The Right to Happiness in three traditions of the global south: Buddhist Happiness, African Ubuntu, and indigenous American BuenVivir

LE DROIT AU BONHEUR DANS TROIS TRADITIONS DU SUD : LE BONHEUR DANS LA PHILOSOPHIE BOUDDHISTE, L'UBUNTU AFRICAIN ET LE « BUEN VIVIR » DES POPULATIONS INDIGENES D'AMERIQUE DU SUD

Summary

Three wellbeing philosophies of the Global South - Gross National Happiness (Bhutan), Ubuntu (South Africa), BuenVivir/SumakKawsay (Ecuador) – each articulate their own understanding of the right to happiness (wellbeing). These theories add dimensions to concepts of human dignity and fundamental freedoms that go beyond the traditional conception of rights. Gross national happiness understands human freedom and dignity from a Buddhist perspective to extend over several lifetimes, viewing it from the perspective of codependent origination and dignity of all sentient beings. Freedom is reinterpreted as freedom from delusion and desire. Ubuntu stresses human boundedness rather than human freedom as well as interdependence as a grandmother principle of law (my dignity is interwoven with your dignity). The community of people includes those who have come before and those who will come after you, all having equal rights. BuenVivir accords rights to mother earth (thereby to spirits, as Pachamama is a spiritual concept) and nature. It expands human dignity to encompass dignity for nature.

Résumé

Trois philosophies du bien-être des pays du sud – le bonheur national brut (Bhoutan), l'ubuntu (Afrique du Sud), BuenVivir/SumakKawsay (Equateur)- chacun ayant sa propre vision du droit au bonheur (bien-être). Ces théories ajoutent certaines dimensions aux concepts de dignité humaine et aux libertés fondamentales qui vont au-delà de la conception traditionnelle des droits. Le bonheur national brut entend la liberté et la dignité humaine dans une perspective bouddhiste pour l'étendre à plusieurs vies, la percevant dans une perspective de la codépendance des origines et la dignité de tout être doué de sentiments. La liberté est réinterprétée comme une liberté d'illusion et de désir. L'Ubuntu souligne le caractère limité de l'être humain plutôt que la liberté humaine ainsi que l'interdépendance en tant qu'ancêtre du principe de droit (ma dignité est liée à ta dignité). La communauté des personnes inclut ceux qui sont venus avant et ceux qui viendront après vous, tous ont les mêmes droits. Le Buenvivir accorde des droits à mère nature (ainsi qu'aux esprits, comme la Pachamama qui est un concept spirituel) et à la nature. Cela elargit la dignité humaine et englobe la dignité de la nature.

Keywords : Buddhism, Gross National Happiness, BuenVivir, SumakKawsay, Ubuntu, law, jurisprudence, Bhutan, Ecuador, South Africa

Mots-clé : Bhouddisme, Bonheur National Brut, Buenvivir, SumakKasway, Ubuntu, lois, jurisprudence, Equateur, Afrique du Sud

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1. INTRODUCTION: THREE TRADITIONS FROM THE GLOBAL SOUTH

This article is derived from Van Norren 2017 and based on post-colonial legal thinking (through literature and interviews (marked A1, B1, E1 etc), to reconstruct law,taking a critical realist approach.

1.1 GROSS NATIONAL HAPPINESS (GNH)

GNH can be defined as calling for material and spiritual development that mutually reinforce one another, which aims at harmony between 'inner skills' and 'outer circumstances', respect for nature, compassion, and balance and moderation and interdependence of all things. Bhutan enshrines these in its constitution and government policies based on four pillars: culture, social and economic development and good governance (Ura et al. 2012).The Bhutanese legal system contributes to deconstruction of conventional concepts of law while it goes against law rooted in objective rationality and strict secularism: The Constitution is based on people's ethics of Happiness, derived primarily from Buddhism but also supported in Hinduism, focuses on harmony, is internalized by people and is thus easier to enforce, but at the same time guarantees separation of religion and state. It includes a constitutional monarch bound by the ethics of Happiness (Boddhisatva leadership). However, the court system tends to follow more common law principles. There is little jurisprudence developing the principle of happiness.

1.2 UBUNTU

Ubuntu can be defined as the continuous motion of the enfoldment of the universe, but more popularly as 'I am because we are' (a person is a person through other persons). It is a collective ontology which stresses the value of compassion or 'life as mutual aid' (Ramose 1999/2005;Mbiti 1969). It is embodied in national Batho Pele (People First) policies related to government conduct. The interim South African Constitution mentioned Ubuntu, to enable the Truth and Reconciliation Commission, and this legal history inspired activist judges into civil and criminal Ubuntu jurisprudence based on victim participation, forgiveness, reintegration of criminals in society, dialogue, relatedness, meaningful engagement, the value of apologies, mutual respect, extended family and hospitality with concrete results such as abolition of the death penalty and prevention of eviction from housing (less strict property rights).

1.3 BUEN VIVIR

BuenVivir can be defined as derived from the Quecha Sumak Kawsay, Good Living based on living in harmony with (and not at the cost of) others or nature and in balance between spiritual and material wealth (Acosta 2015). Ecuador enshrines BuenVivir principles in its Constitution and national and international policies. Rights of nature (Mother Earth) are central to BuenVivir, as a form of restorative justice (between humans and nature) articulated in a modest jurisprudence enabling persons to protect nature without proving personal damage, however, not preventing large scale natural resource exploration. It deconstructs legal concepts centered around individual humans, the utility value of nature (defined as property), nature conservation, and reconstructs them based on the earth as central system (mother), collective

rights, the redefinition of economy-society-nature-relationship and the intertwinement of culture and nature as well as plurinationality.

2. COMPARISON

The three world views are similarin that they emphasize: Cosmic unity and harmony as the basis for justice; the creation of the world from our mind/heart, putting spiritual before material; altruism; expanded notions of dignity and freedom as overarching legal principles; a strong sense of socio-economic (positive) rights as indivisible of political and civil (negative) rights, intergenerational justice and varying degrees of collectivity (collective rights); restorative justice; economic-ecological principles; simple life; the value of being (leisure); different notions of poverty (beyond the material) and putting cultural beliefs at the heart of 'development'. All three philosophies derive from this cosmic unity a sense of an expanded community (that reaches into future lives and includes nature) and absence of the hierarchy of living beings. From this is also derived a notion of equality (though in practice with graded scales). (Van Norren 2017, Chapter 8).

3.OVERARCHING LEGAL PRINCIPLES: EXPANDED NOTIONS OF DIGNITY AND FREEDOM

3.1. BUDDHIST HAPPINESS

Dignity in GNH is combining the mind (reason) and the heart (compassion) and needs to be viewed from the aspects of (a) karma (several lives), (b) dependent origination (no self, interrelation of all that is open to change), (c) compassion with Buddhahood in all living beings, (d)the path of self-development (awakening and actualizing our dignity), and (e) being able to contribute to manifesting the world (through the mind) (Shiotsu 2001; Matsuoka 2005). Freedom is associated with freedom of the mind, from delusion (detachment from belief in the self) and desire (Kinga 2009; Tobgye 2015). However, this does not translate in significant difference on fundamental freedoms in the Constitution. Freedom is limited by duties (the concept of service) (art. 8), mainly related to sovereignty, culture, nature, non-killing and reciprocity. The Constitution puts the generation of rights on equal footing (Tobgye 2015), but without enforceable collective rights (limited to secondary law). The understanding of the Buddha field of interdependence makes indivisibility of rights, for all sentient beings, logic. The idea of reincarnation and 'karma' makes one automatically part of future generations (protected in art. 5 nature and art. 14.5 debt sustainability, Constitution).

3.2 UBUNTU

Dignity in Ubuntu is not rooted in reason (because it would deny dignity to those without the capacity of reasoning) (Cornell 2012); it regards our beingness as related to the beingness of others (the other comes first) (Wewerinkee 2007); human freedom being limited and overruled by human boundedness as interdependence of all is seen as a simple fact of life. This implies a natural indivisibility of rights and an emphasis on basic necessities (water, food, air) first. As only the earth and community can ensure the actualization of rights, it would prioritize

first humanity-as-a-whole-rights, then solidarity rights, then socio-economic rights, then civil and political rights (though these are equally important) (Ramose 1999/2005). However, the South-African Constitution only recognizes collective rights through its respect for customary law. Future generations are part of the 'bantu' (people)communityand enshrined in the Constitution (art. 24.2 environment) as well as ancestors. Duties are, however, not emphasized in the Constitution and formulated as correlates to rights.

3.3 BUENVIVIR

BuenVivir equally reconstructs freedom and dignity; dignity is accorded to all living beings; nature rights take precedence over human rights as one cannot live without mother earth; freedom also entails freedom as community to live with nature, and culture and nature being in permanent dialogue; it requires recognition of cultural diversity, interculturality and plurinationality; and recognition of 'the principle of relationality' (derived from the Andean cross, Chacana) connecting territory with spirituality, culture and the form of organization of indigenous peoples. It solidifies third generation solidarity rights and recognizes collective rights and emphasizes social-economic rights. It recognizes the rights of nature and rights of spirits (living in nature) as part of Pachamama (art. 7.7 Constitution), but the idea of nature as object, expressed in the right to property, has only been limited in the penal code of 2014 (in certain cases to protect nature; due to the Esmeraldas mining case, see Table 6). The Ecuadorian Constitution puts emphasis on specific collective and individual duties. Art 395.1 guarantees justice for future generations.

4. RESTORATIVE JUSTICE AND JURISPRUDENCE

A cosmic view related to harmony leads to a specific interpretation of justice.

4.1 HAPPINESS

Bhutan adopted a constitution based on gross national happiness in 2008. For arguments pro and contra Buddhist inspired law (Bhutanese constitution) derived from literature see Table 1. These are seen as non-binding guiding principles for policy (Tobgye 2014). Bhutan recently adopted a western justice system and has so far not institutionalized indigenous principles of justice, butpractices of reparation to the community were revealed in interviews as well as practices of mediation by senior citizens prior to going to court avoiding official justice, which is considered a means of last resort (Baylis and Munro 2003, 134; Table 2). This is traditional 'simple justice' based on Buddhist principles. Suspected criminals embrace restorative justice from a point of view of avoiding bad karma in a future life through confession. Here there is equally an element of purification, as understanding causality (karma) is essential on the path to enlightenment. Confessions may also help the victims to heal and facilitate settlement. There is, however, no evidence in jurisprudence (Table 2) yet of happiness (or compassion) as a legal principle breaking the barriers of ordinary justice.

Table 1 Arguments pro and contra Buddhist inspired law (reconstruction of law)

Western:	**Buddhist:**
• Law is and should be based on objective rationality; religion is subjective. • Western legal systems are rooted in reason (and in the economic reality of 'self-interested man'), not religion, and therefore universally applicable. • Separation of religion and state (though exceptions exist in the West too). • Principle of non-discrimination (of non-Buddhist minorities). • Freedom of religion: Proselytization punishable by law (Art 7.4 of the Constitution; section 463A Penal Code) is against. • Human Rights and legal systems are universal. • Bhutan is a Buddhist theocratic constitutional state. • Traditional dual (religious-political) system of government still underlies the Constitution. • Gross National Happiness does not foster economic growth. • Happiness is subjective and cannot be measured, can therefore not be a goal of legal systems or policies.	• 'Legal code expresses the people's fundamental ethical principles' (Baylis and Munro 2003). • Large majority of country is Buddhist; largest minority adheres to Hinduism which recognizes similar principles. • More adherence to the law because internalized. • Separation of religion and state still guaranteed; unlike in the West, political parties are not allowed to have religious affiliations (art. 4.b Constitution), nor use religion for political gain (art. 15.3 Constitution), duty on the religious leaders, not the state, to ensure that religion remains separate from politics (art. 3.3 Constitution); religious persons are not allowed to vote (electoral laws). • Proselytization is offensive to the religious feelings of the Buddhist and Hindus (National Assembly of Bhutan). • Western system also rooted in religion; avoiding Western colonization of law system. • Happiness is to be understood as 'Dewa' in Buddhism and not as hedonistic happiness or pleasure=ultimate goal in life. • Restorative rather than punitive justice. • More confessions (based on avoiding bad karma). • More settlements (based on mediation by community, senior citizen or judge). • Less court cases = simple justice. • Integrates respect for nature as duty of citizens.
• ***Converges with*** concepts of Modernity (material development of the individual and society) and (superior and inferior) stages of development.	• ***Converges with*** indigenous beliefs in harmony and balance (within oneself, with community, with nature) and self-sufficient survival in precarious

Western:	Buddhist:
• Analogy with colonialism: Unlimited resources to be discovered, conquered and exploited; ranking of human civilizations whereby indigenous is inferior.	environment, self-development through spirituality. • Post-colonial law based on equality of different cultural traditions.
Consequences: • Dignity rooted in human reason. • Freedom centers around human freedom: of expression, of religion and from fear (civil political rights), from want (socio-economic rights) (President Roosevelt 1941); or freedom to actualize ones (individual) rights and capabilities (Sen 1999). • Sustainable development often outside Constitution; environmental laws centred around human.	***Consequences: Reconstruction of law*** • Dignity is combining the mind (reason) and the heart (compassion) and needs to be viewed from the aspects of (a) karma (several lives) (b) dependent origination (no self, interrelation of all that is open to change) (c) compassion with Buddhahood in all living beings (d)the path of self-development (awakening and actualizing our dignity) (e) being able to contribute to manifesting the world (through the mind) (Shiotsu 2001; Matsuoka 2005). • Freedom is associated with freedom of the mind, from delusion (detachment from belief in the self) (Kinga 2009; Tobgye 2015), but does not translate in significant difference on fundamental freedoms in the Constitution; it is limited by duties (concept of service) (art. 8), mainly related to sovereignty, culture, nature, non-killing and reciprocity. • The Constitution puts the generation of rights on equal footing (Tobgye 2015), but without enforceable collective rights (limited to secondary law); the understanding of the Buddha field of interdependencemakes indivisibility of rights, for all sentient beings, logic. The idea of reincarnationand 'karma' makes one automatically part of future generations (protected in art. 5 on nature and art. 14.5 on debt sustainability, Constitution). • Sustainable development is incorporated in Constitution.

Table 2 Jurisprudence and practices involving Happiness principle in Bhutan

Case	Happiness principles
Government of Bhutan against Opposition Party (2011) Supreme Court Judgment No. SC. Hung 11-1	Opposition party demanding tax measures to be passed in parliament. The **government** invoked the argument of happiness: 'The purpose and essence of the direct and indirect taxes: A primary purpose of taxation is to create the enabling conditions for the pursuit of happinessby all Bhutanese. This is in keeping with the principles of state policy as enshrined in Article 9(7) of the Constitution which requires that 'The State shall endeavour to develop and execute policies to minimize inequalities of income, concentration of wealth, and promote equitable distribution of public facilities among individuals and people living in different parts of the Kingdom'. These are also to ensure that the country becomes self-reliant and that its sovereignty and independence are not compromised through perpetuation of dependence on foreign development assistance.' The Supreme **court** did not follow this argument. Therefore it did not elaborate on the principle of happiness as 'the authority of the government to impose tax' was not under dispute (para 6.1). It did elaborate on democracy: 'The Supreme Court as the guardian of the Constitution is deeply impressed with the paramount importance of ensuring and establishing a firm foundation for democracy and the functioning of the democratic institution as based on the tenets enshrined in the Constitution. As mentioned by His Majesty that: '(...).The key to success is the manner in which new democratic institutions learn to work in harmony, and with unity of purpose, in the interest of the Nation and People. If we can set this tradition in place in the first years, our democratic future will be forever strengthened' (para 6).
Sonam Tshering Vs. Office of Attorney General (2011) Judgement No HC-2011-58	Convicted disputing punishment of tobacco smuggling with three years imprisonment on the basis of compassion. The court: 'Extreme compassion would pose more harm to the justice system and may endure palpable threat to the society while improper sentencing will breed contempt and disproportionate attributes of mismatching between crime and punishment.' The court did not want to 'encourage legislation from the Bench.'
SangayGyaltsen and others vs Attorney General (2011) Press release, High Court. July 22, 2011.	Convicted disputing punishment for illegal mining on the basis of compassion. Court deemed arrest, search and seizure lawful and stated 'The law cannot be compassionate towards the guilt.' This case also involves the separation of religion and state, as the defendant being a monk pleaded 'the will of the people will not apply to religious personalities as they are not qualified to vote in the elections and are not represented in Parliament.' (and pleaded ignorance of the law as a consequence). The court dismissed this: 'The very essence of the electoral

Case	Happiness principles
	laws to disqualify our religious personalities from voting in election is in keeping with the original intent of the Constitution under Article 3, section 3 to ensure that our religious personalities and institutions remains separate and above politics. But this does not guarantee impunity to commit common law crimes'. Furthermore stipulating that invoking 'the status of one being a monk is a classification against the principle of equality and effective protection of laws under our Constitution.'
Settlements in criminal and civil law (preventing case law)	Simple justice, settlement based on confession with a large intermediary role of the judge (Baylis and Munro 2003, 134). 'Buddhist principles, while not serving any official role in the law, are not stopped at the courtroom door.' 'Rather than being an artificial structure which must be learned and imposed on society by specialists, the law is itself an organic expression of social (Buddhist) values, and the court an expression of the social will.' '(…) because the legal code expresses the people's fundamental ethical principles, the wrongdoer in each case should be aware of his own guilt, and will therefore often be compelled by his conscience to admit the wrong. This happens frequently (…) in criminal cases as well as civil (…) (which) is the principal basis for the resolution of so many cases through settlements without any need for judicial hearing (…) the Bhutanese system focuses on substantive justice rather than procedural fairness, and (…) on procedural simplicity (...) the appearance of new and more complicated legal problems in Bhutan is a source of great concern to those who believe in simple justice' (Baylis and Munro 2003, 135-136). 'Reforms undertaken to advance Bhutanese law to a 21st century model add procedural and substantive flourishes that do not serve any purpose for the law's domestic constituency' (Baylis and Munro 2003, 137). Mediation is part of Bhutanese culture: 'If there is a problem in my family, we can call a senior citizen to mediate, if not we can take it to court, but that is very rare' (B23); 'if he can't solve it we go to the Gup (local leader) or the Dhungkhag (deputy district leader, Sebastian 2015, 63)' (B26). Restorative rather than punitive justice features in some conversion of sentences in religious offenses (Van Norren 2017, 12.4.2), seeking harmony and redress of those offended (though not direct rehabilitation within the community). GNH has so far not emphasized this element: 'The country's foreign-trained lawyers lost sight of Bhutanese community law, which emphasizes restorative justice, and negotiated settlements with mutually beneficial resolutions.'(Michael Peil 2015).The first law school in Bhutan to be established in 2017 is 'to facilitate research and to promote cultural enrichment and traditional Bhutanese values'.[1]

[1] Royal Institute of Law, Royal Charter, February 21, 2015 http://www.jswlaw.bt/

4.2 SOUTH AFRICA

In South Africa truth and reconciliation based on Ubuntu (draft constitution of 1993) has played a major part in putting behind the apartheid era. Furthermore activist judges have extended the common (and Roman Dutch) lawinto restorative justice principles based on Ubuntu. Table 3 gives arguments pro and contra Ubuntu law. The elements of restorative justice are consecutive and fourfold: 1) Encounter (meaningful engagement face-to-face) between parties), 2) reparation (repairing the harm), 3) reintegration (in community with mutual commitment), and 4) participation (of others close to the parties). These principles were formulated by Justice Sachs in the Dikoko v Mokhatla[2] defamation case (Skelton 2010). Meaningful engagement (as earlier defined in Grootboom[3]) was made mandatory in the earlier Port Elizabeth municipality case, and became a decisive factor in deciding whether eviction from housing is just (though the Constitution and relevant acts related to housing do not require reasonable engagement, Skelton 2010, 106). Arguments in favor of restorative justice are: Restoring dignity to the victim (instead of impersonal punitive vengeance), victim participation, dialogue and compromise, recognizing relatedness and restoring it ('we are not islands onto ourselves'; Port Elizabeth case, para 37), value of apology, promoting service to the community (in sentencing), achieving mutual respect, the public interest in reducing prison population, welcoming people back into society as functioning members (Skelton 2010), reciprocity (giving the same respect as one receives) and mutual enjoyment of rights as well as specifically in South Africa, nation building through reconciliation, even in smaller disputes, 'as part of maintaining peace and stability in a diverse country with a difficult history' (Skelton 2013, 142). Similarly, the objectives of the Child Justice Act (2008) are restoring dignity, respect for human rights, reconciliation and participation of parents, families, victims and communities, referring explicitly to Ubuntu. Skelton points out that none of the South African laws till then included the option of diversion to restorative justice, though a discretionary option for the prosecutor existed (Skelton 2005, e.g. 127). South Africa is, however, actively transforming common law to recognize restorative justice, (though Roman Dutch law originally also included provision for apology, Skelton 2013, 137) in a wider sense than only criminal restorative justice (Skelton 2013, 123). Table 4 gives examples of jurisprudence (see also Cornell and Muvangua 2012).

Table 3 Arguments pro and contra Ubuntu law (reconstruction of law)

Contra Ubuntu	Pro Ubuntu
• Ubuntu is not in the Constitution, only part of the interim Constitution to enable the Truth and Reconciliation Commission. • Only promoted by activist judges. • Death penalty could have been abolished without reverting to Ubuntu.	• Restoring dignity to the victim (instead of impersonal punitive vengeance). • Victim participation. • Dialogue and compromise. • Recognizing relatedness and restoring it ('we are not islands onto ourselves'; Port Elizabeth case, para 37),

[2] 2006 6 SA 235 (CC); 2007 1 BCLR 1 (CC)

[3] Government of the Republic of South Africa v Grootboom, 2001 1 SA 46 (CC), para 87

Contra Ubuntu	Pro Ubuntu
• Invented tradition by African philosophers. • 'Communist' principles of Ubuntu do not sit well with modern economic principles and private law. • Ubuntu is not emancipatory (against communism). • Ubuntu is for Africans, not universal, cannot apply to non-Africans. • Ubuntu forgiveness denied justice, concealing conflict. • Objectivity of reason can establish universal truths. • No difference between Ubuntu and human dignity. • Cultural relativity (as consequence of recognizing other cultural systems) will undermine international law system and lead to instability.	• Value of apology, promoting service to the community (in sentencing). • Achieving mutual respect. • The public interest in reducing prison population. • Welcoming people back into society as functioning members (Skelton 2010). • Reciprocity (giving the same respect as one receives) • and mutual enjoyment of rights. • Nation building through reconciliation, even in smaller disputes, 'as part of maintaining peace and stability in a diverse country with a difficult history' (Skelton 2013, 142).
• ***Converges with*** concepts of Modernity and (superior and inferior) stages of development. Kantian social contract theory, namely individuals while maximizing their own capabilities agreeing to do some things together. Utilitarian moral theory. • Analogy with colonialism: ranking of human civilizations whereby indigenous is inferior, already established western based law systems are sufficient.	• ***Converges with*** African indigenous concepts of justice, bridges common and customary law, rainbow nation (cultural diversity including wholeness or 'holo-culturality'). • Analogy with post-colonial law. Post-colonial law can enable postcolonial economics.
Consequences • Dignity: rooted in human reason, individual not collective. • Freedom: rights prioritized over duties to community. • Private/Property law: individual, allowing for inequality, exclusion. • Meritocracy: based on talent/effort one advances oneself. • Criminal justice: punitive. • Family law: nuclear, not extended family.	***Consequences*** • Ubuntu/Humaneness/interconnectedness: grandmother of law, above dignity, relational aspect of rights. • Dignity: 'not rooted in reason because (…) this would deny dignity to too many human beings' (Cornell 2012); extends to those who are deceased (as part of bantu community). • Freedom: human boundedness (duties to the other) more important than human freedom.

Contra Ubuntu	Pro Ubuntu
• Environmental protection centred around humans.	• Legal culture rooted in reconciliation, sharing, compassion, civility, responsibility, trust and harmony; Ubuntu reciprocity also extends to respecting natural environment. • Development is not the central goal, human relations and mutual aid are. • Property (equal distribution), criminal justice (restorative), medical confidentiality (transparent to group members), family life (duty to wed and have children), and moral education (developing personhood).
***Interconnection with*:** • Individual rights. • Historic generation of rights (in theory indivisible, but in practice with priority of civil-political rights; socio-economic rights are deemed desirable but not feasible, idem for cultural rights).	***Interconnection with:*** • Collective rights. • Could be connected to rights of nature, though bantu community is central (born, yet to be born, deceased). • Protection of environment for future generations in Constitution.

Table 4 Ubuntu jurisprudence and restorative Justice principles

Case examples	Ubuntu Principles
Criminal law	
Truth and Reconciliation Commission. Draft Constitution.	Forgiveness (amnesty) for (apartheid) crimes, based on confessing the truth; in the interest of the whole of society (restoring harmony) and placing the crimes in the context of time and place (history); nation building through reconciliation***;*** peace and stability in a diverse country; welcoming people back into society as functioning members.
Albutt v Centre for the Study of Violence and Reconciliation and Others (2010) 3 SA 293(CC)	Victim participation in deciding the proper punishment for offenders and forgiveness (and thus presidential pardon should include a voice for the victims).
State versus Makwanyane (1995) (3) SA 391 (CC)	Abolition of the death penalty; collective dignity***;*** the life of another person is at least as valuable as one's own; instead of punitive vengeance.
M v. S (2007)	Defining rehabilitation in the community as preferable over a prison sentence.

Case examples	Ubuntu Principles
(Center for Child Law Amicus Curiae), 12 BCLR 1312 (CC), para 3	
S v. Mandela (2001) 1 SARC 156 (C)	The scope of the definition of life threatening compulsion departing from regard for life and the Ubuntu community.
Crossley v The National Commissioner of the South African Police Services (2004) 3 All SA 436 (T), JDR 0448 (T), JOL 12839 (T)	The right of the family to customary burial preceding over the right to fair trial (barring further pathological tests): 'The right to dignity (…) embraces not only those who are living, but also those who have departed.'
Housing, prevention of eviction	
Grootboom case (definition of meaningful engagement, 2001) 1 SA 46 (CC), para 87 (and Dikoko v Mokhatla defamation case, below) 2006 6 SA 235 (CC); 2007 1 BCLR 1 (CC)	1) Encounter (meaningful engagement face-to-face between parties). 2) Reparation (repairing the harm). 3) Reintegration (in community with mutual commitment). 4) Participation (of others close to the parties) (Skelton 2010). = recognizing relatedness and restoring it
Port Elizabeth municipality (2005) 1 SA 217 (CC); 12 BCLR 1268 (CC)	Made meaningful engagement mandatory for eviction cases.
AbahlaliBasemjondolo Movement SA&SibusisoZikode v The Premier of the Province of Kwazulu-Natal (2010) BCLR 99 (CC)	Declaring the slums act unconstitutional in light of the above.
Other Public law	
Migration -Khosa versus Minister of Social Development (2004) 6 BCLR 569 (CC) -Union of Refugee Women and Others v. Director Private Security Industry Regulatory Authority and Others (2007) 4 SA 395 (CC)	The culture of providing hospitality to bereft strangers (allowing for welfare grants to migrants and having to allow refugees to take up employment in the security industry).
Administration Masetlha v. President of the RSA and Another (2008) 1 SA 566 (CC)	Fairness and civility as inseparable from Ubuntu (and therefore due compensation at termination of a contract; Respect for the reputation of the person concerned and securing public confidence in the integrity of the incumbents of these public institutions).

Case examples	Ubuntu Principles
Pharmaceutical Society of South Africa and others v. Tshabalala-Msimang and Another NNO New Clicks South Africa (Pty) Ltd v Minister of Health and Another (2005) 3 SA 238 (SCA)	Relationship of mutual respect (in case between courts and organs of the state towards citizens and therefore delay of giving judgment was unreasonable).
Koyabe and Others v. Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae) (2010) 4 SA 327 (CC)	Give reasons for administrative decisions and an obligation to treat people with dignity and respect, linking it with Batho Pele (People First) policies: The best interest of the public must come first.
Joseph and Others v. City of Johannesburg and Others (2010) 4 SA 55 (CC)	Fair and respectful administrative action and the *relational* nature of rights (move beyond the common law conception of rights as strict boundaries of individual entitlement).
Dikoko v Mokhatla (2006/2007) 6 SA 235 (CC) / 1 BCLR 1 (CC)	Respectful relationship between parties and an apology, instead of monetary compensation for defamation.
Family Law ***Child Justice Act (2008)*** first in the option of diversion to restorative justice, refers to Ubuntu Earlier a ***discretionary option for the prosecutor*** existed (Skelton 2005, e.g. 127)	Objectives of the act: 1) Restoring dignity. 2) Respect for human rights. 3) Reconciliation and participation of parents, families, victims and communities.

4.3 ECUADOR

Ecuadorhas included restorative justice principles in its Constitution (constitutional art. 95 -102 stimulate active community participation in all government levels including alternative forms of dispute mediation; and in secondary legislation, see Table 14.10 and 14.11 in Van Norren 2017). Interviews revealed that justice is seen as a process of healing, a material and spiritual reparation, through a process of 'justice made with the other'. These practices are recognized through the 'indigenous branch of justice' (art. 167-203, Constitution). Community justice is collective and horizontal and has no judge; oral instead of written; it includes victim/family participation; it strives at purification of the individual, reparation to the community and apologies (confession) reconciliation for future well-being and therefore excludes prison sentences and retaliation as a principle of justice; instead of justice involving the individual, an offense to one person is an offence to the whole community. Proponents deem it cheap, fast, transparent, publicand gender friendly by including women. There is a need for preventing conflicts between ordinary justice and customary law and delineating clear

jurisdiction (Art. 343 -346 of the 'Codigo Organico de la Funcion Judicial'[4], art. 171 of the Constitution, and art. 66 of the 'Ley Organica de Garantias Jurisdiccional y Control Constitucional'[5];La Cocha case; Ávila-Santamaría 2012, 298). Ecuador could learn from South Africa that has an established tradition of dealing with customary law, though both systems operate independently. By recognizing Ubuntu as a legal principle, however, this segregation between the two systems of law has been broken. Firmly establishing BuenVivir as a legal principle may have the same effect, though the Ecuadorian Constitution is already a hybrid construction of both.

Restorative principles also come into action in unique jurisprudence on the rights of nature, protecting constitutional rights of 'integral respect for its existence and for the maintenance and regeneration of its life cycles' (art. 71) and to restoration (art. 72) and prevention of extinction of species (art. 73) and duty of citizens to protect natural resources (art. 84). Table 5 summarizes the debate on the adoption of this legislation and its consequences. This point of view is supported by some (South) African environmental activists (e.g. Cullinan 2002 and 2010).

Table 5 Arguments pro and contra rights of nature

Opposition	Proponents
• Law aims at regulating *human* relations • Utility value of nature, lesser value than humans • Giving agency to non-humans without moral sense and rational ability is not rational • An outright 'absurdity' or 'stupid' • Nature is not able to fulfill corresponding obligations • Inability to sue nature causing damage (e.g. Flooding destroying other life) • Scientific difficulties for establishing alteration to a natural cycle • Fear of excessive litigation and increased conflicts • Imprecise definitions of what nature (or natural) is, may impede implementation (the Constitution gives a positive definition 'where life is reproduced and occurs', art. 71, while a negative definition would be 'that which is not human-made')	• Assigning intrinsic value to nature • As to utility value of nature: • Human governance systems are failing: Designed for exploitation and domination of Earth, leading to environmental degradation • Like liberation of slaves, liberation of nature is needed: Both subject to ownership of their masters • Human well-being is derived from earth well-being • Therefore, balance the interests of all (human and Earth) for the benefit of humans and non-humans • =Redefinition of economy-society-nature relationship • =Recognition of environment- culture interrelations • Law is central to human governance and therefore must recognize rights of non-human members to protect Earth and human survival

[4] *https://www.oas.org/juridico/mla/sp/ecu/sp_ecu-int-text-cofj.pdf*
[5] http://www.seguridad.gob.ec/wp-content/uploads/downloads/2016/09/ley_organica_garantias_jurisdiccionales_y_control_constitucional.pdf

Opposition	**Proponents**
	• (Abstract) corporations have rights, so can (abstract) Nature
• ***Converges with*** concepts of Modernity and (superior and inferior) stages of development • Analogy with colonialism: Unlimited resources to be discovered, conquered and exploited; ranking of human civilizations whereby indigenous is inferior	• ***Converges with*** indigenous logic: 'Of course, nature is our mother, she has rights' • Analogy: Postcolonialism, deep ecology and environmental justice
Consequences: • Dignity concerns human dignity and rights • Freedom concerns human freedom and capabilities to actualize that freedom, using Earth and non-human members to their benefit (lack of reciprocity) • Development concerns human progress and may go at the cost of earth • Sustainable development with continued economic growth, but without recognizing rights of the earth, is possible and will solve environmental governance crisis	***Consequences****:* Reconstructsthe notion of: • Dignity (wider circle of reciprocity: Rights/duties) • Freedom is'1) the right of existence of different Communities as part of nature.. 2) keeping the vital cycles of nature and 3) of animals' (E8) (=reciprocity sets one free) • 'Development is not important, what is important is well-being or life. Sustainable life!'(E8). Not sustainable development
Interconnection with: • Individual rights • Civil, political rights; socio, economic and cultural rights to protect and emancipate humans • Culture and nature are separate; culture concerns humans • Property law; humans own land, animals, earth systems for their benefit and private and collective use • Conservation: 'The dissociation of human rights, social rights and nature rights' (E8)	***Interconnection with:*** • Collective rights: Nature is territory • Free prior and informed consent (tool) • Culture and nature are intertwined: 'Community with nature .. are in permanent dialogue; it means to be part of, secondly interdependence, thirdly complementarity, which means both depend on each other, and there is reciprocity'(E8) • Fundamentally reshapes property law, as the natural world has been seen as legal property thus far • Integration of human and nature in one balanced system

Table 6 summarizes the actual case law on rights of nature in Ecuadorian courts including some of the possibilities that the civil society initiative of the tribunal for the rights of nature[6] sees for future rulings as it deems the courts of Ecuador not to be independent. First the three significant cases are mentioned in oil and mining: BP (Deep Horizon), Chevron and

[6]http://therightsofnature.org

Condor Mirador, which either did not invoke the rights of nature or were rejected by the courts, showing that real impact still has to be obtained. Then the minor cases in which victories were obtained are listed. Certain administrative measures are contentious as they destroy the livelihood of small communities, whereas large mining projects are left untouched, or involve political conflicts on opposition against mining projects. Thus in some cases rights of nature have become a tool of the government to suppress opposition.

Table 6 Jurisprudence Rights of Nature (RoN)

Case name	***Content/Judgment***
outcome	*Civil cases*
British Petroleum *RoN claim rejected (no jurisdiction)* Rejected petition to constitutional court of 26 November 2010	• invoking the principle of universal jurisdiction, defending the right of the sea • a moratorium on deep sea oil drilling • 'leaving untapped an equivalent amount of oil to the oil spilled in the Gulf' and • 'British Petroleum be ordered to redirect investment earmarked for further exploration towards strategies aimed a leaving oil underground • making public the information on cleaning mechanisms reducing oil particles, which are being absorbed by species • Dismissed on jurisdictional grounds
Condor Mirador (open-pit) mining project *RoN claim Rejected* 2nd instance case no 1711120130317, Provincial Court of Pichincha, 15 January 2013, sentence 20 June 2013	• Violation of the rights of Nature, the rights of people to adequate water and decent life (resp. art. 71, 73, 406, 411; art. 12, 318, 282, 318, 276, 15, 413, 66.2 constitution) • The suits were rejected by Provincial Court of Pichincha (ruled that project does not affect protected areas, responsible mining can mitigate environmental damages) • People's RoN 'tribunal': Violates collective and nature rights; proposed remedies: • restoration of the area • suspension of mining • compensation of those affected • investigation of public officials involved in decision-making • punish those responsible for the death of activist José Tendentza • evidence of drainage affecting the high biodiversity and deforestation was presented as well as intimidation of indigenous people and 'campesinos
Chevron *NOT RoN case, but brought in by victims* Sentencia N.Q230-1S-SEP-CC Case no 0105-14-E 27 June 2018	• only environmental rights for the persons who are affected; civil action in the national court (del Lago Agrio), damages awarded • Chevron took the case to the constitutional court (trying to revoke the decision) declaring that there is a violation of due process • In their defense the victims have invoked the rights of nature; therefore the constitutional court also upheld the rights of nature in this case.

Case name	*Content/Judgment*
(pp. 110, 119-120)	
Amparo Biodigestor *Positive for RoN* sentence 0567-08-RA, 16 July 2009	• Positive ruling pig nurseries/biodigestor machine • state's duty to guarantee water for inhabitants, to protect the natural heritage and guarantee the rights of persons, collectivities and nature (art. 3.1 and 277) • nature as a subject of rights (art. 10), the state guaranteeing the exercise of rights (art. 11), right to a healthy and ecologically balanced environment (art. 14) • the company had ' to ensure that all its productive activities are tuned towards the integral respect for Pachamama or Nature..' (art. 71, 72) (various private persons vs el señoringeniero Juan Rivadeneira, Gerente General de la Empresa PRONACA)
Camaronera (shrimp farm) *Positive for RoN* case 0507-12-EP, 26 March 2012; sentence 166-15-SEP-CC; 20 May 2015	• the constitutional court also took a positive decision to consider the rights of nature to protect the trees in the Cayapas reserve • overruled the decision of the provincial court in favor of the shrimp-farmer who cut the trees • overruled the right to work, art. 319; right to a property, art. 66.26 and art. 32; and to legal security, art. 82(el señor Santiago GarcíaLlore, director provincial del Ministerio del Ambiente de Esmeraldas vs la CamaroneraMarmeza,)
Vilcabamba River *Positive for RoN but failing implementation* Prov.Court of Justice of Loja, sentence No. 11121-2011-0010, March 30, 2011	• The river won the case against the provincial government of Loja, which widened a road without environmental permits. The court invoked • (a) the 'precautionary principle', a duty of the judges to prevent environmental damages until the contrary is proven • (b) the notion that damages to nature are generational damages • (c) government to provide certain proof that the widening the road would not affect the environment • (d) defeated the argument that 'the population needs roads' • (Wheeler vs Director de la Procuraduria General Del Estado de Loja; Provincial Court of Justice of Loja)
Galapagos-Medidos Cantelares *Positive for RoN* Constitutional measure of prevention, no 269/2012, 28 June 2012, Civil and Commercial Court of Galápagos	• local businesses launched a court case against expansion of a boardwalk (Charles Darwin avenue) on the coast • court invoked violation of the 'Rights of Nature, established in the Political Constitution of the Republic, in its Arts. 71, 73, 66 sub 27, 258, 397 sub 1, 14 and 11' • 'art 258 limits the activities in the insular region of Galápagos that can affect the environment' • 'art. 242, sub 2 grants Galapagos the quality of special regime, for being a unique eco-system in the world, of special interest for conservation and science, not just of the country, but of humanity itself'

Case name	*Content/Judgment*
TangabanaParamos case *RoN claim rejected but appealed* 2nd instance: Sentence no 06334-201401546, 24 August 2015, the Criminal division of the Provincial court of Justice of Chimborazo;	• RoN claim to remove a pine tree plantation in a paremo ecosystem and to restore the ecosystem (art. 71-72 of Constitution), by activist organizations against ERVIC company that operates on behalf of ministry of agriculture (reforestation program), but violates ministry of environment protocol with ministry of agriculture not to reforest in paremo ecosystems • Constitutional appeal (Various activist organisations (Yasunidos Chimborazo, AcciónEcologica and indigenous pastorate of Chimborazo) against ERVIC company)(1st instance court Canton of Colta, decision 10 December 2014)
	Criminal cases
Condor Felipe *Positive for RoN* Case 0323046; 19 November 2012 (criminal investigation against Damián by district attorney in Azuay)	• campesino was sentenced for shooting a condor, an endangered species • art. 3.7 ('the state has to protect the cultural and natural heritage according with the Constitution) • art. 83.6 (the Ecuadorians have the responsibility and duty to respect the rights of nature, preserve a healthy environment and use natural resources in a reasonable, maintaining and sustainable way) • art. 14 (public interest to preserve the environment, and to preserve ecosystems and biodiversity) • art. 73 (the State has to apply the measures in restriction and precaution of activities that may lead to extinction of species, the destruction of ecosystems or permanent altering of natural cycles) • art. 395. 1 (the state will guarantee a sustainable model of development, environmentally balanced and respectful towards cultural diversity, that conserves biodiversity and capacity for natural regeneration of ecosystems, and assures the provision in needs of current and future generations) • art. 395.2 (the politics of environmental management will be applied in a transversal way and will be have to be observed by the state in all its levels and by all natural and legal persons in the national territory) • art. 400.2 (biodiversity is declared of public interest the conservation of biodiversity and all of its components, especially the agricultural and wild biodiversity as well as the genetic heritage of the country)
Galapagos sharkfin *Positive for RoN* Case no 005-2011-UMA, Galapagos, 2011; sentence no 09171-2015-0004. Guayaquil, 2015	• sharks gained legal standing, defeating illegal shark fishing in or by the territorial waters of Galapagos • avoiding problem of territorial waters jurisdiction • 13 fisherman were sentenced to 1-2 years in prison and an addition 8 sentenced in absentia; based on the New Penal Code (COIP) of

Case name	*Content/Judgment*
	2014; articles 71, 72, 73, 83.6, 395.4, 396, 397 final part and 405 Constitution
Macuma-Taisha Road *Positive for RoN but contentious* No.140101814100163PG (the Prosecutor's Office of the Province of Morona Santiago)	• See below; criminal prosecution of prefect for continuing to build road to village without the proper license (violation of the right of the soil, art. 252 penal code) • Prefect claims political persecution for his community's refusal to oil exploration in their area (for which the road building was begun)
Killing of Jaguar *Positive for RoN* Case no. 2003-2014 - C.T. Quito, 31 de julio de 2015	• Hunter convicted based on art. 247 (crimes against wildlife) • Fine paid to ministry of environment and 6 months in prison (criminal investigation against Mr. Pomaquero, criminal court of Napo)
	Administrative Measures
Esmeraldas Mining *Positive for RoN but contentious* No. 0016-2011, 20 May 2011,2nd court of criminal law of Pichincha	• Protective action for RoN against small scale illegal miners for polluting the rivers; affecting the forests, ecosystems and habitat of species (art. 71, 72, 73 of the Constitution) • RoN overruled the right to property (mining equipment destroyed) • Some claim action was disproportional and may give go ahead for large scale mining
MAE (ministry of environment) vs Secoya *Positive for RoN but contentious* Kauffman and Martin 2016, appendix	• fine for Secoya community for clearing native forest for palm farming without permit • violation of art. 10, 57,71, 72, 73, 321, 396 and 397 of the Constitution and art. 78 of the forestry law • community perceives fine as pressure to agree with oil extraction in their territory and/or participating in community foresting programs which they oppose, to pay of the fine
Macuma-Taisha Road *Positive for RoN but contentious* MAE-D-2015-0616 of 10 July 2015 (inter alia)	• administrative action against province of Morona Santiago for building of a road to village of Taisha through 'minga', community labor (violation of the right of the soil), violation of art. 396 (violating policies to avoid environmental damages); fine of $70.800 for prefect and lawyer • community claims political persecution for refusing oil exploration in their territory for which the road was built but left unfinished

5. CONCLUSION

Countries in the Global South are experimenting with the right to happiness in their constitutions and policies. Happiness needs to be understood as a broad term defining the right way of living, leading to wellbeing. This is interpreted in different ways in various continents and includes the 'happiness' of nature and of communities. Jurisprudence gives mixed results.

Indigenous law and understanding of happiness is slowly permeating the strict boundaries of equally adopted (colonial) Western law systems, resulting in hybrid legal systems.

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