

## **“My Power in the Constitution:” the Perversion of Rule of Law in Ecuador**

Daniela Salazar\*

### 1. Introduction

In 1830, Ecuador’s first president, Juan José Flores, appeared in a portrait wearing a silk sash, upon which was embroidered in gold letters the slogan: “My Power in the Constitution.” Since then, though with some changes of style, presidential sashes in Ecuador have kept that phrase intact, a characteristic which differentiates the sashes from others in the region. The meaning of the presidential slogan, nevertheless, has changed significantly. This phrase, which in its time referred to the importance of adhering to the Constitution as a limitation of power, today has taken on a more literal meaning: the power of the president, not the president’s limitations, resides in the Constitution. In the process that led to the adoption of the Constitution, and in the constitutional text itself, it is possible to find the keys to understanding the growing authoritarianism in Ecuador.

With some frequency, those who recognize the excesses of presidential authority in Ecuador attribute them to the personality of President Rafael Correa, to his confrontational and populist style. Without claiming to carry out an exhaustive analysis of the extensive, complex, and imaginative Ecuadorian Constitution, in this essay I will allude to some examples of its innovations to demonstrate that the root of the perversion of rule of law in Ecuador does not lie in the leadership of the President, but rather in the 2008 Constitution itself, also known as the Constitution of Montecristi. It is my intention that the case of Ecuador and the examples

described here serve to inspire deeper reflection on the implications of the so-called new Latin American constitutionalism and its unfulfilled promises.

## **2. Forgetting is forbidden**

One of the President Rafael Correa's preferred phrases, ceaselessly repeated at every public speaking event, is the phrase, "forgetting is forbidden." The phrase is used in his speeches to remind us of the situation which reigned over Ecuador prior to the so-called government of the "citizen revolution," in contrast to the current situation. However, more than eight years having already passed since he came to power, it is essential to also begin to create a record of how this "revolution" began and was planned. The scant attention that Ecuador received in the international arena, together with the weak historical memory of its citizens, has created a situation in which the questionable process of the progressive accumulation of power implemented by the current government passes unnoticed or perhaps forgotten.

The 2008 Ecuadorian Constitution created a stability unprecedented in the history of our republic. The so-called Constitution of Montecristi is Ecuador's twentieth<sup>1</sup> constitution. While the validity of the constitutional text has not set any records with respect to the average duration of the preceding constitutions, and its first amendments are already on the way, Ecuador is experiencing the longest term of power exercised by a president of the Republic. Since just the return of democracy, in 1979, we can count 12 constitutional presidents and one acting president; and in just the 10 years preceding the government of Rafael Correa, between 1997 and 2007, we had seven presidents (without counting a triumvirate that claimed to govern for a few hours on the night of January 21, 2000), three of which were overthrown. But this apparent overcoming of political instability has had a price, and I do not only mean the fact that the President's term of government could become indefinite.<sup>2</sup> This prized stability was obtained by means of the

deterioration of the fundamental elements of rule of law, through authoritarian strategies disguised as legal or validated by popular vote.

Unlike before, the process of writing a constitution<sup>3</sup> that began in Ecuador in 2007 was not immediately preceded by an institutional or political crisis which justified it. There were weaknesses, as there were in the State overall, but it was not imperative to reinvent anything. Under the Constitution of 1999, Ecuador was a constitutional regime, with an important range of rights recognized in the Constitution, with legal guarantees of these rights, among other important advances. The only apparent justification for this institutional re-foundation seemed to be the necessity of absolute control of power. It was a premeditated issue. So much so that when Rafael Correa ran for president, he did so without presenting candidates for Congress, a body he planned to eliminate once he assumed power.

When President Correa took office, he refused to swear to defend the Constitution. He swore only to respect the mandate of his voters,<sup>4</sup> whom he had convinced during the campaign of the necessity of a Constitutional Assembly. Following this, the authorities took advantage of the President's popularity to give legitimacy to the abuses of power by means of a direct popular vote. In this way, looking back on the November 2006 presidential election, bombarded with official publicity and faced with a shameless abuse of governmental resources and infrastructure to assure thoroughly favorable results, we Ecuadorians returned to the ballot box in April 2007 to weigh in on the necessity of a Constitutional Assembly, then again in September 2007 to elect a Constituent Assembly, and again in September of 2008 to ratify by referendum the new Constitution of the Republic. The majority support of the people for these processes has made it so that very few dare to question them, despite the fact that authoritarianism has been present with great strength since the first acts of the citizen revolution.

It is also the case that before these votes, in March of 2007, the government of the citizen revolution busied itself destroying the parliamentary majority of the opposition. Since the beginnings of the President's campaign, political parties and institutions had been subjected to a smear campaign, which made it easy for the government, through a decision of the Supreme Electoral Tribunal handed down on April 13, to dismiss 57 out of 100 legislators – all of them from the opposition – and suspend their political rights for one year.<sup>5</sup> Those legislators who were dismissed availed themselves of the Constitutional Tribunal and filed a writ of protection (*amparo*). On April 23, the Constitutional Tribunal resolved that the measure taken by the Supreme Electoral Tribunal was unconstitutional for having failed to comply with due process and having failed to afford the legislators the opportunity to defend themselves, and that by virtue of this, the 57 who had been dismissed should be returned to office. But on April 24, the day following the Constitutional Tribunal's decision, legislators standing in for those that had been dismissed met in secret with the private secretary of the Minister of Internal Affairs to negotiate a sufficient number of votes that would secure the popular referendum. On being surprised by the press, they got out of their cars covered with tablecloths, for which, after what later happened, they came to be known as the "tablecloth" congressmen. At dawn the following day, at five in the morning, the stand-in legislators taking the places of those who had been illegally dismissed boarded a police bus that secured their entrance to the Congressional facilities, at which time public security forces impeded the entrance of the members of congress whose reincorporation had been ordered by the Constitutional Tribunal. Once inside, the stand-in legislators, together with government supporters, resolved to dismiss the nine members of the Constitutional Tribunal that had declared the unconstitutionality of the measure that removed the 57 opposition congressmen and to replace them with other judges linked to the President,

rendering the judicial resolution ineffectual. All of this scandalous institutional dismantling happened without causing a great reaction among the citizenry, which demanded political changes against the “partyocracy” (*partidocracia*) and allowed the President, just as much as the Constitutional Assembly, which was next to be installed, to govern without any political counterweight.

To this was added the fact that the Constituent Assembly – beyond the mandate to draft a new constitution – received “plenary powers” to transform the institutional framework of the State<sup>6</sup> and they knew to take advantage of them to dismantle the entire institution that in one way or another could have limited or at least balanced the power of President Rafael Correa, who at all times controlled the decisions of the Assembly. When the Constituent Assembly got to work, it was clear that its members were not subject to the then-current constitution, but rather solely to the Constituent Statute, approved by a majority of the population. The “plenary powers” of the Assembly in practice meant absolute powers which allowed this body to approve mandates, laws, and resolutions in legislative, administrative, and even judicial matters, matters quite distant from the process of drafting a constitution. While the Constituent Assembly appropriated powers that were not expressly contemplated in the Statute, in applying the logic that he that can do the greatest task can also do the least, it was interpreted that a body empowered to draft a constitution could issue all the regulations and resolutions necessary for its administration.

In other constituent processes, the Constituent Assembly dedicates itself to writing up a draft of the constitution while other institutions continue functioning normally within their capacities. In principle, the Constituent Assembly could have functioned at the same time as the Congress, if the former was concentrated on the drafting of the constitution and the latter carried out its legislative work. But once the Assembly self-appropriated legislative powers, it decided to close

the Congress that had been democratically elected in October of 2006 (despite the fact that months before it had fulfilled the executive's orders to dismantle the Constitutional Tribunal). The plenary powers served them as well to confirm them in their posts as public officials close to the government and to design new posts for other public officials, which meant in the end that all authority resided in the Constituent Assembly, and not in the people. Even the justices of the Supreme Court continued in their posts "while the Constituent Assembly does not dispose to the contrary," according to one mandate. Lawyers who participated in this process of the concentration of powers, in trying to justify this chain of abuses, limited themselves to responding that freeing themselves from the opposition was the only way to govern. For those who were within the government, everything was justified because there was a political plan greater and more important than Rule of Law: the presidential project.

All institutions were subject to what they denominated "the project," which justified everything, including impunity. The acts of the Constituent Assembly could not be judicially challenged by virtue of the fact that the first "mandate" approved by that body resolved that: "the decisions of the Constituent Assembly are hierarchically superior to any other legal rule and their fulfillment is mandatory for all natural and legal persons, and all other public powers, without any exception. No decision of the Constituent Assembly will be susceptible to control or challenge on behalf of any constituted power. The judges and courts that undertake any action contrary to the decisions of the Constituent Assembly will be removed from office and subject to trial."<sup>7</sup> Thus, the Constituent Assembly was omnipotent and its acts were cloaked in immunity.

The Constituent Assembly assumed so much power that it neglected the work of deliberation over and composition of the constitution. The period of time established by the referendum expired without the constitutional debate having advanced. Finally, the passages of the

Constitution were voted on “between midnights and the rooster’s crows,” some without any debate. It is known that, with hindsight on the voting, a Drafting Commission had altered around 80 passages and cut out more than forty approved articles in the process of preparing the final version which was submitted to popular vote. In this way, not only the process, but also the actual passages were born surrounded by reasonable doubt about their legitimacy. But by then, the government of the citizen revolution had not only coopted all bodies of power through the appointments made by the Constituent Assembly, but had also ordered the dismissal of the Congress and the members of the Constitutional Tribunal who could have acted as brakes and counterweights to its actions.

The Constituent Assembly was followed by a transitional regime devised by the Constitution itself to assure the President of control of all public powers, installing his followers in all branches of power and in all positions of authority. The transitional period began after the approval of the new Constitution (in September of 2008) and lasted, at least, until the definitive integration of the Council of Citizen Participation and Social Control (in March 2010), although some institutions remained in transition for much longer. It is important to pay attention to this period since the implementation of the Constitution is owed not just to its text, but also to the facts surrounding its drafting such as the way in which the institutional transition was implemented. As César Montúfar had warned, “in the 60 articles that constitute the Temporary Rules and in the document called the Transitional Regime [it is possible to identify] a true plan of complete capture of the State’s institutions, of total control of power, on the part of the political group that had controlled the Constituent Assembly, led and managed by the Executive.”<sup>8</sup> Without the intention of undertaking a comprehensive analysis of this period, there is room to mention a few of the major events that were carried out in this moment of political

exceptionality, in which the 2008 Constitution was still not completely in force, but the Constitution of 1998 did not apply, which permitted the group in power to make decisions which consolidated its institutional cooptation, always acting under the notion of plenary powers.

First, the Montecristi Constitution included rules for dismantling the Supreme Court, formed in 2006 under what in my judgement was the most serious and rigorous process of judicial selection that has been carried out in the history of Ecuador. The thusly designated Supreme Court had 31 magistrates but the National Court conceived by the Assembly was to have only 21. According to the Transitional Regime, the magistrates had to submit themselves to a lottery to determine who would remain in office. Thirty of the thirty-one magistrates decided not to recognize the lottery, and so the National Court was left leaderless.

Second, the day that the Constitution was promulgated, the spokespersons for the Constitutional Tribunal – who had been removed from office by the “tablecloth congressmen” – self-designated themselves magistrates of the first Constitutional Court, in application of a questionable interpretation of the articles of the constitutional Transitional Regime, and it was also they who by means of an interpretative judgment reformed the Constitution to resolve the leadership gap in the National Court, and named judges with a distinct procedure established in the Transitional Regime.

Third, due to the fact that the process of electing members of the Assembly was soon to end in the middle of 2009, the Legislative and Oversight Commission of the Constituent Assembly (known as the “mini-Congress”) was charged with exercising the legislative function, which facilitated the approval of legal bodies of vital importance for the consolidation of “the project.”



Fourth, once the new National Electoral Council was formed, the mini-Congress delegated to it the authority to regulate the designation of the members of the fifth power, the Council on Citizen Participation which, as we will see further on, is in charge of the designation of the highest public authorities.

It is in this way that, during the first years, President Correa governed without submitting himself to the prevailing Constitution and without any political or institutional counterbalance, and designed a plan which permitted him to control all the powers under an apparent legality ratified by popular vote. Though cloaked in a veil of legitimacy, “the project” was born tainted by authoritarianism. Forgetting is forbidden.

### **3. The Ecuadorian Constitutional laboratory**

The defenders of the Ecuadorian Constitution assert that the constitutional design of this Andean country goes beyond neo-constitutionalism because it not only breaks with the positivist vision of the Constitution, but also introduces novel aspects such as multiculturalism, interculturalism, *pachamama* (the recognition of nature as a legal entity), and *Sumak Kawsay* (or Good Living), among others. “Pluri-nationality, *Sumak Kawsay*, and the rights of *pachamama* are three pillars upon which the new paradigmatic change is sustained.”<sup>9</sup>

The Spanish doctrinaires which gave theoretical basis to the Ecuadorian Constitution, principal exponents of the doctrine of new Latin American constitutionalism, assure us that the new Latin American constitutionalism is a category that derives from “the sum of the legitimacy, application, and democratic deepening that takes place in the new Latin American constitutions”<sup>10</sup> and explain that “the new constitutionalism maintains the positions on the necessary constitutionalization of the legal order with the same firmness as neo-constitutionalism

and lays out, just as neo-constitutionalism does, the necessity of building the theory and observing the practical consequences of the evolution of constitutionalism toward the Constitutional State. But its concern is not solely with the legal aspect of the Constitution, but rather, even at the first level, with the democratic legitimacy of the Constitution.”<sup>11</sup> Different from neo-constitutionalism and new constitutionalism, the “new Latin American Constitutionalism” has elements in common, according to the cited authorities: a thoroughly democratic constituent process, not representative of the elites, made up of originality and the loss of fear of invention in its texts.

In this way, while neo-constitutionalism is characterized, among other things, by a flexible constitutional structure which allows judges, by way of guarantees, to make constitutional mandates into realities, given prevalence to deliberation as the beginning of constitutional interpretation, the new Latin American constitutionalism expressed in the Constitutions of Venezuela, Bolivia, and Ecuador would be characterized by the following elements: “1) The presence of preambles which supply the constitutions with spirituality, to connect the text with the history of the country and provide it with programmatic content. 2) The existence of opening chapters which establish concepts and principles that form the basis of the constitutional pact. 3) A high level of norms/principles and theological and axiological precepts [...] 4) A recognition of the supremacy of the Constitution, emphasizing the primacy of this legal principal, its binding force on natural and judicial persons as well as public powers, and its direct efficacy. [...] 5) The configuration of a new model of the State [in Ecuador’s case, a rule of rights and justice] 6) The social protection of the State, emphasized by the social and environmental function with which private property is delineated and its coexistence with other forms of property, such as the individual, collective, public, state, communal, associative, and mixed forms of property. [...] 7)

The configuration of a pluri-national and intercultural state, in which there is wide protection of minority ethnic groups and indigenous peoples. [...] 8) Constitutions which guarantee rights through the control of constitutionality structure. [...] 9) Wide and novel list of rights, grouped in a manner that differs from traditional Western constitutions. [...] 10) An original presentation of constitutional duties, which are expanded beyond the typical obligations which regulate constitutionalism. 11) Expansive protection of rights through various mechanisms, instruments, and devices. [...] 12) Legitimization of a legal posture of Latin American integration, and support for the organization of regional super-national institutions on the basis of solidarity, fairness, equality, and respect. [...] 13) Recognition of the preeminence of the State and its influence on economic and social issues. [...] 14) A configuration of procedures of reform with the primary constituent participation. [...].”<sup>12</sup> Ramiro Ávila refers to Latin American neo-constitutionalism with these characteristics as a transforming neo-constitutionalism.<sup>13</sup>

Without the intention of theorizing about the new Latin American constitutionalism, I have focused on that which from my perspective constitutes the principal character of the Ecuadorian Constitution of 2008: its creative capacity. Its proponents made enormous efforts to create what they call new paradigms. Those who labored in the constitutional laboratory of Montecristi tried, without much success, to avoid transplanting ideas from previous or comparable constitutions, and ensured the incorporation of new definitions into the Constitution, principles and institutions without precedent in constitutional history, aimed at building a different State and a different law, capable of adapting to the Andean reality. Although it is outside the scope of this essay to address all of the innovations of Ecuador’s 2008 Constitution, I will mention a few of those which have had great impact on the current weakening of Ecuadorian democracy, such as a) the elimination of rule of law as a defining characteristic of the State; b) the institutional design

which dissolves the separation of powers at the same time as it reinforces the President's power; and c) the incorporation of an abundant catalog of rights subject to the achievement of Good Living.

I advance my skepticism with respect to this enthusiasm for producing constitutional innovations. The argument that it is advisable to set aside comparable constitutional experience to create rules and institutions that can be adapted to our unique and particular reality is too risky and – in my experience – has been systematically used by Ecuadorian authorities to justify arbitrariness in apparent disregard of constitutional and international human rights standards.<sup>14</sup> The eagerness to build paradigms which allow us to step away from neo-liberalism should not justify the restriction of rights which recognition has been so difficult to obtain.

**a. The abdication of the rule of law**

Among its efforts to differentiate itself from other constitutional experiences, “the outlines and tracks for this construction are found in the first article of the Constitution, which are a call to make a paradigm shift from the traditional and neoliberal state to a state that makes Good Living a reality, and which characterize the transforming constitutionalism”<sup>15</sup> This first article of the Constitution of 2008 declares that Ecuador is a “rule of rights,” (*estado de derechos*) avoiding defining itself as a “rule of law” (*estado de derecho*).

While there are neither significant theoretical foundations for this concept that is incorporated into the 2008 Constitution nor a consensus on what it means, the doctrine agrees that it constitutes a deliberate distancing from the notion of rule of law that appears in the 1998 Constitution. According to Fabián Corral, a “rule of rights” is a conscious flight from the principle of subjugation to the authority of law and a strengthening of discretion which implies

that “ownership of individual rights is attributed to the State, or at least it conveys, as a defining characteristic of the State, that which belongs to other distinct subjects of power and is defined by political power through a characteristic of natural persons.”<sup>16</sup> According to Corral, “the elimination of the concept of rule of law is significant, because that system assumed general subjection to the law, limitation of military authority, and public responsibility, submitted to the public policies and rules and the prevalence of the rights of persons over the interests of the state.”<sup>17</sup>

Others, such as Ramiro Ávila, explain that “in a rule of law, power is submitted to law in two forms. In the first, the law is understood exclusively as rules; in the other, the law, has a much broader conception, and could be understood as the formal legal system or as submission to the Constitution [...]. In a “rule of rights”, finally, all power, public and private, is subject to the rights [...]. In this sense, to say that the state is one of rule of rights (as opposed to of rule-of-law), means that the centrality of the rights of people are redefined as being above the State and above the law.”<sup>18</sup>

While if we follow the interpretation of the very Constitutional Court we could infer that, in truth, this statement is nothing new since according the Court this doctrine’s “basic characteristics are a) the existence of a Constitution which cannot be modified by means of the law; b) the normative character and the binding strength of the whole Constitution; c) judicial control of constitutionality, by means of judicial safeguards which allow the monitoring of infra-constitutional rules with respect to the Constitution; d) the direct application of the Constitution to resolve all legal conflicts that arise in society; and e) the ability to interpret all orders, in light of the Constitution, by means of a specialized organ of public power called the Constitutional Court or Tribunal.”<sup>19</sup> In application of the definition of the Court, then, there did not appear to

have been any novelty with regard to the substitution of the term “Constitutional rule of law,” for the terms “Constitutional rule of rights and justice,” given that the elements are the same.

I will not pause to analyze the significance of the category “rule of rights and justice”; I am interested solely in calling attention to the abdication of rule of law as a defining element of the State. The meaning of “rule of rights,” is yet to be defined, but we know with certainty that we do not have a state of rule of law. In my opinion, when the Constituent Assembly declined to recognize Ecuador as a rule of law, characterizing it as a Constitutional rule of rights and justice, it recognized that there were no limits of power established in the Constitution. To bury the rule of law, understood as one in which all people, including those that govern us, subject their actions to the existing legal system, is an affirmation that what governs is the power without rules. In the words of the Constitutional Court itself: “This new Ecuadorian state is not, certainly, a state of legality, such as that which prevailed in Ecuador until October 20, 2008; and therefore, it cannot be judged, as the critics of the new Constitution hope, with the analytic categories that of theoretical analysis which explain the nineteenth century European state. The study of the constitutional rule of rights implies the adoption of new methodologies and instruments of interpretation and comprehension of the legal reality, which goes beyond the separation of powers and the formal recognition of the rights of persons.”<sup>20</sup> The rule of rights, in being a concept still under construction, allows judges and whatever other authority in charge of determining its meaning to infer anything into it, as long as it allows it to differentiate it from that which has served as a defining element of liberal democracies.

The elimination of the rule of law from among the defining elements of the Ecuadorian state has meant the loss of all legal certainty. Expressions such as the principle of legality and legal reserve have less and less meaning.<sup>21</sup> This dose of originality by the Ecuadorian Constitution’s

drafters has opened infinite spaces of discretion for public authorities – in the executive, legislative, and judicial branches – to the point that it turns out to be impossible to know what will be their limits. Power in Ecuador is no longer bound to the Constitution and the law, and therefore is not limited or bound by them, as is recognized in the first article of the Constitution. When there is a confession, no proof is needed.

#### **b. The reign of the executive power**

Closely linked to what we have discussed in the preceding section, another innovation in the text of the Ecuadorian Constitution was the institutional design that collapses the separation of powers at the same time that it offers strengthened authority to the President. Five powers replaced the three classic powers: to the legislative, executive, and judicial powers were added the electoral power and the citizen power (which was called transparency and social control).

The idea of the five powers was conceived by Spanish jurists from the Center for Political and Social Studies, run by Roberto Viciano Pastor, who had a contract with the Office of the Solicitor General and participated in the redaction of constitutional texts in close collaboration with the President of the Republic and the Constituent Assembly. The electoral power had already been created in Venezuela,<sup>22</sup> and so the real innovation consisted of the fifth power: the office of transparency and social control. This office is integrated with the Council on Citizen Participation and Social Control, the Office of the Ombudsman, the Comptroller, and the Superintendents, though the real key to understanding this office is the Council on Citizen Participation and Social Control.

The Council on Citizen Participation and Social Control – made up of seven council members selected by the National Electoral Council through contests which even up to now have

been seriously questioned – selects the Ombudsman, the Public Defender, the Attorney General, the Comptroller, members of the National Electoral Council, members of the Election Disputes Commission, and members of the National Judicial Council. In turn, the National Judicial Council selects the magistrates of the National Court of Justice, judges of the lower courts, and even notaries. So in the control of the Council on Citizen Participation – or that of its commissions<sup>23</sup> -- resides the control of the principal authorities and the rest of the state offices, including the judiciary. As has been proven in practice, as long as the races for selecting the council members of the Council on Citizen Participation can be manipulated, it is certain that all the designated authorities will respond to the interests of the executive.

The portrayal of the Council on Citizen Participation would not be complete if I limited myself to describing it as a body through which the task of designating public authorities is controlled. This body is also designed to institutionalize citizen participation. So beyond its power to designate authorities, the Council on Citizen Participation also has the authority to promote citizen participation, public deliberation, citizenship training, principles, transparency, and the fight against corruption, among other things.

The 2008 Constitution includes rights of participation, in the form of direct exercise of democracy (referendum and recall elections), as much as it does political rights related to representative democracy (the right to elect and be elected). In a novel way, beyond the rights of political participation that already existed in the 1998 Constitution, the Montecristi Constitution establishes as a separate right the right to participate in matters of public interest.<sup>24</sup> Additionally, various articles of the Constitution refer to the obligation of state entities to take into account citizen participation, the authority of the citizenry to present draft legislation, and their right to be consulted about certain matters.



Nevertheless, a detailed analysis of the constitutional language about this participation permits us to conclude that it has more to do with the making of speeches, “a mere mask that hides the same forms of the exercise of power; which allows everyone to opine so long as the decision remains controlled by the centers of power.”<sup>25</sup> As Aguilar explains, this participation is not conceived as a social initiative, but rather as an institutional space controlled by the State. That the Constitution has created a new office of the State dedicated to participation and social control does not mean that it has vested it with any significance, but rather it evidences the ambition to institutionalize social movements, subordinating their demands to the logic of the state apparatus.<sup>26</sup> This is so much the case that the two council members who, from their positions of power, have managed to give voice to a sentiment that differs from the official line of thought are constantly referred to by the President of the Republic as the two infiltrators.

In theory, the greater the citizen participation, the more limited the Presidential power. But in practice, ways have been conceived to block the mechanisms of direct democracy and participation in public affairs by means of practical and legal obstacles which have rendered them inefficient, as has been recognized by various authors in Ecuador.<sup>27</sup> Citizen participation in the legislative process is practically null. Under the government of the citizen revolution, the only viable legislative suggestions have originated from the Executive’s own office. Resources have been squandered on what the Assembly insists on calling “socialization,” but in practice there are no significant spaces for proposals from the citizenry in the legislative process. In a similar way, the referendums that have ended up in the ballot box have been those which are supported or called by the Executive. When the citizenry has tried to activate the mechanisms of referendum, the National Electoral Council and the Constitutional Court have undertaken to block them.

It is illustrative to look at how the mechanisms of direct participation by the citizenry have been blocked. When the executive called for a referendum on bullfighting, cock-fighting, and – in passing – judicial reform, the Constitutional Court affirmed the constitutionality of these proposed questions, modified them slightly, and immediately passed them along to the electoral process through the National Electoral Council. The process of calling one of the President’s initiatives was quick and simple. By comparison, although the Constitution establishes the right of the citizenry to call a referendum “about any issue,” as well as the authority of the Assembly to call a referendum when it has to do with undertaking activities to extract non-renewable resources in protected or intangible territories, initiatives to call for referendums on petroleum extraction in the Yasuní National Park have been blocked. When citizens who sought to avoid petroleum exploitation in the Yasuní National Park – to protect its biodiversity and the survival of indigenous peoples living in voluntary isolation – organized themselves to convene a referendum and submitted their request to the Constitutional Court to validate the constitutionality of the questions before soliciting the necessary signatures to convene the referendum (the question must go on the signature form), the Court decided that they must first collect the signatures, and afterward they would rule on the constitutionality of the questions. The decision lacks logic, for if the Court determines that the question conflicts with the Constitution, the process of collecting the signatures will have been in vain. In any case, they never did rule on the constitutionality of the questions because the National Electoral Council ordered the invalidation of the signatures that were presented. Later on, in a new citizen initiative to gather signatures and submit to referendum the possibility of amending the Constitution to allow for indefinite reelection, the National Electoral Council denied it before they had even delivered the signature forms on the pretext that the question is unconstitutional (vesting itself

with an authority which falls to the Constitutional Court). So, faced with citizen initiatives, either the Electoral Council denies the delivery of the forms for collecting signatures or the Court declines to decide the constitutionality of the questions. Referendums are used to validate questionable decisions of the executive, such as the reform of the judiciary by procedures not contemplated by the 2008 Constitution, but they are impeded when they are proposed by the citizenry to deal with themes adverse to the government's interests, such as to impede the extraction of petroleum in the Yasuní or to impede the reform of the Constitution to allow for the indefinite reelection of the President. In this way, far from moderating the power of the President, citizen participation is manipulated at his convenience.

At the same time, the body has served as an instrument to designate the authorities who consolidate the executive influence in all branches of government. To give just one example, the Council on Citizen Participation and Social Control designated the Judicial Council, which is presided over by the ex-private secretary of the President and the ex-Minister of the Judiciary. The President of the Judicial council, who is very close to the President of the Republic, is now in charge of the body which directs the process of selecting judges, as well as their evaluation, promotion, and discipline. In this way, the control of the executive over the judiciary was perfected. But during the time he did not have it under his control, the President of the Republic convened a referendum to take away from the Council on Citizen Participation the authority to designate the Judicial Council, changing "for this instance only," the procedure for designating the Judicial Council and the whole judiciary, in such a way that he could control them directly, failing to satisfy the rules of the Constitution that had just been approved, with the sole object of controlling the judicial power.

The high expectations created by the constitutional innovation of the fifth power have not been fulfilled. It has not transferred power to society, but rather the referendum has been used at the convenience of the executive to legitimize its actions. By bureaucratizing citizen participation, converting it into an institution of the state, in truth it has been annihilated.<sup>28</sup> As Gargarella and Courtis warned: “doing both things at the same time (strengthening the President and opening spaces for a greater participation) paves the path for a contradictory operation, which runs the great risk that one of the two ideals or objectives will end up overshadowed or directly eliminated.”<sup>29</sup>

But when I mentioned the institutional design that collapsed the separation of powers, I did not allude solely to the existence of the five powers by which citizen participation has been degenerated and the authority of the President to name delegates in all state institutions has been assured. I am also referring to the process of devising the rules conceived by the Constitution. While according to the text of the constitution, the initiative to present legislative proposals is absolutely broad, in practice only the proposed legislation presented or driven by the executive is successful. Beyond the initiative, the legislative process limits legislative debate and, once approved, laws pass through the executive for its total or partial veto. Up to this point there is nothing novel compared with other constitutions or at least as compared to the Constitution of 1998. What draws attention is that President’s veto authority includes not just the authority to take note of certain articles of the initiative, but that the Constitution also concedes to the President the power to veto the law completely, forcing the Assembly to hold off on the initiative for a year, and later down the line requiring that the votes of one-third of the Assembly members be gathered to be able to move forward with the proposal. Additionally, as part of the veto power, the President is granted the freedom to propose alternative text, which ends up being

approved without having been debated. More than this, the President can call a referendum to approve laws without very many requirements, which permits the approval of laws that could otherwise be blocked in the Assembly. If we were to add up the number of executive orders through which the executive governs without the necessity of having laws approved, we could say that in Ecuador the president is becoming the exclusive legislator.

That is not all. The enthusiasm for originality in the Ecuadorian constitutional laboratory brought them to come up with the mechanism called “crossed death.” This figure refers to the authority of the executive power to dissolve the Assembly if, for example, it feels that there is a grave political crisis. Once dissolved, the National Electoral Council must convene elections to renew both the legislative power as well as the executive power itself (this is where the name “crossed” comes from). The President who makes use of this mechanism is authorized to run for president himself. While during the first years of his government the President threatened various times to make use of this mechanism, in practice, without having to apply it, he has aroused such a submissive attitude in the Assembly toward the President, that he looks likely to avoid any kind of political crisis which could culminate in a dissolution. To this is added the fact that, if the President makes use of his legal authority to dissolve the National Assembly, until elections to install a new Assembly are convened, the President is empowered to issue laws by decree, subject only to the favorable opinion of the Constitutional Court.

Since its first Constitution, Ecuador adopted a presidential system which has maintained along the way all the political charters, but that has been reinforced in the last. As a corollary to the lack of separation of powers, the 2008 Constitution, far from solving the marked presidentialism of the 1998 Constitution, strengthened the legal authority of the President to exert influence in the legislative and judicial spheres.<sup>30</sup> The lack of political instability that has

characterized the country was not fought for by constituents, with limits on presidentialism, but rather by a hyper-presidentialism. The whole Constitution was drafted under the shadow of the President to the point that other models of government, with their merits and their defects, were not even debated. Convinced that their friend Rafael had the best of intentions for the country, those who participated in the process of drafting the constitution considered it necessary to bestow all power on the President. “The project” could only be consolidated if the President had all authority to turn it into a reality. Not only did they not notice the necessity that the Constitution be applicable to future governments, eventually more dangerous, but some of them did not imagine that President Correa could be capable of using his unlimited vested powers. In this way, as Javier Couso warned, “it seems clear that the so-called ‘new constitutionalism’ has very little about it that is constitutionalist, given its hostility to the separation of powers – and especially the independence of the judiciary – and its aspiration to carry on the sovereign moment of the constitutional drafting process as *the* constitutional landmark par excellence.”<sup>31</sup>

**c. The inflation of constitutional rights subject to an axiological principle**

The 2008 Constitution has 444 articles, 30 provisional regulations, 30 articles of the “transitional regime,” and one final regulation, which amounts to 505 articles. It is easy for it to seem as if there is, on one hand, an inflation of rights in the Constitution, and on the other, an excessive regulation of certain themes. Said inflation is not bad in itself; I am convinced that it would be worse if all of these rights had not been contemplated in the text. But I admit that it creates a kind of devaluation of constitutional rules to the point that the most basic rights can become trivial. At the same time, the detail with which some subjects were regulated, together with the rush and the superficiality that characterized the drafting debates, has revealed the existence of inconsistencies and contradictions within the constitutional text itself and, what is

more difficult to overcome, has impeded the possibility that advances in rights and liberties can be made by legal or jurisprudential means. If we add to this the fact that the zeal for innovating brought the constituents to incorporate *Sumak Kawsay*<sup>32</sup> as an axiological principle throughout the Constitution, the result is a constitutional text that opens infinite spaces of discretion.

I am not against the idea of setting down ideals and aspirations in the constitutional text. On the contrary, the design of the Constitutional should keep a little distance from empirical reality to allow constitutional propositions to progressively become realities through legislation, jurisprudence, and public policy. But the Constituent Assembly does not seem to have understood the differences between incorporating ambitions into the Constitution and attempting to take on everything. In this way, they drafted a Constitution so descriptive and detailed on the subject of rights, that what they accomplished was the limitation of rights, or even their elimination.

For example, when the Constitution refers to the right of freedom of expression and information, it refers only to information that is, “true, verified, timely, contextualized, diverse, without prior censorship of the facts, events, and the processes of general interest.”<sup>33</sup> In this way, there are prior conditions on information that enjoys constitutional protection. In practice, this has permitted a Superintendent to administratively sanction media, among others, because in his opinion, certain information is not sufficiently contextualized. The authority of the Superintendent has gone so far as to require the rectification of cartoons for not reflecting the truth with regard to the public interest. Likewise, the authorities of all public powers have made use of the constitutional regulation concerning truthful information to impose content upon the media, through government broadcasts or articles of correction which demand the dissemination

of the official version of things as the only admissible truth. In this way, the text of the Constitution has served to put limits on the free circulation of ideas and opinions.

Also illustrative are the articles of the Constitution which proclaim a constitutional prohibition on the adoption of children by same-sex couples<sup>34</sup> as well as same-sex marriage,<sup>35</sup> without leaving space for the achievement of advances in these rights by means of legislation or jurisprudence. Perhaps when it comes to constitutional language, less is more.

The flood of constitutional propositions ends up drowning them and makes it easy for them to be emptied of content by means of laws, executive orders, judicial pronouncements, and public policies. To illustrate the above it can be useful to mention briefly an example of a law, order, judicial decision, and public policy promulgated without taking into consideration its possible contradiction with constitutional norms. The Constitution refers to sexual and reproductive rights,<sup>36</sup> but legislation has been approved which penalizes abortion, including in cases of rape, unless the woman proves that she suffers from mental incapacity.<sup>37</sup> The Constitution proposes the principle of universal citizenship, the free movement of all inhabitants of the planet,<sup>38</sup> and the right to asylum,<sup>39</sup> but by executive order it has been limited, including access to due process to determine refugee status.<sup>40</sup> The Constitution defines the state as intercultural and pluri-national,<sup>41</sup> at the same time that it grants the indigenous communities, towns, and nationalities the authority to exercise legal functions based on their ancestral traditions and their own law,<sup>42</sup> but by a ruling of the Constitutional Court, this right was denied with respect to criminal issues, subordinating indigenous justice to ordinary justice even when it has not violated the Constitution or human rights.<sup>43</sup> The Constitution recognizes the family in its diverse types,<sup>44</sup> establishing the right of persons to make free, informed, voluntary, and responsible decisions about their sexuality, and establishing the obligation of the State to ensure



that all educative entities impart an education on sexuality from a rights-based perspective,<sup>45</sup> but the public policy on the issue aims to reduce teen pregnancy by means of abstinence, supported by questionable studies according to which – among other issues – “adolescents who live with both parents are three times less likely to lose their virginity before turning 16-years-old.”<sup>46</sup>

The list of laws, executive orders, judicial rulings, and public policies that contradict Constitutional promulgations grows more and more extensive. More than six years having passed since the Constitution came into force, an analysis of its efficacy would not be premature, and it seems important to show examples that this is not just a problem of a lack of efficacy in the constitutional norms. One inevitably wonders how a supposedly progressive, protective and advanced Constitution can permit excesses such as those we have described here, and one inevitably concludes that it is not just that there occur, as in all states, certain violations of the Constitution that must be corrected later; what happens is that the Constitution’s norms are acting as a foundation for these laws, executive orders, judicial rulings, and public policies, which limit rights protected as sacrosanct in the same constitutional text. The fact that there are violations of rights or excessive of power is not necessarily what makes the Constitution inappropriate; the disturbing thing is that this occurs under the appearance of constitutionality, with the support of the Constitution’s norms, and in the absence of protections that allow the correction and sanctioning of these excesses.

The 2008 Constitution was also an innovator in terms of guarantees. Among the jurisdictional guarantees it contains, it maintained those which existed in the Constitution of 2008 – habeas corpus, habeas data, and *amparo* (which is called the “writ of protection”) – and added new guarantees such as an action for non-compliance, an action for access to public information, and an extraordinary writ of protection. A study of the legal guarantees established

in the Constitution leads us to conclude that there should be no public act which cannot be prevented, impeded, sanctioned, or subject to reparations by means of said guarantees. But once again, through legislation,<sup>47</sup> the contents of the constitutional guarantees have been divested of their meaning, demanding requirements not contemplated in the Constitution. Added to which is the fact that, as a consequence of the “meddling of the hand in justice,”<sup>48</sup> judges do not enjoy the necessary independence to decide cases against the public authorities or their interests.<sup>49</sup> On the subject of rights, the extensive constitutional text contains the keys to understanding their violation. On the subject of constitutional guarantees, the reason for their inefficacy as a means to correct and sanction abuses of power is not solely in the constitutional text but also in the process by which it was implemented during the constitutional drafting process to eliminate the checks and counterweights on power.

To the above is added that which perhaps was the most risky innovation in the constitutional laboratory installed in Montecristi: *Sumak Kawsay* as the backbone of the Constitution, as a right, as a principle, as the goal of the State and society, and as a condition of the validity of all acts. Without the intention of offending those who believe this expression “can only be understood from the ‘Andean conscience’ and not the ‘Western conscience,’”<sup>50</sup> before identifying the Constitutional norms which refer to Good Living, I will try to briefly go into its meaning.

*Sumak Kawsay* is a concept revived from the ancestral Quechua knowledge which “sets out a different vision of the cosmos than the Western vision, and arises out of communal, not capitalist, roots. It equally breaks with anthropocentric logic and dominant civilization, as well as the diverse socialisms which have existed up till now. [...] With its theory of harmony with nature, its opposition to the concept of perpetual accumulation, and its return to principles of service, Good Living opens the door to forming alternative visions for life.”<sup>51</sup>

The indigenous populations in the Andean region “conceive of ‘sumak kawsay’ or ‘Good Living’ as the participation of human beings in a vital joining of a cosmic character, that is to say, in tightly held relationality, or harmony with nature. For its part, the Ecuadorian Constitution reclaims ‘sumak kawsay,’ it puts it forth as a goal of life in society, and it presents it as a “citizen coexistence in diversity and harmony with nature.’ ‘Good Living’ appears in the new constitution as a holistic concept which serves as a foundation, and which integrates the joining together of the aspects which comprise political life. For this, ‘sumak kawsay’ acquires in the Ecuadorian Constitution the meaning of a general goal toward which economic, political, and social life are oriented.”<sup>52</sup> According to what Cortez explains, it was the Confederation of Indigenous Nationalities of Ecuador (CONAIE is the Spanish acronym) which presented the concept of Good Living as a core concept in the draft constitution to the Constituent Assembly in October 2007, and suggested that “good living can be an alternative in the face of the depletion of the paradigm of civilization and of life which over centuries has fed the design of projects by capitalist as well as socialist modernity, with colonialist characteristics.”<sup>53</sup>

The National Development Plan, named in Ecuador the National Plan of Good Living, defines this concept as, “the satisfaction of necessities, the attainment of a quality of life and dignified death, loving and being loved, the healthy flourishing of everyone and everything, in peace and harmony with nature and the indefinite prolonging of human cultures. Good Living envisions having free time for contemplation and emancipation, and that the liberties, opportunities, capacities, and potential of all individuals will broaden and blossom in a fashion which allows them to become simultaneously that which society, the territories, the diverse collective identities and every one – seen as a universal and individual human being at the same

time – value as a desirable goal of life (both materially and subjectively and without producing any kind of domination of one over the other).”<sup>54</sup>

This concept, which for some might seem poetic, has meant in practice support for the restriction of individual rights and liberties with the goal of realizing an ideal society, one with an undetermined meaning and subject to multiple interpretations. As Breton, Cortez, and García recognize: “It would seem that *sumak kawsay* has been turned into a kind of hodgepodge to accommodate concepts that are very distinct – sometimes almost antithetical – for the purpose of serving the observer’s point of view. [...] *Sumak kawsay*, *suma qamaña*, Good Living, and other related terms have in reality taken on a diverse number of elaborations because they are social constructs or narratives which by definition are understood to be ‘under construction,’ in the framework of proposals put forth by multiple social actors, who imprint on the terms a broad political perspective in the face of the general crisis that has been experienced and is being experienced in the region of neoliberal projects, and, with them, the western paradigms of civilization.”<sup>55</sup> While it is acceptable – even desirable – that the Constitution sets aspirations, there is an enormous difference between the best possible regime and an imaginary regime like *Sumak Kawsay* or Good Living, whose definition is so broad that it could include all that allows the substantial modification of liberal thought based on the individual or the awakening from “the long and sad neoliberal night,” in the words of President Correa.

One of the characteristics of neoconstitutionalism is that “the constitutional architecture of rules and principles is measured by programmatic and axiological value which provide said architecture with an *ethos*, in which can be found the keys to the project which must be agreed to in the constitutional document; they offer the ideological *mos* of public power, and provide the axiological plexus which has to set guidelines for the power-society-citizen relationship. In this

way, the ontological ceiling is delineated by the Constitution, it emits the spirit of the constituent pact, and qualifies the political formula. This group of principles functions, in turn, as a hermeneutic guideline for the legal order to send out those legal thresholds in light of those which must interpret the constitutional text and fill in the gaps.”<sup>56</sup> The Ecuadorian constitution-drafter felt that this axiological principle that conditions the validity of all that is done should have Andean roots, and it was in this way that they introduced *Sumak Kawsay* or Good Living into the 2008 Constitution.

The Constitution lumped together the majority of economic, cultural, and social rights, as well as rights to communication and information as “rights to Good Living.”<sup>57</sup> It can be inferred from the writing of the constitutional text that these rights do not have value in and of themselves, but rather as indispensable conditions to Good Living. Additionally, in their zeal to differentiate themselves from the regime of individual liberties, the drafters established as an obligation of all Ecuadorians that they must “promote the common good and put the general interest ahead of individual interest, in conformity with Good Living.”<sup>58</sup> And according to the Constitution, public policies and the provision of goods and services must be oriented not so as to effectuate those rights but rather Good Living.<sup>59</sup> In a similar way, the system of development must guarantee Good Living is realized.<sup>60</sup> All the duties of the State<sup>61</sup> and of persons and communities<sup>62</sup> exist for the attainment of Good Living. The conjoining of systems, institutions, policies, norms, programs, and services form part of the regime of Good Living.<sup>63</sup> In other words, “the state power and state order do not matter, the former does not exist solely to be exercised and assumed in conformance with constitutionally prescribed rules and procedures, nor solely for emitting said power to the latter. They matter because they derive their validity in the end from the values that they set forth and make real, respectively; in other words, the

parameters of validity or legitimacy can be found in the first few phrases.”<sup>64</sup> In the case of Ecuador, the parameter of validity or legitimacy is Good Living. In the design of the Ecuadorian Constitution, Good Living is at the same time a right, a category of rights, a goal of public policy, and a primary regulator of social life.

In defense of this paradigm, Ramiro Ávila explains that under the understanding that “the judicial system that is based on hypothetical rules or norms is already not sufficient, nor is it the best tool to guarantee legal security [...] it has been seen as necessary to establish principles.”<sup>65</sup> I agree, however, with Farith Simon in that the introduction, by way of principles, of axiological elements upon which the validity and application of laws are conditioned has led to a situation of great judicial insecurity, during which time, in the name of “the defense” of principles, judges have ignored the rules when they want to and make decisions with a dangerous amount of discretion.<sup>66</sup>

The courts have not busied themselves with filling out the content of this indeterminate judicial concept, they simply limit themselves to citing it as a justification for the restriction of rights. For example, when deciding a question as complex as the constitutionality of categorizing communication as a public service, the analysis of the Constitutional Court was limited to mentioning that the “text of the Constitution contains a directive norm that requires that the provision of public goods and services be oriented toward effectuating Good Living, and in general, all rights; this guideline leads to an indispensable complimentary analysis: apart from Article 12, the Constitution develops the wide joining of rights which endow Good Living with normative meaning, starting with the rights to water and food, continuing with the rights to enjoy a healthy environment, and continuing with rights to communication and information. Rights related to culture and science, education, habitat and housing, as well as health, work, and social

security then follow. From here it can be gathered that the rights to communication and information make up part of the constitutional content of the rights to Good Living, the satisfaction of which, in accordance with Article 85 number 1 of the Constitution, must necessarily be guaranteed by means of the provision of public service.”<sup>67</sup> In this way, according to the Court, *Sumak Kawsay* supports the need to convert communication into a public service, without requiring greater reflection.

Another example of the above occurred when the Ecuadorian government, after the failure of the Yasuní ITT initiative,<sup>68</sup> made the decision to proceed with the exploitation of petroleum in Blocks 31 and 43 of Yasuní National Park, setting aside that – as indicated above – not only it is home to the most important biodiversity on the planet, but it is also the territory of indigenous groups living in voluntary isolation. The possible effects on human rights that could be stem from the exploitation of a territory that the Constitution itself designates as intangible imposes additional obligations on the State at the time of justifying its decision. The authorities were to resolve the apparent contradiction between constitutional norms, one which “prohibits the extraction of non-renewable resources in protected areas and in zones declared to be intangible assets, [except] by a petition based on the Presidency of the Republic and previous declaration of the national interest made by the National Assembly, who, in finding it to be appropriate, would convene a referendum”<sup>69</sup> and another, according to which, “the lands of groups living in voluntary isolation are irreducible and intangible ancestral possessions, and every type of extractive activity will be prohibited in them.”<sup>70</sup> This last statement, which does not refer to all intangible zones in general, but rather it specifically protects the lands of indigenous peoples in voluntary isolation, allows no exceptions. Nevertheless, in contradiction with this express rule, the National Assembly declared the exploitation of petroleum in this zone to be in the national

interest. The report that supported this declaration indicates that, “in Article 275, the Constitution proscribed the general axiological framework for the permanent and political goals of the State, establishing that the proposed Development Plan is what guarantees the realization of Good Living, of *Sumak Kawsay*, which the Ecuadorian state holds as primordial obligations in accordance with Article 3 numbers, 1, 5, and 7 of the Constitution, to guarantee the effective enjoyment of the rights established in the Constitution, and in international instruments, to plan national development, to eradicate poverty, promote sustainable development, and equitable redistribution of resources of the wealthy, to access Good Living, and protect the natural and cultural heritage of the country [...]. There is a real possibility of accelerating the process of national development and a consequent possibility of executing with a greater swiftness the first primordial duty of the State, which is to guarantee the rights of the people (in particular their rights to Good Living) through the satisfaction of their basic, unsatisfied needs. [...] The concrete realization of these possibilities in the near future [...] is reason enough [to declare the blocks to be] in the national interest [...] The Declaration of National Interest of Blocks 21 and 43 uphold the firm goal of achieving Good Living or *Sumak Kawsay*.”<sup>71</sup>

The cases that I just cited demonstrate how Good Living has served in practice as a pretext to justify decisions outside the law, while all the constitutional norms are subject to a superior axiological principle, called *Sumak Kawsay*, whose content is sufficiently broad to justify all of it: to achieve Good Living, it is necessary to turn communication into a public service, even though this limits freedom of expression as an individual right; to achieve Good Living, it is necessary to exploit Block 41, despite compromising the survival of the Taromenane indigenous people. These are only two examples of a much broader and cross-cutting policy of restriction of rights supported by the necessity of attaining *Sumak Kawsay*, according to which vision of the



world the human being is only worthy of protection as part of an natural and social whole. As a matter of fact, in Ecuador there is a National Secretary of Good Living, “aimed at developing a new form of coexistence for the promotion of inquiry and the development of thought, which would transcend borders and promote responsible citizen behaviors associated with *Sumak Kawsay*.”<sup>72</sup>

When the drafters of the Constitution, enlivened by their inventive appetite and their anxiety to differentiate themselves from liberalism, subjected the validity of constitutional rights and guarantees to the achievement of sublime Good Living, they opened up an unlimited space of discretion for public authorities, with the consequent loss of a core of legal certainty for those who are ruled. The rights of Good Living, far from being limits to power, grant a power to the authorities that is limited only by what in their judgment constitutes the way to achieve that which legitimizes the political project of President Correa. There is a radical difference between the principle-based constitutionalism which Alexy, Dworkin, and Nino defended, and the constitutionalism of Good Living. There is a great difference between those other principles -- whose content is the rights themselves and whose interpretive framework is also based in those rights – and the design of the Constitution of Montecristi, in which rights are not an end in and of themselves, but rather merely a means to achieving Good Living. The constitutional norms lack value or legitimacy by being conditioned on the realization of a principle whose content is so slippery. Good Living has meant the imposition on citizens of a concept of supreme good for which every Ecuadorian is obligated to yearn, without space for each individual to define and seek his or her own aspirations in a pluralist manner and under a system of tolerance for social ideas and different policies.

#### **4. The Constitution in my power**

In his reflections on the experiments of radical constitutionalism, Couso indicates that, “in general, these regimes are firm at the time of respecting the will expressed by vote.”<sup>73</sup> Certainly in using the words “in general,” he advanced the possibility that there are exceptions. The case of Ecuador is without doubt an exception. The vote operates only to allow the legitimization of the presidential project. If the popular will could compromise this project, no appeal would be made to the power of the ballot box. It is in this way that a Constitution, whose legitimacy was born by means of a referendum through which a Constituent Assembly was convened and a referendum through which the constitutional text was ratified, is about to be reformed without the population being consulted.

I admit that constitutional reform without the necessity of a referendum or the convocation of a constitutional drafting process is contemplated in the Constitution itself as a power of the legislators, but I anticipate that certain reforms can cause grave harm to the legitimacy of the constitutional text. In fact, the 2008 Constitution can be reformed by three procedures: i) an amendment approved by the National Assembly, the initiation of which must be undertaken by one-third of the members of the Assembly, and whose approval must be undertaken by two thirds of the members of the Assembly;<sup>74</sup> ii) an amendment approved by direct constitutional referendum;<sup>75</sup> and iii) a partial reform approved first by the National Assembly and later by the citizenry via referendum.<sup>76</sup> For either of the first two alternatives to proceed, it is a requirement that the amendment does not alter the fundamental structure of the Constitution or the constituent elements of the State, that it does not restrict fundamental rights or guarantees and that it does not modify that procedure of constitutional reform; while to proceed with the third alternative, it is only necessary to show that the amendment does not impose a restriction of constitutional rights or guarantees, nor modify the procedure for reforming the Constitution. In all cases, it is

the Constitutional Court which determines which of these processes is appropriate for a particular proposal.

Well, in June of 2014 the President of the Assembly, acting on behalf of the presidential party, presented before the Constitutional Court a packet amendments to reform the constitutional text. Among these reforms, a few stood out that aspired to i) regulate the supposed abuse of the writ of protection; ii) eliminate the phrase “about whatever issue” with regard to the citizen authority to petition to convene a referendum in the exercise of direct democracy iii) permit the indefinite reelection of all offices of popular election, including the President of the Republic; iv) lower to 30 years of age the minimum age to run for President of the Republic; v) permit the armed forces to supplement to role of the National Police in the domestic security of the State, and not just under a state of emergency; vi) minimize the authority of the General Comptroller of the State; and vii) convert communication into a public service, among others. Of these proposed modifications, only that which aspired to limit the writ of protection did not pass through the approval of the Constitutional Court, by virtue of which decision all the other amendments will be decided by the National Assembly without the need to convene a referendum or a Constituent Assembly.<sup>77</sup>

The Constitutional Court’s pronouncement underscored the weaknesses of the constitutional text in which the Court based its pronouncement. For example, in considering the proposal for indefinite reelection, the Constitutional Court warned that, differently from Article 1 of the Political Constitution of 1998, Article 1 of the current Constitution “did not consider term limits as an aspect which formed part of the fundamental structure, character, or those aspects which constitute the State, nor did it consider term limits as an essential characteristic of the chosen form of government.”<sup>78</sup> The Court not only took advantage of this empty norm, it also made use

of the way in which the rights to participation and non-discrimination are held as sacrosanct, to say that: “the limitation on running for office put on persons who have occupied a public office elected by popular vote, and who have been reelected for a reason, acts as an unjustified limitation on the constitutional rights of those candidates [and] acts as a measure which does not express rationality, given that it affects the rights of participation as much for the candidate to be reelected as for the citizenry to be able to express their choice regarding the candidacy. [In this way] the proposed modification guarantees the right of the citizenry to elect their representatives, without there being discrimination against people who want to run for an office elected by popular vote who have been reelected, by virtue of their constitutional rights to participation, to be reelected.”<sup>79</sup> At the root of this decision, the strong presidentialism which was enshrined in the Constitution of 2008 could become unlimited in time.

It exceeds the scope of this essay to analyze each one of the proposed constitutional reforms. What interests me is to show how, through a procedure contemplated in the Constitution itself, and endorsed by the Constitutional Court, the President can – through the obsequious Assembly – manipulate and reform the constitutional text according to his whim, including with respect to substantive issues of democracy, and all of this without consulting the people, in whose will supposedly resides the legitimacy of Latin American constitutionalism. The mechanisms of participation imagined in the Constitution of 2008 succumb to the zeal for those in power to gain absolute control.

The Ecuadorian experience brings one to think that perhaps we will have to retake the approach of Luigi Ferrajoli when he affirmed that “a Constitution does not serve to represent the common will of the people, but rather to guarantee the rights of all, including in the face of the popular will. [...] The foundation of its legitimacy does not reside in the consensus of the

majority, but rather in a prior and much more important value: the equality of all persons in their fundamental liberties and social rights [...] before the law and before the acts of the government which express the majority's will.”<sup>80</sup> The legitimacy of the Constitution of 2008 resides in a majority vote, through which a text was approved which trivialized the limits of authority and power. The current process of constitutional amendments demonstrates that the 2008 Constitution is subject to the power of the President, not vice versa, to the point that the President could install himself indefinitely in power without the need for the people to express an opinion on the modification of the constitutional rule that limits the possibility of his reelection.

## **5. Conclusions**

If what characterizes the “new Latin American constitutionalism” is the legitimacy of the constituent process and the originality of its texts, it could be concluded that in this new Latin American constitutionalism resides the path for the growing authoritarianism which governs Ecuador. In terms of the process of drafting the Constitution, it is clear that it was marked by a disregard of the democratically elected authorities, the dismantling of the institutions capable of acting as balances and counterweights to power, and the accumulation of power by the executive. The fact that the process of drafting the constitution has been approved by the ballot box does not make it any less authoritative. In terms of the zeal for originality in the text of the Constitution, it has been shown that certain innovations have been turned into a repertoire of tools that allow the ruling power to limit constitutional rights while basing their interpretation in the form of society to which we should aspire, always in defense of the President's political project.

I have made sure to be cautious with the causal argument. I understand that abuses of power and violations of human rights exist in every country as a result of the confluence of distinct

elements, without everything being able to be attributed to the Constitution. That fact that the Constitution is violated does not make it imperfect. But when the process of drafting the constitution and the constitutional text turn out to favor and incentivize abuses of power, it becomes imperative to reflect on the risks of this innovation. While more and more voices clamor for a revision of the model of checks and balances in the system which forms the original basis for Latin American presidential systems, arguing that said model does not currently represent a strategy of desirable normative design inasmuch as it limits the capacity to make effective decisions, we must consider Ecuador's experience illustrative to show the risks of abandoning the paradigm of checks and balances as conceived by Madison.

It is not that I am incapable of finding positive aspects in the current constitutional model. But the worthy points in some areas of the Constitution and the undeniable advances in social benefits in Ecuador should not impede us from both recognizing and studying the error of not establishing sufficient control over public power. It serves little purpose to have a progressive Constitution in a State where the President holds so much power that he can impose his visions in disregard of constitutional rights. We cannot limit ourselves to theorizing about the Ecuadorian constitutional drafting experience as an expression of Latin American neoconstitutionalism, taking into account only the text of the Constitution, and ignoring the drafting process and the results of the Constitution's application. That could bring us to conclude that the constitutional design is appropriate and that the only questionable part is in its application, when in truth the Constitution has a theoretical basis which justifies the current excesses of Ecuadorian presidentialism. It turns out not to be appropriate to disassociate the theory and the practice.

The supporters of these constitutional innovations warn that “one of the principal obstacles for paradigmatic change and for the authentic application of the Constitution has been the presence of legal scholars who are committed to the status quo within and without the government, clinging to a framework of civil/private law and the commitment to the law and for the law, and not to the people who suffer the most and for whom the constitution and the law should be instruments of power (and not of repression).”<sup>81</sup> I do not believe in law for the sake of the law, nor in the law as the sole source of rights; but I aspire to a system of law in which the law and the Constitution function as limits of public power. If I could choose, I would settle on a State model that allowed me to choose freely, and not one which imposed Good Living upon me as a condition to the validity of my rights. I would go back to a model that allowed the free circulation of ideas and prevented a public body from being considered legitimate to define the limits of humor or the truth of opinions. I would trade institutional spaces of citizen participation for spaces of public deliberation that were transparent and subject to public scrutiny. I would choose a model that reinforces the rule of law, not its dissolution. Though in the face of risk of political instability, I would seek to reinstate the classic separation of powers, not its breaking up. I would advocate for a less extensive constitutional text, but one upon which demands could be made; less detailed, but with a greater possibility of jurisprudential development. I would take back the value of individuals in and of themselves, and not solely in their function in their community or in harmony with nature. I would reclaim the principle of legality and recover judicial security, to distance myself from this regime that understands itself to be the only entity capable of interpreting what its limits are.

Even so, I do not consider myself an enemy of new Latin American constitutionalism; I cannot say which would be its wise moves or missteps if it was applied following truly

democratic procedures. In my opinion, its principal enemies were those who allowed the Constitution to be built on a foundation tainted with authoritarianism; those for whom the limits of power are not applicable when it comes to their friends or their project; those who envision a system which conditions the validity of rights and liberties on the achievement of an indeterminate axiological principle.

The risks of the combination of a lack of judicial independence, the absence of separation of powers, the placing of citizen participation in the hands of the State, the reinforced authority of the President, and an extensive catalog of rights subject to axiological principles such as Good Living, are palpable. The 2008 Ecuadorian Constitution constitutes a legal phenomenon that has aided the ease of governance, at the cost of certain substantial elements of a democratic system of government.

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<sup>1</sup> Constituciones de 1830, 1835, 1843, 1845, 1851, 1852, 1861, 1869, 1878, 1884, 1897, 1906, 1929, 1938, 1945, 1946, 1967, 1979, 1998 y 2008. Algunos autores consideran que la Constitución de 1998 se limitó a reformar la Constitución de 1979, por lo que consideran que la Constitución de 2008 es la Constitución número diecinueve. No se cuentan en esta cifra la Constitución de Quito de 1812 ni la Constitución de Cúcuta de 1821 pues no rigieron al Ecuador como República independiente.

<sup>2</sup> Posibilidad que depende del proyecto de enmiendas constitucionales que está tramitando la Asamblea Nacional, como se explica más adelante en este ensayo.

<sup>3</sup> Para una descripción detallada del proceso véase: Torres, Luis Fernando. *Presidencialismo Constituyente. La ruta del autoritarismo en el Ecuador (Semblanza de la Constitución de Montecristi)*. Editora Jurídica Cevallos. Quito, 2009.

<sup>4</sup> En el acto de posesión, frente a la pregunta ¿jura "cumplir la Constitución Política y las leyes de la República (...) respetar la institucionalidad democrática del país dentro del Estado Social de Derecho, consagrado en la Carta Magna?", el Presidente electo respondió: "Ante Dios y ante el pueblo ecuatoriano juro cumplir el mandato que me otorgó la ciudadanía del Ecuador, el 26 de noviembre".

<sup>5</sup> A través de cuestionables interpretaciones constitucionales y en absoluto irrespeto al debido proceso, sin tener derecho a la defensa, los legisladores fueron sancionados por haber formalizado un juicio político en contra de cuatro vocales del Tribunal Supremo Electoral, haber destituido a uno de ellos y haber patrocinado una demanda de inconstitucionalidad en contra de la resolución del Tribunal Supremo Electoral de convocar a consulta popular con un Estatuto Constituyente que no había sido aprobado por el Congreso.

<sup>6</sup> La pregunta que se sometió a consulta popular, señaló: "¿Aprueba usted que se convoque e instale una Asamblea Constituyente con plenos poderes, de conformidad con el Estatuto Electoral que se adjunta, para que se transforme el marco institucional del Estado y elabore una nueva Constitución?"

<sup>7</sup> Asamblea Constituyente. Mandato 1, de 29 de noviembre de 2007. Registro Oficial 233 (S) de 30 de noviembre de 2007.

<sup>8</sup> Montufar, César. Régimen de Transición y Excepcionalidad Política. *Aproximación al Tránsito Político – Constitucional post 2008*. Quito, 2010. Trabajo almacenado en el repositorio digital de la Universidad Andina Simón Bolívar.

<sup>9</sup> Ávila, Ramiro. *El neoconstitucionalismo transformador. El estado y el derecho en la Constitución de 2008*. Quito, 2011. Pág. 254.

<sup>10</sup> Viciano Pastor, Roberto y Rubén Martínez Dalmau. Fundamentos Teóricos y Prácticos del Nuevo Constitucionalismo Latinoamericano. Gaceta Constitucional No. 48.



<sup>11</sup> Viciano Pastor, Roberto y Rubén Martínez Dalmau. Fundamentos Teóricos y Prácticos del Nuevo Constitucionalismo Latinoamericano. Gaceta Constitucional No. 48. Pág. 312.

<sup>12</sup> Villabella, Carlos Manuel. "Constitución y Democracia en el Nuevo Constitucionalismo". En: *El nuevo constitucionalismo latinoamericano*. Revista del Instituto de Ciencias Jurídicas de Puebla, año IV, No. 25, Puebla, 2010.

<sup>13</sup> Ávila, Ramiro. *El neoconstitucionalismo transformador. El estado y el derecho en la Constitución de 2008*. Quito, 2011.

<sup>14</sup> Por poner un ejemplo, el argumento se invoca constantemente por las autoridades a cargo de la comunicación para justificar decisiones incompatibles con los estándares sobre libertad de expresión; no hay argumento de derecho internacional o derecho comparado válido para convencerlos de que sus acciones ya han sido interpretadas como violaciones a la libertad de expresión, en tanto la realidad ecuatoriana –a su juicio- es tan distinta de la del resto del mundo, que requiere medidas distintas sin importar lo que piensen las cortes internacionales.

<sup>15</sup> Ávila, Ramiro. *El neoconstitucionalismo transformador. El estado y el derecho en la Constitución de 2008*. Quito, 2011. Pág. 80.

<sup>16</sup> Corral, Fabián. "Estado de Derechos y Justicia". *El Comercio*, 6 de octubre de 2011.

<sup>17</sup> Corral, Fabián. "Los Derechos del Estado". *El Comercio*, 5 de marzo de 2015.

<sup>18</sup> Ávila, Ramiro. *El neoconstitucionalismo transformador. El estado y el derecho en la Constitución de 2008*. Quito, 2011. Págs. 122, 136.

<sup>19</sup> Corte Constitucional en transición. Sentencia No. 001-08-SI-CC, 2 de diciembre de 2008.

<sup>20</sup> Corte Constitucional para el período de transición. Sentencia interpretativa No. 002-08-SI-CC.

<sup>21</sup> A manera de ejemplo, respecto del desvanecimiento del principio de legalidad, puede consultarse el artículo 77 del Reglamento a la Ley Orgánica de Comunicación, expedido por el ejecutivo, en virtud del cual se establece una medida sancionatoria para todas las conductas prohibidas en la Ley Orgánica que no tengan determinada una sanción en la Ley, así como también para todas las nuevas conductas prohibidas únicamente en el Reglamento y no en la ley. Y con respecto al principio de reserva de ley, garantizado no sólo en instrumentos internacionales sino en la propia Constitución, puede consultarse la sentencia de la Corte Constitucional respecto del Decreto Ejecutivo 1182 que regula el derecho al refugio en Ecuador, en la cual la Corte interpreta como absurdo el principio de reserva de ley para regulación de derechos constitucionales y admite que los derechos sean limitados por vía de decreto ejecutivo.

<sup>22</sup> En Ecuador, la función electoral está conformada por el Consejo Nacional Electoral y el Tribunal Contencioso Electoral.

<sup>23</sup> Los Consejeros del Pleno del Consejo de Participación Ciudadana y Control Social sólo aprueban las designaciones, pero los concursos de mérito se llevan a cabo por Comisiones de Selección de diez integrantes con amplia participación de delegados de las funciones del Estado.

<sup>24</sup> El Art. 95 de la Constitución señala: Las ciudadanas y ciudadanos, en forma individual y colectiva, participarán de manera protagónica en la toma de decisiones, planificación y gestión de los asuntos públicos, y en el control popular de las instituciones del Estado y la sociedad, y de sus representantes, en un proceso permanente de construcción del poder ciudadano. La participación se orientará por los principios de igualdad, autonomía, deliberación pública, respeto a la diferencia, control popular, solidaridad e interculturalidad. La participación de la ciudadanía en todos los asuntos de interés público es un derecho, que se ejercerá a través de los mecanismos de la democracia representativa, directa y comunitaria".

<sup>25</sup> Aguilar, Juan Pablo. "Derechos de Participación y Derecho a Participar". En *¿Estado constitucional de derechos? Informe sobre derechos humanos Ecuador 2009*. Universidad Andina Simón Bolívar, Programa Andino de Derechos Humanos. Quito, 2009.

<sup>26</sup> Aguilar, Juan Pablo. "Derechos de Participación y Derecho a Participar". En *¿Estado constitucional de derechos? Informe sobre derechos humanos Ecuador 2009*. Universidad Andina Simón Bolívar, Programa Andino de Derechos Humanos. Quito, 2009.

<sup>27</sup> Véase: Aguilar, Juan Pablo. "La cuarta función del Estado. Análisis de una ficción", en Santiago Andrade, Agustín Grijalva y Claudia Storini, edit., *La nueva Constitución del Ecuador. Estado, derechos e instituciones*, Quito, Universidad Andina Simón Bolívar / Corporación Editora Nacional, 2009; Trujillo, Julio César: "Sociedad civil, Estado y participación", en Santiago Andrade, Agustín Grijalva y Claudia Storini, edit., *La nueva Constitución del Ecuador. Estado, derechos e instituciones*, Quito, Universidad Andina Simón Bolívar / Corporación Editora Nacional, 2009; Morales, Juan Pablo: "Los nuevos horizontes de la participación", en Ramiro Ávila, edit., *Constitución de 2008 en el contexto andino*. Quito, Ministerio de Justicia y Derechos Humanos, 2008.

<sup>28</sup> El desprestigio y la falta de entusiasmo del Consejo de Participación Ciudadana es evidente. Mientras que hace cinco años 1228 personas se postularon al concurso para ser parte de este organismo, en 2015 sólo se recibieron 242 carpetas.

<sup>29</sup> Gargarella, Roberto y Christian Courtis. *El nuevo constitucionalismo latinoamericano: promesas e interrogantes*. Serie Políticas Sociales. Santiago de Chile, noviembre 2009. Pág. 29.

<sup>30</sup> Una detallada comparación de los poderes presidenciales antes y después de la Constitución de 2008 en Ecuador puede encontrarse en: Balda Santistevan, Rafael. "Hacia un nuevo sistema de gobierno: diseño institucional del presidencialismo en la nueva Constitución del Estado ecuatoriano". En: *Desafíos Constitucionales. La Constitución ecuatoriana de 2008 en perspectiva*. Ramiro Ávila Santamaría, Agustín Grijalva Jiménez y Rubén Martínez Dalmau, Editores. Ministerio de Justicia y Derechos Humanos. Quito, 2008.

<sup>31</sup> Couso, Javier: Las democracias radicales y el "nuevo constitucionalismo latinoamericano". En: *Derechos humanos: posibilidades teóricas y desafíos prácticos*. Seminario en Latinoamérica de Teoría Constitucional y Política (SELA) 2013. P. 201

- <sup>32</sup> Algunos autores consideran como sinónimos: Buen Vivir, vivir a plenitud, vida plena, eudaimonía, florecimiento, felicidad y *sumak kawsay*. Véase: Ramírez G., René. *La vida (buena) como riqueza de los pueblos*. Editorial IAEN, 2012. Se señala también que este concepto tiene varios nombres, siendo Sumak Kawsay el nombre en idioma kichwa, Suma Qamaña en idioma aymara, y Buen Vivir en castellano. Véase: Oviedo Freire, Atawalpa. *Buen Vivir vs. Sumak Kawsay. Reforma Capitalista y Revolución Alter-Nativa*. Ediciones Ciccus, 2013.
- <sup>33</sup> Constitución de la República del Ecuador 2008, Artículo 18.
- <sup>34</sup> Constitución de la República del Ecuador 2008, Artículo 68 inciso segundo: “La adopción corresponderá sólo a parejas de distinto sexo”.
- <sup>35</sup> Constitución de la República del Ecuador 2008, Artículo 67 inciso segundo: “El matrimonio es la unión entre hombre y mujer [...]”.
- <sup>36</sup> Constitución de la República del Ecuador 2008, Artículos 32, 66.9 y 363.3.
- <sup>37</sup> Código Orgánico Integral Penal, Registro Oficial Sup. 180, 10 de febrero de 2014, Artículo 150.
- <sup>38</sup> Constitución de la República del Ecuador 2008, Artículo 416.6.
- <sup>39</sup> Constitución de la República del Ecuador 2008, Artículo 41.
- <sup>40</sup> Decreto Ejecutivo No. 1182. “Reglamento para la aplicación en el Ecuador del derecho al refugio establecido en el artículo 41 de la Constitución de la República, las normas contenidas en la Convención de Naciones Unidas de 1951 sobre el Estatuto de los Refugiados y en su Protocolo de 1967”. Registro Oficial 727 del 19 de junio de 2012.
- <sup>41</sup> Constitución de la República del Ecuador 2008, Artículo 1.
- <sup>42</sup> Constitución de la República del Ecuador 2008, Artículo 141.
- <sup>43</sup> Corte Constitucional del Ecuador. Sentencia Nº 113 -14- SEP- CC. Caso Nº 731-10-EP. 30 de julio 2014.
- <sup>44</sup> Constitución de la República del Ecuador 2008, Artículo 67.
- <sup>45</sup> Constitución de la República del Ecuador 2008, Artículo 347.4
- <sup>46</sup> Presidencia de la República del Ecuador. Coordinación General de Planificación y Gestión Estratégica. Proyecto Plan Nacional de Fortalecimiento de la Familia.
- <sup>47</sup> Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional.
- <sup>48</sup> Término utilizado por el propio Presidente Rafael Correa para referirse a la reforma judicial implementada durante su gobierno.
- <sup>49</sup> El Programa Andino de Derechos Humanos de la Universidad Andina Simón Bolívar en su Informe Anual de Derechos Humanos ha evidenciado que nueve de cada diez acciones de protección son rechazadas por los jueces. Asimismo, se han hecho públicos memorandos enviados desde la Secretaría Particular de la Presidencia de la República a los jueces advirtiéndoles sobre las consecuencias de admitir acciones de protección contra organismos del Estado.
- <sup>50</sup> Oviedo Freire, Atawalpa. *Buen Vivir vs. Sumak Kawsay. Reforma Capitalista y Revolución Alter-Nativa*. Ediciones Ciccus, 2013, p. 228.
- <sup>51</sup> Acosta, Alberto. Prólogo al texto de Oviedo Freire, Atawalpa. *Buen Vivir vs. Sumak Kawsay. Reforma Capitalista y Revolución Alter-Nativa*. Ediciones Ciccus, 2013.
- <sup>52</sup> Cortez, David. “Genealogía del “buen vivir” en la nueva constitución ecuatoriana”. En: Raúl Fonet-Betancourt. *Gutes Leben als humanisiertes Leben. Vorstellungen vom guten Leben in den Kulturen und ihre Bedeutung für Politik und Gesellschaft heute*. Dokumentation des VIII. Internationalen Kongresses für Interkulturelle Philosophie. Denktraditionen im Dialog. Studien zur Befreiung und Interkulturalität. Band 30.
- <sup>53</sup> Cortez, David. “Genealogía del “buen vivir” en la nueva constitución ecuatoriana”. En: Raúl Fonet-Betancourt. *Gutes Leben als humanisiertes Leben. Vorstellungen vom guten Leben in den Kulturen und ihre Bedeutung für Politik und Gesellschaft heute*. Dokumentation des VIII. Internationalen Kongresses für Interkulturelle Philosophie. Denktraditionen im Dialog. Studien zur Befreiung und Interkulturalität. Band 30.
- <sup>54</sup> Plan Nacional para el Buen Vivir 2009 – 2013.
- <sup>55</sup> Breton, Víctor, David Cortez y Fernando García. *En busca del Sumak Kawsay*. Íconos. Revista de Ciencias Sociales. Num. 48, Quito, enero 2014, pp. 9-24 (citas internas omitidas)
- <sup>56</sup> Villabella, Carlos Manuel. “Constitución y Democracia en el Nuevo Constitucionalismo”. En: *El nuevo constitucionalismo latinoamericano*. Revista del Instituto de Ciencias Jurídicas de Puebla, año IV, No. 25, Puebla, 2010. Pág. 51
- <sup>57</sup> Constitución de la República del Ecuador 2008, Título II, Capítulo II.
- <sup>58</sup> Constitución de la República del Ecuador 2008, Artículo 83 numeral 7.
- <sup>59</sup> Constitución de la República del Ecuador 2008, Artículo 85.
- <sup>60</sup> Constitución de la República del Ecuador 2008, Artículo 275.
- <sup>61</sup> Constitución de la República del Ecuador 2008, Artículo 277.
- <sup>62</sup> Constitución de la República del Ecuador 2008, Artículo 278.
- <sup>63</sup> Constitución de la República del Ecuador 2008, Título VII.

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- <sup>64</sup> Parejo Alfonso, Luciano, "Constitución y valores del ordenamiento constitucional y el ordenamiento jurídico", Compilación de textos para Seminario Internacional, Universidad de Alicante, 1997, p. 104. Citado por: Villabella, Carlos Manuel. "Constitución y Democracia en el Nuevo Constitucionalismo". En: *El nuevo constitucionalismo latinoamericano*. Revista del Instituto de Ciencias Jurídicas de Puebla, año IV, No. 25, Puebla, 2010. Pág. 51
- <sup>65</sup> Ávila, Ramiro. *El neoconstitucionalismo transformador. El estado y el derecho en la Constitución de 2008*. Quito, 2011. Pág. 126.
- <sup>66</sup> Simon, Farith. "Peligro Extremo". *El Comercio*. 19 de enero de 2015.
- <sup>67</sup> Corte Constitucional. Caso 0028-13-IN. Septiembre 2014.
- <sup>68</sup> La Iniciativa Yasuní ITT se refiere al compromiso anunciado por el Presidente Correa ante la Asamblea General de las Naciones Unidas en 2007, de mantener indefinidamente inexploradas las reservas de 846 millones de barriles de petróleo en el campo ITT (Ishpingo-Tambococha-Tiputini), localizadas en el Parque Nacional Yasuní, a cambio de que la comunidad internacional contribuya financieramente con al menos 3.600 millones de dólares, equivalentes al 50% de los recursos que percibiría el Estado en caso de optar por la explotación petrolera.
- <sup>69</sup> Constitución de la República del Ecuador 2008, Artículo 407
- <sup>70</sup> Constitución de la República del Ecuador 2008, Artículo 57, inciso segundo.
- <sup>71</sup> Asamblea Nacional. Texto final para votación del informe para segundo debate sobre la solicitud de declaratoria de interés nacional para la explotación petrolera de los bloques 41 y 43 situados dentro del Parque Nacional Yasuní. 3 de octubre de 2013.
- <sup>72</sup> Secretaría de la Iniciativa Presidencial para la construcción de la Sociedad del Buen Vivir. Decreto Ejecutivo 30, 19 de Junio de 2013.
- <sup>73</sup> Couso, Javier. *Las democracias radicales y el "nuevo constitucionalismo latinoamericano"*. En: Derechos humanos: posibilidades teóricas y desafíos prácticos. Seminario en Latinoamérica de Teoría Constitucional y Política (SELA) 2013. Pág. 202.
- <sup>74</sup> Constitución de la República del Ecuador 2008, Artículo 441.2.
- <sup>75</sup> Constitución de la República del Ecuador 2008, Artículo 441.1.
- <sup>76</sup> Constitución de la República del Ecuador 2008, Artículo 442.
- <sup>77</sup> Corte Constitucional. Dictamen 001-14-DRC-CC de 31 de octubre de 2014.
- <sup>78</sup> Corte Constitucional. Dictamen 001-14-DRC-CC de 31 de octubre de 2014.
- <sup>79</sup> Corte Constitucional. Dictamen 001-14-DRC-CC de 31 de octubre de 2014.
- <sup>80</sup> Ferrajoli, Luigi. *Pasado y futuro del Estado de Derecho*. RIFP/17 (2001). Pág. 41.
- <sup>81</sup> Ávila, Ramiro. *El neoconstitucionalismo transformador. El estado y el derecho en la Constitución de 2008*. Quito, 2011. Pág. 259.