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Toward a Constitution of Care: Lessons from the Chilean Constitutional Process of 2021-2022

Hacia una Constitución del cuidado: Lecciones del proceso constituyente chileno de 2021-2022

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Abstract

The Chilean constitutional proposal of 2022 was labeled as the most progressive constitution in the world, especially regarding environmental rights and gender equality. It's a text permeated by a renewed concern for nature and new ways of interacting with the natural world. The proposal, for numerous reasons, was widely rejected by Chileans. However, that did not entail the conclusion of the constitutional process. In a context of climate crisis, the rejection of a text that explicitly acknowledges the existence of a catastrophe and presents mechanisms to deal with it appears as a negative landscape. Against this backdrop, the aim of this article is to analyze the scope and limits of the second chapter of the constitutional proposal, which regards to the Rights of Nature. Specifically, from an ecofeminist perspective, this work is dedicated to those aspects related to environmental justice and the institutions established to protect it. It questions whether the reason for the rejection of the constitutional proposal might be that the language of rights and constitutional clauses could be obsolete in the current context of environmental struggle.

Keywords: *Ecofeminism, Ethics of care, New constitution, Rights of nature.*

Resumen

La propuesta constitucional chilena de 2022 fue catalogada como la constitución más progresista del mundo, especialmente en materia de derechos medioambientales e igualdad de género. Se trata de un texto permeado por una renovada preocupación por la naturaleza y nuevas formas de relacionarse con el mundo natural. La propuesta, por numerosas razones, fue ampliamente rechazada por las y los chilenos. Aunque ello no significó que el proceso constituyente concluyera. En un contexto de crisis climática, el rechazo de un texto que explícitamente reconoce la existencia de una catástrofe y presenta los mecanismos para lidiar con ella aparece como un paisaje negativo. Con este telón de fondo, el objetivo de este

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artículo es analizar el alcance y los límites del segundo capítulo de la propuesta constitucional, referido a los Derechos de la Naturaleza. Específicamente, desde una perspectiva ecofeminista, este trabajo está dedicado a aquellos aspectos relacionados con la justicia ambiental y las instituciones establecidas para protegerla, y se pregunta si la razón del rechazo de la propuesta constitucional sería que el lenguaje de los derechos y cláusulas constitucionales estaría obsoleto en el actual contexto de lucha medioambiental.

Palabras clave: *Ecofeminismo; Ética del Cuidado; Nueva Constitución; Derechos de la Naturaleza.*

I. INTRODUCTION

On September 4, 2022, Chile held a referendum to submit a new constitutional text to the citizens, replacing the constitution currently in force (hereafter referred to as the "current constitution"), which was written and enacted during the dictatorship. The majority of the population expressed their opposition to the text drafted by the Constitutional Convention between July 4, 2021, and July 4, 2022. What might have motivated the Chilean electorate to reject the proposed constitution from a process they themselves had chosen?

One of the most controversial chapters of the proposed constitution—although hardly the only controversy that both the process and the final document faced—was Chapter 3, regarding nature and the environment. This chapter introduced the novelty in Chilean legislation of considering nature as a "subject of rights". While this was the first time such recognition was seen in a legal text in Chile, the rights of entities that are beyond the human have had a trajectory dating back a few years. In 1972, Christopher D. STONE popularized the idea of nature as a subject—rather than an object—of rights in his essay "Should Trees have Standing",[1] notwithstanding various similar legal concepts considering a relationship of harmony and coexistence with nature in indigenous law long before.[2] The legal consideration of what is more than human in the proposal for the new Chilean constitution of 2022 (hereinafter referred to as the NCP) caused particular discomfort in the population. These rights were considered contrary to the country's progress, traditions, and, overall, were seen as either too radical or too millennial.[3]

The purpose of this article is not to offer a single answer to the defeat of the "approve" vote in Chile—there are numerous reasons why the proposal was rejected, many of which were unrelated to the content of the text[4]—; rather, the aim of this article is to take the Chilean case and analyze the development of rights of the more-than-human in the NCP, its virtues, and its shortcomings. It seeks to problematize the use of rights language as a mechanism for environmental protection and suggest, as an alternative, an ethics of care more oriented toward an harmonious, particular and unique

[1] STONE (2010).

[2] Ver BORROWS (2010).

[3] See PEÑA (2021) & REDACCIÓN MUNDO (2022)

[4] Numerous other factors are disinformation, advertising campaigns against the Convention, the Convention's public image, a punishment to the current government, the economic uncertainty, uncertainty in front of deep structural changes, etc. Besides, it's worth mentioning that the NCP included other controversial elements, such as the indigenous justice system and the end of bicameralism.

coexistence with nature. The idea is to propose an institutional framework that, in addition to considering the challenges of expressing legal orders in rights and obligations, can surpass the discomforts generated in the population by the language of rights.

Considering the overall trend regarding the presence of entities beyond the human in the legal realm, the intention is to propose an alternative from an ecofeminist perspective to this concept that better suits the Chilean reality. To achieve this, firstly, the background concerning nature's rights in the current constitution of Chile will be presented. Secondly, an analysis of the inclusion of nature and non-human animals in the NCP will be conducted. Thirdly, the main points of ecofeminist critique regarding rights will be outlined. Fourthly, an examination of the incorporation of an ethics of care in the NCP from an ecofeminist standpoint will be provided. Fifthly, alternative concepts to rights theory will be suggested to underpin an institutional framework focused on care, nature protection, and what is distinct from human beings. Ultimately, it will be concluded that the new constitutional process might offer the opportunity to align closer with the interests of citizens.

II. BACKGROUND AND THE CURRENT CONSTITUTION

There is a fundamental difference between the consideration of nature in the current Constitution and those currents that consider it as an agent within legal frameworks, as was done by the NCP in its third chapter. Broadly speaking, legal concepts—especially those that address the rights and duties of the subjects considered by the legal system—have been central in the analysis of analytical jurists. They have emphasized the importance of rights, as well as the corresponding duties. Authors such as, for example, Wesley N. Hohfeld, regards the language of rights and obligations as the "lowest common denominator" (*sui generis*) in "jural relations" as relationships between pairs of individuals".[5] Likewise, Alan R. WHITE states that a right "is something which can be said to be exercised, earned, enjoyed, or given, which can be claimed, demanded, asserted, insisted on, secured, waived, or surrendered.... A right is related to and contrasted with a duty, an obligation, a privilege, a power, a liability".[6] Ultimately, rights and the faculties they protect have been a central element of legislation and, in particular, the primary tool in regulating interactions among human beings.

However, over time and the emergence of new legal needs—especially those related to climate change— the legal doctrine has considered alternative ways to conceptualize the role of the environment and the relationship between humans and nature within jurisprudence. Such consideration has become part of several legal texts. CORDERO VEGA—Minister of Justice and Human Rights at the time of writing this article—, for instance, believes that since the 1960s, environmental concerns promoted by various environmental groups have managed to be expressed in jurisprudence.[7] Despite this, the conception of nature's rights—aside from, as mentioned earlier, indigenous regulatory systems, which historically have considered nature as an integral part of their legislation[8]—has been codified from an "anthropocentric" framework. This means that legislation has been clear in focusing on humans as rights holders, while nature is granted rights only to the extent that it can be protected as a resource that can be utilized by humans in order to safeguard their own

[5] SIMMONDS (2000), p. 148.

[6] WHITE (1984), p. 120.

[7] CORDERO VEGA (2013).

[8] See, for example, BORROWS (2010).

dignity.[9] The respectful treatment of nature is demanded not for the sake of nature itself, but because its conservation is necessary to protect the well-being of human beings. A clear example of this trend—and one that arises as a controversy regarding the NCP—is Article 19 No. 8 of Chapter III of the current Chilean constitution. This contains the sole direct reference to the protection of the environment and nature in the entire text, which establishes that:

> 8º.- El derecho a vivir en un medio ambiente libre de contaminación. Es deber del Estado velar para que este derecho no sea afectado y tutelar la preservación de la naturaleza. [The right to live in an environment free from pollution. It is the duty of the State to ensure that this right is not affected and to safeguard the preservation of nature][10]

From this norm, it must be understood that the rights concerning the environment and the coexistence of humans with nature are subordinate to human beings. Under this conception, the environment is not a subject of rights, and therefore, no duties can be demanded on its behalf. This framework presents the environment as a passive entity, an object in the legal sense, or an ownable property. There is a right for individuals to demand that their environment be free from pollution; however, the environment can fall victim to severe pollution, and if no human is affected or files a complaint to the State, no legal interest ("*bien jurídico*") has been violated.

The issue regarding nature in the current constitution is not exclusive to this passage but endemic throughout the entire constitutional text. Article 1, regarding legal personality—who holds rights and legal standing—, for instance, establishes that:

> El Estado está al servicio de *la persona humana* y su finalidad es promover el bien común, para lo cual debe contribuir a crear las condiciones sociales que permitan a todos y a cada uno de los integrantes de la comunidad nacional su mayor realización espiritual y material posible, con pleno respeto a los derechos y garantías que esta Constitución establece. [The State is at the service of *the human person* and its purpose is to promote the common good, for which it must contribute to create the social conditions that allow all and each of the members of the national community their highest possible spiritual and material fulfillment, with full respect for the rights and guarantees established by this Constitution].[11]

This norm expresses that the primary duty of the legal system is to safeguard *the human person*, excluding the territory as an ecosystem. Thus, the protections granted to nature are not, under any circumstances, "rights of nature." Nature itself is not protected by the constitution. The protection that the State provides to nature does not entail the recognition of a collective interest belonging to the biotic community, as would occur in a non-anthropocentric framework,[12] but rather, its protection solely falls upon the human person and her interests. Therefore, the constitution establishes and endorses the hierarchy of the human person over the environment by focusing on individual rights, which differ from and are in direct conflict with that which cannot be encapsulated

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[9] Despite this, in recent times, rights within a less anthropocentric framework are being slowly incorporating into several initiatives of law, as well as into constitutions around the world, in countries as diverse as, for example, New Zealand, Bolivia, Colombia, Switzerland, Germany and India (See BOYD (2017)). It is worth mentioning that the rights of nature and the rights of animals are not equivalent, even though they can reinforce each other (See STILT (2021)).

[10] Constitución Política de Chile (1980).

[11] Propuesta de Nueva Constitución (2022).

[12] DONOSO (2021), pp. 148–151.

in a single individual. Similarly, the common good is defined purely in human terms, not in terms of harmony with nature or coexistence with the environment. Consequently, "well-being" is considered at an individual level, as the sum of individual well-beings, making the aggregate of private wills, not public interaction, the concept of the common good that the State is obliged to safeguard.

It is not surprising, then, that laws aimed at protecting nature have had limited viability in the judgments issued by the Constitutional Court ("*Tribunal Constitucional*"). In a review of prominent cases in environmental jurisprudence, CORDERO VEGA points out that there has been a shift in all legal systems for some time "from a system of normative centrality in the State to one based on a concept of environmental governance."[13] In the case of Chile, this author highlights a legislative shift that, from 2009 onwards, has moved closer to a more "green" judicial power, leaning towards legal activism. This contrasts with previous decades, where legal authority prioritized the protection of private property and the rights of private enterprises over environmental protection. The author attributes this shift to the proceduralization ("*procedimentalización*") of the Administration in environmental matters. However, this change is not sufficient. Despite differences in judgments compared to previous decades, several jurists noted that the Constitutional Court and other environmental regulation mechanisms still did not act as a relevant player in this matter.[14] The reluctance to move away from property rights and entrepreneurial freedom enshrined in the constitution, even if their intensity has diminished over the years, renders the fundamental charter an inadequate tool for ensuring environmental well-being. With the opportunity to implement a new constitution, many activists saw the chance to embed environmental ideas in Chilean society through legislation.

III. THE PROPOSAL FOR A NEW CONSTITUTION

A trend towards including rights for nature and other non-humans as a figure incorporated into law has ceased to be unfamiliar in international jurisprudence. Globally, the concept of rights of nature has been gaining popularity, with 2019 being a year when more initiatives for rights of nature were approved.[15] Thus, it is not just groups like animal activists, indigenous peoples, and representatives fighting against climate change who recommend their inclusion in legal texts, but several jurists and experts have also called for the inclusion of these rights in legal systems.[16]

Therefore, it is not surprising that Chilean constituents saw in the 2019 Social Outbreak ("*Estallido Social*") and the subsequent Constitutional Process an opportunity to include a model that would grant proper rights to nature and recognize a level of legal agency, drawing upon existing legislation. The text of the NCP departs from the anthropocentric framework established by the current constitution, at least in the sense of fully endowing nature with rights, dedicating an entire chapter to its regulation and care. In other words, the political forces convened by the 2021-2022 constitutional process were able to use the drafting of a new constitution as an opportunity for normative reconsideration regarding their relationship with the natural world.

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[13] "Desde un sistema de centralidad normativa en el Estado a otro basado en un concepto de gobernabilidad ambiental" CORDERO VEGA (2013), p. I.I-I.II.

[14] GÁLDAMEZ ZELDA (2020).

[15] PUTZER, LAMBOOY, JEURISSEN & KIM (2022).

[16] SIDDIQUE (2022).

This way, in contrast to the current constitution, the NCP establishes in Chapter II, On Constitutional Guarantees, that: "3. La naturaleza es titular de los derechos reconocidos en esta Constitución que le sean aplicables. [Nature holds the rights recognized in this Constitution that are applicable to it]."[17]

Through this norm nature would be acknowledged as a subject of rights, thereby creating the possibility of bringing claims regarding damage affecting nature, without necessarily needing a human to be a direct victim. In other words, what is encoded in this clause is the legal agency of nature. This paragraph is further elaborated in Chapter III of the NCP, which delves deeply into the subjects of Nature and the Environment, their specifications, and the mechanisms that would be established to defend their rights. Thus, Article 127, paragraph 1, which initiates the chapter, states that: "1. La naturaleza tiene derechos. El Estado y la sociedad tienen el deber de protegerlos y respetarlos. [Nature has rights. The State and society have the duty to protect and respect them.]."

The concept of nature is used, therefore, in coordination with Article 1° of Chapter I, according to which Chile is "a pluri-national, intercultural, regional and ecological State."[18] Unlike the previous constitution, the State has the duty to protect nature using the means at its disposal.

IV. ECOFEMINIST CRITIQUE OF RIGHTS

Ecofeminism, a position that upholds that "(...) there are important connections—historical, experiential, symbolic, theoretical—between the domination of women and the domination of nature"[19]—, particularly focused on the treatment of non-human animals, has remained skeptical of using jurisprudence and the establishment of rights as an effective tool for the protection of entities beyond the human.[20] On one hand, feminist critique aims to unravel the apparent "neutrality" of rights. Authors like Catharine MACKINNON and Robin WEST have drawn attention to the existence of gender within legal systems, where masculinity is equated with neutrality and positivity, consequently relegating women to negative cases: they become exceptions in the eyes of the law. As a result, women are excluded by a law made by and for men that conceptualizes rights within a patriarchal framework.

In this way, rights such as freedom of speech[21] or the right to self-defense are turned into weapons against women, becoming tools to maintain male supremacy. In *Jurisprudence and Gender,*[22] WEST points out that both liberal and critical jurisprudence are grounded in a "theory of separation"—that is, "a "human being," whatever else he is, is physically separate from all other human beings"[23]—as the foundation of individual rights codified in legislative systems. WEST argues that this is a paradigmatically male experience, as the complete separation from another human being marked by physical boundaries is not entirely applicable to women, whose bodies are intimately connected

[17] Propuesta de Nueva Constitución (2022).

[18] "(...) un Estado plurinacional, intercultural, regional y ecológico".

[19] WARREN (1990), p. 126.

[20] Ver DONOVAN & ADAMS (1996).

[21] Ver MACKINNON (1996).

[22] WEST (1988).

[23] WEST (1988), p. 1.

with others during intercourse and pregnancy.[24] Likewise, Catharine MACKINNON's critique states that "The State is male in the feminist sense", as "the law sees and treats women the way men see and treat women."[25] The liberal State is based on neutrality and objectivity as measures of justice but models the legal person, the subject of rights, as a man. This implicit exclusion of women in politics perpetuates men—men belonging to the human species, white, heterosexual, cisgender, etc.—as the owners of public space. Women, on the other hand, are excluded from considerations of equality.

On the other hand, the ecological critique—specifically, the critique made by theorists of animal ethics—follows a similar line concerning the suspicion regarding the legal fiction that constitutes personhood. In law, what has been termed "the second wave of animal ethics and animal rights" raises the question of whether it is possible to extend legal personhood to individuals, groups, and entities that do not correspond to individual humans. OFFOR[26] asserts that this current proposes four principles on how legislative frameworks should address the legal consideration of non-human animals: first, the need for non-human animals to be morally considered only in relation to human beings; second, that moral consideration and legal protection should extend only to non-human animals and no further; third, the rejection of liberal concepts such as rights and the incorporation of experiences from different marginalized communities for the construction of new paradigms; and finally, an approach to casuistry over generality. These shortcomings of the traditional legal system to adapt to the needs of what is more-than-human, becoming more than a defense, a limitation to its protection, have led authors like Corey WRENN[27] to claim that the State is an institution that maintains both the supremacy of man over woman—according to MACKINNON—as well as the supremacy of humans over animals. Both oppressions mutually support each other, making the domination of the State both patriarchal and speciesist, both deeply permeated by logics of extraction and commodification of bodies—both feminine and non-human—that underpin capitalist systems of production and reproduction.[28]

In the Chilean case, although the NCP had numerous feminist and environmentalist activists involved, it's clear that it failed to transcend the use of rights to guarantee the social demands of the

[24] In her text, West asserts that the female particularity is based on the fact that only women are penetrated during intercourse and are capable of becoming pregnant. Presently, we know that many women are not penetrated and are not capable of becoming pregnant; specifically, WEST's text implicitly excludes transgender women and other sexual and gender dissidences. Nevertheless, her analysis of the masculinization of jurisprudence and the devaluation of reproductive and caregiving labor remains relevant for feminist legal analysis and ethics of care.

[25] MACKINNON (1995), p. 288.

[26] OFFOR (2020).

[27] WRENN (2017).

[28] WRENN uses the dairy and egg industries as an example to demonstrate how normalized the institutional captivity and torture of female bodies is. In advertising, dairy cows and egg-laying hens are coded as women whose fluids are gracefully offered to consumers. Their status as mothers, however, is concealed, as these fluids consumed are necessary for the creation of products. In this sense, animals coded as women are systematically abused because their bodies are perceived as feminine. Wren also compares this to the campaigns for missing or kidnapped children on milk cartons in the 1980s in the United States. The campaign drew attention to the issue of abducted children—a problem of male violence—but concealed the fact that the calves of the cows featured in the ads were never sought or even considered lost (WRENN (2017), pp. 212–214).

citizenry.[29] The overuse of the concept of rights led some sectors of society to view the constitution as "a Christmas tree" [30] or "an interesting wish list",[31] rather than a viable proposal for a new constitution. Overall, it was seen more as an abstract concept than a feasible constitutional text.[32] Rights, as a concept that could be attributed and demanded by their holders from the State authority, gave the impression that they were more aspirational than realistic. A widespread criticism was that it was not possible to encompass all social demands in a list of rights that the State had to guarantee. Instead, this format ended up hindering normal State functions.

An ecofeminist perspective cannot overlook the shortcomings of rights theory and, in support of the citizenry, seek a solution that reflects their concerns. Ecofeminism, as the intersection between feminism and ecology, must highlight how rights are constructed "from above", with a State as an omnipotent and omniscient entity tasked with delivering its faculties to individuals incapable of providing for themselves, sustaining the logics of hierarchy and domination that permeate various social struggles. The figure of the State as the guarantor of rights drifted away from the demands of the citizenry or, at the very least, failed to generate sufficient confidence regarding the stability and functioning of a constitution.

It's clear that this wasn't the sole reason the project was rejected. There are numerous and diverse reasons why the citizenry decided not to support this particular proposal.[33] It's also easy to recognize that ecofeminist criticism of rights wasn't a highly relevant factor. Nevertheless, the goal of feminist criticism is to highlight the inconsistencies of the legal system and the rule of law concerning women's experiences—or, in other words, to unveil the neutrality veil of the law and place women's experiences—specifically, their interdependence with other bodies—as the focal point of legal analysis,[34] as well as to question the supremacy of the State as the guarantor of rights, inseparable from its origins as the embodiment of hegemonic group characteristics.[35] As the cycle of that constitutional discussion concludes, an ecofeminist perspective can construct and propose a supportive foundation grounded in grassroots social policy. In the continuation of the constitutional process or in subsequent discussions, a perspective worth considering is that of the "ethics of care".

V. THE ETHICS OF CARE AND CARE IN CHILE

As an alternative to rights theory, ecofeminism offers an ethics removed from generality, abstraction, and difference: an ethics of care.[36] The origins of this trend can be traced back to Carol GILLIGAN's book *In a Different Voice*,[37] where she defines a feminist ethic of care focused on ethical

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[29] The word "right" is used 220 times in the text and 15 times in Chapter III.

[30] VELÁSQUEZ LOIZA (2022).

[31] CANALES (2022).

[32] This characterization aligns with what is perceived by the media and the opinions expressed by Chilean citizens. The abstraction of the constitution and the rights it enshrines could be considered a feature, not an error. However, the demand from the citizens aimed at the concrete resolution of their issues, which the proposal failed to satisfy.

[33] See, for example, Forbes Staff (2022); MOLINA (2022); ROMO, EHLINGER, SOTO & MCCARTHY (2022).

[34] WEST (1988).

[35] DONOVAN & ADAMS (1996).

[36] DONOVAN & ADAMS (2007).

[37] GILLIGAN (1982).

thinking not as a set of abstract principles governing interactions at a general level, but determined by the concrete instances of practical application, where the relationships and particular interactions between individuals are relevant. The ethics of care focuses on women's experiences and proposes that morality is case based, meaning that moral actions do not necessarily follow abstract principles but arises from the voices involved in each situation and from the empathy with the affected individuals. GILLIGAN is clear in establishing that

> In the culture of patriarchy, overt as well as concealed, the different voice sounds feminine. When it is listened in its own right and on its own terms, it is nothing but a human voice. As relational ethics, care addresses problems of oppression as well as those of abandonment.[38]

The ethics of care concerns both the person making the moral decision and the one affected by that decision. The goal is to listen to and consider all voices when choosing one option or another in a moral situation. Additionally, the ethics of care follows a rather holistic trend, contrasting with the individualism of liberal theories. Instead of viewing individuals as isolated entities, it pays special attention to the interrelationship and interdependence of moral agents and recipients.

Although GILLIGAN discusses care as a particular relationship in the application of ethics, her approach is inseparable from the role assigned to women in the division of public/private dichotomies,[39] where women occupy a disadvantaged position. A fundamental example is the entry of women into the formal labor market, which has not led to a decrease in domestic work but rather has transformed into a "double workday" for women. This dual labor burden has fallen especially on poor and racialized women, who, in addition to working for wages, must cook, clean, do laundry, engage in sex with their husbands, give birth, and handle all that encompasses "invisible labor". This combination of reproductive and productive work, usually poorly paid, is what HOSCHILD and MIES[40] have termed the "housewifeization" of work. Moreover, in Chile, the majority of caregivers are informal in-home caregivers—"any person who assists another person within the home without pay"—and within this group, there exists an enormous gender gap: 76% of caregivers are women.[41] These experiences serve as a relevant point of reflection for the development of a feminist ethic, which confronts the task of amplifying voices silenced by traditional ethical theories while avoiding the naturalization of women's caregiving labor.

Care work is vital for the sustenance of societies, yet it is minimized and made invisible by legal codes that disregard relationships of intimacy and connection when crafting laws and

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[38] "En la cultura del patriarcado, tanto manifiesta como encubierta, la voz diferente suena femenina. Cuando se escucha por derecho propio y en sus propios términos, no es más que una voz humana. Como ética relacional, el cuidado aborda tanto los problemas de la opresión como los del abandono". GILLIGAN (2013) p. 55.

[39] In fact, GILLIGAN's book emerged as a response to Lawrence Kohlberg's stages of moral development, where he deemed abstract reasoning as the epitome of moral maturity. According to Kohlberg's model, many women were thought to get "stuck" in a lower stage of moral thinking, as they were unable to attain the "moral maturity" exhibited by their male counterparts.

[40] HOCHSCHILD & MIES (1996).

[41] "toda persona que asiste a otra persona al interior del hogar de forma no remunerada", GAZMURI & VELASCO (2021).

principles.[42] The project of creating an ethic centered on concrete interactions and care relationships—emphasizing who is cared for and who cares, observing power relations between both agents, as well as the world around them—is the starting point of an ethic of care. Additionally, the ecofeminist proposal—focused on the interconnectedness between logics of domination subjugating both women and the natural world—has embraced the ethic of care as an instance of creating a moral framework from a horizontal and alternative perspective, prioritizing mutual care relationships between human beings and nature.[43]

Therefore, when considering the use of rights language in the codification of care,[44] it's important to examine the role of care in the text and its relationship (or lack thereof) with passages that codify the rights of nature. The codification of the right to care is part of a feminist aspiration, according to which, as expressed in a statement signed by various caregiving organizations at the beginning of the constitutional process,

> [Should propose] that care must be a fundamental axis of the new society we seek to build. In this sense, it is necessary to acknowledge that people are not independent but, quite the opposite, interdependent and eco-dependent, meaning we need other people and nature to live. When we talk about care, we refer to the work that never stops and that sustains life, carried out both within and outside the home, whether compensated with a salary or not.[45]

Thus, the institutionalization of care is reflected in Article 50 of the NCP:

> 1. Toda persona tiene derecho al cuidado. Este comprende el derecho a cuidar, a ser cuidada y a cuidarse desde el nacimiento hasta la muerte. El Estado se obliga a proveer los medios para garantizar que el cuidado sea digno y realizado en condiciones de igualdad y corresponsabilidad. [Every person has the right to care. This includes the right to provide care, to receive care, and to take care of oneself from birth to death. The State is obligated to provide the means to ensure that care is dignified and carried out under conditions of equality and shared responsibility.][46]

This paragraph is complemented y Article 45 paragraph 2:

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[42] WEST (1988).

[43] PETTERSEN (2020).

[44] It's important to note that some authors may consider the codification of care itself to be against the ethic of care itself. The reason for this might be, for instance, that the centrality placed by the ethic of care on the special relationships between individuals as a source of moral value in caregiving actions that cannot be fully captured by a code (see COLLINS (2018) pp. 199–201). In light of this, I propose that the recognition of care by the State remains limited enough to acknowledge its existence and significance while refraining from defining the specific situations or special relationships that make up caregiving networks.

[45] "[Debe plantear] que los cuidados deben ser un eje fundamental de la nueva sociedad que buscamos construir. En ese sentido, es necesario asumir que las personas no somos independientes sino, muy por el contrario, interdependientes y ecodependientes, es decir, que necesitamos de otras personas y de la Naturaleza para vivir. Cuando hablamos de cuidados, nos referimos a los trabajos que nunca paran y que permiten sostener la vida, que se realizan tanto dentro como fuera del hogar, a cambio o no de un salario". Red Feminista de Cuidados (2021).

[46] Propuesta de Nueva Constitución (2022).

> 2. La ley establecerá un sistema de seguridad social público, que otorgue protección en caso de enfermedad, vejez, discapacidad, supervivencia, maternidad y paternidad, desempleo, accidentes del trabajo y enfermedades profesionales, y en las demás contingencias sociales de falta o disminución de medios de subsistencia o de capacidad para el trabajo. En particular, asegurará la cobertura de prestaciones a quienes ejerzan trabajos domésticos y de cuidados. [The law shall establish a public social security system that provides protection in cases of illness, old age, disability, survival, maternity and paternity, unemployment, work-related accidents, and occupational illnesses, as well as in other social contingencies involving the lack or reduction of means of subsistence or the ability to work. In particular, it shall ensure coverage of benefits for those performing domestic and caregiving work.][47]

Lastly, these segments are complemented by Article 46, which establishes the following:

> 4. El Estado generará políticas públicas que permitan conciliar la vida laboral, familiar y comunitaria y el trabajo de cuidados. [The State will create public policies that allow for the harmonization of work, family, and community life with caregiving responsibilities.][48]

While this is a substantive step toward gender equality and recognizing domestic labor, there remains a significant critique regarding the way it was drafted. Specifically, this critique points to the lack of connection to nature or mention of ecology within the conditions of care, along with the overreliance on the "rights" framework to express various demands of the population. The exclusion of the relationship of care with nature, ecosystems, and non-human animals is problematic when considering how caregiving activities are effectively carried out. If care is a right, it becomes a legal concept implemented through rights and obligations, or in other words, it becomes an issue between the caregiver and the cared-for individual. The rights approach is inherently individualistic as it pertains to the duties and obligations of specific individuals.

Contrary to this, Marti KHEEL[49] contrasts individualistic ethics with holistic ethics —related to the care of nature and the conception of communities as a unified, interdependent, and inseparable whole— where the interdependent individual is the center of moral reflection. While the fact that nature is excluded from certain social functions such as, for example, voting,[50] is not immediately problematic, the non-human has alternative ways of expressing its political presence that are not dependent on established human institutions. However, the separation of care from nature is indeed incongruent with the very essence of caregiving labors. This is because it completely disregards the holistic and interdependent dimension of caring for others. Care does not unfold as an isolated activity, and indeed, the ethics of care has been presented as an alternative to individualistic ethics that base their moral reflections on the reason or interest of a single person.[51]

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[47] Propuesta de Nueva Constitución (2022).

[48] Propuesta de Nueva Constitución (2022).

[49] KHEEL (1985)

[50] A classic example of a right that is not applicable to non-human entities but needs to be enshrined in legal documents is the right to vote. SINGER (2009, p. 29) uses it as an example to argue in favor of considering each creature according to its own capabilities. However, authors like DONALDSON & KYMLICKA (2011) and HRIBAL (2003) have considered the possibility of political participation by non-humans.

[51] DONOVAN (2006).

Although the acknowledgment of care is crucial, its codification as a "right to care" lends itself to an individualization of the act of caregiving—a duty imposed on the caregiver and owed by the one being cared for. It becomes an isolated activity between two individuals and the State, the guarantor that ensures that the relationship remains normal. This relies on the State's neutrality and overlooks that care extends beyond the two individuals involved; rather, it's a concern and a public issue for each and every member of the community, including the environment in which it occurs and the non-human animals that are part of it. This dependency on the State and the assurance of neutral rights, equal for each and every citizen, especially in the realm of caregiving, becomes a hindrance when implementing programs and laws that, although they must be provided nationwide, should be approached differently and with particular attention to disadvantaged groups or those more inclined to undertake caregiving tasks—namely, women.[52] Interdependence and particularity are inherent in caregiving, since in it not only rights holders are involved, but every factor creating and encompassing the caregiving situation. In this regard, resorting to indigenous worldviews is valuable, since they contribute to a feminist perspective on care, where caring for the community and the environment are not separate dimensions because there is no care without consideration for the non-human other.[53]

Care as an individual right is a step forward, but it does not encompass all care demands. Rather, care should be understood in its political dimension, as a fundamental activity in human life, considering that all human beings are interdependent and rely, to varying degrees, on others throughout their lives.[54] In this sense, care is never an individual activity or a forced imposition by the State. While the NCP enshrines numerous collective rights for indigenous communities and hypothetically allows care provided by them within their own communities, the separation of care and the environment severely limits the ways to protect territories and address conflicts that escape indigenous jurisprudence. Not to mention that all care provided and received by non-indigenous people would potentially also be excluded from cosmological consideration and in harmony with nature. The defense of nature and the defense of care would be treated separately, even though these two are intimately connected spheres.

This critique aims not to undermine the efforts involved in including this right—and others—as part of the new constitution. Rather, its goal is to point out the inherent shortcomings in a framework that uses rights as the primary means of safeguarding different vulnerable members within society. A rights-based framework will be limited as it relies on the subjectification of the entity to which personhood is granted.[55] In other words, rights—which originally pertained only to heterosexual white cisgender men—are "expanded" to those who demand them or have someone demand them on their behalf, without this expansion being correspondingly aligned with the particular needs of those who obtain them. Additionally, the use of legal personhood expresses a boundary within society: the division between those who are people and those who are things. While expanding rights to nature and non-human animals is a significant step forward, it perpetuates the person/object division, between those who are active entities in the legal system and those who are passive entities acted upon. Advances regarding the quality of being an agent as opposed to a legal

[52] ZÚÑIGA-FAJURI, HATIBOVIC & GAETE (2022).

[53] AIMÉ TAPIA GONZÁLES (2015).

[54] TRONTO (2013) p. 26.

[55] RIDLER (2013).

patient of different non-human entities in the legal system, and their protection through granting of a degree of personhood, have entailed a radical reconsideration of the foundations of the duality of person/object or person/property—one of the many reasons for the fierceness of the opposition—and it particularly challenges production systems.

VI. THREE CONCEPTS FOR AN ECOFEMINIST PROPOSAL OF AN INSTITUTIONAL FRAMEWORK OF CARE

The ethics of care, from the ecofeminist perspective, has encountered difficulties when it comes to institutionalization and incorporation into normative codes. There is a certain tension between an ethics that is necessarily casuistic and adapted to specific situations and a document that should endure over time, such as a constitution.[56] This has not prevented the flourishing of various ideas regarding how to reconcile both concepts, care and law, where both can be assigned a harmonious role within society. Proposals like those of Joan TRONTO[57] and Daniel ENGSTER[58] have designed institutional frameworks that incorporate care into political relationships, employing the language of rights. However, TRONTO does not address animals, and ENGSTER entirely avoids anything beyond the human. Neither delves into the topic of what is more than human, the environment, and nature, and therefore, care is considered an anthropocentric activity by these authors. For them, care remains a set of practices exclusively performed among human beings.

The ecofeminist author Deane CURTIN[59] proposes that in order to institutionalize care and integrate it into our democracies, we must abandon the language of rights and find a more effective approach by politicizing the ethics of care. Her critique of rights consists of six main points, which are quite similar to those already expressed in this article: 1) rights are too narrow theoretically, as they only recognize beings to the extent that they are identical to humans; 2) it is a formalistic and seemingly neutral approach that does not consider the particularities of each case; 3) it has an inherently adversarial nature; 4) views rights as an autonomous quality rather than relational, as feminist theory does; 5) seeks a fully rational approach at the expense of emotions; and 6) separates the mind and body of the rights-holder, a bias that has been used in the past to marginalize and exclude women from access to rights. In contrast, CURTIN's proposal focuses on the reciprocal relationships that exist among different members of the community and how empowering the affected parties, instead of being addressed with an aspiration to generality, is a fundamental part of caring for historically marginalized groups.

Although the NCP explicitly considers ecological issues relevant —without underestimating at any rate the importance of this draft in addressing gender, environmental, and care issues—the separation between environmental and care issues functions as an artificial and arbitrary division,

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[56] It is well known that Thomas Jefferson, for example, advocated for the fluidity and constant renewal of constitutions as generations changed. While his ideas had influence throughout the American continent, Chile, at least, which has had three constitutions so far in its history—excluding the period of constitutional experiments—does not seem to follow this trend.

[57] TRONTO (2013).

[58] ENGSTER (2004). ENGSTER, in particular, develops three categories of fundamental rights for an institutional theory of care based on the ideas of natural law thinkers such as Martha Nussbaum and John Finnis: a set of rights related to dependency work and development; another category responsible for traditional political rights and economic rights, and finally, a category tasked with ensuring political participation (pp. 131-133).

[59] CURTIN (1991).

hindering the connection between these topics. The rights of one and the other obscure the necessary interconnection between both subjects and separate the action that must be taken. In total, they individualize into rights a collective problem of action. This difficulty can be overcome if, instead of resorting to the language of rights as a guarantee of fulfillment, constitutional texts turn to the establishment of services and institutions that develop care as a multifaceted and constant activity; institutions that must have sufficient powers to effectively carry out their legislative labor. A list of rights is unable, within the limitations imposed by its own format, to cover all the needs that arise in relationships of interdependence, both among humans and between humans and nature. Therefore, rather than entrusting such an important task to the language of rights, attention should be focused on organizations with the explicit goal of protecting nature, based on a kind of ecological solidarity and with the appropriate mechanisms to make them viable. It is not necessary to present ecological thinking as a virtue obligation towards citizens; instead, it should be integrated into the institutional framework as an objective pursued by public policy programs. The goal is to create legislation—both constitutional and legal—that, rather than assign rights, provides tools for care within the community, so that care is not a vertical imposition granted and guaranteed by the State but a reciprocal and horizontal relationship. This does not mean that the State should disregard care. On the contrary, its duty would be, instead of guaranteeing a right that is insufficient and must be constantly expanded to new forms of care, to consecrate the tools to articulate citizen solidarity. In this sense, while the State cannot disregard the importance and recognition of care in society, its duty is not to provide them but to create space for them to be generated, developed, and strengthened. It has the duty to care for individuals, especially caregivers and care providers. However, it is not within the State's competencies to generate personal care relationships or define them specifically. The State is responsible for safeguarding and promoting, not bureaucratizing care.

To achieve a comprehensive proposal for a new constitution not limited to not rely solely on rights to express its objectives, I suggest three key concepts that should be present in a constitution attentive to the aspirations of ecofeminism, especially those passages related to care and the environment: care democracy, interrelational empathy, and political solidarity.

Firstly, before moving away from a rights-based theory, we must examine how it is fully expressed and what its salvageable aspects are, especially in relation to the Chilean case. An example of care democracy is articulated by Joan TRONTO.[60] Although she does not explicitly mention animals or what is more than human, her conception of care, especially her consideration of care rights, is relevant for their articulation in legal matters. When discussing the right to care, TRONTO proposes that, if expressed in rights, care must have at least three dimensions: the right to receive care, the right to provide care or not to provide care, and the right to participate in the public process that defines care.[61] While the NCP clearly incorporated this first right, its relation to the latter two is less clear. On the one hand, the right not to care or not to worry (a right not to care) is based on the diversity of ways of caring and being cared for, so TRONTO considers "the notion that one model of care will work for everyone is absurd".[62] The plurality within human relationships means that care, as an intimate and particular act, cannot be covered by a single public social security system, especially in cases where care may be given to individuals who find it degrading. While the provision

[60] TRONTO (2013).

[61] TRONTO (2013) pp. 153–155.

[62] TRONTO (2013) p. 154.

of benefits to caregivers is an important support, it is difficult to think of a centralized system that can meet all the needs of a society. This becomes even more complex when considering the care of non-human individuals or ecosystems, where the benefits and services that the state can provide exceed the limits of state services, either due to geographical distance—the ability to provide care services to non-human entities in remote areas—or a lack of connection to what is cared for—the mistake of providing caregivers with inadequate tools due to a misunderstanding or imposition of methods—. On the other hand, the right to participate in the public process that defines care, or in other words, the democratization of care, arises from TRONTO's concern about how "(...) the practice of presuming that everyone's needs and desires are like one's own causes people to act in ways that perpetuate vicious circles of care".[63] This proposal is quite similar to the previous one in the sense that it also safeguards the particularity of care labor that cannot be provided solely by a universalizable service. It seems that even in cases where care is expressed as a right, it is not only entitled to the same right to care or be cared for but must be considered in its entirety as an act intimately linked to the environment in which it occurs and that attends to the particularity of the people it affects.

So, in the Chilean case, while the first right was addressed, the most apparent one, to care and be cared for, it is crucial to consider the other two facets of the right to care. Care not as an imposition also encompasses choice and the possibility of opting out: it is vital to have the option not to care and the ability to define what caring entails. While this approach also has its limits—it still does not escape the rights paradigm—democracy within care is a fundamental consideration. A system that enshrines care within the institutional framework—whether as a right or not—must consider the full meaning of caring, which involves looking at aspects that are not necessarily about caring and being a caregiver, as well as what it means not to care and deciding what and how to care for.

Secondly, Lori GRUEN, who has focused on developing the role of care as a foundation for interactions between individuals, introduces the concept of "interrelational empathy" as a framework to express the interconnectedness and interdependence of all individuals within a territory. This framework serves as the basis for care relationships, where one identifies with the other while maintaining autonomy as autonomous agents. Lori GRUEN defines it as:

> a type of caring perception focused on attending to another's experience of wellbeing. An experiential process involving a blend of emotion and cognition in which we recognize we are in relationships with others and are called upon to be responsive and responsible in these relationships by attending to another's needs, interests, desires, vulnerabilities, hopes, and sensitivities.[64]

The NCP, by recognizing that all individuals have the right both to care and to be cared for, asserts that no human exists in a singular role within the relationship. Instead, there is an interdependence of care that exists among each and every member of society, where individuals have multiple needs addressed not by a single person but within a network of care that extends throughout their community. That said, the NCP shelters and protects these types of relationships, considering the needs of both those who are cared for and those who provide this care, ensuring state support for these systems. Nevertheless, as a fundamental part of interrelational empathy, the mentioned

[63] TRONTO (2013) p. 155.

[64] GRUEN (2015).

passages blatantly exclude non-human persons and nature. While a degree of legal personhood is recognized for non-human entities in other clauses, non-human beings and their particular needs are excluded from the right to care. This is because the way these articles are written confirms care as an activity that occurs "from birth to death" and includes events that can only be found in the lives of human beings. However, this recognition, and the social support that comes with it, hesitates to extend beyond the individual or person. The service provisions offered by the State operate under this same paradigm, namely that care labors have a beginning and an end and occur exclusively between caring subjects and cared-for subjects. In an ecofeminist proposal of care, this cannot remain the case. Limiting care to only two human beings in a dialogue relationship does not account for the interrelation of individuals and entities inhabiting a territory. It fails to address the myriad of emotions that arise from being part of a community and, in particular, is blind to how these relationships of interdependence occur not only among humans. A constitution that attends to empathy would not only grant the right to care but would nurture the desire to care, taking into account each and every emotion that arises when caring and the various forms that this care can take.

Thirdly, the concept of political solidarity can be understood, following SCHOLZ,[65] as acts of solidarity and resistance on behalf of others who cannot exercise it for themselves. While political solidarity does not, in principle, include the more-than-human as one of its recipients,[66] its use is particularly helpful when dealing with the natural and animal world.[67] Political solidarity is not an overly demanding concept that requires perfection from the user, as it only asks that the recipient show solidarity with the most disadvantaged. Thus, the duty to care does not rest in the hierarchy of a single entity wielding absolute power to grant rights and, in turn, deciding how to limit them. Instead, it arises from a position of empathy from one being to another. It is especially connected to the experiences of native peoples, their unique understanding of their surroundings, and the autonomous control of their territory. Solidarity motivates compassionate treatment of the more-than-human from a perspective shaped by an understanding of the place one inhabits. Additionally, the use of political solidarity as a guiding principle of action is not unfamiliar to various political movements, and indeed, veganism can be understood as putting this concept into practice.[68] In this way, the codification of solidarity serves as a guiding principle toward an aspiration that—much like veganism[69]—does not demand perfection but merely empathy.

Translated into a legal text such as the NCP or other constitutions, advocating for a "right to solidarity" or a "right to be treated with solidarity" is not proposed. Treating individual agents at such an emotional and private level can hardly be regulated by the State, both due to resource constraints and the difficulty of establishing appropriate standards. The distribution between individuals is effective as long as the object of regulation is what should not be done, but positive regulations on care work threaten to hierarchize, hinder, and invade diverse, multiple, and particular instances. Indeed, when considering solidarity during the constitutional process of 2021-2022, as well as the previous process initiated by President Michelle Bachelet during her second term, it was considered

[65] SCHOLZ (2008).

[66] SCHOLZ (2013).

[67] COCHRANE & COJOCARU (2022); MALLORY (2009)

[68] COCHRANE & COJOCARU (2022).

[69] GRUEN & JONES (2015).

as a kind of guiding principle for the State, especially in the economic sphere,[70] rather than as a right, so that its inclusion as a guiding principle is already familiar to Chilean legal culture. In a broader context, that is, solidarity with the environment, its inclusion also seems appropriate as a guiding principle for the relationship with the community, both human and biotic, as it is familiar and applicable in the Chilean context.

This, by advocating for the three previously presented concepts, rather than demanding their explicit inclusion, the proposal is that they should be taken as "guiding principles" of the treatment of care in the current constitutional debate and also with a future oriented perspective.

VII. CONCLUSIONS

This article has reviewed the sections of the current Chilean constitution regarding environmental rights and has analyzed the role of nature in the NCP as a subject of rights. Additionally, critiques of the rights theory from care ethics with a focus on the more-than-human have been examined.

From the literature analyzed, critiques emerge from various disciplines such as philosophy, sociology, psychology, anthropology, among others, indicating that the climate situation has led to a proposal for criticism and questioning of reason itself and how it is utilized.[71] Within these critiques, there is also a questioning of how to conceptualize law and rights, how legal constructs are formed, and how they adapt to different contexts and subjects. In the context of creating a new constitutional text, an argument in favor of reconstructing the entire institutional framework that goes against environmental preservation is radical but not alien to the changes that may be necessary to preserve the environment and avoid the most serious effects of climate change: extreme temperatures, natural disasters, resource shortages, etc.

As of writing this text, environmental protection and gender equality remain important topics for Chileans, and they should be incorporated into a proposal for a new constitution. Additionally, there is a continued commitment to various social rights.[72] The invitation of this article is to consider these demands—both social and subjective recognition—as indivisible topics. It is necessary to rethink how we approach nature, care, and rights in a legal sense. It is also of interest to reconsider how our legal systems structure social relationships and construct human relations, and how these can be regulated in a way that escapes the oppressive dynamics that have marked their existence until now. Finally, we should question whether theories assuming the separation of the individual from their community to express general principles are sufficient to defend the territory and ecosystems within it, and whether the climate emergency warrants a serious reflection on the legal, social, and institutional frameworks that human beings have established to date.

According to a recent survey by CADEM, 67% of Chileans are in favor of a new constitution, and 83% agree with the twelve bases established for the third constitutional process (2023).[73] There is, therefore, an opportunity to conceive a constitution that incorporates avant-garde concepts belonging to the new creations of the legal world. A constitution that, on the one hand, can respond to the demands of the nation's inhabitants, while they perceive it as legitimate and achievable. At the

[70] SILVA CIMMA (1996).

[71] PLUMWOOD (2002).

[72] IPSOS (2022).

[73] CADEM (2022).

same time and, considering the increasingly urgent situation the planet is facing, empower it with the capabilities to carry out an effective and integrated defense of the environment.

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