



## AMPAROS FILED BY INDIGENOUS COMMUNITIES AGAINST MINING CONCESSIONS IN MEXICO: IMPLICATIONS FOR A SHIFT IN ECOLOGICAL LAW

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**ABSTRACT:** *Four indigenous communities in Mexico have initiated amparos seeking constitutional protection against mining concessions that have allegedly violated their constitutional rights. In addition to their significant implications for indigenous rights in Mexico, these amparos are part of a growing reaction against laws that prioritize mining interests over community land uses and ecological values. This article explores the relationship of these cases with a new legal paradigm that is emerging in response to the inability of environmental law to adequately address the deepening ecological crisis: ecological law. From an ecological law perspective, these amparos are of interest because of the possibility for courts to give priority to indigenous values ascribing spiritual, ecological and relational meanings to the land and its resources, over economic interests seeking to exploit the land and resources for commercial gain without regard to ecological limits. The article introduces a “lens of ecological law” conceived to understand the nature of the required shift from the current law to ecological law, and then examines the amparo filed by the community of San Miguel del Progreso–Júba Wajín from this standpoint. The analysis shows that the provisions of the Mining Law challenged by the amparo pose serious obstacles for ecological law (prioritizing mining over any other land use), and it points to certain synergies between indigenous rights and ecological law. While the SCJN did not examine the merits of the amparo because the concessions had been withdrawn, the amparo offers insights into the challenges facing a shift away from the current legal paradigm.*

**KEY WORDS:** *Ecological law, indigenous rights, environmental protection, mining law, Mexican Constitution (2001 amendment).*

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**RESUMEN:** *Cuatro comunidades indígenas en México han iniciado juicios de amparo por presuntas violaciones a sus derechos constitucionales en el otorgamiento de concesiones mineras respecto de sus territorios. Estos amparos tienen implicaciones importantes para los derechos indígenas en México, pero además, reflejan la creciente oposición a leyes que dan prioridad a intereses mineros por encima de usos comunitarios del territorio y valores ecológicos. Este artículo explora la relación entre estos casos y un nuevo paradigma jurídico —el derecho ecológico— que está emergiendo para responder al fracaso del derecho ambiental ante la crisis ecológica. Estos amparos son de interés desde una perspectiva de derecho ecológico en tanto que abren la posibilidad de que la corte dé preeminencia a valores indígenas que otorgan significados espirituales, ecológicos y relacionales al territorio, en vez de dársela a intereses económicos de explotación comercial que son indiferentes a los límites ecológicos. El artículo presenta una “lente de derecho ecológico” diseñada para apreciar la naturaleza del cambio que implicará pasar del derecho actual a un modelo de derecho ecológico, y esta lente se aplica para examinar el amparo promovido por la comunidad de San Miguel del Progreso—Júba Wajíin. Se muestra que las disposiciones de la Ley Minera en cuestión representan obstáculos importantes para la adopción del derecho ecológico (la priorización de la minería sobre otros usos del suelo). Asimismo, se revela cierta sinergia entre los derechos indígenas y el derecho ecológico. Si bien la SCJN no examinó el fondo del amparo, dado que la empresa titular abandonó las concesiones, el amparo permite vislumbrar algunos de los retos que plantea el cambio de paradigma jurídico hacia el derecho ecológico.*

**PALABRAS CLAVE:** *Derecho ecológico, derechos indígenas, protección ambiental, legislación minera, Constitución Mexicana (reforma de 2001).*

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### I. INTRODUCTION

Ecological law is an emerging approach to law that seeks to constrain economic activities within ecological limits, restore and protect ecological integ-

rity, and promote ecological justice.<sup>1</sup> It has arisen in response to the inability of environmental law to adequately address the deepening ecological crisis,<sup>2</sup> and is part of a move away from the dominant growth-insistent economic model to an economy that operates within the planet's biophysical limits with much reduced material-energy throughputs and ecological footprints.<sup>3</sup> Also, ecological law is part of a shift to a different concept of the relationship of humans among themselves and with the Earth.<sup>4</sup> It is an alternative to environmental law—a paradigm shift—rather than a call for its reform.<sup>5</sup> As one of the key components of the current growth-insistent economy,<sup>6</sup> mining will need to undergo a profound transformation if it is to contribute to a new ecologically-bounded economy and to ecological justice.<sup>7</sup> A critical component of this is the role of indigenous communities in deciding whether and how mining takes place in their territories.

Indigenous peoples are increasingly being affected by mining activities in their territories.<sup>8</sup> At the same time, they are gaining the recognition of their

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<sup>1</sup> See, among others: David R. Boyd, *Sustainability Law: (R) Evolutionary Directions for the Future of Environmental Law*. (*Future Directions*?), 14 *J Envtl L & Prac* 357 (2004); Klaus Bosselmann, *Ecological Justice and Law*, in ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER, (Benjamin J. Richardson & Stepan Wood, eds., 2006); CORMAC CULLINAN, *WILD LAW: A MANIFESTO FOR EARTH JUSTICE* (2nd ed., c2011); Geoffrey Garver, *The Rule of Ecological Law: The Legal Complement to Degrowth Economics*, 5:1 SUSTAINABILITY 316 (2013).

<sup>2</sup> On the shortcomings of environmental law, see e.g. Boyd, *Sustainability Law*; *supra* note 1; and Hans Christian Bugge, *Twelve Fundamental Challenges in Environmental Law*, in RULE OF LAW FOR NATURE: NEW DIMENSIONS AND IDEAS IN ENVIRONMENTAL LAW (Christina Voigt, ed., 2013). On the ecological crisis, see e.g., Johan Rockström, *et al*, *The Anthropocene: From Global Change to Planetary Stewardship* 40 *AMBIO* 739 (2011); Will Steffen, *et al*, *Planetary Boundaries: Guiding Human Development on a Changing Planet*, 15 *SCIENCE* 1 (January 2015); Will Steffen, *et al*, *The Trajectory of the Anthropocene: The Great Acceleration*, *THE ANTHROPOCENE REVIEW* 1 (2015).

<sup>3</sup> WILLIAM E. REES, *AVOIDING COLLAPSE: AN AGENDA FOR SUSTAINABLE DEGROWTH AND RELOCALIZING THE ECONOMY* (2014).

<sup>4</sup> THOMAS BERRY, *THE GREAT WORK: OUR WAY INTO THE FUTURE* (1999); CULLINAN, *supra* note 1; PETER BROWN & GEOFFREY GARVER, *RIGHT RELATIONSHIP: BUILDING A WHOLE EARTH ECONOMY* (2009).

<sup>5</sup> The term “environmental law” is consistently used in English to refer to the body of law aimed at mitigating the effects of human activities on the environment. In contrast, there has been debate in Spanish about the use of the terms “*derecho ecológico*” and “*derecho ambiental*” and these have at times been used interchangeably to refer to this body of law (see e.g., MARÍA DEL CARMEN CARMONA LARA, *DERECHO ECOLÓGICO*, (1991)). In this article, “ecological law” and “*derecho ecológico*” refer only to the emerging approach to law that, as briefly explained herein, is fundamentally different to environmental law, and is also referred to in English literature as “wild law”, “sustainability law”, “Earth jurisprudence”, and “Earth law” (see *supra* note 1).

<sup>6</sup> INTERNATIONAL COUNCIL ON MINING AND METALS (ICMM), *THE ROLE OF MINING IN NATIONAL ECONOMIES* (2nd ed., 2014).

<sup>7</sup> CARLA SBERT, *Re-imagining Mining: The Earth Charter as a Guide for Ecological Mining Reform*, 6 *IUCN AEL E JOURNAL* 66 (2015).

<sup>8</sup> C. DOYLE & A. WHITMORE, *INDIGENOUS PEOPLES AND THE EXTRACTIVE SECTOR: TOWARDS A RIGHTS RESPECTING ENGAGEMENT* 5 (2014).

rights in international law<sup>9</sup> and in a growing number of national constitutions, like the Mexican one.<sup>10</sup> This generally includes the need for the free and informed consent of indigenous peoples before carrying out activities that affect their territories.

Mexico has a long history of mineral exploitation, but mining activities in the country have increased dramatically over the past fifteen years.<sup>11</sup> This is primarily due to neoliberal policies that enable foreign investment in the sector<sup>12</sup> and to technology that has greatly enhanced extraction capabilities.<sup>13</sup> Conflicts in connection with extraction projects are also on the rise,<sup>14</sup> accompanied by the criminalization of dissent.<sup>15</sup>

According to the official estimate, approximately 12.5% of the country was subject to a mining concession in 2015,<sup>16</sup> while other sources report it at 30%.<sup>17</sup> It is thought that 17% percent of indigenous territory is subject to mining concessions.<sup>18</sup> In the State of Guerrero, new discoveries of mineral deposits have pushed the number of concessions to approximately 600.<sup>19</sup> While these figures may seem high to some, a government publication that promotes business in Mexico writes that “[t]he Mexican territory occupies 1,964,000 km<sup>2</sup>, of which 70% has geological suitability for development of mining projects”<sup>20</sup> but that “only 27% of the national territory has been

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<sup>9</sup> Convention Concerning Indigenous and Tribal Peoples in Independent Countries (C169), 1989 [ILO C169]; American Convention on Human Rights, 1969 [ACHR]; Miguel Ángel Sámano Rentarúa, *Derechos indígenas y la nueva relación de los pueblos indígenas y el Estado en América Latina: en específico en México*, 60 ALEGATOS (2005).

<sup>10</sup> Constitución Política de los Estados Unidos Mexicanos, art. 1, 2, 4, 18, 115. See, CONSTITUCIÓN Y DERECHOS INDÍGENAS (Jorge Alberto González Galván, coord., 2002).

<sup>11</sup> MARVIN D. BERNSTEIN, *THE MEXICAN MINING INDUSTRY 1890–1950* (1964); Jaime Cárdenas, *The Mining Industry in Mexico: The Dispossession of the Nation*, 28 CUESTIONES CONSTITUCIONALES (2013).

<sup>12</sup> DARCY TETREAU, *Social Environmental Mining Conflicts in Mexico*, 204:42:5 LATIN AMERICAN PERSPECTIVES 48-66, 52-4 (2015).

<sup>13</sup> ICMM, *MINING’S CONTRIBUTION TO SUSTAINABLE DEVELOPMENT: THE SERIES*, Ch. 3, at 9.

<sup>14</sup> TETREAU, *supra* note 12.

<sup>15</sup> JEN MOORE, ROCH TASSÉ, CHRIS JONES & ESPERANZA MORENO, *IN THE NATIONAL INTEREST? CRIMINALIZATION OF LAND AND ENVIRONMENT DEFENDERS IN THE AMERICAS* 14 (2015).

<sup>16</sup> *Concesiones mineras vigentes por entidad federativa a mayo de 2015*, in PRONTUARIO DE LA INDUSTRIA MINERO METALÚRGICA 24 (Secretaría de Economía, 2015).

<sup>17</sup> CÁRDENAS, *supra* note 11 [citing López Bárcenas] 53; MOORE, *et al*, *supra* note 15, at 14.

<sup>18</sup> Agustín del Castillo, *17% de tierras indígenas concesionadas a minería*, MILENIO.COM (April 24, 2015).

<sup>19</sup> CENTRO DE DERECHOS HUMANOS DE LA MONTAÑA “TLACHINOLLAN” (EN ADELANTE, TLACHINOLLAN), *LA DEFENSA DEL TERRITORIO DE SAN MIGUEL DEL PROGRESO–JÚBA WAJIÍN, COMUNIDAD ME’PHAA DE LA MONTAÑA DE GUERRERO, FRENTE A LA ENTREGA DE CONCESIONES MINERAS SIN CONSULTA: FICHA INFORMATIVA 1-2* (2014).

<sup>20</sup> Secretaría de Economía, *The Mexican Mining Industry: More than Diamonds in the Rough* NEGOCIOS PROMÉXICO (May 2015), at 18.

explored.”<sup>21</sup> Critics instead note that “[t]he unprecedented rapaciousness with which the extractive model in Mexico threatens collectively owned lands and peoples far out measures colonial times.”<sup>22</sup>

Since 2013, four indigenous communities in Mexico have initiated *amparo trials*<sup>23</sup> seeking constitutional protection against mining concessions that allegedly violated their constitutional rights. These *amparos* have significant implications for indigenous rights in Mexico. The analysis that follows, however, explores the relationship of these cases to the new legal paradigm that is ecological law.<sup>24</sup>

## II. THE “LENS OF ECOLOGICAL LAW”

To improve the understanding of the implications of a shift from existing law (primarily, but not exclusively, environmental law) to ecological law I have built on existing scholarship<sup>25</sup> and propose a *lens of ecological law* with which to analyze the major affinities and inconsistencies between the laws in place<sup>26</sup> and ecological law. This lens is formed by three interconnected principles that inform the objectives of ecological law and help advance it as an alternative to environmental law. This is based on the general definition of the term *principle* as “a fundamental truth or proposition that serves as the foundation for a system of belief or behavior or for a chain of reasoning.”<sup>27</sup> As for the objectives of ecological law, in my view these can be summarized as 1) constraining the economy within ecological limits, 2) restoring ecological integrity, and 3) enabling an ecologically just society. These principles are drawn from a grow-

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<sup>21</sup> *Id* (emphasis added).

<sup>22</sup> MOORE, *et al*, *supra* note 15, at 14.

<sup>23</sup> In this article, I use the 2010 Mexican Supreme Court (SCJN) English translation of the Mexican Constitution. MEXICAN SUPREME COURT, POLITICAL CONSTITUTION OF THE UNITED MEXICAN STATES (4th ed., 2010). I also follow the common practice of referring to the brief filed to initiate an *amparo trial* as an “*amparo*.”

<sup>24</sup> GARVER, *supra* note 1.

<sup>25</sup> KLAUS BOSSELMANN, THE PRINCIPLE OF SUSTAINABILITY: TRANSFORMING LAW AND GOVERNANCE (2008); David R. Boyd, *Sustainability Law: (R)Evolutionary Directions for the Future of Environmental Law*. (*Future Directions?*) 14 J ENV L & PRAC 357 (2004); BROWN AND GARVER, *supra* note 4; CULLINAN *supra* note 1; Garver, *supra* note 1; Nicholas A. Robinson, *The Resilience Principle*, 5 IUCN AEL E-JOURNAL 19 (2014).

<sup>26</sup> Ecological law challenges the narrow specialization of environmental law. As exemplified in this article, the obstacles and opportunities for adopting ecological law may also be found in other kinds of laws (mining, constitutional, etc.). See Michael M’Gonigle & Paula Ramsay, *Greening Environmental Law: From Sectoral Reform to Systemic Re-formation* (*Future Directions?*), 14 J ENVTL L & PRAC 333 (2004).

<sup>27</sup> THE NEW OXFORD AMERICAN DICTIONARY (Angus Stevenson & Christine A. Lindberg, eds., 3rd ed., 2010) *SV* “principle.” The term “principle” is intended herein in the sense of a legal principle as per HUMBERTO AVILA, THEORY OF LEGAL PRINCIPLES 8, 40, 45-50 (2007).

ing body of scholarship, in particular the features of the “rule of ecological law” as defined by Geoffrey Garver.<sup>28</sup> Ecological law is an emerging approach to understand and imagine law, so these principles are only proposed as tentative contributions to its evolving theory. They are as follows:

1. *Ecocentrism: To Recognize and Respect the Value of all Beings and their Interconnectedness, Equitably Promoting the Interests of Human and Non-Human Members of the Earth Community*

*Ecocentrism* primarily illuminates the law’s ability to support and promote a worldview in which humans are part of nature and no more important than other life forms and systems. It also guides the law in preventing decisions that disregard ecological consequences and lean towards short-term human interests. The focus of this principle is relational and conceptual: it centers on the view and understanding of the human-Earth relationship underlying the law.<sup>29</sup> *Ecocentrism* sets a strong basis for the other two principles.

As understood here, the principle of *ecocentrism* corresponds to the first feature of Garver’s rule of ecological law: “recogniz[ing] humans are part of Earth’s life systems.”<sup>30</sup> In requiring that law “recognize and respect the value of all beings,” the principle also implies Aldo Leopold’s land ethic,<sup>31</sup> and Thomas Berry and Cormac Cullinan’s Earth rights.<sup>32</sup> The requisite to “equitably promote the interests of human and nonhuman members of the Earth community” is meant to invoke the essence of biocentrism/ecocentrism (further discussed below) and the responsibility towards other beings, as in the Earth Charter’s call for “universal responsibility.”<sup>33</sup>

The proposed principle includes the acknowledgment of the relationship that humans have with other beings as part of the web of life, through the notion of interconnectedness. As noted, interconnectedness is often present in indigenous worldviews and legal traditions.<sup>34</sup> However, the recognition of interconnectedness does not exclude *per se* anthropocentric approaches that value other life forms and systems based on human interests (in particular

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<sup>28</sup> GARVER, *supra* note 1, at 325.

<sup>29</sup> See CULLINAN, *supra* note 1, at 29.

<sup>30</sup> *Id.*

<sup>31</sup> WILLIS ENKINS & WHITNEY BAUMAN quote Leopold as follows: “In short, a land ethic changes the role of *Homo sapiens* from conqueror of the land-community to plain member and citizen of it. It implies respect for her or his fellow-members, and also respect for the community as such. Source: Aldo Leopold (1949). *A Sand County Almanac, and Sketches Here and There*, p. 204. New York: Oxford University Press.” Willis Jenkins & Whitney Bauman, *Ecocentrism*, in BERKSHIRE ENCYCLOPEDIA OF SUSTAINABILITY, VOL 1: THE SPIRIT OF SUSTAINABILITY 119-120 (Willis Jenkins & Whitney Bauman, eds., 2010).

<sup>32</sup> BERRY, *supra* note 4; CULLINAN, *supra* note 1.

<sup>33</sup> EARTH CHARTER COMMISSION, THE EARTH CHARTER, Preamble, (2000).

<sup>34</sup> E. RICHARD ATLEO, TSAWALK: A NUUCHAH-NULTH WORLDVIEW (2004).

utilitarianism). Therefore, the principle of *ecocentrism* also includes biocentrism, which “articulat[es] a larger philosophical vision in which all life is interconnected and which seeks to promote the interests of human and nonhuman life alike.”<sup>35</sup> Combining interconnectedness and biocentrism permits a rich appreciation of the approach to the human-Earth relationship underlying the law. Thus, *ecocentrism* is not understood here narrowly as “an argument that asserts ecological integrity as the most important moral good or that considers ecological systems as the bearer of ultimate value.”<sup>36</sup> It is a broader argument for respect for the Earth community. The value of and need to give primacy to ecological integrity is captured instead in the second principle proposed below (*ecological primacy*).

2. *Ecological Primacy: To Ensure that Social and Economic Behavior and Systems are Ecologically Bound, Respecting Planetary Boundaries*

*Ecological primacy* provides clarity about the need to ensure human development is pursued without irreversibly impairing natural systems or crossing Planetary Boundaries, including precaution about respecting these boundaries. This principle should be understood as targeting the social and economic behavior of individuals, groups, corporations and other legal persons (for example, the acquisition and use of property, family planning, marketing and consumer behavior, etc.), as well as social and economic sectoral and systems behavior (for example, the financial system, the mining sector, etc.).

This principle corresponds to the second and ninth features of Garver’s rule of ecological law, respectively: “ecological limits must have primacy over social and economic regimes;”<sup>37</sup> and “requir[ing] precaution about crossing global ecological boundaries.”<sup>38</sup> This includes Bosselmann’s *principle of sustainability*, which he defines “as the duty to protect and restore the integrity of the Earth’s ecological systems”<sup>39</sup> because creating ecologically-bound human systems requires that this duty be observed. At the same time *ecological primacy* also indirectly implies Garver’s fourth feature: “focus on radically reducing material and energy throughput.”<sup>40</sup> Such a reduction is needed to achieve sustainability (in the sense Bosselmann gives it)<sup>41</sup> and for creating ecologically-bound human systems. The principle captures the recognition that some ecological limits have already been surpassed and cannot continue to be transgressed

<sup>35</sup> GAVIN VAN HORN, *Biocentrism*, in Jenkins & Bauman, eds., *supra* note 31, at 36 (emphasis added).

<sup>36</sup> JENKINS & BAUMAN, *supra* note 31.

<sup>37</sup> Garver, *supra* note 1 at 325.

<sup>38</sup> *Id.*, at 329.

<sup>39</sup> BOSSELMANN, *supra* note 25, at 53.

<sup>40</sup> Garver, *supra* note 1, at 326.

<sup>41</sup> BOSSELMANN, *supra* note 25, at 53.

without compromising the planet's life supporting systems.<sup>42</sup> The reference to Planetary Boundaries<sup>43</sup> highlights the need to respect ecological limits not only of the local ecosystem, but also at a planetary level,<sup>44</sup> and implies the need for legal systems to incorporate the growing understanding of complex social-ecological systems.<sup>45</sup>

*Ecological primacy* also includes the *precautionary principle (in dubio pro natura)* with respect to Planetary Boundaries specifically, as in Garver's ninth feature of the rule of ecological law, and more broadly as a means to prevent harm.<sup>46</sup>

The concept of ecological integrity is incorporated as a fundamental component of the proposed principle of *ecological primacy*, while acknowledging its contentious meaning and that the boundaries for its implementation may appear elusive.<sup>47</sup> Given the profound complexity of nature, ecological integrity is difficult to measure and defies rigid standardization.<sup>48</sup> The Panel of Ecological Integrity of Canada's National Parks offers the following definition: "[i]n plain language, ecosystems have integrity when they have their native components (plants, animals and other organisms) and processes (such

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<sup>42</sup> WILL STEFFEN, *et al*, *The Trajectory of the Anthropocene*, *supra* note 2; see also Geoffrey Garver, *Moving Forward with Planetary Boundaries and Degrowth*, in, CONFRONTING ECOLOGICAL AND ECONOMIC COLLAPSE: ECOLOGICAL INTEGRITY FOR LAW, POLICY AND HUMAN RIGHTS 203-214, 203 (Westra & Michelot, eds., 2013).

<sup>43</sup> ROCKSTRÖM, *et al*, *supra* note 2; Steffen, *et al*, *Planetary Boundaries*, *supra* note 2.

<sup>44</sup> Geoffrey Garver, *A Complex Adaptive Legal System for the Challenges of the Anthropocene* (forthcoming).

<sup>45</sup> SOCIAL-ECOLOGICAL RESILIENCE AND LAW (Ahjond S Garmestani & Craig R Allen, eds., 2013); J.B. Ruhl, *Panarchy and the Law*, 17:3 *ECOLOGY AND SOCIETY* 31 (2012).

<sup>46</sup> As JAMIE BENEDICKSON explains: "From its German origins in good household management, the *precautionary principle* has evolved to encompass a cluster of basic principles. It includes, for example, the proposition that early preventive action is appropriate even in the absence of scientifically documented need when delay would impose increased costs and greater risks of environmental harm. Precaution also entails recognition of the importance of leaving wide margins of tolerance or room for manoeuvre to permit natural adaptation to human interference. Pushing the edge of the envelope is not a good idea. In addition, the precautionary principle implies a shift in the onus of proof to those who propose initiatives, innovations, and activities whose environmental impact is not fully understood". JAMIE BENEDICKSON, *ENVIRONMENTAL LAW (ESSENTIALS OF CANADIAN LAW)* 22 (2nd ed., 2002), citing T. O'RIORDAN & J. CAMERON, *INTERPRETING THE PRECAUTIONARY PRINCIPLE* 16-8 (1994).

<sup>47</sup> GARVER, *supra* note 44, at 203.

<sup>48</sup> *ECOLOGICAL INTEGRITY: INTEGRATING ENVIRONMENT, CONSERVATION, AND HEALTH* 20-21, 99 (David Pimentel, Laura Westra & Reed F. Noss, eds. 2000). See also Garver, *supra* note 44, at 5-6; P.J. Crabbé & J.P. Manno, *Ecological Integrity as an Emergent Public Good*, in *RECONCILING HUMAN EXISTENCE WITH ECOLOGICAL INTEGRITY: SCIENCE, ETHICS, ECONOMICS AND LAW* 73-86 (Westra & Bosselmann, eds., 2008); Bosselmann, *supra* note 25, at 53; Klaus Bosselmann, *The Rule of Law Grounded in the Earth: Ecological Integrity as a Grundnorm*, in *THE EARTH CHARTER, ECOLOGICAL INTEGRITY AND SOCIAL MOVEMENTS* 3-11 (Laura Westra & Mirian Vilela, eds. 2014); Joseph H. Guth, *Law for the Ecological Age*, 9 VT J ENVTL L 431(2007-2008) (proposing a tort of "ecological degradation"), at 496.



as growth and reproduction) intact.”<sup>49</sup> The notion of ecological integrity is adopted here following this general definition, with the understanding that humans are not separate from nature, but part of the native animal components of ecosystems.

Another concept broadly captured by this proposed principle of *ecological primacy* is the *resilience principle*. Nicholas Robinson articulates it as follows: “Governments and individuals shall take all available measures to enhance and sustain the capacity of social and natural systems to maintain their integrity.”<sup>50</sup> Resilience plays an important role in ecological integrity, so the *resilience principle* can contribute to building the ecologically-bound behavior and systems enshrined by the principle of *ecological primacy*.

*Ecological primacy* is strongly linked with *ecocentrism*. It is by recognizing the place of humans in the web of life, their dependence and impact on other life forms and their equal intrinsic value that it becomes possible to embrace limits and forego non-essential benefits that may be harmful to the Earth community. In contrast to *ecocentrism*, *ecological primacy* has a material focus that aims at bounding material and energy consumption within ecological limits. In turn, this ecologically-bound material basis helps create the conditions for the implementation of the last principle, *ecological justice*.

### 3. *Ecological Justice: To Ensure Equitable Access to the Earth’s Sustaining Capacity for Present and Future Generations of Humans and Other Life Forms and Systems, and Avoid the Inequitable Allocation of Environmental Harms*

*Ecological justice* provides an ethical grounding for decisions about the equitable use of the planet’s sustaining capacity and the fair distribution of and restraint on wealth. Its focus is relational, but unlike *ecocentrism* it is so in a practical and material way, aiming to render respect for all beings into actual equitable access to the Earth’s sustaining capacity and the avoidance of the inequitable allocation of harm.

This principle captures the sixth feature of Garver’s rule of ecological law: “ensur[ing] the fair sharing of resources and environmental harms among present and future generations of humans and other life”<sup>51</sup> and Bosselmann’s

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<sup>49</sup> PARKS CANADA AGENCY, UNIMPAIRED FOR FUTURE GENERATIONS: PROTECTING ECOLOGICAL INTEGRITY WITHIN CANADA’S NATIONAL PARKS: A CALL TO ACTION 2 (2000). The question of whether ecological integrity is the most appropriate concept as a reference for developing a new legal framework for the human-Earth relationship remains open as ecological law evolves. Similarly, the question of the baseline to be adopted for judging the ecological conditions that ecological law aims to protect and restore requires further research and discussion. At a global level, perhaps the thresholds identified as Planetary Boundaries (which are meant to evolve through ongoing scientific inquiry and debate) could provide that baseline.

<sup>50</sup> ROBINSON, *supra* note 25, at 24.

<sup>51</sup> GARVER, *supra* note 1, at 326.

concept of ecological justice.<sup>52</sup> As Bosselmann explains, intergenerational and intragenerational equity are “two ethical elements that are widely accepted as being essential to the idea of sustainable development.”<sup>53</sup> In contrast, the notion of humans and other species having equal intrinsic value is controversial and is only starting to be recognized in law.<sup>54</sup> Bosselmann argues that interspecies equity or “concern for the non-human natural world” is needed along with the moral duties to the poor (intragenerational equity) and to future generations (intergenerational equity) if we are to exclude the “very possibility of destroying the planet’s conditions of life” from humanity’s development paths.<sup>55</sup>

The fundamental idea behind this triple principle of *ecological justice* is that the Earth’s sustaining capacity should be used so as to enable humans *and other species* to sustain themselves today and in the future.<sup>56</sup> Moreover, this principle goes beyond fair distribution and implies a society that aims to attain sufficient—not maximum—wealth held collectively and individually. Garver argues that “[t]he focus on sufficient as opposed to maximum wealth implies a limit on inequality of wealth, and that it is possible to be too rich—with the limits established so as to allow for the flourishing of non-human species and ecological restoration.”<sup>57</sup>

The principle of *ecological justice* also captures the values promoted by Berry and Cullinan in their arguments for recognizing the rights of other beings through Earth jurisprudence and wild laws.<sup>58</sup> At the same time, it allows for other approaches that do not assign rights to nonhumans, like Taylor’s proposal emphasizing the ecological responsibilities and constraints attached to human rights (ecological human rights).<sup>59</sup> Finally, the principle includes the concept of environmental justice<sup>60</sup> by requiring that inequitable allocation of environmental harms be avoided.

In summary, *ecocentrism*, *ecological primacy* and *ecological justice* are intended together as a tool (a “lens of ecological law”) to critique existing laws in order to better understand what changes adopting ecological law might entail. In the sections that follow, I use this lens to discuss the *Júba Wajín Amparo*. First, I briefly introduce the case and its context; second, I present the analysis of

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<sup>52</sup> BOSSELMANN, *supra* note 25.

<sup>53</sup> *Id.*, at 97.

<sup>54</sup> *Id.*, at 103-109; UNIVERSAL DECLARATION OF THE RIGHTS OF MOTHER EARTH (2010).

<sup>55</sup> *Id.*, at 99.

<sup>56</sup> PETER G. BROWN, *Are There Any Natural Resources?* 23 POLITICS AND THE LIFE SCIENCES 1 (2004).

<sup>57</sup> GARVER, *supra* note 1, at 328.

<sup>58</sup> BERRY, *supra* note 4; CULLINAN, *supra* note 1.

<sup>59</sup> PRUE TAYLOR, *Ecological Integrity and Human Rights*, in Westra & Bosselmann, eds., *supra* note 48, at 89-108, 91.

<sup>60</sup> JASON A. BYRNE, ENVIRONMENTAL JUSTICE (2013).

the case from the lens of ecological law; and third, I offer a summary of the status of the case and some considerations on its importance. The article then closes with a short conclusion.

### III. INDIGENOUS COMMUNITIES IN MEXICO CHALLENGE MINING CONCESSIONS IN THEIR TERRITORIES

Under the Mexican Constitution, the nation owns all minerals, irrespective of surface ownership. The Mining Law further considers mining an activity of public utility and a preferential land use over any other, with the exception of hydrocarbon extraction and electricity transmission.<sup>61</sup> Concessions are granted on a first come, first serve basis to qualified Mexican nationals or Mexican companies (which can be 100% foreign owned).<sup>62</sup> They include both exploration and extraction rights, as well as guaranteed access to mining deposits, including through expropriation.<sup>63</sup> Mining concessions are granted for 50 years and may be renewed for the same time period.<sup>64</sup> Some praise the Mining Law for its simplicity and for imposing very few restrictions on mining enterprises.<sup>65</sup> For others, like Jaime Cárdenas, “the aims of the Mining Law are incompatible with the Constitution and international treaties.”<sup>66</sup> Francisco López Bárcenas further argues that mining law and policy in Mexico have life-threatening implications for indigenous communities.<sup>67</sup> The Mexican legal mining regime has also been criticized as “unsustainable legislative nonsense, or blunt corruption and environmental suicide.”<sup>68</sup>

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<sup>61</sup> Ley Minera, DIARIO OFICIAL DE LA FEDERACIÓN, June 26, 1992, as amended November 8, 2014, Art. 6.

<sup>62</sup> Ley Minera, Art. 10, 11 13 and 13 BIS. Indigenous and agrarian communities that claim a concession on the land they occupy at the same time others do will have a preference over the concession if they meet the same requirements (which is, in practice, nearly impossible).

<sup>63</sup> Ley Minera, Art. 19.

<sup>64</sup> Ley Minera, Art. 15.

<sup>65</sup> Federico Kunz, *Mexican Mining Law: Healthy Development for the Industry*, in Secretaría de Economía, *supra* note 20, at 38-40.

<sup>66</sup> CÁRDENAS, *supra* note 11, at 64 (author’s translation); also Marisol Anglés Hernández, *Jurisprudencia interamericana. Acicate contra la discriminación y exclusión de pueblos originarios de México en relación con sus recursos naturales (Inter American Case Law. Incentive against Discrimination and Exclusion of Mexican Indigenous Peoples Regarding their Natural Resources)*, XIV ANUARIO MEXICANO DE DERECHO INTERNACIONAL, 261 (2014), at 282.

<sup>67</sup> FRANCISCO LÓPEZ BÁRCENAS & MAYRA MONTSERRAT ESLAVA GALICIA, *EL MINERAL O LA VIDA: LA LEGISLACIÓN MINERA EN MÉXICO* (2011).

<sup>68</sup> J. LARA GONZÁLEZ, *Sobre la Ley Minera de México: ¿dislate legislativo insustentable o llana corrupción ambiental suicida?*, 187 OBSERVATORIO DE LA ECONOMÍA LATINOAMERICANA (2013) (author’s translation).

A growing number of indigenous and agricultural communities in Mexico are taking action to protect their territories from mining projects. San Miguel del Progreso-Júba Wajíin is a Me'phaa (Tlapaneca) community of approximately 3,800 people located in the Municipality of Malinaltepec, Guerrero, which depends principally on cultivating maize, coffee and fruit trees.<sup>69</sup>

In April 2011, aware of the growing number of mining projects in the region, its governing assembly unanimously decided to reject any mining activity in their territory.<sup>70</sup> After confirming the existence of two mining concessions on their lands, in July 2013 the community filed an *amparo* alleging the concessions violate their constitutional rights to territory and consultation, and challenging the constitutionality of the Mining Law (hereinafter the *Júba Wajíin Amparo* or the *Amparo*).

Hundreds of communities in Mexico have declared themselves free from mining and a total of 71 indigenous communities in the States of Puebla and Colima have filed 3 *amparos* similar to the *Júba Wajíin Amparo*.<sup>71</sup> These *amparos* have all been admitted by district courts that have imposed injunctions on the concessions in question, pending the resolution of each case. The decisions on these cases could have momentous implications for achieving indigenous communities' self-determination, as well as other important issues related to indigenous rights in Mexico.<sup>72</sup> The effective observance of the rights of indigenous communities to consultation and to territory could have critical implications for mining in indigenous territories. As scholar Anglés Hernández has shown, effective implementation of free prior and informed consent is fundamental for empowering indigenous peoples regarding the use of their natural resources and the protection of their environment in the context of extractive projects in their territories, and more broadly, to counter the systemic exclusion they endure.<sup>73</sup> Furthermore, these *amparos* are of interest from the perspective of ecological law because of the possibility that courts might give precedence to indigenous values ascribing spiritual, ecological and relational meanings to the land and its resources over economic interests seeking to exploit such land and resources for commercial gain without regard to ecological limits.

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<sup>69</sup> TLACHINOLLAN, *supra* note 19, at 2.

<sup>70</sup> *Id.*, at 5; Eloisa A. Mora Cabrera, *The ecosocial struggle against mining in The Montaña de Guerrero: defending the territory in times of dispossession*, 65 TEXTUAL 129 (2015).

<sup>71</sup> Red Mexicana de Afectados por la Minería, REMA (Mexican Network of Those Affected by Mining) [www.remamx.org](http://www.remamx.org)

<sup>72</sup> SCJN, REASUNCIÓN DE COMPETENCIA 23/2014 RELATIVA AL AMPARO EN REVISIÓN 167/2014 (Ponente: Ministro José Ramón Cossío Díaz) (hereinafter "REASUNCIÓN") par. 35-36.

<sup>73</sup> ANGLÉS HERNÁNDEZ, *Jurisprudencia interamericana*, *supra* note 66, at 278-284; see also GEORGINA GAONA PANDO, *El derecho a la tierra y protección del medio ambiente por los pueblos indígenas*, XXVI: 78 NUEVA ANTROPOLOGÍA, 141 (2013).

#### IV. THE SAN MIGUEL DEL PROGRESO-JÚBA WAJÍÍN AMPARO FROM THE LENS OF ECOLOGICAL LAW

##### 1. *Main Claims of the San Miguel del Progreso-Júba Wajíín Amparo*

The *Júba Wajíín Amparo* was filed on July 15, 2013, before the Federal District Court in the State of Guerrero. The *Amparo*<sup>74</sup> makes six claims, five of which relate to the concessions and one to the constitutionality of certain provisions of the Mining Law itself. It argues that the act of granting the two concessions under Articles 6,<sup>75</sup> 10,<sup>76</sup> 15<sup>77</sup> and 19-IV<sup>78</sup> of the Mining Law violates the following rights:

- A. The community's collective right to property of their indigenous territory under Article 21 of the American Convention on Human Rights<sup>79</sup> and Articles 13, 15 and 17 of ILO Indigenous and Tribal

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<sup>74</sup> The *Júba Wajíín Amparo* brief was provided to me for this research by the REMA civil society group. This article does not disclose any private or confidential information therein that is not otherwise publicly available.

<sup>75</sup> Article 6 of the Ley Minera states: "The exploration, exploitation and beneficiation of minerals or substances this law makes reference to are of public convenience and necessity, will be preferential over any other use or exploitation of the land, subject to the conditions established herein, and these activities may only be taxed through federal laws..." (Author's translation).

<sup>76</sup> Article 10 of the Ley Minera provides that: "The exploration and exploitation of the minerals or substances referred to in Article 4 ... may only be carried out by Mexican nationals, *ejidos* and agrarian communities, indigenous towns and communities, ... recognized as such by the Constitutions and Laws of the States, and by corporations created under Mexican law, through a mining concession granted by the Ministry..." (Author's translation).

<sup>77</sup> Article 15 of the Ley Minera provides: "Mining concessions confer rights over all the minerals or substances subject to the present law. Mining concessions will be valid for a period of fifty years as of the date of their registration with the Public Mining Registry and will be renewed for the same time period if their holders did not incur any grounds for cancellation provided by this law and so request it within the five years prior to the end of the term. The concessions for which a renewal request has been made will remain valid during the processing of such requests (Author's translation).

<sup>78</sup> Article 19 of the Ley Minera states: "Mining concessions confer rights to: ...IV. Obtain the expropriation, temporary occupancy or establishment of an easement of the lands needed to carry out the works and activities of exploration, exploitation and beneficiation, as well as for the deposit of waste, tailings, and slags, and equally to establish underground rights of way through mining lots; ..." (Author's translation).

<sup>79</sup> This article of the ACHR provides that: "Article 21. Right to Property. 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases

Peoples Convention No. 169,<sup>80</sup> in conjunction with Articles 1 and 133 of the Mexican Constitution.<sup>81</sup>

B. The right to integral protection of indigenous lands under Articles 2-A (V), (VI) and 27 (VII) second para., in conjunction with Article 1, all of the Mexican Constitution.<sup>82</sup>

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and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.”

<sup>80</sup> These provisions of ILO C169 set forth that: “Article 13. 1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. 2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use...”

“Article 15. 1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities...”

“Article 17. 1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected. 2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community. 3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.”

<sup>81</sup> Article 1 of the Constitution provides: “Article 1. In the United Mexican States, all persons shall enjoy the fundamental rights recognized by this Constitution, which may not be abridged nor suspended except in those cases and under such conditions as herein provided...”

Every form of discrimination motivated by ethnic or national origin, gender, age, incapacities, sexual preferences, status or any other which attempt on human dignity or seeks to annul or diminish the rights and liberties of the people, is prohibited.”

<sup>82</sup> See *supra* note 81 for Article 1. Articles 2-A (V), 2-A (VI) and 27 (VII) para. 2 of the Constitution read: “Article 2... A. This Constitution recognizes and protects the right to self-determination of indigenous people and communities and, consequently, their right to autonomy, so that they may... V. Maintain and improve their habitat and preserve the integrity of their lands as provided in this Constitution.

VI. Attain preferential use and enjoyment of any natural resources located in the sites inhabited and occupied by the communities, save for the ones pertaining to strategic areas as provided in this Constitution. The foregoing rights shall be exercised respecting the nature and classes of land ownership and land tenure set forth in this Constitution and the laws on the matter, as well as the rights acquired by third parties or by members of the community.

- C. The right to consultation under Articles 6 and 13 of ILO C169,<sup>83</sup> in conjunction with Articles 1 and 133 of the Mexican Constitution.<sup>84</sup>
- D. The guarantees of legality and legal certainty under Articles 14 and 16 of the Constitution.<sup>85</sup>
- E. The right to the protection of communal lands both for purposes of human settlements and for productive activities provided by Article 27 (VII) of the Constitution.<sup>86</sup>

Finally, the *Amparo* also claims that, in granting the concessions, the authorities applied Articles 6, 10, 15 and 19 (IV) of the Mining Law to the detriment of the community as said articles are deemed unconstitutional and contrary to international conventions because they allegedly violate Articles 1 last para., 2, 25, 27 sixth para., and 28 tenth para. of the Mexican Constitution; Articles 6, 13, 15 and 17 of ILO C169; and Article 21 of the ACHR; all in conjunction with Articles 1 and 133 of the Mexican Constitution.<sup>87</sup>

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To achieve these goals, communities may constitute partnerships under the terms established by the Law... Article 27... VII... The Law shall protect the integrity of the lands of native indigenous groups...”

<sup>83</sup> See Article 13 of ILO C169 in *supra* note 80. Article 6 of ILO C169 reads as follows: Article 6. 1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

<sup>84</sup> See Article 1 of the Constitution in *supra* note 81. Article 133 provides:

Article 133. This Constitution, the laws of the Congress of the Union which shall be enacted in pursuance thereof and all treaties in accordance therewith, celebrated or which shall be celebrated by the President of the Republic with the approval of the Senate, shall be the supreme law of the Union. The Judges of the Federal District and of the States shall be bound thereby, notwithstanding any provision to the contrary in the local constitutions or local laws.

<sup>85</sup> Article 14 and 16 of the Constitution state:

Article 14. No law shall be enforced *ex post facto* in the detriment of any person.

No one shall be deprived of their freedom, properties, possessions or rights without a fair trial before previously established courts, according to the essential formalities of the proceedings and laws issued beforehand... Article 16. No one may be disturbed in his person, family, home, papers or possessions, except by written order of a competent authority, duly grounded in law and fact which sets forth the legal cause of the proceeding...

<sup>86</sup> See *supra* note 82 for Article 27 (VII) of the Constitution.

<sup>87</sup> See *supra* notes 81, 82, 84, respectively for Articles 1, 2 and 133 of the Constitution. See text following *infra* note 108 for Article 25. Article 27 para. 6 and 28 para.10 provide:

## 2. *Analysis From the Lens of Ecological Law*

This section reflects on the issues raised in the *Júba Wajín Amparo* using the lens of ecological law described above. The objective of this reflection is to test the hypothesis that judicially advancing indigenous rights to territory might also further the interests of ecological law. Thus, it inquires into whether the arguments in the *Amparo* overlap in any way with the principles of ecological law.

I believe there are synergies between ecological law and indigenous rights and legal orders, and that those synergies should be respectfully discovered and fostered. Numerous statements from indigenous peoples around the world highlight the relationship of indigenous peoples with the environment<sup>88</sup> and some indigenous scholars argue that common features of indigenous law include the concept of interconnectedness<sup>89</sup> and strong environmental protection values.<sup>90</sup> However, one should be mindful to avoid essentializing indigenous peoples by assuming their relationship to the environment is consistent across their diversity<sup>91</sup> or by claiming that indigenous peoples are inherently less destructive of the environment than Western industrial societies.<sup>92</sup> A further caution is that this article limits the consideration of the potential interactions between *ecocentrism*, *ecological primacy* and *ecological justice* with the worldview of the Me'phaa only to the arguments put forth in the *Amparo*.

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Article 27 ...In the cases established in the two paragraphs hereinbefore, the Nation's dominion is inalienable and not subject to the statute of limitation and the exploitation, use or enjoyment of the resources in question by private persons or by companies incorporated in accordance with Mexican laws, may not be undertaken save by means of concessions granted by the President of the Republic and in accordance with the rules and conditions set forth by the Laws...

Article 28 ...The State may, in accordance with the law and in case of general interest, grant concessions for the provision of public services or for the exploitation, use and profit of property owned by the Federation, save for the exceptions established by the laws. The laws shall set forth the requisites and conditions required to guarantee the efficiency of the services rendered and the social use given to such property; and shall prevent occurrences of hoarding which contravene public interest.

<sup>88</sup> For example, the UNIVERSAL DECLARATION OF THE RIGHTS OF MOTHER EARTH, *supra* note 54. Some international instruments also recognize this relationship, e.g. Chapter 26 of U.N. Agenda XXI (1992).

<sup>89</sup> PEIGI WILSON, INTERCONNECTIONS: THE SYMBIOSIS OF HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION (LL.M. Thesis University of Ottawa 2009) 29.

<sup>90</sup> JOHN BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW (c2002) at 47.

<sup>91</sup> VAL NAPOLEON, INDIGENOUS LAWS: SOME ISSUES, CONSIDERATIONS AND EXPERIENCES-AN OPINION PAPER PREPARED FOR THE CENTRE FOR INDIGENOUS ENVIRONMENTAL RESOURCES (CIER) (2007).

<sup>92</sup> Benjamin J. Richardson, *The Ties that Bind: Indigenous Peoples and Environmental Governance*, in, INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES (Benjamin J. Richardson & Shin Imai, eds., 2009).



### A. *Ecocentrism*

To recall, this principle calls for law to *recognize and respect the value of all beings and their interconnectedness, equitably promoting the interests of human and non-human members of the Earth community*. What elements in the *Amparo* are in line or conflict with *ecocentrism*?

The *Amparo* describes the applicants (the Me'phaa people) as for centuries having owned their territories and collectively used the resources of the land while maintaining a cultural link to the "land and habitat in its integrity," in accordance with their indigenous worldview.<sup>93</sup> The *Amparo* argues that the destructive nature of mining is incompatible with the protection of their territory and their resources.<sup>94</sup>

A sense of interconnectedness is apparent in these statements, but beyond this there are no other obvious signs of *ecocentrism* in the *Amparo*. The claims and arguments put forth are fundamentally anthropocentric. Whether this may be due to the constraints imposed by the types of arguments expected in a legal document such as an *amparo* brief is an intriguing question, which is, however, beyond the scope of this article.

As for the Mining Law provisions in question, it is clear that the pre-eminence of mining over any other land use is profoundly anthropocentric because the land is valued as a source of mineral resources solely for human consumption. Land uses that seek to fulfill human interests in harmony with the ecosystem (for example, permaculture or polyculture orchards) are more likely to be in line with *ecocentrism*. Whether and what forms of mining could be in line with *ecocentrism* remain open questions.<sup>95</sup>

### B. *Ecological Primacy*

The principle of *ecological primacy* aims for law to *ensure social and economic behavior and systems are ecologically bound, respecting Planetary Boundaries*. What can be said of the *Amparo* from this perspective?

The *Amparo* states that the open pit silver and gold mining authorized by the concession would "necessarily involve the material destruction of [the community's] territory and of the use of the natural resources that inhabit [their] land, such as the water, forests, grasslands and other vegetation that make up [their] habitat."<sup>96</sup> As noted, the fifth claim of the *Amparo* invokes the constitutionally enshrined right to the protection of communal lands for purposes of human settlements and for productive activities.<sup>97</sup> The community

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<sup>93</sup> *Amparo*, at 11 (author's translation).

<sup>94</sup> *Id.*, at 62.

<sup>95</sup> Sbert, *supra* note 7.

<sup>96</sup> *Amparo*, at 62 (author's translation).

<sup>97</sup> *Amparo*, at 80.

argues that because Article 6 of the Mining Law gives preferential use of the land to mining over any other use, the concessions granted to the company are incompatible with this constitutional indigenous right.<sup>98</sup>

Compared to large-scale open pit mining, the Juba Wajíin settlement and the small-scale farming and harvesting activities the community carries out are more likely in line with *ecological primacy*, especially to the extent that these maybe governed by a worldview that seeks to maintain a balance with the environment. In contrast, it would be hard to argue that prioritizing mining over any other land use reflects ecological rather than economic primacy. Mining inherently disturbs the land on which it is carried out.<sup>99</sup> Especially in its increasingly frequent form of large-scale open pit extraction involving large volumes of toxic substances, mining cannot be viewed as an activity that is ecologically bound at the site level.<sup>100</sup> Globally, the sector is driven by the demand for commodities and the pursuit of profit, neither of which are ecologically bound. Mining directly and indirectly impacts Planetary Boundaries:<sup>101</sup> it contributes to biodiversity loss through pollution and direct and induced habitat destruction; to land use change through displacement of agricultural communities and forest clearing; to climate change through coal and bitumen mining; to the production of fertilizers disrupting the nitrogen and phosphorous cycles; and to the depletion and pollution of fresh water.<sup>102</sup> Even under the most ambitious sustainability standards for mining, environmental considerations are an operational concern aimed at minimizing—not preventing—harm to the environment.<sup>103</sup> In contrast, from an ecological law perspective, respecting ecological limits locally, regionally and globally would be fundamental concerns in determining whether a mining project is to be pursued at all.<sup>104</sup>

Protecting land from destruction and maintaining a traditional land use may be supportive of ecological integrity; however, they do not necessarily lead to a system that is ecologically bound. The challenge of incorporating *ecological primacy* into law involves setting benchmarks for ecological integrity and mechanisms to measure whether ecological integrity is being maintained and restored. At the same time, it is clear that norms that grant primacy to extractive land uses are obstacles in a shift toward ecological law.

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<sup>98</sup> *Amparo*, at 81.

<sup>99</sup> See for example, *Mining: Adding Up the Costs of a Hole in the Ground* in SOIL ATLAS: FACTS AND FIGURES ABOUT EARTH, LAND AND FIELDS 32-33 (Heinrich Boll Foundation and Institute for Advanced Sustainability Studies, January 2015).

<sup>100</sup> PHILIPPE SIBAUD, OPENING PANDORA'S BOX: THE NEW WAVE OF LAND GRABBING BY THE EXTRACTIVE INDUSTRIES AND THE DEVASTATING IMPACT ON EARTH (2012); THE GAIA FOUNDATION, UNDERMINING AGRICULTURE: HOW THE EXTRACTIVE INDUSTRIES THREATEN OUR FOOD SYSTEM (2014).

<sup>101</sup> ROCKSTRÖM *et al.*, *supra* note 2.

<sup>102</sup> SBERT, *supra* note 7, at footnote 28.

<sup>103</sup> For example, NATURAL RESOURCES CHARTER (2014), Precept 5, at 20; MINING ASSOCIATION OF CANADA (MAC), TOWARD SUSTAINABLE MINING: GUIDING PRINCIPLES.

<sup>104</sup> SBERT, *supra* note 7.

### C. *Ecological Justice*

Law under this principle would *ensure equitable access to the Earth's sustaining capacity for present and future generations of humans and other life forms and systems, and avoid the inequitable allocation of environmental harms*. What can be said of the case from this perspective?

The *Amparo* raises issues of intra and intergenerational equity regarding the mining concessions, but no obvious links are made to inter-species equity. The threat of loss of access to and destruction of the land on which the community depends for their livelihood is at the heart of the Juba Wajjín opposition to mining in their territory. As noted, the *Amparo* argues that the preferential use of the land given to mining violates the constitutionally enshrined right to the protection of communal lands both for purposes of human settlements and for productive activities.<sup>105</sup>

The *Amparo* further claims that the fifty-year term of the concessions —renewable for another fifty years— compromises the future of the community and threatens future generations of its members.<sup>106</sup> The *Amparo* also deems this term unconstitutional because it obstructs the implementation of several indigenous rights. According to the *Amparo*, the fifty-year term:

- hinders the authorities from fulfilling their constitutional duty to protect the territory for human settlement and productive activities;
- impedes the State's constitutionally-mandated direction of the economy from being implemented to benefit indigenous communities and in a non-discriminatory fashion; and
- prevents the Mexican authorities from complying with their duty to promote, respect, protect and guarantee indigenous peoples and communities the rights to consultation and to territory under ILO C169 and the ACHR.<sup>107</sup>

The *Amparo* alludes to Article 25 of the Constitution,<sup>108</sup> which says in its first paragraph that:

*The State is in charge of directing national development and must guarantee that such development is comprehensive and sustainable, that it strengthens national sovereignty and its democratic regime, and that it enables full exercise of the liberties and dignity of the individuals, groups and social classes, whose safety is protected by this Constitution, by promoting economic growth and employment, and a more just distribution of income and wealth.*

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<sup>105</sup> *Amparo*, at 80.

<sup>106</sup> *Id.*, at 22.

<sup>107</sup> *Id.*, at 91.

<sup>108</sup> *Id.*, at 93 [*italics in amparo*].

The *Amparo* argues that based on this constitutional mandate, mining concessions are bound by ulterior and higher ends such as the general interest and the social use of the goods covered by the concessions.<sup>109</sup> This argument furthers *intragenerational* equity. From an *intergenerational* perspective, the renewable fifty-year term of mining concessions is deemed inconsistent with the social use of the land.<sup>110</sup>

In sum, what light does the *Júba Wajjín Amparo* shed on some of the challenges and opportunities for adopting an ecological law model in Mexico, in particular regarding mining? The current approach to the human-Earth relationship as gleaned from the *Amparo* is anthropocentric with only incipient acknowledgement of interconnectedness on the part of the applicants, which indicates an important challenge for an *ecocentric* approach. From the perspective of *ecological primacy*, the *Amparo* reveals some opportunities for ecological law by highlighting the deeply conflicting rules over the use of the land. On the one hand, constitutional provisions proclaim the protection of traditional indigenous and agrarian uses (arguably consistent with respecting ecological limits); and on the other, the Mining Law prioritizes large-scale mineral extraction (generally not conducive to respect for ecological limits). There are conflicting rules determining who decides what use should be given to the land: indigenous rights to consultation and territory require the free, prior and informed consent of indigenous communities for mining in their territories and the protection of those territories; contrasted with a framework designed to facilitate access to the land for mining investors. These provisions also have implications for *ecological justice*, as the latter appears to support profit-driven short-term uses while hampering the continuation of multi-generational relationships with the land.

A fundamental question underlying this case is whether any specific use should be preferred to others, and whether and in which ways the ultimate ends of any such use (subsistence, ceremonial, commercial, recreational, developmental, etc.) should affect that determination. The Mexican Constitution explicitly enshrines economic growth in Article 25, cited above, but at the same time this growth is bound to the fulfillment of broader societal goals. This is at the heart of a fundamental question underlying ecological law: what is the economy for and what is its proper place in society?<sup>111</sup>

#### V. STATUS AND SIGNIFICANCE OF THE *JÚBA WAJJÍN AMPARO*

For now, the *Júba Wajjín* community is free from mining concessions on their territory although their case was not ruled on by the SCJN. In summary, the procedural history of this *amparo* is as follows. First, the district judge ruled

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<sup>109</sup> *Amparo*, at 94.

<sup>110</sup> *Id.*

<sup>111</sup> BROWN AND GARVER, *supra* note 4.

in favor of Júba Wajjín declaring that the two mining concessions violated the community's constitutional rights; however, the judge did not rule on the constitutionality of the contested articles of the Mining Law.<sup>112</sup> In response, the community and the Mexican authorities concerned both appealed the decision. Among other things, the former argued that the court failed to resolve all the matters set forth in the *Amparo* while the latter argued that there is no right to prior consultation regarding mining concessions.<sup>113</sup> Following a request from the applicants, on February 11, 2015, the SCJN assumed jurisdiction over the appeal of the *Amparo* on the grounds that it raised issues of "importance and transcendence," such as the interpretation of indigenous rights to territory and consultation, and deliberation as to whether the Mining Law is in accordance with the Constitution and international law.<sup>114</sup>

In November 2015, the company holding two of the challenged concessions abandoned those concessions.<sup>115</sup> On May 25, 2016, the SCJN ordered a stay on its review of the *Amparo* and revoked the district judge's ruling on grounds that the contested act no longer existed given the withdrawal of the concessions.<sup>116</sup> Some argue this withdrawal was a strategy to prevent a momentous SCJN decision that would uphold indigenous rights against concessions and partially strike down the Mining Law.<sup>117</sup>

The *amparos* brought by indigenous communities against mining concessions on their territories can be interpreted as a (cautious) willingness on behalf of these communities to engage with the State (to a certain extent) and use the legal system to address some of their grievances. This is no trivial matter: other communities in Mexico have decided that engaging with the system is not worthwhile and are instead creating alternative ways to live.<sup>118</sup> Many of the indigenous rights currently enshrined in the Constitution were introduced in 2001 as the result of a long struggle triggered by the Zapatista uprising in December 1994 and in recognition of ILO C169.<sup>119</sup> The San Andrés Accords between the Zapatistas and the Mexican government called for

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<sup>112</sup> TLACHINOLLAN, INDIGENOUS ME'PHAA COMMUNITY OF THE MONTAÑA OF GUERRERO OBTAINS AN UNPRECEDENTED AMPARO AGAINST MINING CONCESSION (June 27, 2014).

<sup>113</sup> *Id.*

<sup>114</sup> SCJN, REASUNCIÓN, *supra* note 72, at par. 29.

<sup>115</sup> Herculía Castro, *Se retira la minera Hochschild y cierra El Corazón de las Tinieblas*, LA PLAZA-DIARIO.COM (February 2, 2016).

<sup>116</sup> *Suspende la SCJN amparo promovido por indígenas de La Montaña contra minera*, LA JORNADA-DE GUERRERO.COM (May 26, 2016).

<sup>117</sup> *Id.*

<sup>118</sup> Jessica Davies & Helen Jaccard, *Gustavo Esteva: Recovering Hope - The Zapatista Example*, UPSIDE-DOWN-WORLD.COM (January 10, 2013).

<sup>119</sup> PABLO GONZÁLEZ CASANOVA, *Los zapatistas del siglo XXI*, 4 OSAL (June 2001), at 5-8; FRANCISCO LÓPEZ BÁRCENAS, *LEGISLACIÓN Y DERECHOS INDÍGENAS EN MÉXICO* 49-50 (3rd ed., 2010); César Nava Escudero, *Indigenous Environmental Rights in Mexico: Was the 2001 Constitutional Reform Facilitated by International Law?*, IV (2) MEXICAN LAW REVIEW (2012).

constitutional reforms that would have gone beyond those actually adopted in 2001.<sup>120</sup> For some, the reforms were a mockery<sup>121</sup> and further reason for disengagement.<sup>122</sup>

These *amparos* reflect some indigenous groups' decision to test the legal system by seeking judicial recognition of their rights. The *amparos* also test the 2011 Constitutional reforms that broadened the scope of the *amparo trial* to include the constitutionality of general norms and the observance of human rights recognized in international treaties to which Mexico is party.<sup>123</sup>

The district court's initial favorable decision in the *Júba Wajún Amparo* was hailed as evidence that the *amparo trial* could be used as a tool to protect indigenous rights.<sup>124</sup> Arguably, a favorable decision from the SCJN might have even signaled a departure from what legal scholar Francisco López Bárcenas describes as the Mexican State's historical treatment of indigenous peoples: a refusal to recognize their rights or recognizing them only in ways that cannot be enforced.<sup>125</sup> The fact that the SCJN instead stayed its review of the case and revoked the district court ruling is viewed as yet another failure to protect the community's rights, as well as a lost opportunity to examine indigenous rights and the constitutionality of the Mining Law.<sup>126</sup> Speculating on whether the SCJN could have decided otherwise is beyond the scope of this analysis, but based on its February 2015 decision to review the *Amparo*, it seems clear that the court recognizes the importance of indigenous rights and the need to further their development.<sup>127</sup> Communities affected by mining will continue to fight to have their rights respected, and other opportunities for the SCJN to rule on the constitutionality of the Mining Law may arise.<sup>128</sup>

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<sup>120</sup> FRANCISCO LÓPEZ BÁRCENAS, *AUTONOMÍAS Y DERECHOS INDÍGENAS EN MÉXICO* 94-95 (Universidad de Deusto, 2008); Francisco López Bárcenas, *La Reforma constitucional en materia de derechos indígenas: los discursos y los hechos*, 36 *ALEGATOS* 225-234 (1997); see also Ana Esther Cedeña, *La marcha de la dignidad indígena*, 4 *OSAL* 13 (June 2001).

<sup>121</sup> LÓPEZ BÁRCENAS, *supra* note 120, at 95.

<sup>122</sup> Juan José Carrillo Nieto, *El rechazo zapatista a las reformas constitucionales y la construcción de la Autonomía*, *REBELIÓN.ORG* (March 22, 2009).

<sup>123</sup> See SCJN, *REFORMAS CONSTITUCIONALES EN MATERIA DE AMPARO Y DERECHOS HUMANOS PUBLICADAS EN JUNIO DE 2011* (*scjn.gob.mx*).

<sup>124</sup> TLACHINOLLAN, *supra* note 19, at 10.

<sup>125</sup> LÓPEZ BÁRCENAS, *supra* note 120, at 76 (“...la tónica del trato histórico del Estado mexicano hacia los pueblos indígenas: se les reconoce su existencia pero no sus derechos o en el mejor de los casos, estos se reconocen siempre que no se puedan ejercer.”)

<sup>126</sup> TLACHINOLLAN, *SCJN DEJA PASAR OPORTUNIDAD HISTÓRICA PARA PROTEGER LOS DERECHOS COLECTIVOS DE LOS PUEBLOS INDÍGENAS* (May 25, 2016).

<sup>127</sup> SCJN, *REASUNCIÓN*, *supra* note 72, at par. 29 [listing a substantial number of issues the court might examine].

<sup>128</sup> REMA, *POSICIONAMIENTO DE LA RED MEXICANA DE AFECTADOS POR LA MINERÍA, ANTE EL FALLO DE LA PRIMERA SALA DE LA SCJN EN EL CASO DEL AMPARO EN REVISIÓN DE LA COMUNIDAD SAN MIGUEL PROGRESO, GUERRERO* (May 27, 2016).

For the mining company to have abandoned the concessions is, of course, a victory for the community of Júba Wajíin.<sup>129</sup> However, it is a fragile, partial and short-term victory because, under the Mining Law, the land with a cancelled concession becomes available for another concession within 45 days of such cancellation.<sup>130</sup> In fact, the Júba Wajíin community filed another *amparo* arguing that the authorities once again violated their constitutional rights to consultation by officially declaring the lots in question available for a new concession on November 24, 2015, without consulting the community. This *amparo* is under review by the district judge, who on December 11, 2015, granted the suspension of the declaration.<sup>131</sup>

A favorable SCJN decision would have delivered a victory with longer-term implications for Júba Wajíin and other indigenous communities threatened by extractive projects in their territories. Other *amparos* may have followed with similar results, changing the way mining companies relate to indigenous communities when there is an interest in mining on community territory.<sup>132</sup>

What does the fate of the *Amparo* mean from the perspective of ecological law? Admittedly, had the SCJN examined the merits of the case, it is unlikely that it would have even mentioned the environment, let alone explicitly engaged with ecological law. No reference is made to the environment in the initial SCJN decision to review the case.<sup>133</sup> However, the fact the *Amparo* challenged Mining Law provisions that conflict with ecological law (in particular those prioritizing mining over other land uses) reveals that issues of great interest to ecological law are at least reaching the courts. Had the SCJN found the contested provisions of the Mining Law unconstitutional, it would have indirectly removed certain rules that are clear obstacles to ecological law.

## VI. CONCLUSION

Ecological law is an emerging approach to law aimed at constraining the economy within ecological limits, restoring ecological integrity and enabling an ecologically just society. Based on a wealth of existing scholarship, this article proposed a lens of ecological law, comprised of the principles of *eco-centrism*, *ecological primacy* and *ecological justice*, as a tool to better understand what adopting ecological law might entail. It then offered an analysis of the *Juba Wajíin Amparo* against mining concessions using this lens, testing the hypothesis that upholding indigenous rights may also imply opportunities for

<sup>129</sup> TLACHINOLLAN, COMUNIDAD INDÍGENA ME'PHAA LOGRA CANCELACIÓN DE CONCESIONES MINERAS EN LA MONTAÑA DE GUERRERO (May 18, 2016).

<sup>130</sup> Ley Minera, Art. 14.

<sup>131</sup> *Júba Wajíin, la comunidad indígena que marcó un alto a las mineras*, LAPLAZADIARIO.COM (16 May 2016).

<sup>132</sup> TLACHINOLLAN, *supra* note 19, at 12.

<sup>133</sup> SCJN, REASUNCIÓN, *supra* note 72, at par. 35-6.

ecological law. The analysis shows that the Mining Law provisions challenged by the *Juba Wajín Amparo* pose important obstacles to ecological law; and even if tenuously, it shows synergies between indigenous rights and ecological law. From the perspective of ecological law, it is not justifiable for mining to be a priority land use over any other use: giving mining such pre-eminence is profoundly anthropocentric since by definition it gives primacy to economic interests, treating ecological considerations like operational concerns aimed at minimizing—not preventing—ecological harm. Finally, it is incompatible with ecological justice because it interferes with indigenous communities' and other life forms' and systems' access to the Earth's sustaining capacity, potentially over several generations. That the merits of this *amparo* were not examined by the SCJN because the concessions it was based on were cancelled makes it no less important as an example of the struggle for indigenous rights to territory and self-determination. Moreover, it illustrates the challenges facing a shift away from the current legal paradigm.

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