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Wroclaw Review
of Law, Administration & Economics
Vol 13:1, 2023
DOI: 10.2478/wrlae-2023-0010

Rights of Nature? Shifting Patterns in Environmental Constitutionalism[1]

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Keywords

rights of nature, environmental rights, environmental constitutionalism, environmental law, constitutional law, environmental claims

Abstract

The article outlines improvements in environment and climate protection in constitutional law and practice all over the world, examining constitutional texts, case law and constitution-like legislation. A legal standing of individuals to defend the environment is increasingly added to programmatic provisions addressed to public authorities. In some cases Nature is granted legal personality. The latter innovation connects well to traditions established in the global South, where it was introduced first, but not so to legal systems of the Occident, where it was recently introduced for the first time. In strictly legal terms the effects of this innovation can also be achieved by classical legal instruments, while its metaphoric dimension promises a change in people's attitudes towards nature. A second innovation concerns the shift from an anthropocentric to a bio-cultural or ecocentric approach. This would render constitutional law on the environment

1 This research was funded in part by National Science Centre, Poland, 2021/41/B/HS5/01557.
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fully effective and convey a substantive meaning to a personalised concept of Nature. Such a development is, however, uncertain. The rights of Nature risk remaining trapped in anthropocentric categories of *subject* and *object* of law when transposed to Occidental legal thinking and practice. To avoid such inadvertent contradictions, the article pleads for reconciling both approaches by seeking more equilibrium in the Human-Nature relationship.

I. Introduction

On 30 September 2022, the Spanish Senate adopted the Law (19/2022) for the recognition of legal personality of the Mar Menor lagoon and its basin. It is the first law of this kind in Europe, whereas instances of granting legal personality to natural entities are well known in the global South, notably in Africa[2] and South America.[3] Granting fundamental rights to non-human natural entities is one of the attempts to address ecological damage caused by human activity, be it by national legislators (as in the Spanish case) or the courts (Colombia Constitutional Court *Atrato* ruling). While rights of nature can be an important impetus for change in tackling the ecological crisis, a question arises whether the prospects for such a qualitative change should be attributed to the legal status of natural entities as such, or rather respective adaptation of environmental policy-making and governance by responsible authorities.[4] This article argues that the binary categories of subjects and objects of law, stemming from the ancient Roman civil law tradition, are unfit to address and accommodate the complex interdependencies of human life in and as a part of nature. These binary categories rather obfuscate than illuminate the transformation of socioeconomic foundations of the Occidental legal order that would be necessary to effectively address the destruction of the environment by human activity.

The argumentation in the article proceeds as follows: Section II briefly outlines the concept and ramifications of environmental constitutionalism,

2 In 2019, Uganda became the first country in Africa to recognise the rights of Nature in national legislation (Section 4 of the National Environment Act of 24 February 2019, *The Uganda Gazette* No. 10, Volume 62 of 7 March 2019, Acts, Supplement No. 2, <https://nema.go.ug/sites/all/themes/nema/docs/National%20Environment%20Act,%202019%20(1).pdf>). See also <https://gaiafoundation.org/uganda-recognises-rights-of-nature-customary-laws-sacred-natural-sites/> both accessed 4 May 2023.

3 E.g. the new Ecuadorian constitution of 2008 (Registro Oficial 449 de 20-oct.-2008 <http://www.pge.gob.ec/images/documentos/LeyTransparencia/2023/marzo/a2/constitucion%20_de_la_republica_del_ecuador.pdf> accessed 4 May 2023) introduced rights of Mother Nature, *Pacha Mama* (Article 10).

4 Cf. Philipp Wesche, 'Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision' (2021) 33(3) *Journal of Environmental Law* 531.

grasping the phenomenon within differing anthropocentric and ecocentric frames. These frames serve to both contextualise and shed light on the nuances in the process of constitutionalising environmental protection. Section III takes stock of the latest developments in that process, identifying three separate albeit interlinked and interdependent channels through which environmental concerns are being elevated to foundational principles of the socioeconomic order. These channels involve constitutional text, judicial process and ordinary legislation, with the latter touching on, to greater or lesser extent, constitutional substance. Section IV concludes by exploring opportunities for reconciling anthropocentric and ecocentric frames, conceiving such reconciliation as both feasible and desirable outside the binary categories subject and object of law.

II. Perspectives on Environmental Constitutionalism

'Environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights, and environmental law. It embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide. (…) It can be used to protect local concerns – such as access to fresh food, water or air – or global concerns like biodiversity and climate change that share elements of both human rights and environmental protection.'[5]

That assessment, as vague and generalist as it may be, grasps a surprising phenomenon. Since the publication of the 1972 Club of Rome report on "the limits to growth", constitutional lawyers all over the world started to pay increasing attention to environmental issues.[6] In the following analysis, we construe 'environmental constitutionalism' as a movement amongst lawyers, politicians, historians and other social scientists who take up the search to accommodate environmental and climate change[7] concerns in constitutional instruments and practice. According to such views, commitment to the *common good* – an objective underlying any constitutional law[8] – would no longer allow

5 James R. May, Erin Daly, *Global Judicial Handbook on Environmental Constitutionalism* (3rd edn UNEP 2019).

6 A very early testimony of this turn in constitutional thinking was Christopher Stone, 'Should Trees have Standing? Towards Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 459 et seq.

7 Efforts to constitutionalise specifically climate concerns and protection are referred to as 'climate constitutionalism'. See e.g. Navraj Singh Ghaleigh, Joana Setzer, Asanga Welikala, 'The Complexities of Comparative Climate Constitutionalism' (2022) 34(3) *Journal of Environmental Law* 517.

8 Such commitment is unavoidably contextually nuanced and may be expressed in constitutional texts explicitly (e.g. Art. 1 of the Polish Constitution - *dobro wspólne*, for English

ignoring the absence of constitutional safeguards against failures of public authorities, including the legislator, to protect the natural preconditions for all life on earth. Moreover, even where the legislature had enacted appropriate rules for the protection of the environment, these risked (and still risk) remaining unapplied if in a particular case they came into conflict with a constitutionally protected individual right, such as the right to property. While until the mid-1970s the majorities needed for conveying a constitutional rank to environmental objectives were out of reach, the situation generally changed from the 1990s on. Moments of constitutional change gave rise to debating a fundamental right to a clean and healthy environment. By way of example, in Germany in 1994 a new Art. 20a was eventually incorporated into the Basic Law that obliges State authorities to at least care for the natural foundations of life.[9] More recently adopted constitutions of Central and Eastern European States have endorsed environmental protection[10] and provide for sustainable use of natural resources.[11] Whilst environmental protection is typically conceived as a duty of public authorities,[12] these constitutions also provide for a kind of general duty of care for the quality of the environment, including liability for causing its degradation.[13]

Constitutionalisation of environmental objectives, including environmental rights and duties, may also be observed at subnational,[14] supranational and

version see <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> accessed 4 May 2023) or more implicitly, e.g. where the limitation of constitutional (typically economic) freedoms should serve the general interest (*utilità generale* - Art. 41 of the Italian Constitution, <https://www.senato.it/istituzione/la-costituzione> accessed 4 May 2023), *Allgemeinwohl* - Art. 14(2) German Grundgesetz, <https://www.gesetze-im-internet.de/gg/BJNR000010949.html> accessed 4 May 2023). Wishing neither to embark on nor to embrace common-good constitutionalism as postulated by Adrian Vermeule (*Common Good Constitutionalism*, Polity Press 2022), let alone its critical interpretations (William Baude, Stephen E. Sachs 'The "Common-Good" Manifesto' (2023) 136(3) Harv. L. Rev. 861 and the literature cited therein), we do acknowledge that the concept entails a contradiction to an overly individualistic mindset of Western societies that 'resist the notion of a good that may be somehow shared' (Thomas O'Brien, 'Reconsidering the Common Good in a Business Context' (2009) 85 *Journal of Business Ethics*, Supplement 1: 14th Annual Vincentian International Conference on Justice for the Poor: A Global Business Ethics 25.

9 The protection was explicitly extended to animals in 2002 only.

10 See i.a. Art. 53-54 of the Lithuanian Constitution of 1992, Art. 53 of the Estonian Constitution of 1992, Art. 5 of Polish Constitution of 1997; English versions of the discussed constitutions available at < https://www.constituteproject.org/constitutions?lang=en&status=in_force&status=is_draft> accessed 4 May 2023.

11 E.g. Art. 54 and Art. 5 of the Lithuanian and Polish Constitutions, respectively.

12 Art. 54 of the Lithuanian Constitution, Art. 74 of Polish Constitution of 1997.

13 Art. 86 of Polish Constitution of 1997 reads: 'Everyone shall care for the quality of the environment and shall be held responsible for causing its degradation'. Cf. also Art. 53 of the Estonian Constitution which provides for the general 'duty to preserve' natural environment and compensate for damage caused to it.

14 May and Daly (n 5) 9 see this development (notably in the states in the Americas) as filling gaps in federal systems. On the endorsement of environmental concerns in the constitutions

international[15] levels. Despite their heterogeneity in legal terms, such developments may be embraced by the concept of environmental constitutionalism, asserting that it 'is playing an important role in recognizing the human rights implications of environmental degradation and climate disruption'.[16] Through that perspective, the constitutional dimension of the protection of nature would be reduced to a means to preserve human lives, dignity, health, housing, access to food and water, livelihood[17] and the respective generally recognized human rights. On the other hand, new concepts such as the rights of nature and an ecocentric approach are emerging in the debate. They tend to be put under the umbrella term 'environmental rights' even if the necessary procedural safeguards against duty bearers are not explicitly provided for. In effect, in the name of advancing ecological justice, environmental constitutionalism tends to shift the balance of power in favour of the judiciary, which not infrequently compensates for insufficient or lacking legislative instruments and procedures. In South America constitutional protection of nature was first achieved in 1992 by judge-made law, followed by courageous constitutional language in 2008 (see Section III on the emerging practice). Thus, it appears justified to have a closer look at how such emerging concepts of environmental rights are fitting with the theory and practice of legal reasoning and decision making.

From the outset the debate on the constitutional dimension of the protection of the natural environment developed under two different frames:

a) Along the lines of classical human rights doctrine, the idea of an individual fundamental right to enjoy a clean and healthy natural environment was developed and debated. It would find its ultimate justification in the idea of human dignity as a basis of rights[18] that, among other things, would enjoin human beings to have due respect for the natural environment common to all human beings. Being focused on the importance of a clean and healthy natural environment for mankind itself, this approach is characterised as

of the German regional entities (*Länder*), see e.g. Christian Calliess, 'Möglichkeiten und Grenzen eines "Klimaschutz durch Grundrechte" (Klimaklagen) - Zugleich ein Beitrag zum Vorschlag von Ferdinand von Schirach für ein Grundrecht auf Umweltschutz' (2021) 129 Berliner Online-Beiträge zum Europarecht 11; Ines Haertel, 'Klimaschutzverfassungsrecht: Klima-Staatszielbestimmungen im Föderalismus' (2020) 42 Natur und Recht 580 et seq.

15 See article 37 of the EU Charter of Fundamental Rights or the ECHR case law referred to below. It is noteworthy that the International Court of Justice is expected to examine climate protection State obligations following the request for an advisory opinion by General Assembly, resolution (A/77/L58) of 29 March 2023.

16 May and Daly (n 5) 8.

17 Cf ibid 12.

18 Alan Gewirth, 'Human Dignity as the Basis of Rights' in Michael J. Meyer and William A. Parent (eds), *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992) 10.

'anthropocentric'. In that sense, the right to a clean and healthy environment would be merely derivative from other human rights.[19] It is intended to serve both the proper realisation of the latter by the duty bearers (mainly, but not exclusively, States) and their full enjoyment (e.g. the right to health) by the rightsholders: humans.

b) Drawing on the findings of critical contemporary philosophy as well as reviving indigenous wisdom, the idea has been defended that nature should be considered as subject having rights of its own that must be respected by mankind. Were mankind to treat nature, of which it is an integral part, as a mere object, it would treat part of itself as a mere object, thereby denying its own dignity conceived in Kantian terms. This way of thinking is generally called 'ecocentric'. From that perspective, based on the intrinsic value and agency of the natural environment, the idea of its substantive rights may be postulated.[20]

Both frames of thought are represented in the practice of contemporary environmental constitutionalism. Based on the analysis of some salient examples, the paper proposes a tentative assessment of the respective consequences, advantages or disadvantages of these frames and the likelihood of their general acceptance and application.

III. Emerging Practice of Environmental Constitutionalism

The process of constitutionalising environmental protection may be channelled through various instruments and processes,[21] depending on the legal and social context in which it occurs. A critical review would have to look in the first place at how constitutional texts in the strict sense have developed since the awareness of environmental issues spread in contemporary societies. A second step would involve verifying what role courts and ordinary legislators play in advancing environmental concerns, notably their elevation to the rank of fundamental environmental rights.

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19 Michelle Scobie, 'Framing Environmental Human Rights in the Anthropocene' in Walter F. Baber and James R. May (eds), *Environmental Human Rights in the Anthropocene: Concepts, Contexts, and Challenges* (Cambridge University Press 2023) 12.

20 Catherine Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in Alan E Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press 1996) 71.

21 A comprehensive and very useful overview is provided by the United Nations Website 'Harmony with Nature: Rights of Nature Law and Policy' <http://www.harmonywithnatureun.org/rightsOfNature/> accessed 4 May 2023, through which many of the quoted sources are easily accessible.

1. Constituent Power in Action

At the beginning of the 1970s provisions on the protection of the environment were missing in European constitutions.[22] Discussions on incorporating a fundamental right to an environment (*Grundrecht auf eine menschenwürdige Umwelt*) gained attention in early 1970s German Federal Republic under a centre-left government.[23] In the debate the appropriateness of a subjective right was questioned as well as whether such a right should be conceived in an anthropocentric or ecocentric perspective.[24] The idea of a 'right of nature' was occasionally voiced, but never seriously taken into consideration.[25]

The majority required for modifying the constitution could be reached only ten years later in the context of the German unification. The compromise adopted in 1994 as new Article 20a of the German Basic Law (GG), avoids an explicit reference to the anthropocentric orientation as well as conveying any particular status to the protection of the environment.[26] Due to difficulties of precisely defining the scope (*Schutzbereich*) and rightsholders, the new provision, instead of the initially intended fundamental right, took the form of a constitutional norm addressed to public authority (*Staatszielbestimmung*)[27]: 'Mindful … of its responsibility towards future generations', German public authority is bound to 'protect the natural foundations of life and animals'.[28] However, debate did not end there, given that individuals risked not having access to justice if that

22 Peter Schiffauer, 'Überlegungen zur Kodifizierung der Grundrechte der Europäischen Gemeinschaften aus der Sicht der Grundrechtstheorie' (1981) 8(7-8) Europäische Grundrechte Zeitschrift 193.

23 Bettina Bock, *Umweltschutz im Spiegel von Verfassungsrecht und Verfassungspolitik* (Dunkker u. Humblot 1990) 13; Haertel (n 14) 577.

24 Johannes Rux, 'Art. 20a Grundgesetz' in Volker Epping, Christian Hillgruber (eds), *Beck'scher Online-Kommentar Grundgesetz* (54th edn Beck-Online 2023) Rn. 3.

25 Christian Calliess, 'Von den Grenzen eines Grundrechts auf Umweltschutz zum Staatsziel' in Günter Dürig, Roman Herzog, Rupert Scholz, Christian Calliess (eds), *Grundgesetz. Kommentar* (99. EL Beck Online 2022) Art. 20a Rn.16, n 6, quotes the following proposal from Peter Pernthaler: 'Mensch, Tiere, Pflanzen und unbelebte Natur haben das Recht auf eine würdige Existenz in ihrem angestammten Lebensbereich, auf Erhaltung und Pflege ihrer Existenzgrundlagen, auf Erhaltung von Artenreichtum und Vielfalt.' See: Peter Pernthaler, in Peter Pernthaler, Karl Weber, Norbert Wimmer, *Umweltpolitik durch Recht – Möglichkeiten und Grenzen* (Manz 1992).

26 Rux (n 24) Rn. 3-4.

27 Calliess (n 25) Rn. 10-18.

28 See original version: 'Der Staat schützt auch in Verantwortung für die künftigen Generationen die natürlichen Lebensgrundlagen und die Tiere im Rahmen der verfassungsmäßigen Ordnung durch die Gesetzgebung und nach Maßgabe von Gesetz und Recht durch die vollziehende Gewalt und die Rechtsprechung.' English translation provided by the Federal Ministry of Justice and Consumer Protection and the Federal Office of Justice <www.gesetze-im-internet.de> accessed 4 May 2023.

obligation was not respected. Legal doctrine has therefore proposed that the right to a healthy environment should be guaranteed through procedural rights such as rights to information, participation in administrative procedures and effective access to justice.[29]

Interestingly, an appropriate legal remedy was created not by a constitutional amendment, but by the case law of the Federal Constitutional Court (FCC). With the order of 24 March 2021 the FCC[30] on the one hand denied a standing to environmental associations as 'advocates of nature', but on the other hand affirmed that the individual fundamental right protecting life and physical integrity under Art. 2(2) first sentence of the GG encompasses protection against impairments caused by environmental pollution, regardless of who or what circumstances are the source of the impairment.[31] This means that in case of shortcomings in the environment protection law, individuals may bring a constitutional complaint to the FCC with the argument that the legislature has not complied with its obligations under Article 20a GG. Moreover, this would not necessarily require that concrete damage to their physical integrity have already occurred. In the said order the FCC, qualifying fundamental rights as 'intertemporal guarantees of freedom', found that a complaint could also be justified when the legislative shortcomings have 'an advance interference-like effect' (*eingriffsähnliche Vorwirkung*) on the freedom comprehensively protected by the GG. Thus, the practical consequences of the FCC case law are coming close to the mentioned proposal by Callies, being understood that a correction of a failure of the democratic process through judicial review will be likely only in cases of a severe impact on individual rights.

Developments towards constitutionalising environmental protection can be observed in most other European countries as well as at the level of the European Union and the ECtHR case law. The frontrunners were States that adopted new constitutions after overcoming authoritarian regimes: article 24 of the constitution of Greece (1975), article 66 of the constitution of Portugal (1976), article 45 of

29 'Jeder Mensch hat das Recht auf eine saubere und gesunde Umwelt, sowie deren Erhaltung und Schutz. Dieses wird durch Rechte auf Information, Beteiligung im Verwaltungsverfahren und effektiven Zugang zum Gericht gewährleistet', Callies (n 14) 24. A first step in that direction was achieved in the Aarhus Convention of 25 June 1998 on access to information, public participation in decision-making and access to justice in environmental measures which the EU has subsequently implemented by adopting Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (OJ L 41, 14.2.2003, p. 26–32).

30 BVerfG, 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.

31 An English version of the order and of a press release referring to it are available respectively at <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html;jsessionid=4F4C39895C33C1527802A5664766BB82.internet972> and <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html> both accessed 4 May 2023.

the constitution of Spain (1978). Currently the constitutions of all EU member States but three (Denmark, Ireland, Cyprus) contain programmatic provisions on environment protection; thirteen of them provide for a fundamental right and seven of them even for a fundamental obligation for everybody to protect the environment.[32] All constitutional developments in Europe, however, stopped short of codifying a genuine 'right of nature'.

The Swiss Constitution of 29 May 1874 contained merely isolated provisions on the protection of animals or waters until the Referendum of 6 June 1971 incorporated Article 24f (now Article 74 of the Constitution of 18 April 1999[33]) which obliges the Federation to protect people and their natural environment from harmful or annoying influences. Unlike the German FCC, the Swiss Supreme Court, however, denied individual protection with regard to alleged shortcomings of the Swiss law on climate protection. The plaintiffs are now bringing their case to the ECtHR.[34]

In France the Charter of the Environment[35] enshrines with constitutional rank everybody's right to live in a balanced and healthy environment (Art. 1) and to access relevant information thereon (Art. 7) as well as their corresponding obligations to protect and improve the environment, as far as provided for by the Law (Articles 2-4). Public authorities are obliged to apply the precautionary principle (Art. 5) and promote sustainable development by reconciling the protection and improvement of the environment, economic development and social progress (Art. 6). In the current state of the case law, the scope of the provisions of the Charter does not appear uniform. Although the *Conseil dÉtat* allows an applicant to invoke the provisions of the Charter to request the annulment of an administrative act, their applicability is not fully recognized by judges and the control carried out on their basis is hesitant.[36]

The most recent innovation in European environmental constitutionalism was achieved in Italy with the adoption of the constitutional law of 11 February

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32 Haertel (n 14) 586, n 96-98.

33 See original version: 'Art. 74. Umweltschutz (1) Der Bund erlässt Vorschriften über den Schutz des Menschen und seiner natürlichen Umwelt vor schädlichen oder lästigen Einwirkungen. (2) Er sorgt dafür, dass solche Einwirkungen vermieden werden. Die Kosten der Vermeidung und Beseitigung tragen die Verursacher. (3) Für den Vollzug der Vorschriften sind die Kantone zuständig, soweit das Gesetz ihn nicht dem Bund vorbehält.'

34 Luigi Jorio, 'Is the climate crisis a threat to human rights?' (4 December 2020) SWI swissinfo.ch <https://www.swissinfo.ch/eng/business/is-the-climate-crisis-a-threat-to-human-rights-/46194344> accessed 4 May 2023.

35 Loi n° 2005-205 du 1er mars 2005 relative à la Charte de l'environnement (JUSX0300069L).

36 Meryem Deffairi, 'La portée constitutionnelle des dispositions de la Charte de l'environnement', No 8 April 2022, <https://www.conseil-constitutionnel.fr/publications/titre-vii/la-portee-constitutionnelle-des-dispositions-de-la-charte-de-l-environnement> accessed 4 May 2023.

2022, amending Art. 9 and 41 of the Italian constitution. While the provision added to Art. 9 of the Italian constitution[37] refers to the duty of the Republic to protect the environment, also in the interest of the coming generations (in a very similar manner as Art. 20a of the German GG), it is innovative insofar as by explicitly protecting biodiversity and ecosystems it could be understood as expressing a conceptual shift towards a moderate and balanced ecocentrism. Moreover, the amendment to Art. 41[38] is noteworthy in that it makes it clear that private and free economic activity must not be detrimental to health and the environment as integral aspects of human dignity. Evidently, no case law regarding the new provisions can be reported yet. But it would be surprising if the Italian Constitutional Court would not find the procedural means to give them effect.

At the supranational level, the EU Charter of Fundamental Rights which was agreed by a Convention in 2000, but legally enforced only with the entry into force of the Lisbon Treaty on 1 December 2009, falls short of granting individuals the right to a clean and healthy environment.[39] Its Art. 37 does not go beyond the obligation of EU decision makers to integrate a high level of environmental protection and the improvement of the quality of the environment into the policies of the Union, in accordance with the principle of sustainable development. The meaning of these requirements has not been concretised yet by the Court of Justice of the European Union, which for the time being has only confirmed that acts of the Union legislator could be declared invalid if not complying with those requirements.[40]

The European Convention on Human Rights (ECHR) does not explicitly recognize an individual right to a clean and healthy environment. Case law of the ECtHR has considered severe ecological damage as infringement of the right to

37 See original version: '[La Repubblica] Tutela l'ambiente, la biodiversità e gli ecosistemi, anche nell'interesse delle future generazioni. La legge dello Stato disciplina i modi e le forme di tutela degli animali.'

38 See original version: '[L'iniziativa economica] Non può svolgersi in contrasto con l'utilità sociale o in modo da recare danno alla sicurezza, alla libertà, alla dignità umana, *alla salute, all'ambiente*.' (The words in italics were added by the 2022 constitutional amendment).

39 Bernhard W. Wegener, 'Grundrechte Charta Art. 37 Umweltschutz' in Hans von der Groeben, Jürgen Schwarze, Armin Hatje (eds), *Europäisches Unionsrecht* (7th edn Beck Online 2015) Rn.1.

40 Judgement of 21 December 2016 'Onius' ECLI:EU:C:2016:978, Rn. 62; see also Christian Callies,c'EU-Grundrechtecharta Art. 37' in Christian Calliess, Matthias Ruffert (eds), *EUV/AEUV Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar*' (6th edn Beck On-line 2022) Rn. 6-8.

physical integrity.[41] A pending case (Swiss Seniorinnen) might bring clarification on the Court's position regarding the impact of climate risks on that right.[42]

Outside of Europe, the picture is less homogeneous. Some States have adopted constitutional guarantees for environment and climate protection: Côte d'Ivoire, Dominican Republic, Ecuador, Thailand, Tunisia, Venezuela, Vietnam.[43] The most telling example is the 2008 Constitution of Ecuador. Referring to the millenarian roots, diverse wisdoms and religions of the human beings that constitute the sovereign people of Ecuador, the preamble expresses the will of the latter to establish a new way of citizens living together, in diversity and harmony with nature,[44] which, in the words of the Constitutional Court, is based on 'an intercultural convergence of the knowledge of the indigenous peoples with modern occidental science'.[45] Art. 10 of the Constitution conceives nature as a subject of constitutionally guaranteed rights which, according to Art. 11, are to be implemented by all authorities of the State, including the judiciary. These rights are subsequently spelled out in detail in chapter seven on rights of nature (*Derechos de la naturaleza*, Art. 71-74). Based on such explicit texts, the country's Constitutional Court in the said judgement could overrule without major hermeneutic efforts the arguments that contested the application of those rights by the judiciary which had been advanced in doctrine and by lower courts.[46] The Court was aware that it would be difficult to understand Ecuador's constitutional choice 'from a strictly anthropocentric perspective which conceives the human being as the species with the highest value'.[47] Reporting judge Jiménez qualified this choice to be 'a change of paradigm since throughout its history the law had

41 E.g. ECtHR judgement of 8.7.2003, case Nr. 36 022/97 – *Hatton v. United Kingdom*. For discussion, see Sebastian Heselhaus, Thilo Marauhn, 'Strassburger Springprozession zum Schutz der Umwelt. Ökologische Menschenrechte nach den Hatton-Entscheidungen des Europäischen Gerichtshofes für Menschenrechte' (2005) 32(19-21) Europäische Grundrechte Zeitschrift 549.

42 Evelyne Schmid, 'Victim Status before the ECtHR in Cases of Alleged Omissions: The Swiss Climate Case' (30 April 2022) EJIL:Talk! <ejiltalk.org/victim-status-before-the-ecthr-in-cases-of-alleged-omissions-the-swiss-climate-case/> accessed 4 May 2023.

43 Haertel (n 14) 585et seq. n 87-94; United Nations 2022 (n 21).

44 See original version: 'Una nueva forma de convivencia ciudadana, en diversidad y armonía con la naturaleza' - translation by the authors.

45 See original version: 'una convergencia intercultural de los saberes de los pueblos indígenas y la ciencia occidental moderna' - translation by the authors. Sentencia No. 1149-19-JP/21,10 *Los Cedros* de noviembre de 2021, Rn. 29.

46 See also judgement of 8 September 2021 regarding mangrove ecosystems. Gustavo Prieto, 'The Los Cedros Forest has Rights: The Ecuadorian Constitutional Court Affirms the Rights of Nature' (2021/12/10) *VerfBlog* <https://verfassungsblog.de/the-los-cedros-forest-has-rights/> accessed 4 May 2023.

47 See original version: 'La valoración intrínseca de la naturaleza mediante el reconocimiento de derechos es difícil de entender desde una perspectiva rígidamente antropocéntrica, la cual concibe al ser humano como la especie más valiosa' Rn. 48 - translation by the authors.

the function to instrumentalise, appropriate and exploit nature as mere natural resource'[48].

The constitutional choice of the people of Ecuador is clearly outstanding in its attempt to free the constitutional dimension of environmental care from its anthropocentric logic. Even if it sets a worthy example for all mankind, its immediate contagious effect can seriously be doubted. Up to now, only the Chilean constitutional convention agreed on provisions of the same kind, but its proposal for a new constitution was rejected by the Chilean people in 2022. Moreover, it seems as if it is still an open question whether the case law of Ecuador's constitutional court will hold. It has been observed that the case law does not uniformly answer the question who concretely is the subject of the constitutional rights: nature as a whole, or individual natural entities such as forests, rivers, etc.[49] Moreover, a strict interpretation of the precautionary principle as retained by the Ecuadorian court would mean that in future anyone undertaking an economic project would have to scientifically prove that it would not produce environmental damage. This would put courts in the position of ultimate evaluators of scientific evidence and expose the country to litigation based on investment protection clauses in trade agreements.[50] Diverging decisions of lower courts have been reported in the meantime.[51] Future case law may satisfactorily address technical legal issues and find balanced solutions, albeit at the expense of the principled radicalism of *Los Cedros*, but the question remains whether the Ecuadorian approach is fully coherent. Building the legal personality of nature on the idea of *Pacha Mama*, shared amongst indigenous peoples of Southern America, the Ecuadorian constituent power makes a literal use of what in the ancient traditions is one of the metaphors that – in contrast to abstract principles – guide human beings in their interactions with the surrounding world. While the indigenous wisdom of conceiving all of nature and its multiple ecosystems as living entities is even more valid at present times of ecological crisis, it can be doubted whether translating it into the subject-object dichotomy of legal relationships is an appropriate means of dignifying its intrinsic value and agency in the sustaining of life in general. Such subject-object relationships – as Judge Jiménez rightly pointed out – were always functional to human self-interest. In order to sort out a balanced way forward, a closer look may be useful at how –

48 See original version: 'Se trata de un cambio de paradigma jurídico porque históricamente el Derecho ha sido funcional a la instrumentalización, apropiación y explotación de la naturaleza como un mero recurso natural' Rn. 52 – translation by the authors.

49 Prieto (n 46).

50 Ibid.

51 Lena Koehn, Julia Nassl, 'Judicial Backlash Against the Rights of Nature in Ecuador: The Constitutional Precedent of Los Cedros Disputed' (2023/4/27) *VerfBlog* <https://verfassungsblog.de/judicial-backlash-against-the-rights-of-nature-inecuador/> accessed 4 May 2023.

independently of any constitutional pathos - courts all over the world have tried to strike ecological justice.

2. Case law trajectories to ecological justice

Independently from the controversial question whether or not the described constitutional innovations constitute effective safeguards for a healthy natural environment, in many parts of the world constitutional change was out of reach, at least through the formal constitutional amendment process. In the absence of normative texts vested with constitutional authority, the judiciary was faced with the challenge of compensating on legal grounds the underperformance of more or less democratically legitimate political authority.

Courts in the Netherlands have early shown awareness of the need to protect the natural environment. A judgement of 10 September 1986 by the Rechtbank Den Haag,[52] applying the principles of Dutch tort law, concluded from the joint dependency of the riparians of a body of water that private water users have a duty of care to ensure that the riparian communities living downstream have appropriate opportunities for use of water. In effect, the Court's legal view resulted in a strict, no-fault liability for those who discharged toxic or polluting substances into a body of water. A similar line of reasoning was taken up again more than 30 years later by the Rechtbank Den Haag with regard to CO2 emissions.[53]

In 2015 litigation was initiated on the question of whether the State is obliged to reduce, by the end of 2020, the emission of greenhouse gases originating from Dutch soil by at least 25% compared to 1990, and whether the courts can order the State to do so. That litigation was concluded with the judgement of 20 December 2019 by the Hoge Raad (Dutch Supreme Court[54]), confirming that the Dutch government has obligations to urgently and significantly reduce emissions in line with its human rights obligations. Such obligations are based on Art. 2 ECHR protecting the right to life, and Art. 8 ECHR protecting the right to respect for private and family life. According the established ECHR case law, these provisions oblige a contracting state to take suitable measures if a real and

52 *Tijds chr. v. Aansprakelijkheid*, TMA/ELLQ 1 (1987) p. 15.

53 For discussion see: Izabela Jędrzejowska-Schiffauer, Peter Schiffauer, 'Sorge über den Fluss: Menschliche (Un-) Tätigkeit und die ökologische Katastrophe der Oder' (2022/9/06) *VerfBlog* <https://verfassungsblog.de/sorge-uber-den-fluss/> accessed 4 May 2023. On strict liability of private actors under EU law, see Izabela Jędrzejowska-Schiffauer, 'Business Responsibility for Human Rights Impact under the UN Guiding Principles: At Odds with European Union Law?' (2021) 46 *European Law Review* 481.

54 ECLI:NL:HR:2019:2007, *Urgenda* Climate Case. English version of the judgement is available at <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2019:2007> accessed 4 May 2023.

immediate risk to people's lives or welfare exists and the state is aware of that risk. The Hoge Raad holds that the same obligation applies when it comes to environmental hazards that threaten large groups or the population as a whole, even if the hazards will only materialise over the long term. Moreover, the court finds itself bound to grant legal effective protection because according to Art. 13 ECHR national law must offer an effective legal remedy against a violation or imminent violation of the rights that are safeguarded by the ECHR.

The argument that a duty to protect the environment can be based on human rights obligations flowing from the ECHR was upheld in the abovementioned judgement of 26 May 2021 by the Rechtbank Den Haag.[55] The interesting aspect of that judgement is that it extends the duty to protect the environment to private (commercial) actors, granting individuals or environmental organisations remedy under tort law. The court interprets the unwritten standard of care from the applicable Dutch Civil Code (Book 6 Section 162) on the basis of the relevant facts and circumstances, the best available science on dangerous climate change and how to manage it, and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights. Such interpretation shows a kind of environmental constitutionalism reaching beyond the literal text of the national constitution. The legal text crucial for the court's ruling, a general clause of civil law, in substance refers to recognized and shared standards, in other words to aspects of the actual constitution of the society.

In Columbia the Constitutional Court in its judgement No T-411/92 of 17 June 1992, referring to 34 provisions of the constitution that came into force in 1991, developed the concept of an 'ecological constitution' (*Constitución Ecológica*). As the main pillars thereof, the Court highlights the obligation of the State and of individuals to protect the cultural and natural wealth of the Nation (Art. 8),[56] the ecologic function which is inherent to the social function and to the obligations implied by property (Art. 58)[57] and the duty of everybody to protect the cultural and natural resources of the country and take care for the conservation of a healthy environment (Art. 95-8).[58] Building on the concept of 'ecological

55 *Milieudefensie v. Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5339. English version of the judgement is available at < https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5339> accessed 4 May 2023.

56 See original text available at <https://www.corteconstitucional.gov.co/relatoria/1992/T-411-92.htm> accessed 4 May 2023: 'obligación del Estado y de las personas proteger las riquezas culturales y naturales de la Nación.'

57 See original text: 'La propiedad es una función social que implica obligaciones. Como tal le es inherente una función ecológica' – translation by the authors.

58 See original text: 'Son deberes de la persona y del ciudadano: … Proteger los recursos culturales y naturales del país y velar por la conservación de un ambiente sano'– translation by the authors.

constitution', the same Court in its judgement of 10 November 2016 (T-622/16) asserted the concept of biocultural rights (*derechos bioculturales*) and recognised the entity of the Atrato river, its basin and tributaries as a legal subject entitled to protection, conservation, maintenance and restoration by the State and ethnic communities.[59] In the literature the attribution of constitutional rights to an entity of nature was hailed as a landmark decision that 'adopted, for the first time, an explicit ecocentric approach to environmental protection' and 'pushed the boundaries of constitutional law'.[60]

Due to globalisation and digitalisation, this courageous judgement has been duly noted and followed by similar case law all over the world. Societies became increasingly aware of the progressive destruction of the natural environment through the growth of population, poorly conceived technology and industrialisation, with democratic and non-democratic public authorities frequently failing to slow that process down. Under such circumstances the high judiciary, provided it is sufficiently independent from political powers, may step in and give expression to concerns widespread in the society. Thus, on 30 January 2019 the High Court of Bangladesh recognised the river Turag as a living entity with legal rights and held that the same would apply to all rivers in Bangladesh. The judgement was upheld by the Appellate Division of the Supreme Court on 17 February 2020.[61] The Constitutional Court of Guatemala, on 7 November 2019, rendered a verdict[62] recognizing the spiritual and cultural relationship between Indigenous People and acknowledging Water as a living entity. In Brazil the Superior Court of Justice in a judgement of 21 March 2019[63] based an ecological perspective on the principle of dignity of the human person and recognised non-human living beings as subject of rights. The judgement further addresses the need to change the Kantian anthropocentric paradigm and replace it with biocentric or ecocentric thinking, stressing the interconnectedness between human beings and Nature and also recognising Nature's intrinsic value. With

59 See original text available at <https://www.corteconstitucional.gov.co/relatoria/2016/t-622-16.htm> accessed 4 May 2023: V. Decisión, cuarto: 'Reconocer al río Atrato, su cuenca y afluentes como una entidad sujeto de derechos a la protección, conservación, mantenimiento y restauración a cargo del Estado y las comunidades étnicas' – translation by the authors.

60 Welsche (n 4) 538 et seq.

61 Writ Petition № 13989. See also Maria Clara Maffei 'Legal Personality for Nature: From National to International Law' in Maurizio Arcari, Irini Papanicolopulu, Laura Pineschi, *Trends and Challenges in International Law: Selected Issues in Human Rights, Cultural Heritage, Environment and Sea* (Springer 2022) 213.

62 Expediente 452-2019 available at <http://138.94.255.164/Sentencias/843425.452-2019.pdf> accessed 4 May 2023.

63 Recurso Especial No 1.797.175, available at <https://ww2.stj.jus.br/websecstj/cgi/revista/REJ.cgi/ITA?seq=1806039&t> accessed 4 May 2023.

judgement of 6 February 2020 the Inter-American Court of Human Rights[64] confirmed the protection of Indigenous communities' property rights over their ancestral territories under Article 21 of the American Convention on Human Rights and of their rights to water, food, a healthy environment and cultural identity under Article 26. In India, on 19 April 2022 the Madras High Court[65] declared Mother Nature as a Living Being – many other High Court judgements follow a similar line.

These impressive developments give rise to the question whether and to which extent they constitute a significant breakthrough in to-date-prevalent anthropocentric approaches to environmental protection. A closer look at the arguments developed on the 397 pages of the extremely well-reasoned judgement of 10 November 2016 by the Colombian Constitutional Court may, however, induce a more nuanced assessment. The biocultural rights as understood and affirmed by the Court[66] were conceivable within the well-established concept of 'ecological constitution', taking a standpoint which the Court qualified as holistic[67] and 'ecocentric'.[68] Such biocultural rights would have been alone sufficient legal grounds for justifying the five concrete orders and two admonishments[69] that the Court addressed to the distinct public authorities and ethnic communities with a view to resolve the complex task of safeguarding the

64 *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) Vs. Argentina* available under <https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_esp.pdf > accessed 5 May 2023.

65 W.P.(MD) Nos.18636 of 2013 and 3070 of 2020, available at <http://files.harmonywithnatureun.org/uploads/upload1274.pdf> accessed 5 May 2023; additional references available at <http://www.harmonywithnatureun.org/rightsOfNature/> accessed 5 May 2023.

66 '… the so-called biocultural rights, in their simplest definition, refer to the rights of ethnic communities to autonomously **administer and exercise guardianship** over their territories – in accordance with their own laws and customs - and over the natural resources that make up their habitat, where their culture, traditions and *form of life* are developing on the basis of the special relationship they have with the environment and biodiversity. In effect, these rights result from the recognition of the profound and intrinsic connection that exists between nature, its resources and the culture of the ethnic and indigenous communities that inhabit them, which are interdependent and cannot be understood in isolation' (Paragraph 5.11) – translation by the authors.
The original text (see n 59) reads : '… los denominados derechos bioculturales, en su definición más simple, hacen referencia a los derechos que tienen las comunidades étnicas a **administrar y a ejercer tutela** de manera autónoma sobre sus territorios -de acuerdo con sus propias leyes, costumbres- y los recursos naturales que conforman su hábitat, en donde se desarrolla su cultura, sus tradiciones y su forma de vida con base en la especial relación que tienen con el medio ambiente y la biodiversidad. En efecto, estos derechos resultan del reconocimiento de la profunda e intrínseca conexión que existe entre la naturaleza, sus recursos y la cultura de las comunidades étnicas e indígenas que los habitan, los cuales son interdependientes entre sí y no pueden comprenderse aisladamente.'

67 See paragraph 5.13 and footnote 94 of the judgement.

68 See paragraph 5.9 of the judgement.

69 See part 'V. Decisión, Quinto – Decimo Primero' of the judgement.

Atrato river ecosystem. The recognition of constitutional rights of that ecosystem was somehow a surplus that deployed scarce legal effects besides conferring the joint guardianship – that is, its legal representation – to the Colombian State and the ethnic communities that inhabit the Atrato river basin.[70] Even the effects of such representation could have been achieved otherwise, for instance by granting rights of legal standing and requirements for public administration to proceed with the consent of the indigenous communities. The value of the innovation may rather be found in its persuasive force. Alike in archaic or indigenous traditions, the personification of nature is a forceful metaphor that commands human compliance perhaps with more strength than legal norms ever can. It therefore has a legitimate place in the context of environmental constitutionalism – as long as those who apply the law do not forget about its metaphoric dimension and consider granting nature legal subjectivity as panacea against destruction of the environment by humanity. By doing so, nature would remain subsumed to the subject-object dichotomy of legal relationships. Due to the legal form, rights of nature would continue to conflict with contrasting interests of other legal subjects, be subject to the balancing of interests in accordance with the principle of proportionality and thus remain imprisoned in anthropocentric structures of thought and agency. This is why the concept of biocultural rights, understood from an ecocentric perspective, appears to be more far-reaching than only attributing legal personality to nature.

3. Legislative Attempts

In contrast to examples of poor legislative performance in the field of environment protection, some recent developments in countries moving towards environmental constitutionalism through committed pieces of legislation merit notice. Their scope ranges from regionally limited measures such as granting a natural entity the legal status of a person (the *Whanganui* River in New Zealand[71]) to granting such status to *Madre Tierra* (Bolivia's Ley Nr. 071 of 21 December 2010[72]) or making effort to set in motion a comprehensive program for a sustainable form of life.

70 See paragraph 9.32 of the judgement for original text: '… la Corte dispondrá que el Estado colombiano ejerza la tutoría y representación legal de los derechos del río en conjunto con las comunidades étnicas que habitan en la cuenca del río Atrato'.

71 Public Act 2017 No. 7 of 20 March 2017, Te Awa Tupua (Whanganui River Claims Settlement) Act.

72 Available at <http://www.planificacion.gob.bo/uploads/marco-legal/Ley%20N°%20071%20DERECHOS%20DE%20LA%20MADRE%20TIERRA.pdf> accessed 5 May 2023.

Such a program is embedded in Bolivia's Ley Nr. 300 of 15 October 2012.[73] It aims at establishing 'the vision and foundations of integral development in harmony and balance with Mother Earth to Live Well'.[74] It conceives *Madre Tierra*[75] as dynamic living system consisting of the indivisible community of all life systems and living beings which are interrelated, interdependent, complementary and share a common destiny. It aims at *Vivir Bien*,[76] understood as an alternative civilizational and cultural horizon to capitalism and modernity, that is born in the worldviews of nations and rural communities of indigenous origin and of intercultural and Afro-Bolivian communities, and is conceived in the context of inter-culturality. The entire law has the character of the substantive constitution of a State where the civilisation and the economy no longer treat nature as an object (or *res* in the sense of Roman law), clearly and deliberately distancing itself from the occidental way of life. From the perspective of the latter, this text would rather appear as utopic and the fact that it was adopted in the form of law and not of a constitution may give rise to some doubts as to the majorities that were in support of it.

Other examples of environmental constitutionalism manifested by national legislators are the Uganda National Environment Act of February 2019 that recognizes Nature's fundamental rights to be, evolve and regenerate, or Australia's Great Ocean Road and Environs Protection Act of 16 June 2020 that recognizes the Great Ocean Road as 'one living and integrated natural entity' (section 1 (a)). In the same vein, Panama's law No. 287 of 24 February 2022[77] recognises in its first article Nature as a subject of rights and concretises the rights of nature and the obligations of the State authorities to protect and respect these rights with the assistance of the citizenry (Art. 6). The law considers the interest of Nature as superior in principle, due to its vulnerability through human activity, and it

73 Available at <https://mineria.gob.bo/juridica/20121015-11-39-39.pdf> accessed 5 May 2023.

74 See original text: 'Artículo 1. La presente Ley tiene por objeto establecer la visión y los fundamentos del desarrollo integral en armonía y equilibrio con la Madre Tierra para Vivir Bien, garantizando la continuidad de la capacidad de regeneración de los componentes y sistemas de vida de la Madre Tierra, …'.

75 See original text: 'Artículo 5.1: Es el horizonte civilizatorio y cultural alternativo al capitalismo y a la modernidad que nace en las cosmovisiones de las naciones y pueblos indígena originario campesinos, y las comunidades interculturales y afrobolivianas, y es concebido en el contexto de la interculturalidad.'

76 See original text: 'Artículo 5.2: Es el sistema viviente dinámico conformado por la comunidad indivisible de todos los sistemas de vida y los seres vivos, interrelacionados, interdependientes y complementarios, que comparten un destino común.'

77 Ley que reconoce los Derechos de la Naturaleza y las Obligaciones del Estado relacionadas con estos Derechos, Gaceta Oficial Digital No. 29484-A, jueves 24 de febrero de 2022 <https://www.gacetaoficial.gob.pa/pdfTemp/29484_A/GacetaNo_29484a_20220224.pdf> accessed 5 May 2023.

establishes '*in dubio pro* natura' and '*in dubio pro* aqua' as maxims for administrative and judicial authorities (Art. 8).

In several other countries national legislation on the Rights of Nature has been proposed, either with regard to Nature in general, as in Argentina (Proposal of 2020 for a national regulation on Rights of Nature[78]) and Peru (Proposal of 2 June 2022 of a Law recognizing Mother Nature, the ecosystems and the species as subjects of rights[79]), or with regard to distinct ecosystems, as in Canada (Bill C-271 aiming at giving legal capacity to the St. Lawrence River, examined on 5 May 2022 in first reading by the House of Commons of Canada[80]).

The first measure of this kind adopted in Europe is the Spanish Law 19 of 30 September 2022[81] which confers legal personality to the lagoon of Mar Menor in the province of Murcia. In contrast to the southern hemisphere, where the personalisation of nature could be linked with indigenous tradition and contribute to better integrate the society, in the European legal systems since Roman times nature is treated as *res*, as possible object of property rights and at the disposal of mankind. Against such backdrop personalisation of nature is an unprecedented step. It is all the more interesting to examine what the concrete legal effects of such change are.

The law 19/2022 links to the legal person of the lagoon of Mar Menor (Art. 1) the rights to exist and naturally evolve (Art. 2), to be protected notably against activities potentially detrimental to its ecosystem (2a), to be entitled to actions preserving terrestrial and marine species and habitats (2b) as well as to repair actions, which restore natural dynamics and resilience once damage has occurred (2c). Representatives of public authorities, of the citizenry of waterfront communities and a scientific committee are entrusted with the legal person's guardianship (Art. 3), while everybody is given a standing to assert rights and prohibitions of the law at Court or vis-à-vis the public administration (Art. 6). In case of any violation of a right established by it, the law stipulates that the responsible persons or authority are to be pursued and sanctioned in accordance with the provisions of criminal, civil, environmental and administrative law (Art. 4) while nullity is provided for of any act of the public authority that is found in

78 Proyecto Ley sobre la Protección de los Derechos de la Naturaleza <http://files.harmonywithnatureun.org/uploads/upload1037.pdf> accessed 5 May 2023.

79 Proyecto Ley que propone reconocer a la «madre naturaleza, los ecosistemas y las especies» como sujetos de derechos <http://files.harmonywithnatureun.org/uploads/upload1107.pdf> accessed 5 May 2023.

80 Available at <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-271/first-reading> accessed 5 May 2023.

81 Ley 19/2022 de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su Cuenca <https://www.miteco.gob.es/es/ministerio/servicios/participacion-publica/rd_desarrollo_parcial_ley_19_2022.aspx> accessed 5 May 2023.

contrast with the law (Art. 5). Finally, public authorities are instructed to take a number of policy measures to achieve the objectives of the law (Art. 7).

Bearing in mind that the Spanish parliament adopted the law 19/022 pursuant to article 149.1.23.a of the Constitution, making use of the exclusive competence of the State for basic legislation on environmental protection (Disposición final segunda), provisions having the legal effect of articles 2-7 described above could have also been adopted in the absence of the provision of Art. 1 in form of general environmental protection rules.[82] In that case, these provisions should have been worded differently, such as redrafting the rights of Art. 2 in form of prohibitions and obligations, replacing the guardianship in Art. 3 by the requirement of the public authorities acting in agreement with the citizens' representations and the scientific advice. It would even be unnecessary to change instructions addressed at the public authority in Art. 7. As to articles 4 and 5 of the law, it is questionable whether they have any legal value at all, since they provide for the obvious that any act of the public authority not in conformity with the law needs to be declared void. Moreover, Art. 4 does not stipulate other than the obligation of public authorities to pursue in accordance with the principle of legality any violations of the law with a view of them being sanctioned pursuant to penal, civil, administrative or environmental law as applicable. Insofar there are good reasons to share the doubts expressed by Marie-Christine Fuchs[83] about any real increase of environment protection, while her assumption that personalisation might turn out to belong to the realms of fetishism and legal utopias, is probably an exaggeration. Such considerations apply *mutatis mutandis* to all legislative action taken in recent years. In legislation as well as in constitutions and case law the same doubts come up: What is the effective added value of recognising personality to natural entities? In strictly legal terms, the personalisation of nature mostly does not have measurable effect that could not be achieved on other legal grounds.

The exception is the most far-reaching and coherent approach that is offered by the Bolivian Ley 300/2012. If that program became a reality and the Bolivian political class, society and economic actors were really successful in implementing its provisions, and if the rest of the world would let them do so, a new societal order could be expected to arise. Under such a changed societal paradigm the personification of nature would assume a meaning that is different from the understanding we develop in societies built on the law and structured through contradictory legal claims. By conceiving *Madre Tierra* and *Vivir Bien* as

82 Such an approach would also have avoided doubts about the state's competence, which has been challenged in a case brought to the Spanish Constitutional Court. See Marie-Christine Fuchs, 'Rights of Nature Reach Europe: The Mar Menor Case in Spain in the Light of Latin American Precedents' (2023/2/24) *VerfBlog* <https://verfassungsblog.de/rights-of-nature-reach-europe/> accessed 4 May 2023.

83 Ibid.

interdependent with and co-equal to all other rights (see Art. 4.1 of Ley 300) and prohibiting to commercialise natural processes and components of the Earth's life systems (Art. 4.2.), the personalised nature would cease to be a fictitious legal entity opposed to other legal and natural persons and everybody could feel appealed to identify as part of *Madre Tierra*.

Another interesting aspect can be drawn from the experience of the making of the Spanish law on the Mar Menor. In the Spanish parliament the bill was carried with the votes of all political parties but one (Vox), following a referendum that initiated and endorsed the bill with a large majority. One might ask why, despite such a broad political consensus, the representatives did not take equivalent action sooner. This casts a rather dim light on the capacity of democratic representative bodies to take decisive action for the protection of the environment. Apparently that consensus only came about once a large number of the citizenry in despair about the ongoing destruction of their habitat through its progressive commercialisation resolved to oppose it through the metaphor of personalising nature. Since it is the big number that counts in democracy,[84] addressing nature as a person can help build the majorities required for its protection.

IV. Concluding Remarks: Towards Reconciling the Anthropocentric and Ecocentric Frames

The idea of Nature as a subject of rights has a principled social context-dependent shortcoming: It is not apt to overcome the subject-object dichotomy, a stable feature of occidental tradition common to the Aristotelian concept of science, Roman law and Stoa philosophy, René Descartes and Immanuel Kant. When in that context Nature in its totality were to be declared a subject of law, its rights would continue to be perceived in conflict to those of other legal subjects, thus annihilating the advancement of a counter-perspective which construes human existence in itself as part of that very Nature.

Moreover, in contemporary legal thinking, the fiction of nature as a person and rightsholder has limited scope only. If Nature were genuinely recognised as rightsholder, a question arises what concrete legal attributes should it have and whether they should be on a par to that of human beings. Assuming yes, Nature would in the first place need to be represented in the democratic political institutions. But this conclusion for obvious reasons is not even drawn in the Constitution of Ecuador. While it most pathetically affirms the status of nature as

84 Thucydides, '431 BC, History of the Peloponnesian War', translated by Richard Crawley, book II chapter VI, Funeral Oration of Pericles, release date December 1, 2004, <https://www.gutenberg.org/cache/epub/7142/pg7142-images.html#link2HCH0006 > accessed 29 November 2023

holder of constitutional rights, it restricts the number of these rights to those to which it explicitly refers.

To avoid inadvertent contradictions, it would appear wiser to stick to the understanding of Law as an instrument of conflict avoidance and conflict settlement through institutionalised communication amongst human beings. The recognition of Nature as rightsholder has twofold practical consequences: First, human beings recognise that nature has a value in itself and is not only a means for their own purposes. Secondly, individuals are given access to justice for defending the intrinsic value of nature. Both consequences appear desirable, but neither of them requires perforce conferring on nature a legal status. Elevating the value of nature to a constitutional rank and granting individuals or associations legal standing to defend that value in judicial proceedings would appear sufficient to achieve the desired result. It would still be worthwhile to re-elaborate and divulge the indigenous wisdom and traditions of *Pacha Mama*, the metaphor representing nature as a living being. This could usefully contribute to developing in the citizenry the emotional readiness to respect nature's intrinsic value. The acceptance of that intrinsic value in the citizenry is essential. Notwithstanding the normativity of contemporary constitutions, their provisions risk remaining dead letters when not reflected in the consciousness of the citizenry. Taking instead the metaphor in a literal sense and transforming it into a legal tool does not seem very promising, unless accompanied with appropriate procedural safeguards and commensurate public policy.

To sum up, any attempt at reconciling the anthropocentric and ecocentric approaches to environmental protection should try to mitigate the inherent tensions that arise at the level of their conceptual foundations. The essential difference between these approaches is whether the starting point for construing the status of nature is human superiority or the intrinsic value of Nature. A reconciliation of the frames appears to be impossible as long as the prevailing understanding of human dignity implies the idea of the human being's superiority in relation to the rest of Nature. In occidental societies, and not only there, such ideas are deeply rooted and stabilised by religious narratives. A path to change would need to respect such sensitivities and, for example for the Christian tradition, review and relativise Genesis 1:28[85] by the teachings of Romans 8:19-23[86] or that of Saint Francis of Assisi. Minds may change as societies become more aware of the threats posed to them by large-scale phenomena (pollutants,

85 'Be fruitful and multiply and fill the earth and subdue it, and have dominion over the fish of the sea and over the birds of the heavens and over every living thing that moves on the earth.' English Standard Version 2016 <https://biblehub.com/genesis/1-28.htm> accessed 4 May 2023.

86 'And we know that for those who love God all things work together for good, for those who are called according to his purpose.' English Standard Version 2016 <https://biblehub.com/romans/8-28.htm> accessed 4 May 2023. See also Cherryl Hunt, David G. Horrell, Christopher Southgate, 'An Environmental Mantra? Ecological Interest in Romans 8:19–23 and a

waste, overpopulation). Reasonable proposals for pragmatic procedural remedies without transcending the anthropocentric frame have already been put forward in the relevant literature.[87] They could be reworded in more ecocentric terms such as: 'Everyone has the right to resist infringements on nature's intrinsic value and to live in a pollution-free and healthy environment. Everyone can demand its preservation and protection from public authorities and third parties. These rights are made effective by rights to information, participation in the administrative process and effective access to the court.' Such compromises would not overcome the conflict of interest between human fruition of the world as an object and defending the integrity of that world against massive human exploitation. They simply would channel procedures allowing to duly oppose the intrinsic value of nature to human impacts on the environment that are detrimental, unnecessary, quantitatively exaggerated, noxious or otherwise in contrast to human values. The question remains whether beyond such compromises there is a path to a more genuine form of ecocentric constitutionalism. In view of the foregoing analysis, that path will not be easily found. It will not be sufficient to glue mythic metaphors of Mother Nature on millennial concepts of subject-object dichotomy. The deep structures of contemporary thought would need to be changed. An example of a holistic thinking that could lead towards such a path is the reconstruction of the history of the concept of Nature by the philosopher Georg Picht.[88] He demonstrates how conceiving the role of human beings as a part of nature – as was still shared by pre-Socratic Heraclitus – went lost and was replaced with the subject-object structure through the Aristotelian concept of science, the prevalence of Roman law and the Stoa school of philosophy. After two millennia of the success of this way of thinking, confirmed by the achievements of science and technology, but also under the threat of human self-destruction through such technology, Picht has no illusion about romantic ideas of a return to the roots. He nevertheless raises the question whether an ecology of human life (*Humanökologie*)[89] is possible, conceiving human dignity as a part of, dependent on, conscious of and respectful towards the great ecosystem that we call Nature. In present times of dire environmental and climate change preoccupations, the immediate urgency of that question is reflected in the shifting patterns of environmental constitutionalism.

Modest Proposal for its Narrative Interpretation' (2008) 59(2) The Journal of Theological Studies 546.

87 'Everyone has the right to a clean and healthy environment, and to its preservation and protection. This is guaranteed by rights to information, participation in the administrative process and effective access to the court.' Callies (n 14) 24, original quote in German n 29.

88 Georg Picht, *Der Begriff der Natur und seine Geschichte* (Klett-Cotta 1989).

89 Georg Picht 'Ist Humanökologie möglich' in Eisenbart C (ed.) *Humanökologie und Frieden* (Klett-Cotta 1979), 14.

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