement, which complements what is recognized in the Constitution, establishes:

a. The purpose of *"guaranteeing full and effective implementation of the rights of access to environmental information, public participation in environmental decision-making processes, and access to justice in environmental matters…contributing to protection of the right of every person, of present and future generations, to live in a healthy environment and to sustainable development."*

b. The obligation to ensure the public's right to participation in environmental decision-making processes (including authorizations to be issued), within reasonable times, purposes for which it must implement *"an open and inclusive participation in decision-making processes…"*.[115]

c. The obligation that public participation processes be effective, comprehensible, and timely;[116] that before a decision is made, the right to public participation must include *"the opportunity*

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[113] Constitution, article 398: "… the consulting subject will be the State."

[114] The obligated entity, at its different government levels, is the State. Projects for which the environmental authority is the national government, obligate the corresponding institution of that level of government; when the environmental authority is a lower government level, then that level will be in charge of guaranteeing the right.

[115] Escazú Agreement, article 1.

[116] Escazú Agreement, article 7 (6): *"The public must be informed in an effective, clear, and timely manner, using appropriate means, which may include written, electronic, or oral means, as well as traditional means, of the following, as a minimum: a) the type or nature of the environmental decision in question and, when applicable, in a non-technical language; b) the authority responsible for the decision-making process and other institutional authorities involved; c) the procedure foreseen for participation of the public, including the beginning and ending date of the same, the mechanisms foreseen for said participation, and, when applicable, the public consultation or hearing locations and dates; and d) the public authorities involved from whom further information on the applicable environmental decision may be requested, and the procedures to use in requesting the information."* Article 7 (16): "a) *description of the area of influence and of the physical and technical characteristics of the proposed project or activity; b) the description of the environmental impacts of the project or activities and, as applicable the cumulative environmental impact; c) description of the measures foreseen with respect to said impacts; d)a summary of items a), b), and c) of the present paragraph using non-technical and comprehensible language; e)the public reports and rulings of the organisms involved addressed to the public authority having to do with the project or activity in question".*

to submit observations through appropriate and available means, in conformity with the circumstances of the process"; that the decision adopted, the reasons for adopting it, and the manner in which observations of participants were processed must be informed; that the information on environmental impacts delivered must contain the minimum information established in the Agreement; that the process must be adapted to the social, economic, cultural, geographic, and gender characteristics of the public.

139. Article 184 of COAM does not include all the obligations emanating from the Constitution. Having gone into effect prior to the Escazú Agreement, it also fails to include its content. The norm restricts the purpose of citizen participation to *"collecting citizens' opinions and observations in order to incorporate them into the Environmental Studies, provided they are technically and economically viable."* This purpose is different from and incompatible with the purpose of environmental consultation.

140. The IDH Court establishes that access to public information and citizen participation are necessary to make the right to live in a healthy environment effective and that they make environmental justice possible.[117] It has established that the right to freedom of thought and expression *"protects the right of each person to request access to any information subject to State control, with permitted exceptions… With respect to activities that could affect the environment, this Court has emphasized the fact that access to information on activities and projects that could have an environmental impact constitute matters of obvious public interest."*

141. Just like the Constitution[118] and the Escazú Agreement, [119] the IDH Court establishes in its consulting opinion that granting access to information about policies that may have an environmental impact on the community, as well as to guarantee citizen participation in decision-making that may affect the exercise of the right to live in a healthy environment is a duty of the State".[120] This is something that article 184 of COAM does not guarantee.

142. The State must deliver the information to the subject to be consulted, to the citizenry that would suffer the possible environmental impacts that the project to be implemented is estimated to possibly produce[121]. This information must be delivered in a timely manner.

143. The information will be considered *timely*, when it is delivered in the initial stages of the decision-making process. [122] In addition, the information must be delivered in a manner that is effective and clear.[123]

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[117] IDH Court, consulting opinion OC-23/17, November 15, 2017, paragraphs 211 and those following.

[118] Constitution, articles 95, 395 (3), and 398.

[119] Escazú Agreement, articles 5 (Access to environmental information), 6 (generation and dissemination of environmental information), 7(public participation in environmental decision-making processes).

[120] In order for the State to comply with its obligation to guarantee access to public information, the same must be clear, objective, and complete.

[121] This must not be understood to be a restriction, since both the IDH Court in its consulting opinion 23/17 (par. 219), as well as the Escazú Agreement (article 5) establish that the information must have the maximum possible level of dissemination and must be delivered to any person without proof of direct interest.

[122] Escazú Agreement, article 7 (4).

[123] Escazú Agreement, article 7 (6)

144. The Constitution establishes that the information must be broad, but does not define or develop its scope. The Escazú Agreement allows us to understand that, in order to be considered *broad*, the information must be accessible, and establishes the principle of maximum publicity[124]. The state must generate and divulge the information necessary to make informed decisions on the environmental impact.[125]

ii) Environmental consultation

145. The second element of the constitutional article is the consultation itself, which implies active participation of the citizenry in decision-making. The object of citizen participation is not achieved solely by informing.

146. The object of the consultation is to enable a back and forth dialogue before making a decision on a policy, or project, during implementation of the policy and project (in the event that the decision to implement it has been participatory), and while project execution is taking place.

147. The dialog cannot begin with a decision made in advance. If there is a prior decision, then this is not a consultation but merely compliance with a formality that consists of informing, and would be contrary to the good faith with which this consultation must take place.

148. Active participation is manifested when democratic deliberation by the citizenry is enabled, in other words, when instances of involvement of different points of view are generated and public environmental policies originate and are executed within the framework of a debate that includes citizen voices. Active participation referred to in the Constitution therefore, is not participation without debate or one which passively accepts the position of the State or of companies.

149. The IDH Court has said that it *"represents a mechanism to integrate the concerns and knowledge of the citizenry with public policy decisions that affect the environment."*[126] The IDH Court has been clear that, to be able to guarantee social participation, one must have previously guaranteed access to public information in the afore-described terms.

150. The constitutional norm establishes that the opinion of the citizenry must be valued based on the criteria established by law and in international instruments[127]. The Escazú Agreement is an international instrument which establishes several commitments related to citizen participation in the framework of a consultation that Ecuador must hold. It establishes the characteristics that citizen participation must have. [128] It must be open and inclusive. [129]

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[124] Escazú Agreement, article 5.

[125] Escazú Agreement, article 6.

[126] Ditto, paragraph 228.

[127] Escazú Agreement, article 7 (8): *"Once the decision has been adopted, the public must be informed of the same in a timely manner, and of the reasons and foundations that back it, as well as of the way in which its observations were taken into account. The decision and its background must be public and accessible."*

[128] Constitution, articles 425 and 426.

[129] Escazú Agreement, article 7.

151. Environmental consultation must be timely and participatory. It will be considered *timely* when it is ensured to take place from the initial stages of the decision-making process on.[130] In order to be considered timely, it must also include reasonable deadlines so that the subject being consulted has sufficient time to become informed and to participate effectively.[131] Public participation implies that there is participation in environmental decision-making processes that include the opportunity to present observations via appropriate and available means.[132]

152. The consultation must be *inclusive*. In order for it to become inclusive it must be adapted to the social, economic, cultural, geographic and gender-related characteristics of the subjects being consulted.[133]

153. The environmental catastrophe affecting the planet demands that public policy and project-related decisions that are at risk of having a negative environmental impact are made within the framework of a social consensus that makes it possible to help guarantee an inter-generational responsibility so that future generations can exercise their right to live in a healthy environment.[134]

154. On the other hand, where applicable, consultation must incorporate the elements of the right to prior consultation of indigenous peoples, such as the prior character and good faith.

155. The Court considers that article 184 of COAM, interpreted in an isolated manner, is contrary to what the Constitution and international human rights instruments establish.

156. Consequently, the contested norm will be constitutional provided it is interpreted and complemented with what is established in this judgment, with jurisprudence on prior consultation as applicable, with the constitutional norm that establishes the right to environmental consultation, and with the norms of the Escazú Agreement, which establish the elements necessary to guarantee this right.

157. Article 463 of RCOAM reproduces the purpose established in article 184 (*"making the possible socio-environmental impacts of a project, work, or activity known, as well as collecting the opinions and observations of the population living in the corresponding area of direct social influence"*)

158. The regulatory norm refers to consultation established in article 398 of the Constitution. The norm defines the purpose of the environmental consultation, which is not the same as the purpose of the constitutional norm. The regulatory norm contains contradictions similar to that of the article

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[130] Escazú Agreement, article 7 (4).

[131] Escazú Agreement, article 7 (5).

[132] Escazú Agreement, article 7 (7).

[133] Escazú Agreement, article 7 (10 and 11). "*11. When the public being directly affected speaks mostly languages that are different from the one spoken by officials, the public authority must see that understanding and participation are facilitated*".

[134] See summary for political decision-makers contained in the Report of the Inter-governmental Group of Experts on Climate Change (IPCC) 2021(Grupo Intergubernamental de Expertos sobre el Cambio Climático), in which the conclusion is reached that heating of the atmosphere, without a doubt, is due to the influence of human beings (page 5); that climate change induced by human beings is already affecting climate in all regions of the world, consequently resulting in a larger number and intensity of floods, droughts, heat waves, among other effects (page 10). https.//www.ipcc.ch/report(ar6/wg1/downloads/report/IPCC_AR6_WG1_SPM.pdf.

of COAM already analyzed. The constitutional norm establishes that the community must be consulted, whereas the regulatory norm establishes "*making the possible impacts known…*" as the object of the consultation.

159. Article 463 establishes that the object of the consultation is "*to collect the opinions and observations of the population that lives in the area of direct influence…*", the constitutional norm establishes a much more profound exercise that surpasses the simple collection of opinions and observations. Article 398 of the Constitution establishes that the consultation will enable the State to value the opinion of the community, and that in case the community opposes execution of the project, the State must decide whether to execute it or not by means of a well-reasoned resolution.

160. There is evidence of a contradiction between the constitutional norm and the regulatory norm. The contested norm (article 184 of COAM), has also been reproduced in article 463 of RCOAM.[135] This contradiction is resolved through exercise of the Court's jurisdictions, which allow it to correct this normative unit by making the constitutional norm prevail.[136]

161. For the reasons exposed above, article 463 of RCOAM is contrary to article 398 of the Constitution and to articles 4, 5, 6, and 7 of the Escazú Agreement. Consequently, the President of the Republic must adapt the regulatory norm to what is resolved by the Court in this judgment.

v) Omission of the administrative sanction for wood products

162. Article 320 of COAM establishes several sanctions of an administrative nature.[137]

Arguments of the parties

163. Petitioners argue that article 320 of COAM is unconstitutional because *"there is a behavior typified as administrative infraction, but the applicable sanction has omitted a reference to wood or non-wood forest products, thereby generating (sic) the situation where the punishable behavior lacks an applicable sanction, thus creating a clear juridical uncertainty, in addition of a violation of the right to a healthy and ecologically balanced environment." They request that the Court "proceed to adapt the text of the article being analyzed by means of an additive judgment*

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[135] LOGJCC, article 76 (9:a): *"Abstract control of constitutionality will be governed by the general principles of constitutional control foreseen in the Constitution and constitutional norms, jurisprudence, and doctrine. In particular, it will be governed by the following principles: 9. Configuration of the normative unit.- Existence of a normative unit is presumed in the following cases a)When the pertinent provision is reproduced in other uncontested normative texts; ".*

[136] Constitution, article 25, second subparagraph.

[137] COAM, article 320: *Sanctions: The following are administrative sanctions: 1. Economic fine; 2. Seizure of the wildlife, native, exotic, or invasive species, tools, equipment, means of transportation, and other instruments used to commit the infraction; 3. Destruction of the products, means of transportation, tools, or property used to commit the infraction; 4. Temporary suspension of the activity or of the official acting guarantor; 5. Revocation of the authorization, termination of the contract and of the official acting guarantor; 6. Return, suspension, or loss of incentives; and 7. Eviction of persons from the area where the infraction is being committed, with full guarantee of their rights, as well as disassembly and demolition of the infrastructure or instruments used to commit the infraction. The obligation of integral repair will be imposed in the case of all infractions involving responsibility and occurrence of environmental damages, in conformity with the provisions established in this Code. Definitive closure of establishments, buildings, or services will be imposed when environmental damages have not stopped due to non-compliance with the corrective measures ordered."*

that includes forest wood or non-wood products within the text of the article, so that the sanction provided in the same –seizure- can also be applied in the case of not only wildlife species but also of wood and non-wood forest products; for the sake of guaranteeing effectiveness of the right and, consequently, juridical certainty."

164. The President claims that unconstitutionality of article 320 of COAM does not exist, since there is a sanction established for the established infraction.[138]

165. The National Assembly and PGE claim that petitioners fail to clearly, specifically, and pertinently establish unconstitutionality of the norms they contest; that COAM must be interpreted in an integral manner and that the norm should not be read in a partial manner.

Constitutional analysis

166. The purpose of abstract control of unconstitutionality is to guarantee the unity and coherence of the legal system by means of identification and rectification of incompatible norms.

167. Regarding the present contested article, petitioners' intention and argumentation involve problems that are not relevant to the purpose of unconstitutionality action, reason for which the Court abstains from issuing a pronouncement on the arguments submitted with respect to article 320 of COAM.

IV. Decision

For the foregoing reasons, in the act of administering constitutional justice and by mandate of the Constitution of the Republic of Ecuador, the Plenary Session of the Constitutional Court resolves:

1. To recognize that mangrove forest ecosystems are holders of the rights recognized to nature and have the right to *"integral respect of their existence and maintenance and regeneration of their vital cycles, structure, functions, and evolutionary processes."*

2. To declare unconstitutionality of the phrase *"other productive activities"* of article 104 (7) of the Organic Code of the Environment (Código Orgánico del Ambiente), because it affects juridical certainty. The text of 104 (7) will now read:

   7. Public infrastructure provided with express authorization from the National Environmental Authority and offering reforestation programs.

3. To declare the phrase *"public infrastructure"* of article 104 (7) of COAM constitutional, provided construction of public infrastructure guarantees access to public services of communities living in or next to mangrove forest ecosystems, and it is demonstrated that such infrastructure does not interrupt the vital cycles, structure, functions, and evolutionary processes of mangrove forest ecosystems.

[138] COAM, article 318 (1).

4. To declare unconstitutionality of article 121 of the Organic Code of the Environment (Código Orgánico del Ambiente) because it contradicts article 409 of the Constitution.

5. To declare that article 184 of the Organic Code of the Environment does not apply to or replace the right to free and informed prior consultation of counties, communities, indigenous peoples and nationalities; and that it will be constitutional provided that its purpose and content is interpreted according to and complemented with the constitutional norm that establishes the right to environmental consultation, the Court's jurisprudence on applicable prior consultation, the norms of the Escazú Agreement, and with what is established in this judgment, all of which determine the elements necessary to guarantee this right.

6. Declare that article 278 of RCOAM cannot be applied to authorize "other productive activities", within 104 (7) of COAM and will be applied conditionally in relation to construction of "public infrastructure" 104 (7) of COAM, provided that construction of public infrastructure guarantees access to public services for communities living in of next to mangrove forest ecosystems, and it is demonstrated that such infrastructure does not interrupt the vital cycles, structure, functions, and evolutionary processes of mangrove forest ecosystems.

7. Declare unconstitutionality of substance of articles 462 and 463 of RCOAM. Provide that the President of the Republic adapt the regulatory norms to the provisions of this judgment.

8. Dismiss the legal action on unconstitutionality by reasons of substance of article 320 of COAM.

9. To be notified, published, and complied with.

DR. HERNAN SALGADO PESANTES
PRESIDENT

I hereby inform that the foregoing Judgment was approved by the Plenary Session of the Constitutional Court with six votes in favor cast by Constitutional Judges Ramiro Ávila Santamaría, Agustín Grijalva Jiménez (concurring vote), Enrique Herrería Bonnet, Ali Lozada Prado, Teresa Nuques Martínez, and Hernán Salgado Pesantes, and three dissenting votes cast by Constitutional Judges Karla Andrade Quevedo, Carmen Corral

Ponce, and Daniela Salazar Marín in the ordinary session of Wednesday, September 8, 2021.- I certify the above.

i. Digitally signed by Dra. Aída García Berni
GENERAL SECRETARY

JUDGMENT No. 22-18-IN

CONCURRING VOTE

Constitutional Judge Agustín Grijalva Jiménez

1. Background Information

1. The Constitutional Court approved the judgment in case **No. 22-18-IN/21** with six votes in favor, one of them being my concurring vote, in which the civil action for unconstitutionality proposed by the Ecuadorian Coordinator of Organizations for the Defense of Nature and the Environment (Coordinadora Ecuatoriana de Organizaciones para la Defensa de la Naturaleza y Ambiente), the Animal Welfare Association Libera Ecuador (Asociación Animalista Libera Ecuador) and Ecological Action (Acción Ecológica) ("the petitioners") against articles 104 (7), 121, 184, and 320 of the Organic Code of the Environment (Código Orgánico del Ambiente – "COAM") and articles 278, 462, and 463 of its Regulations was partially accepted.

2. In this case, I agree with the decision adopted by this Organism. However, based on article 92 of the Organic Law on Jurisdictional Guarantees and Constitutional Control (Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional), I respectfully present the reasoning behind my concurrent vote, in the following terms:

II. Analysis

3. The judgment contributes at least in two senses to jurisprudential development of the rights of nature initiated by the Court: 1) it declares unconstitutionality and conditioned constitutionality of legal provisions, finding them contrary to these rights, 2) it exemplifies how application of the rights of nature can materialize in specific rights holders, in this case, mangrove forests.

4. In this valuable effort, the judgment provides a description of these ecosystems and of the way in which human communities coexist with them, having succeeded in developing an economy, social organization, and culture that adapts to and respects the processes, functions, and natural cycles of mangrove forests, i.e. the constitutional rights of nature made concrete in these ecosystems.

5. However, petitioners also included expressly among the provisions violated article 14 of the Constitution, which establishes the following:

> *Art. 14.- **[Right to a healthy environment]**.- The population's right to live in a healthy and ecologically balanced environment, that guarantees sustainability and good living, sumak kawsay, is recognized. Preservation of the environment, conservation of ecosystems,*

biodiversity and integrity of the genetic heritage of the country, prevention of environmental harm, and recovery of degraded natural spaces are declared to be of public interest.

6. The judgment, therefore, should also have analyzed the possible violation of the right to a healthy and balanced environment, not only due to application of the principles of procedural consistency and integral control, but additionally because the wide and actually undefined legal margin to develop *"other productive activities and infrastructure works"* in mangrove forests also violates this right.

7. Additionally, jurisprudential development of the rights of nature necessarily requires an analysis of the relationships between these rights and the right to a healthy and ecologically balanced environment.

8. I believe that the case of mangrove forests, in particular, illustrates the possibility and need to complement the rights of nature and human rights, and among the latter especially the right to a healthy and ecologically balanced environment.

9. As recognized by the Constitution and expressed in the judgment, mangrove forests in themselves constitute ecosystems with rights to their existence and to reproduction of their functions and vital cycles. But what is most interesting, in my opinion, is that human communities that carry out traditional economic activities in mangrove forests have adapted to their functions and ecological cycles, respecting and maintaining them.

10. Thus it is made evident that the rights of nature can be respected without necessarily excluding or relegating human beings, when these are understood to be part of the ecosystems with which they coexist and live in harmony. This is the wisdom present in many indigenous peoples and traditional communities around the world and is also the conclusion to which the best developments of scientific knowledge, the humanities, and social sciences take us.

11. On the other hand, it is evident that mangrove forests constitute the *environment* of these communities, because they obtain their means of survival from them and coexist with them, and even celebrate them in their culture. But the idea of *environment* in this case and in that of the Constitution, has been profoundly transformed, because this term is not instrumentally reduced to a mere source of natural resources or of contamination risks of exclusively individual owners.

12. According to article 14 of the Constitution, the environment constitutes a life system for which we seek *"its health and ecological balance",* even to guarantee future survival of the community within a relationship with nature that is in agreement with good living, with *sumak kawsay*.

13. This way, coexistence of these communities with mangrove forests fits also with this *renewed way of understanding the environment*, clearly established in article 14 of the Constitution as a public interest in connection with conservation of these ecosystems, their biodiversity and genetic heritage, as well as with prevention of environmental harm, all of which goes much further and in a certain way opposes reduction of nature to a mere production factor.

14. This bio-centric conception of the right to a healthy and ecologically balanced environment does not eliminate the ownership exercised by human beings with respect to this right, nor does it neglect the harmful consequences that human beings can suffer in terms of other human rights due to the effects of environmental harms. What the Constitution does in its article 14 is to *reformulate the concepts of health, balance, and sustainability of the environment*, correctly conceiving human beings themselves as part of the latter; and nature as valuable in itself, independently of its usefulness.

15. In harmony with Ecuador's Constitution, this renewed conception of the right to a healthy environment as a human right, which additionally includes intrinsic valuing of nature, is formulated also in Advisory Opinion 23-17 of the Inter-American Court of Human Rights, which conceives components of the environment, such as forests, rivers, oceans, and others, indicating that they are:

> *"objects of legal interest in themselves, even in the absence of certainty or evidence about the risk to individual persons. It is a matter of protecting nature and the environment not only because they are connected to usefulness for human beings or because of the effects that their degradation could have on other human rights, such as health, life, or personal integrity, but due to their importance for other living organisms with whom we share the planet, who also in themselves are deserving of protection".*

16. That said, how do the rights of nature and the human right to a healthy and ecologically balanced environment relate to each other in the light of these criteria? It is clear that, according to article 427 of the Constitution, even interpretation of the express wording of constitutional provisions must be adjusted to the complete sense of the Constitution. Therefore, even though the holders and contents of both types of rights are relatively different, the rights of nature and the human right to a healthy and balanced environment, being independent, must be understood as complementary.

17. The case of mangrove forests illustrates this complementarity, since being ecosystems with their own rights, they at the same time constitute the environment of these communities, of whose ecological balance they become a part and to which they contribute. In fact, these communities perceive mangrove forests as live systems that are valuable in themselves, which precisely contributes to their own integration in biological, social, and economic terms to the functions and cycles of those ecosystems.

18. Finally, I must point out that this vision of the environment developed in the Constitution is relevant not only because of its complementarity with the rights of nature, but because it additionally constitutes the constitutional parameter to be applied in control of infra-constitutional regulations, as well as the framework in which public policies must be implemented.

19. Subject to these parameters, the legal provision under analysis not only contradicts the rights of nature, but when permitting *"other productive activities"* in an indeterminate manner and without limitation, it ignores the constitutional obligation of consolidating a harmonious relationship of human activities with nature. The norms which regulate activities in these ecosystems must clearly incorporate the corresponding due mechanisms and regulations in order to lead to a harmonious

exchange with nature, strengthening that relationship when it has been achieved – as in the case of mangrove forests – and under no circumstances destroying it. Consequently, this norm also contradicts the constitutional right to enjoy a healthy environment.

In dubio pro natura principle

20. In conformity with article 395 numeral 4 of the Constitution, *"in the case of doubt regarding the scope of legal provisions applicable to environmental matters, these must be applied in the sense that is most favorable to protection of nature".*

21. This principle, referred to as in dubio pro natura, has an exclusively interpretative character, as suggested by simple reading of the above-mentioned article 395, numeral 4. Therefore, it must not be confused with the precautionary principle, which seeks to prevent severe or irreversible harm in the presence of scientific uncertainty; neither must it be confused with the principle of favorability, by virtue of which the most protective among several coexistent and pertinent provisions is applied.

22. It is my opinion that the Court, when analyzing article 104, numeral 7 of the Organic Code on the Environment, contested by petitioners, should have examined the expression *"other productive activities"* subject to the interpretative principle of *in dubio pro natura*. The legal provision, in its pertinent section, says the following:

> *Art. 104.- Activities permitted in the mangrove forest ecosystem.- The activities permitted in the mangrove forest ecosystem, beginning on the date of effectiveness of this law, will be the following:*
>
> *7. Other productive activities or public infrastructure activities expressly authorized by the National Environmental Authority and offering reforestation programs. (underlining added).*

23. The expression *"other productive activities"* generates at least two interpretative possibilities, given that, as opposed to the other activities listed in this article[139] , it is very vague, and is not conditioned to not having destructive effects on mangrove forests, but to an administrative authorization of the environmental authority, in addition to implicitly suggesting the possibility of deforestation as it requires reforestation programs.

24. Consequently, there are at least two interpretations of the provision quoted. One in the sense that the expression *"other productive activities"* would be constitutional as long as it is understood that these activities are also non-destructive of mangrove forests and sustainable. Said interpretative possibility would even be contained in the first paragraph of article 103 of the Organic Code of the Environment, which makes reference to concessions in mangrove forests for sustainable activities.

[139] This is phyto-sanitary control, promotion of wildlife, non-destructive tourism, traditional activities, transit easements, non-traditional, scientific, or crafts-related activities.

25. A second interpretation, which is that of the judgment and the one I endorse, makes the point that mere authorization from the environmental authority does not in itself ensure non-destruction and sustainability in exploitation of mangrove forests, i. e. protection of their rights, even worse when considering the width of the provision and the condition to reforest included in this numeral.

26. In order to identify between these two interpretations the one that agrees with the Constitution, the Court should, as I already stated, have applied the *in dubio pro natura principle*. Under this principle, it is very clear that the sense that most favors protection of nature is the one that declares the expression "other productive activities" unconstitutional. This is due to several reasons.

27. First, because the highest duty of the State is to protect human rights and the rights of nature. The State in general, and in the present case the legislator, has a fundamental right to protect these rights, a duty that conditions the freedom of legislative configuration, preventing that legislator from implementing regressive reforms in environmental legislation.

28. Then, and in agreement with the above, because I think that this principle, aiming expressly and directly at the protection of rights, makes it evident that numeral 7 of article 104 of the law being examined, when eliminating specificity of the article, diminishes the threshold of legal protection, not only for mangrove forests, but for the healthy and balanced environment to which traditional communities that coexist with mangrove forests have contributed and have a right, thus generating the above-mentioned regressive character of the norm.

29. Additionally, the strict restrictions of article 103 of the Organic Code of the Environment itself, which categorizes mangrove forests as State property, outside of commerce, not susceptible to possession or any other form of appropriation, over which no dominion or any other prescribed real right may be acquired, and being susceptible to concession for purposes of sustainable use only, contribute to the pro-natura interpretation, which is the one that must be applied in this case.

30. Added to these numerous restrictions of the law itself, restrictions which are understandable in the case of a fragile ecosystem which has been destroyed in an accelerated manner as the majority vote indicates, is the absolute priority established by the second paragraph of the same article to grant to traditional communities custody and sustainable use of mangrove forests, "*for their subsistence, exclusive exploitation and marketing of fish, mollusks, and crustaceans, among other species which develop in this habitat."* (underlining added). To this end, the State, and even the article, must promote the productive associations and activities of these communities, within the framework of a solidarity-based people's economy.

31. In my opinion, the restrictions on productive activity in mangrove forests placed by the law itself, which numeral 7 of article 104 makes strongly relative or dispels when introducing the expression "other productive activities", are reasonable and constitutionally adequate, also in view of the special ecological relationships maintained by traditional communities in their communal economy with mangrove forests, as already mentioned.

32. Protection of the rights of nature requires clear norms that guide towards a harmonious relationship between human activities and nature, something that did not occur with the numeral

of the article under analysis. Consequently, application of the pro natura principle mandated adoption of the decision which best enables protection of rights, which in this concrete case was to expel the norm, ambiguity of which contradicts these constitutional parameters, infringes upon the rights of nature and upon the right to have a healthy and balanced environment.

33. This protection of nature, as analyzed in the first section of this concurrent vote, does not oppose the right to a healthy and balanced environment and other human rights, but, as illustrated in the case of mangrove forests, posits a harmonious relationship of human beings in and with nature, purposes for which the law includes certain legitimate restrictions.

AGUSTÍN MODESTO GRIJALVA JIMENEZ
Digitally signed on 09.24.2021

Dr. Agustín Grijalva Jiménez
CONSTITUTIONAL JUDGE

.- I declare that the concurrent vote of Constitutional Judge Agustín Grijalva Jiménez, in case 22-18-IN, was submitted in the office of the General Secretary on September 20, 2021, via email, at 4:13 p.m., and has been processed jointly with the Judgment. I certify this.

AÍDA SOLEDAD GARCÍA BERNI
Digitally signed by Aída Soledad García Berni

Dr. Aída García Berni
GENERAL SECRETARY

JUDGMENT No. 22-18-IN/21

DISSENTING VOTE

Constitutional Judges Karla Andrade Quevedo and Daniela Salazar Marín

1. The Constitutional Court, in its Plenary Session of September 8, 2021, approved judgment No. 22-18-IN/21 with the vote of the majority of constitutional judges Ramiro Ávila Santamaría, Enrique Herrería Bonnet, Ali Lozada Prado, Teresa Nuques Martínez, Hernán Salgado Pasantes, and Agustín Grijalva Jiménez (concurring vote). Based on article 92 of the Organic law on Jurisdictional Guarantees and Constitutional Control (LOGJCC), we respectfully dissent from the majority judgment and argue our dissenting votes in the following terms:

2. We begin with recognizing the right of mangrove forest ecosystems to special protection. These are ecosystems that are threatened by a series of activities, including extractive activities, to the point that they have become fragile ecosystems. In the light of articles 71, 73, and 406 of the Constitution, it is clear that mangrove forests must be protected constitutionally, not only because of the great wealth of biodiversity that dwells in these reservoirs, their natural function of

protecting coastal zones and combating climate change, and their cultural importance for neighboring communities, but also because mangrove forest ecosystems have value on their own.

3. We also recognize the importance of jurisprudential development of the rights of nature by the Court, as well as the content and scope of the State's obligations and duties to protect them. We therefore coincide with the majority judgment in terms of its purpose of guaranteeing care of mangrove forest ecosystems and in recognition of the rights of nature to receive equal respect for its existence, vital cycles, structure, functions, and evolutionary processes.

4. However, we dissent from the majority judgment in terms of the constitutionality analysis carried out since, according to our opinion, **(i)** abstract incompatibility of article 104, numeral 7 of the Organic Code on the Environment, regulating the activities that are permitted in mangrove forest ecosystems, with the Constitution is not clear; **(ii)** the level of specificity which the judgment demands of law in order to regulate the activities permitted in mangrove forest ecosystems is not reasonable, and **(iii)** declaring the phrase *"other productive activities"* of numeral 7 of article 104 of the Organic Code on the Environment (hereinafter, "COAM") unconstitutional and expelling it from the legal system without prior exhaustion of interpretations that would allow the norm to remain in the legal system, using declaration of unconstitutionality as a last recourse, does not agree with the principles of constitutional justice.

i. *Alleged incompatibility of article 104, numeral 7, of the Organic Code on the Environment with the right to juridical*

5. Article 104 numeral 7 of the Organic Code on the Environment recognizes that among the activities permitted in mangrove forest ecosystems is *"other productive or public infrastructure activities that have express authorization of the National Environmental Authority and offer reforestation programs"*. In that respect, the majority judgment establishes that the phrase *"other productive activities"* is contrary to juridical, because *"it puts mangrove forests ecosystems indefinitely at risk"* and in view of the lack of definition of said productive activities in the law itself, a high degree of discretion on the part of the environmental authority to authorize activities that could be harmful to mangrove forest ecosystems is permitted.[140] Consequently, it declares unconstitutionality of said phrase and provides for its expulsion from the legal system.

6. In our opinion, even though the phrase *"other productive activities"* of numeral 7 of article 104 of the Organic Code on the Environment could be considered indeterminate to the extent that specification of said activities is not expressly established in the law, it does not in itself contradict the right to juridical by reason that , in conformity with the same contested norm, determination of *"other productive activities"* in mangrove forest ecosystems, different from the ones already contemplated in article 104 of the Environment Code[141], will be authorized by the national

[140] Constitutional Court of Ecuador, Judgment 22-18-IN/21 of September 8, 2021, par. 70-72.

[141] Among other activities is: 1. Phyto-sanitary control as established in the management plan or other instruments for conservation and handling of said areas; 2. Promotion of wildlife; 3. Tourism and recreation activities that are not destructive of the mangrove forest; 4. Traditional activities that are not destructive of the mangrove forest, such as handling and use of non-wood products; 5. Transit easement; 6. Other non-traditional, scientific, crafts-related activities that are not destructive of the mangrove forest.

environmental authority, i.e., by the entity that is competent and technical in the matter, some of those being recognized by way of example in article 278 of the COAM Regulations.

7. In addition, we observe that the same numeral 7 of article 104 of COAM recognizes that in order to permit *"other productive activities"* in mangrove ecosystems, there must be express authorization from the national environmental authority, plus the offer of reforestation programs. In the same line, article 278 of the COAM Regulations establishes that authorization from the competent authority is exceptional and must be issued by virtue of a reasoned resolution, subject to a prior technical report.

8. In that respect, judgment No. 22-18-IN/21 establishes that delegating definition of *"other productive activities"* to the national environmental authority allows for *"a degree of discretion that is contrary to the nature of the constitutional norm that protects the rights of nature and its fragile ecosystems"*[142] . In this manner, the majority judgment associates existence of room for the administrative discretion of the national environmental authority with room for arbitrariness that is contrary to the rights of nature.

9. However, the fact that the law establishes room for discretionary administrative action – such as the national environmental authority's – does not imply that the same may act arbitrarily and according to its free will, but, to the contrary, precisely in order to achieve the collective interests aimed at by the law, it is possible – and even desirable and necessary – that the latter allow administration to have a margin of appreciation in terms of opportunity and advisability of its action for purposes of satisfying the general interest in protecting the rights of nature. Thus, what is important is not the existence or not of room for administrative discretion in the norm as stated in the majority judgment, but, if such room exists, administration must reason in a justifiable manner why and what circumstances frame its action within the protection of nature at which that action aims.

10. Hence that one of our disagreements with the majority judgment stems from the fact that the same deems the mere existence of room for administrative discretion in the norm contrary to juridical certainty and to the rights of mangrove forest ecosystems, when this room, being provided by the legislator and clothed in a series of safeguards, is not incompatible in itself with the requirement of certainty and may even be necessary precisely in order to better protect the rights of the mangrove forest ecosystem in each particular case by requiring the environmental authority's exceptional and expressly reasoned authorization, subject to a prior technical report.

11. From our perspective, not every instance of room for discretion in the norm may be deemed, in the abstract, contrary to nature's constitutional rights. To that end, one must evaluate whether the norm in question generates a condition of uncertainty to the extent of putting constitutional rights, such as the rights of mangrove forest ecosystems, at imminent risk.

12. In that respect, it is important to emphasize what is indicated by the Constitutional Court in judgment No. 32-17-IN/21, in which the presumed incompatibility of articles 86 and 136 of the Environmental Regulations on Mining Activities (RAAM) which provided for administrative

[142] Constitutional Court of Ecuador. Judgment No. 22-18-in/21, of September 8, 2021, par. 71.

authorization by the Single Water Authority (Autoridad Única del Agua) to modify or divert courses of water, with the rights of nature. In that decision, this Organism recognized that authorization or permission *"are not in the abstract incompatible with the rights of nature to have its existence integrally respected; to regenerate its vital cycles, structure, functions, and evolutionary processes, or to be restored. This by virtue of the fact that the authorizations or permits referred to must necessarily have the purpose of ensuring that said rights are not violated."*[143]

13. Similarly, neither can we consider authorization by the national environmental authority in the abstract contrary to the rights of nature or to juridical certainty in the case of mangrove forests ecosystems. The national environmental authority, as guarantor of the rights of nature and of mangrove forest ecosystems, is under the obligation to safeguard integral respect for nature and for regeneration of its vital cycles, structure, functions, and evolutionary processes. In the name of respect for the Constitution, this requires that the authorization issued by this authority in order to allow *"other productive activities*" in mangrove forest ecosystems, not constitute a mere administrative procedure, but necessarily be aimed at preventing severe or permanent environmental impacts, and at ensuring the existence of effective restoration mechanisms, as well as at eliminating or mitigating potential harmful environmental consequences in mangrove forests.[144]

14. In our opinion, numeral 7 of article 104 of COAM and article 278 of the COAM Regulations, in establishing some conditions without which mangrove forest ecosystems cannot be intervened, such as: **i)** authorization by a competent authority, **ii)** existence of a prior technical report, **iii)** exceptional character of the measure, **iv)** reasoned resolution, and **v)** the requirement of reforestation or restoration programs, in principle, are compatible with the rights of nature in the terms indicated by this Court in judgment 32-17-IN/21.

15. The majority judgment, when analyzing the conditions or safeguards provided in the regulations in order to ensure that authorizations issued by the competent authority respect the rights of nature and fulfill the purpose of protecting mangrove forest ecosystems, indicates that: *"even though the norm seeks to qualify its indetermination by requiring authorization from the environmental authority and a reforestation program, these measures do not take into account the high economic, environmental, and social value that these ecosystems have in the present. […] The ecological value of the mangrove forest is of immediate usefulness to prevent what currently already is a climate emergency. A reforestation process, as a condition to allow "other productive activities", would not allow, for example, present sequestration of carbon by the mangrove forest ecosystem. The safeguards established in the norm in order to allow "other productive activities" and achieve future remediation of the harm that the same may cause, do not take into account the present value of this ecosystem for the planet".*

16. This reasoning, however, makes it evident that it is not possible incompatibility in the abstract between the norm and the Constitution that is being analyzed, but the possible effects of its application in practice. In that manner, the majority judgment presumes that activities authorized would always be contrary to the rights of nature. But, strictly speaking, it is not possible to

[143] Constitutional Court of Ecuador, judgment No. 32-17-IN/21, of June 9, 2021, par. 72.

[144] Ibid., par. 74

conclude this from the norm in the abstract, but would instead be a matter for analysis in concrete cases. Besides, the possible malpractice or wrong application of a norm does not imply unconstitutionality and neither is it resolved via its expulsion from the legal system.

17. Added to the above, we consider that the alleged undetermined character of the phrase *"other productive activities"* of numeral 7 of article 104 of COAM is reduced by the provision of article 278 of the Regulations, which recognizes that, depending on the case, authorization of *"other productive activities"* in mangrove forest ecosystems may include *"logging or clearing (…), as well as productive activities that require permanent maintenance via navigation, for purposes of risk prevention, opening of transit easements, docks, or harbor works"*.

18. With reference to this item, the majority judgment limits itself to indicating that the list of examples of productive activities recognized by the COAM Regulations, *"can only be admissible when referring to the activities permitted by law, provided they are sustainable and do not put the mangrove forest ecosystem at risk", indicating that [c] since the phrase "other productive activities" has been considered contrary to the Constitution, the contested regulatory article must not be applied".*

19. In our opinion, judgment No.22-18-IN/21 should have at least explained and established whether the activities named by way of example in article 278 of the COAM Regulations promote the indeterminate nature of the phrase *"other productive activities"* of numeral 7 of article 104 of COAM or if, to the contrary, they convey a greater degree of certainty regarding the activities allowed in mangrove forests. The judgment, however, omits a pronouncement in the matter and limits itself to indicating that the Regulatory norm is inapplicable since the legal norm has been declared unconstitutional.

ii. Level of specificity required for regulation of the activities permitted in mangrove forest ecosystems

20. As already mentioned, we have also distanced ourselves from the rationale of the majority judgment with respect to the degree of specificity required by the norm to consider it constitutional. We must consider that, when referring to restriction of rights, the higher the level of interference with the realm protected by the right, the more the degree of precision required of the norm that contains it. In the present case, even though the majority judgment considers that the contested norm is contrary to the rights of nature, it omits an examination of the level of intervention into the rights of the mangrove forest ecosystem for purposes of requiring a higher level of normative precision from the legislator.

21. Thus, in the reasoning of the majority judgment, any productive activity that is not specified in the law would be contrary to the right to juridical certainty. However, this results in a contradiction with the provisions of article 104 of COAM itself, which recognizes as activities permitted in mangrove forests *"2. Promotion of wildlife; 3. Tourism and recreational activities that are not destructive of mangrove forests; 4. Traditional activities that are not destructive of mangrove forests, such as handling and use of non-wood products; (…) 6. Other non-traditional, scientific, crafts-related activities which are not destructive of mangrove forests."* In our opinion, this catalog of activities demonstrates that it is plausible to permit other productive activities which are not

destructive of mangrove forests. Nevertheless, following the reasoning of judgment No. 22-18-IN/21, none of these activities could comply with the required level of specificity.

22. Due to these considerations, even though we recognize the need for people to have *"a predictable, clear, determined, stable, and coherent legal system that makes it possible for them to have a reasonable understanding of the rules of the game that will apply to them"*[145], we consider that the safeguard of juridical certainty cannot become an unreasonable search for regulatory certainty in the law, when there is in fact a technical and competent organism, such as the national environmental authority, which also has the obligation to act as a guarantor of the rights of nature. It seems unreasonable to us to require the norm to foresee each and every one of the activities permitted in mangrove forests, when the authorization to be issued by the environmental authority would be constitutional only if the rights of mangrove forest ecosystems are respected without restrictions. Unreasonable and excessive limitation of the national environmental authority can be even more harmful towards protection of the rights of nature than the supposed lack of certainty to which the majority judgment refers.

23. Given all that has been said, we consider that in the present case, even though the contested norm allows discretionary room for the national environmental authority to authorize *"other productive activities"* in mangrove forest ecosystems, this degree of discretion is reduced by the imperative need to respect the Constitution; by determination of said activities in article 278 of the Regulations; as well as by recognition of various safeguards in COAM and its Regulations which as a whole are aimed at achieving an authorization by the national environmental authority that is not arbitrary and does not jeopardize mangrove forest ecosystems or violate their constitutional rights in a direct and immediate manner. In our opinion, this guarantees a sufficient degree of certainty in the law, without it being necessary to require from the same an unreasonable level of specificity.

iii. Declaration of unconstitutionality and expulsion of juridical norms are ultima ratio measures

24. Finally, we consider it necessary to refer to declaration of unconstitutionality and expulsion of norms from the legal system as a last recourse. In the course of its jurisprudence, this Constitutional Court has determined that these alternatives may only be resorted to when it is not possible to adapt the contested norm to the Constitution through use of the interpretative route.[146]

25. In observance of the principles that govern abstract control of constitutionality recognized in article 76 of LOGJCC, the Constitutional Court must act with a degree of deference towards the legislative branch in order to guarantee, to the extent possible, permanence of provisions in the legal system (principle 4). This implies prior exhaustion of all interpretations in favor of the rights that permit validity of the norm in the legal system (principle 5) and resorting to declaration of unconstitutionality as a last resort (principle 6).

[145] Constitutional Court of Ecuador, judgment No. 989-11-EP/19 of September 10, 2019, par 20

[146] Constitutional Court of Ecuador, judgment 34-17-IN/21 of June 21, 2021, par 54; judgment No. 83-16-IN/21 of March 10, 2021, par. 399, judgment No. 10-20-CN/20 of August 19, 2020, par. 48.

26. The above has to do with presumption of constitutionality of the norms that are part of the legal system (principle 2), which have been issued by the various organisms endowed with regulatory power in compliance with the provisions of article 84 of the Constitution. In our judgment, in order to be able to override this presumption of constitutionality, the Constitutional Court must resort to a high amount of argumentation that makes it evident that all possible justifications or interpretations of the norm have been analyzed prior to declaring the same unconstitutional and expelling it from the legal system.

27. This is not the case in the majority judgment, which omits exploration of interpretations that guarantee permanence of the contested norms. The judgment went to the extent of determining that, in the present case, the conforming interpretation is insufficient, making it indispensable to exercise the authority that counters the majority rule in declaring the phrase *"other productive activities"* of numeral 7 of article 104 of COAM unconstitutional and expelling it from the legal system. However, this degree of argumentation is not developed in judgment No. 22-18-IN/21 either.

28. In the present case, we consider that when it was determined that the problem with the phrase *"other productive activities"* stems from the risk that activities that are harmful and detrimental to the rights of mangrove forest ecosystems will be authorized, the Constitutional Court could well have come up with a conforming interpretation of the phrase, determining that it can only be constitutional to the extent that the authorized productive activities are subsistence activities and do not have negative consequences for mangrove forest ecosystems, as recognized in the majority judgment itself[147] . This alternative, in addition to respecting the limitations that guide abstract control of constitutionality, guarantees constitutional protection of the rights of mangrove forests as fragile ecosystems.

29. Given all the above reasons, although we reaffirm the right of mangrove forests to special protection and recognize the need that the Constitutional Court develop the content and scope of the rights of nature through jurisprudence, we consider that this objective must be attained within the framework of procedural limits that regulate each constitutional action. It is for that reason that, in observance of the principles that govern abstract control of constitutionality, it is our opinion that it was wrong to expel the norm from the legal system, that the same should have remained in the legal system, its application being conditioned to authorization of *"other productive activities"* only if they are non-destructive of mangrove forests and respect the rights of these ecosystems and their vital cycles without restrictions, observing precisely that special protection which our Constitution guarantees them.

Dr.KARLA ELIZABETH ANDRADE QUEVEDO, constitutional Judge
Digitally signed on October 11, 2021

Dr.DANIELA SALAZAR MARÍN, constitutional Judge
Digitally signed on October 6, 2021

[147] Constitutional Court of Ecuador, Judgment No. 22-18-IN/21 of September 8, 2021, par. 62.

.- I declare that the dissenting vote of Constitutional Judges Karla Andrade Quevedo and Daniela Salazar Marín, in case 22-18-IN, was submitted in the Office of the General Secretary on September 16, 2021, via email, at 11:13, and has been processed jointly with the Judgment. I certify this.

AÍDA SOLEDAD GARCÍA BERNI, **GENERAL SECRETARY**
Digitally signed by Aída Soledad García Berni

JUDGMENT No. 22-18-IN

DISSENTING VOTE

Constitutional Judge Carmen Corral Ponce

1. Judgment No. 22-18-IN/21, approved by the majority of constitutional judges, even though affirming that a certain degree of interpretation of the provisions has been carried out, essentially declares unconstitutionality of articles 104, numeral 7,121, and 184 of the Organic Code on the Environment (COAM) and of articles 278, 462, and 463 of the Regulations of the Organic Code on the Environment (Regulations), a decision I do not agree with; as well as constitutionality of article 320 of COAM, a declaration with which I agree.

2. The majority judgment, in my general opinion, exercised abstract control of constitutionality in a particular manner, distancing itself from petitioners' allegations; assuming *integral control* of connected norms without further explanation; and expanding constitutional rights and provisions in order to conduct the examination, without giving reasons for application of the *iura novit curia* principle.

3. The effect of this was that the analysis was not circumscribed to the realm of abstract constitutional control, which emphasizes ensuring unity and coherence of the legal system by determining incompatibilities of infra-constitutional norms with the rights and provisions of the Constitution of the Republic (CRE), the principles of which are provided for in article 76 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (LOGGJCC) (Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional).

4. The Constitutional Court must not expel norms from the legal system as a first option; since abstract control stems from the premise of constitutionality of the contested provisions; the effort being required, if possible, to procure permanence based on the *in dubio pro-legislature* principle, given that declaration of unconstitutionality is an instance of *ultimo ratio*; i.e. operates when *normative incompatibility* is of such a degree that it makes adaptation of the normative statement to the Constitution impossible.

5. It is for that reason that a declaration of *conditioned constitutionality* allows the provision to be kept in the legal system by subjecting it to a constitutional requirement; and that *conforming interpretation* of the norm according to what is prescribed in the Constitution, makes it possible to preserve the normative system within a system of clarification that is compatible with constitutional rights and provisions.

6. Declaration of unconstitutionality was the first, and it seems, the only option that the majority opinion discerned in judgment No. 22-18-IN21, in spite of affirming that a certain amount of nuancing was carried out. For this reason I submit my dissenting opinion in the following terms:

Regarding the rights of nature and its elements

7. The majority judgment establishes that respect towards the existence of nature, understood as a complex subject, implies conceiving it as a set of biotic and abiotic elements (ecosystems), affirming that when one of its elements is affected, functioning of the natural system is altered.

8. Along this line of understanding, legal reasoning states that rupture of the elements that permit a natural evolutionary process would constitute a violation of the rights of nature (i.e. an inductive argument that goes from the particular to the general, which I do not share); to finally conclude that nature and each of the elements that make it up must be respected without distinction of any kind (generalized understanding from which I dissent).

9. This would imply that practically all human activity would lead to a violation of the rights of nature, which is excessive. The categorical conclusions expressed are a generalization with which I disagree.

10. The majority judgment considers that any activity undertaken with one of the elements of the natural surroundings is per se protected by the Constitution, when constitutional protection of nature must be understood as ensuring the protection of biodiversity and of the ecosystems in surroundings, natural habitat, and an environment that is at great risk of being destroyed and eliminated.

11. In this sense, if one is to understand as the majority judgment does, that constitutional protection of nature implies unfailingly protection of any of its elements, one would arrive at the extreme of considering that activities carried out using elements of nature, such as, by way of example, aquaculture, aviculture, livestock raising, and animal science, etc., which are executed using aquatic species, birds, cattle, pigs, etc. should not be promoted, when the Constitution instead protects their execution and implementation (since in a strict sense these activities do not compromise natural cycles and promote economic development of the country).

12. The Constitution protects the rights of nature, guaranteeing its conservation and restoration; which is not incompatible with exploitation of natural resources, given that they can be used to the benefit of society in a rational and sustainable manner[148]

13. In connection with this issue, I allow myself to emphasize that I in no way ignore the special protection granted to mangrove forests, given that they are fragile ecosystems, nor do I ignore the relevance of their care, and even less their ecological value; rather, I highlight the

[148] Constitution of the Republic; Art. 83.- It is the duty and responsibility of Ecuadorians, without prejudice to others foreseen in the Constitution and the law: (…) 6. To respect the rights of nature, preserve a healthy environment and make rational, sustainable use of natural resources.

importance of regulating conservation, management, and sustainable use of this type of ecosystem in conformity with the Constitution's requirements.[149]

Regarding productive or public infrastructure activities in mangrove forests

14. The majority judgment states that petitioners argue that article 104.7 of COAM violates the principles of non-restriction of rights and of their progressive development (article 11, numerals 4 and 8 of CRE); claiming regression with respect to protection of the above law (paragraph 46).[150]

15. These charges by petitioners, are nevertheless not analyzed, given that, invoking the *iura novit curia* principle, the constitutional test was redirected to a possible transgression of the right to juridical and to legal reserve (articles 82 and 132 of CRE) by articles 104.7 of COAM and 278 of its Regulations.[151]

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[149] Constitution of the Republic, article 406; *"The State will regulate conservation, management and sustainable use, recovery, and limitations on dominion of fragile and threatened ecosystems, among others, moors, wetlands, cloud forests, dry and humid tropical forests and mangrove forests, marine and marine-coastal ecosystems".*

[150] *Petitioners argue that article 104 (7) violates the principles of non-restriction of the contents of constitutional rights and that of progressive development of the contents of rights; that it violates the principle of non-regression because "the Law on Forests and Conservation of Natural Areas and Wildlife (Ley Forestal y de Conservación de Áreas Naturales y Vida Silvestre), which was previously in effect, considered mangrove forests as property of the State, which could only be exploited via concession… the law did not contemplate the possibility of granting permits to undertake infrastructure works, allowing only concessions for productive activities in some cases, and subsistence activities in others, precisely because of the special and fragile environmental characteristics of mangrove forest ecosystems"; that it violates the rights of nature "given that infrastructure works interrupt vital cycles, structure, and evolutionary processes of the ecosystem."*

[151] *COAM.- "Art. 104.- Activities permitted in the mangrove forest ecosystem. The activities permitted in the mangrove forest ecosystem, beginning on the date of effectiveness of this law, will be the following:*

1. *Phyto-sanitary control in compliance with what is established in the management plan or other instruments for conservation and management of said areas;*
2. *Promotion of wildlife;*
3. *Tourism and recreational activities that are not destructive of mangrove forests;*
4. *Traditional activities that are not destructive of mangrove forests, such as handling and use of non-wood products;*
5. *Transit easement;*
6. *Other non-traditional, scientific, crafts-related activities that are not destructive of mangrove forests; and,*
7. ***Other productive or public infrastructure activities that have been expressly authorized by the National Environmental Authority and that offer reforestation programs** (emphasis added).*

*COAM Regulations.- Art. 278.- Authorization for use of mangrove forest ecosystems.- **The National Environmental Authority may grant authorizations for works of infrastructure that are of public or productive interest in mangrove forest ecosystems** by means of a reasoned resolution, subject to a prior technical report.*

Said authorization will be granted exceptionally, and depending on the case, may include logging or clearing of mangrove forests, as well as productive activities that require permanent maintenance via navigation for purposes of risk prevention, opening of transit easements, docks, or harbor works.

Said resolution may be issued once the proponent has obtained the corresponding administrative environmental authorization, and must contain:

*a) A determination of the **restoration area** and compensation of the mangrove forest coverage, based on the type of project, in a proportion of 6 to 1 for each hectare cleared in the totality of the project, in the restoration priority areas defined by the National Environmental Authority, who will approve the areas where mangrove forest compensation will be undertaken; and*

*b) Proof of payment in monetary **compensation**, equivalent to the totality of the costs of restoration of the affected area. The funds collected by way of compensation will be destined to restoration activities, through the National Fund for Environmental Management (Fondo Nacional para la Gestión Ambiental). The National Environmental Authority will establish the guides for valuation of ecosystems to be applied to valuation of the loss of environmental services.*

The requirements for authorization of use of mangrove forest ecosystems for public interest infrastructure works and for productive infrastructure works will be defined by the National Environmental Authority through the regulation issued to that end" (emphasis added).

16. The majority judgment concluded that article 104.7 of COAM, allowing the possibility of undertaking *"other productive activities"* in mangrove forests, constitutes a *"generic and indeterminate"* category, that high and extensive vagueness of the phrase creates the risk of it being understood as any industrial and extractive activity with the excuse that these are productive activities, thus putting mangrove forest ecosystems in a situation of indefinite risk, unconstitutionality together with expulsion of the term *"other productive activities"* of the aforementioned norm from the legal system being declared.

17. The Constitutional Court, based on the principle of *indubio pro-legislatore* had the duty to analyze that if inclusion of the category *"other productive activities"* was generic and indeterminate, this did not justify declaration of unconstitutionality, because the latter is a measure of *ultima ratio*; more so when in this case, what was pertinent was to undertake a *conforming interpretation* of the contested legal provision, in such a way that undertaking of productive activities which are *"not destructive of mangrove forests"* will be understood to be constitutional, as is the case in numerals 3 and 6 of article 104 of COAM; that way, the supposed indeterminate character of the category *"other productive activities"* would be limited to the possibility of undertaking them only when they do not destroy mangrove forests.

18. In the same majority judgment, paragraph 56 established that : "(…) *when including 'other productive activities' without adding, as is done in numerals 3 and 6 of the same article,* ***'non-destructive of mangrove forests'****, one would be permitting the possibility of productive activities that could affect mangrove forest ecosystems"* (emphasis added); nevertheless, in spite of recognizing that the problem was created by failure to add in numeral 7 of article 104 the phrase "non-destructive of mangrove forests", the majority judgment resolved – in a contradictory manner – to declare unconstitutionality when it was possible to adapt the norm to the legal system via interpretation.

19. The Constitution establishes that the right to undertake economic activities, either individually or collectively, in conformity with the principles of solidarity, and of social and **environmental** [152]responsibility, will be recognized and guaranteed. Then, interpretation of the norm would permit execution of productive activities provided they do not affect mangrove forest ecosystems, their protection being thereby guaranteed, as required by the Constitution.

20. Article 406 of the Constitution determines that the State will regulate conservation, handling, and sustainable use of mangrove forests; in this sense, article 278 of the COAM Regulations does exactly that by regulating authorization of productive activities, establishing that the same will be granted by the environmental authority in an **exceptional** manner, which, depending on the case, may *"include logging or clearing of mangrove forests, as well as productive activities requiring permanent maintenance due to navigation, risk prevention, opening of transit easements, docks or harbor works"*; and that authorization of the same will require including restoration and mangrove forest coverage compensation programs.

21. Execution of productive and public infrastructure activities would be contingent upon authorization by the corresponding administrative environmental authority, authorization

[152] Constitution, article 66, numeral 15.

which in turn must guarantee protection of nature, evaluate the reparation measures being offered, which obviously must receive authorization – as an exception – subject to prior reports from the environmental entity in charge and issued by means of a duly reasoned resolution. All of these regulations, contrary to the constant reasoning evidenced in the majority judgment, are aimed at guaranteeing the special protection that mangrove forests require as fragile ecosystems.

22. In this sense, the interpretation of article 104.7 of COAM and 278 of the Regulations that the majority judgment affirms has been carried out in connection with the term *"public infrastructure"* given in paragraph 83 of the majority judgment, does not show compliance with the aforementioned constitutional provision, when stating:

> *"With the aim of carrying out a conforming interpretation of the contested norm, the term "public infrastructure" of article 104 (7) of COAM will be constitutional provided that* ***public infrastructure construction guarantees access to public services by communities living in or next to mangrove forest ecosystems****, and it is demonstrated that the same does not interrupt the vital cycles, structure, functions, and evolutionary processes of mangrove forest ecosystems"* (emphasis added).

23. This, because even though the majority sentence has pointed out that construction of public infrastructure in mangrove forests is an activity that is permitted by the Constitution because it is necessary for the rendering of public services, and protection of the mangrove forest ecosystem is demonstrated, I consider the interpretation to also be restrictive as it does not take into account that the need to build public infrastructure in the sector for the benefit of the rest of Ecuador's population could arise, i. e. that of shared well-being and general interest.

24. The Constitution in fact establishes that *"Promoting the common good and prioritizing the general interest before the particular interest, in conformity with good living"*[153] will be the duty and responsibility of Ecuadorians; nevertheless, given the majority judgment interpretation, only infrastructures built for the benefit of communities living close to the mangrove forest will be permissible, the possibility of executing other types of works being restricted without further justification; and, even more, without considering that this type of infrastructure could be implemented for the benefit of the whole population and of productive development of the country, with the environmental and social responsibility measures contemplated in the constitution to protect biodiversity and ecosystems in natural surroundings, habitat, and environments that are at grave risk of being destroyed and eliminated.

25. I emphasize that, just as in the case of *"other productive activities"*, authorizations by the environmental authority for construction of this type of infrastructure works must be granted – as an exception -, observing the pertinent restoration and compensation measures, and protection of the rights of nature, after the corresponding technical reports, and avoiding the least possible impact on ecosystems.

[153] Constitution of the Republic, article 83, numeral 7.

26. Finally, in connection with this subject the majority judgment omits any statement on productive activities which up until due date of issuance of the judgment have been duly authorized by the environmental authority; here the majority judgment should have considered the fact that there are acquired rights and that the past beneficiaries of said authorizations could not be affected; hence that, given the principle of juridical established in the Constitution, the effects of the judgment could only apply to the future.

Regarding monocultures

27. In the normative statement of article 409, sub-paragraph 2, the Constitution includes the language that *"In areas affected by degradation and desertification processes, the State will develop and stimulate forestation, reforestation, and replanting projects that **avoid monoculture** and favor use of native species that are adapted to the zone";* nevertheless, the majority sentence determines that the constitutional norm is mandatory and obligates establishment of action aimed at avoiding monocultures in desertified or degraded soils, while cautioning that the constitutional norm does not contain an express prohibition (when the Constituent prohibits an activity it is express, as in other provisions when genetically modified organisms are prohibited, for example).

28. Article 121 of COAM provides: *"Art. 121.- Monocultures.- **Establishment of monocultures will be permitted** in forest plantations established in degraded areas or in areas that are in the process of desertification, as determined in the land management plan"* (emphasis added); and, even though the contested norm as indicated in the majority judgment is permissive, what was pertinent in this case was to issue a declaration of conditioned constitutionality of the norm, in such a way as to meet a requirement, such as *"provided these are reasonably justified, preventing them from becoming common practice"*, with that, the constitutional precept, which as mentioned, is aimed at avoiding monocultures, would be complied with.

Regarding prior consultation and citizen participation

29. First, I consider that the majority judgment unnecessarily addresses aspects of prior consultation, when it is clear that article 184 of COAM[154] refers to environmental consultation; the effects of prior consultation and the effects of environmental consultation cannot be confused. As stated in the dissenting vote in case 9-19-CP/19, prior consultation is a mechanism for the exclusive use by counties, communities and indigenous peoples and nationalities, whereas environmental consultation is not limited to counties, communities, and indigenous peoples and nationalities, but to the population in general whenever the environment could be affected.

[154] *"Art. 184.- On citizen participation.- The Competent Environmental Authority should inform the population that it could be directly affected by possible implementation of projects, works, or activities, as well as of the possible socio-environmental impacts expected and pertinence of action to be undertaken. The purpose of participation of the population will be collection of its opinions and observations, to be incorporated into Environmental Studies, provided they are technically and economically viable.*
If the consultation process referred to results in majority opposition of the corresponding population, the decision to execute or not to execute the project subject to a duly reasoned resolution will be adopted by the Competent Environmental Authority.
Social participation mechanisms must include environmental facilitators, who will be evaluated, qualified, and registered in the Single System of Environmental Information (Sistema Único de Información Ambiental)".

30. In other words, these are different mechanisms, as evidenced in the comparative table of provisions detailed in paragraph 123 of the majority judgment itself; in addition, that is recognized in paragraph 125 of the same judgment: *"In the present proceeding, the President as well as PGE have argued that article 184 of COAM does not refer to prior consultation established in the Constitution, and is therefore not applicable for matters related to that constitutional right. This Court agrees with this point of view and understands that its scope does not include and must not replace prior consultation with counties, communities, and indigenous, afro-Ecuadorian, and coastal nationalities".*

31. The majority judgment establishes that *"Article 184 of COAM does not include all the obligations emanating from the Constitution. Having originated prior to the Escazú Agreement, it doesn't include the content of that Agreement"*, carrying out a certain amount of interpretation in that respect. I disagree with that opinion, because article 184 of COAM does include what is provided in article 398 of the Constitution, which refers to environmental consultation. This constitutional provision stipulates that:

> *Art. 398.- All decisions or authorizations by the State that may affect the environment must be subjected to the community for consultation, subject to widespread and timely information to the same. The consulting subject will be the State. The law must regulate prior consultation, citizen participation, deadlines, the subject consulted, and the criteria for valuation of and objection to the activity subjected to consultation.*
>
> *The State will evaluate the opinion of the community in accordance with the criteria established in the law and international human rights instruments.*
>
> ***If the consultation process referred to results in majority opposition of the corresponding community, the decision to execute or not to execute the project will be adopted by means of a duly reasoned resolution by the corresponding superior administrative instance, in compliance with the law"*** (emphasis added).

32. Article 184 of COAM is practically a reproduction of the aforementioned constitutional provision, therefore it clearly replicates that the environmental authority must inform the population that could be affected by execution of projects and of possible environmental impacts; that its opinions and observations will be collected, and that in case the **consultation** process results in a majority opposition, the decision must be made by the competent environmental authority ; in other words, the contested norm does not only establish the "duty to inform", but also provides for a "consultation process", reason for which all these parameters are in harmony the provisions of the Constitution. Equally, article 463 of the Regulations[155] in my opinion does not restrict the right to environmental consultation, but rather regulates the purpose of citizen participation in the event of implementation of projects

[155] Regulations on the Organic Code of the Environment (Código Orgánico del Ambiente): ***"Art. 463, Purpose of citizen participation in environmental regulation****. Citizen participation in environmental regulation has the purpose of providing information on the possible socio-environmental impacts of a project, work, or activity, as well as of collecting the opinions and observations of the population that lives in the corresponding area of direct social influence".*

that may generate an environmental impact, in accordance with the parameters established in article 184 of COAM.

33. The interpretation of article 184 of COAM and of article 463 of the Regulations that the majority judgment affirms took place in essence results in declaration of unconstitutionality; act in which the Court again distances itself from the presumption of constitutionality of the contested norm and from the indubio pro-prolegislator principle, when it is evident that these provisions repeat what the Constitution says.

34. Thus, given declared unconstitutionality, it would seem that the very effect established by the Constitution in article 398, which is clear in determining that the decision is to be adopted by the environmental authority even in the event of opposition by the community, provided the resolution is duly reasoned, is being modified; this is the procedure that in my opinion must be observed, since it is expressly stipulated in the Constitution, text of which can only be modified using the modification mechanisms provided to that end (amendment, reform, or constitutional change).

35. The majority judgment mentions that the purpose of article 462 of the Regulations is to regulate the right to prior consultation, which is contrary to the principle of organic law reserve and to what is provided in the jurisprudence of this Court, arguing additionally that the norm is contrary to what is established in article 57, numeral 7 of the Constitution, reason for which the Court declares its unconstitutionality, applying the principle for resolution of contradictions. As mentioned in the preceding paragraphs, the majority judgment unnecessarily addressed aspects of prior consultation when it only had to aim at environmental consultation, confusing these two mechanisms and extending the analysis – which was not to the point – to the regulatory norm in order to declare its unconstitutionality; reasoning which I do not share either.

36. Finally, the majority judgment resorts to the Escazú Agreement, an international instrument which, having been issued in 2018, could not have been foreseen by the Legislator, since COAM was issued in 2017: besides, the Agreement refers in a general manner to observance of consultations for indigenous peoples, without implying confusion of the mechanism of article 57, numeral 7 of the Constitution (prior consultation for indigenous peoples and nationalities) with that of article 398 of CRE (environmental consultation), this international instrument being emphatic in its respect for **national legislation** when it establishes in article 7, numeral 15 that *"While implementing the present Agreement, each Party will **guarantee respect for its national legislation** and for its international obligations regarding the rights of indigenous peoples and local communities"* (emphasis added).

By virtue of the above, I deem that what needed to be declared was:

37. The phrase *"productive activities"* of article 104, number 7 of COAM, will be constitutional with the conforming interpretation *"provided they are not destructive of mangrove forest ecosystems".*

38. The phrase *"public infrastructure"* of article 104, number 7 of COAM, will be constitutional with the conforming interpretation that *"construction of public infrastructure must guarantee access to public services based on general interest and compliance with environmental and social responsibility contemplated constitutionally for purposes of protecting biodiversity and ecosystems in surroundings, natural habitats, and environments that are in grave risk of being destroyed and eliminated"*.

39. The phrase *"other productive activities"* and *"public infrastructure"* of article 278 of the Regulations will be constitutional according to the conforming interpretation given to the aforementioned article 104, number 7, of COAM.

40. Article 121 of COAM is conditionally constitutional, in order that reasonably justified monocultures not become the common practice in degraded areas or those in the process of desertification determined in the land management plan, purposes for which the requirement "provided that they are reasonably justified, preventing this from becoming common practice" will be added.

41. The contents of article 184 of COAM and of articles 462 and 463 of the Regulations are constitutional.

CARMEN FAVIOLA CORRAL PONCE
Digitally signed by CARMEN FAVIOLA CORRAL PONCE on October 7, 2021

Dr. Carmen Corral Ponce
CONSTITUTIONAL JUDGE

.- I declare that the dissenting vote of Constitutional Judge Carmen Corral Ponce, in case 22-18-IN, was submitted to the Office of the General Secretary on September 20, 2021, via email, at 11:07, and has been processed jointly with the Judgment. I certify this.

DR. AIDA SOLEDAD GARCIA BERNI
GENERAL SECRETARY