

Editorial: Nature's Day in Court. Rights of Nature and Access to Justice in Ecuador and Germany

By *Andreas Fischer-Lescano** and *Andreas Gutmann***

Apart from the corona crisis, climate and the environment are probably among the most debated topics in the legal discourse these days. Although neither serious environmental degradation nor civil society protests against it represent new phenomena, the topic has become the focus of public attention – not least due to high-profile civil society actors such as Fridays for Future.

In jurisprudence, the growing importance of environmental protection is reflected in the large number of lawsuits filed by civil society demanding better environmental protection. So-called climate lawsuits increasingly gain popularity in various places around the world. The famous Dutch Urgenda-case¹ is just one of many rulings that call governments for greater environmental protection.² Nevertheless, the number of cases in which courts reject climate action is likely to be even higher.³

Perhaps this outlook will change in the near future. In a landmark ruling earlier this year, the German Federal Constitutional Court obligated the state to take decisive action against climate change.⁴ The court based this on the civil liberties of future generations.

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1 Gerechtshof Den Haag, 9 October 2018, 200.178.245/01, ECLI:NL:GHDHA:2018:2591, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2591> (last accessed on 4 August 2021); see *Thomas Voland*, Zur Reichweite von Menschenrechten im Klimaschutz, *Neue Zeitschrift für Verwaltungsrecht* 38 (2019), pp. 114-120.

2 eg. Corte Constitucional República de Colombia, 10 November 2016, Rs. T-622/16; The Irish Supreme Court, 31 July 2020, Appeal No: 205/19; Rechtsbank Den Haag, 26 May 2021, C/09/571932 / HA ZA 19-379; for background see *Felix Ekardt*, Menschenrechte und Klimaschutz, *Rechtsphilosophie* 6 (2020), pp. 20-39; an (outdated) overview is provided by UNEP, The Status of Climate Change Litigation, <https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-aclitigation.pdf?sequence=1&isAllowed=y> (last accessed on 4 August 2021).

3 *Katja Gelinsky*, Book Review Wolfgang Kahl und Marc-Philippe Weller (eds.): Climate Change Litigation. A Handbook, *Juristenzeitung* 76 (2021), p. 572; eg. Verwaltungsgericht Berlin, 31 October 2019, 10 K 412/18; Schweizer Bundesgericht, 20 Mai 2020, 1C_37/2019.

4 Bundesverfassungsgericht Deutschland, 24 March 2021, 1 BvR 2656/18, English version at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html;jsessionid=FF46CC61E5FF047F3751830DEA3D16BD.1_cid386 (last accessed on 4 August 2021).

Scholars rightly criticized this decision for the fact that the court's extensive reasoning did not deal with legal instruments developed in the global South.⁵ The same lacuna can be found within jurisprudence. A recently published anthology on climate litigation sheds light on legal developments in nine countries, only one of them – Brazil – is located in the global South.⁶ This Western-oriented view is not only problematic because it excludes subaltern voices and therefore reproduces colonial epistemological structures. It also ignores interesting legal developments. At the same time, innovative concepts could be found precisely in legal systems located in the global South. The Colombian Supreme Court provides an auspicious example.⁷ It accepted the petition of a group of young people who had sued the government for inadequate protection of the Amazon rain forest, which plays a crucial role in the global climate. The court based its decision not only on the petitioners' human rights, but also made clear that future generations and the Amazonian region itself have a right to environmental protection.

A. Rights of Nature: A paradigm shift

In 2021, the year Christopher D. Stone, a brilliant scholar and bold advocate for nature, passed away,⁸ his most famous idea of granting rights to nature⁹ seems more vital than ever. Especially in various legal systems of the global South,¹⁰ the emergence of Rights of Nature (RoN) has been observed in the recent past.¹¹ Some authors even describe a global trend in this direction.¹² The declaration of natural assets worthy of special protection as

5 *Katja Gelinsky / Marie-Christine Fuchs*, Bitte noch mehr, <https://verfassungsblog.de/bitte-noch-mehr/> (last accessed on 4 August 2021).

6 *Wolfgang Kahl / Marc-Philippe Weller* (eds.), *Climate Change Litigation. A Handbook*, Oxford/Munich 2021.

7 Corte Suprema de Justicia República de Colombia, 5 März 2018, Rs. STC4360-2018.

8 *Emily Langer*, Christopher Stone, environmental scholar who championed fundamental rights of nature, dies at 83, https://www.washingtonpost.com/local/obituaries/christopher-stone-dead/2021/05/19/7641dd4a-b816-11eb-a5fe-bb49dc89a248_story.html (last accessed on 4 August 2021).

9 *Christopher D. Stone*, Should Trees Have Standing? Toward Legal Rights for Natural Objects, *Southern California Law Review* 45 (1972), pp. 450 et seqq.

10 This is highlighted by *Andreas Fischer-Lescano*, Natur als Rechtsperson: Konstellationen der Stellvertretung im Recht, *Zeitschrift für Umweltrecht* 29 (2018), p. 206.

11 For an overview see *Andreas Gutmann*, Hybride Rechtssubjektivität: Die Rechte der "Natur oder Pacha Mama" in der ecuadorianischen Verfassung von 2008, *Baden-Baden* 2021, pp. 88 et seqq.; *David R. Boyd*, Recognizing the Rights of Nature: Lofty Rhetoric or Legal Revolution, *Natural Resources & Environment Volume* 32 (2018), pp. 13 et seqq.; *Joshua C. Gellers*, Earth system law and the legal status of non-humans in the Anthropocene, *Earth System Governance* 7 (2021), pp. 4 et seqq.

12 *Guillaume Chapron / Yaffa Epstein / José Vicente López-Bao*, A rights revolution for nature, *Science* 363 (2019), pp. 1392 et seqq.; *Susan Emmenegger / Axel Tschentscher*, Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law, *The Georgetown International Environmental Law Review* 6 (1994), pp. 545 et seqq., noticed many years ago that International Law was moving towards RoN; cf. *Andreas Gutmann*, Der globale Trend zu Rechten der Natur:

legal subjects enables, for example, environmental protection associations to file appeals on their behalf and is intended to contribute to solving the pressing environmental problems of our time.¹³ The most decisive step towards RoN was taken in Ecuador, where the 2008 Constitution grants such rights to the whole of nature in Articles 10 (2), 71 (1) and 72.¹⁴

In Ecuador, "Nature or Pacha Mama" now has the constitutionally guaranteed right to have its existence and the maintenance of the reproduction of its life cycles respected (Art. 71(1)). In addition, it must be comprehensively restored¹⁵ in the event of damage (Art. 72). The use of the term Pacha Mama refers to indigenous thinking.¹⁶ Although the exact role that the indigenous movement played in the constituent process that led to the inclusion of RoN in the Constitution is disputed,¹⁷ it is clear that the Constitution calls for the recognition of indigenous thought.¹⁸

Entsteht ein dekoloniales und ökologisches Recht von unten?, in: Frank Adloff / Tanja Busse (eds.): *Welche Rechte braucht die Natur? Wege aus dem Artensterben*, Frankfurt am Main 2021, pp. 119 et seq., in press.

- 13 Laura Schimmöller, Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador, *Transnational Environmental Law* 9 (2020), p. 570; Jörg Leimbacher, *Die Rechte der Natur*, Basel 1988, p. 29 et seq.
- 14 English translation of the Constitution available at <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> (last accessed on 4 August 2021).
- 15 For the importance of restoration within a RoN framework see Linnea Luuppala, Rights-Based Restoration in Daniel Corrigan / Markku Oksanen (eds.), *Rights of Nature: A Re-examination*, London 2021, pp. 121 et seqq.
- 16 Andreas Gutmann, Pachamama as a Legal Person? Rights of Nature and Indigenous Thought in Ecuador, in Daniel Corrigan / Markku Oksanen (eds.), *Rights of Nature: A Re-examination*, London 2021, pp. 36 et seqq.
- 17 See Mihnea Tănăsescu, The rights of nature in Ecuador: the making of an idea, *International Journal of Environmental Studies* 70 (2013), pp. 846 et seqq.; Farith Simon Campaña, La naturaleza como sujeto de derechos en la Constitución ecuatoriana: la construcción de una categoría de interculturalidad, in: Liliana Estupiñán Achury / Claudia Storini / Rubén Martínez Dalmau / Fernando Antonio de Carvalho Dantas (eds.), *La naturaleza como sujeto de Derechos en el Constitucionalismo Democrático*, Bogotá 2019, pp. 299 et seqq.
- 18 Schimmöller, note 13, p. 577; Carolina Valladares / Rutgerd Boelens, Extractivism and the rights of nature: governmentality, 'convenient communities' and epistemic pacts in Ecuador, *Environmental Politics* 26 (2017), p. 1026; Rafi Youatt, Personhood and the Rights of Nature: The New Subjects of Contemporary Earth Politics, *International Political Sociology* 11 (2017), p. 50; at length Gutmann, note 11.

Although Ecuador is the only country to date that recognizes RoN in its Constitution, similar rights have been established in other countries¹⁹ through laws,²⁰ municipal acts,²¹ or court decisions.²²

B. Access to court as a touchstone

The issue of access to justice is one of the main concerns of the discussion on RoN. Stone's seminal article "Should Trees Have Standing"²³, which is still considered the most influential work on the subject,²⁴ bears this question in its title. Stone viewed RoN as a way to solve the problem of restrictions limiting legal actions against environmental damage. In Ecuador, the fact that, according to Art. 71 (2), 88 CRE, RoN can be claimed by any person in court, is one of its defining features. At the same time, the lack of access to justice remains an obstacle to environmental protection or animal welfare law in countries like Ger-

- 19 The website <http://www.harmonywithnatureun.org/rightsOfNature/> provides an overview over jurisdictions where RoN have been established or have been proposed (last accessed on 4 August 2021).
- 20 Eg. Bolivia: Ley N°071, Ley de Derechos de la Madre Tierra, 2010 and Ley N°300, Ley Marco de la Madre Tierra y del Desarrollo integral para Vivir bien, 2012, see *Diana Murcia Riaño*, Estudio de la cuestión en los ámbitos normativo y jurisprudencial, in: Adolfo Maldonado / Esperanza Martínez (eds.), *Una década con Derechos de la Naturaleza*, Quito 2019, p. 17, 59; New Zealand: Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; see *Schimmöller*, note 13, pp. 574 et seqq.; Uganda, The National Environment Act, 2019.
- 21 Various US-communities have recognized RoN, eg. Tamaqua Borough, Municipal Ordinance 2006, see *Mihnea Tănăsescu*, Environment, Political Representation and the Challenge of Rights, Houndmills, Basingstoke, Hampshire 2016, p. 108; *Gwendolyn J. Gordon*, Environmental Personhood, *Columbia Journal of Environmental Law* 43 (2018), p. 58; for a Canadian case see *Chloe Rose Stuart-ulin*, Quebec's Magpie River becomes first in Canada to be granted legal personhood, <https://www.nationalobserver.com/2021/02/24/news/quebecs-magpie-river-first-in-canada-granted-legal-personhood> (last accessed on 4 August 2021).
- 22 Corte Constitucional República de Colombia, 10 November 2016, Rs. T-622/16; Corte Suprema de Justicia República de Colombia, 5 March 2018, Rs. STC4360-2018; High Court of Uttarakhand at Nainital, 30 March 2017, Rs. Writ Petition (PIL) No.140 of 2015; High Court of Uttarakhand at Nainital, 20 March 2017; High Court of Punjab and Haryana at Chandigarh, 02 March 2020, Rs. CWP No.18253 of 2009 & other connected petitions.
- 23 *Stone*, note 9, p. 450.
- 24 Cf. *Lidia Cano Pecharroman*, Rights of Nature: Rivers That Can Stand in Court, *Resources* 7 (2018), p. 1; Stone's work also played an important role in the Ecuadorian constituent assembly, see *Mario Melo / Natalia Greene / Francisco Puente*, Experiencia: Reconocimiento de los Derechos de la Naturaleza en la Constitución Ecuatoriana, Quito 2010, p. 6; *Maria Akchurin*, Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador, *Law & Social Inquiry* 40 (2015), p. 952; *Markku Oksanen / Anne Kumpula*, Close Reading Stone: Investigating the Seminal Article, in: Daniel Corrigan / Markku Oksanen (eds.), *Rights of Nature: A Re-examination*, London 2021, pp. 176 et seqq.

many.²⁵ Even in cases where the violation of environmental regulations is obvious, access to justice may be impossible.

This special issue addresses various aspects of access to justice for natural entities. The question of access to justice essentially determines whether and in what way social conflicts can be handled legally. This requires considerable translation effort on the part of the parties involved. The parties to the conflict must formulate their positions in such a way that they can be dealt with in court proceedings.²⁶

C. Unequal global setting

RoN arise in a global context that is not free of power relations. On the one hand, it is evident, especially since “climate justice” has become an important demand of the climate strike movement, that the causes and consequences of environmental disasters are extremely unequally distributed across the globe. They thus reproduce imbalances shaped by colonialism. In Ecuador in particular, most environmental conflicts are based on the extraction of raw materials for the world market,²⁷ such as oil or copper, which ultimately support above all the life and economic model of the global North and indirectly or directly fuel the climate crisis.

Such inequalities are also reflected in the law. The disregard of Southern legal developments by the German Federal Constitutional Court described at the beginning therefore seems symptomatic. The power of expression is unequally distributed in the global legal discourse, and it is much more difficult for non-Western law to be heard internationally.²⁸ However, this special issue aims to show that dialogue with legal systems of the global South can also significantly enrich Western law.

25 Cf. *Ulrich Ramsauer* in: Hans-Joachim Koch (ed.), *Umweltrecht*, Munich 4th ed. 2014, § 3 No. 170 et seqq.

26 Cf. *Andreas Fischer-Lescano*, Soziologische Rechtsästhetik, in: Monika Dommann / Kijan Espahangizi / Svenja Goltermann (eds.), *Wissen, was Recht ist*, Zürich 2015, p. 34; *Gunther Teubner*, Rechtseinfremdungen: Zum gesellschaftlichen Mehrwert des zwölften Kamels, *Zeitschrift für Rechtssoziologie* 21 (2000), p. 189-216; *Andreas Gutmann*, Umkämpfte Zugänge zur Bedeutung des Rechts: Die interkulturelle Auslegung in der Verfassungsrechtsprechung Ecuadors und Kolumbiens, in: Benedikt Huggins et. al. (eds.) *Zugang zu Recht: Tagungsband 61. Junge Tagung im Öffentlichen Recht*, Baden-Baden 2021, p. 311.

27 See *Carolina Valladares / Rutgerd Boelens*, Mining for Mother Earth. Governmentalities, sacred waters and nature's rights in Ecuador, *Geoforum* 100 (2019), pp. 68 et seqq.; *Laura Affolter*, The Responsibility to Prevent Future Harm: Anti-Mining Struggles, the State, and Constitutional Lawsuits in Ecuador, *Journal of Legal Anthropology* 4 (2020), pp. 78 et seqq.; *Andreas Gutmann / Alex Valle Franco*, Extraktivismus und das Gute Leben: Buen Vivir/Vivir Bien und der Umgang des Rechts mit nichterneuerbaren Ressourcen in Ecuador und Bolivien, *Kritische Justiz* 52 (2019), pp. 58 et seqq.; *Andreas Gutmann*, The Ecuadorian Chevron Judgement, <https://www.juwiss.de/92-2020/> (last accessed on 4 August 2021).

28 *Claudia Escobar García*, *Transconstitucionalismo y diálogo jurídico*, Quito 2011, p. 171.

D. About the content of the special issue

Exclusion and inclusion is the central theme of the paper written by *Andreas Gutmann* and *Viviana Morales*. They argue that modern and liberal law, because of its focus on human beings, bring about a double exclusion. Thus, on the one hand, nature is largely absent from the law and only enters the legal process mediated by human rights. For this reason, the German Federal Constitutional Court had to take the detour via the civil rights of future generations in the judgement mentioned at the beginning. On the other hand, this exclusion of nature – according to *Gutmann* and *Morales* – at the same time excludes numerous non-Western worldviews and forms of knowledge to which a separation of humans and nature is alien. RoN challenge this exclusion. The authors emphasize that such rights are demanded by various social movements in different places around the world. These movements demand that nature has to be heard within the legal framework. The global movement for RoN thus negotiates the exclusions that anthropocentric law produces. These processes of negotiation continue even when, as in Ecuador, RoN are formally recognized by the legal system. RoN, the authors argue, are thus not a panacea, but they institutionalize the participation of previously excluded entities and worldviews.

The closely related contributions by *Maria José Narváez* and *Elena Ewering/Tore Vetter* deal with the effectiveness of RoN. Here, the authors undertake an innovative kind of legal comparison by asking the questions: What if RoN existed in Germany (*Narváez*)? And what if these rights did not exist in Ecuador (*Ewering/Vetter*)? Instead of the classic comparison consisting of two country reports and the elaboration of similarities and differences, a case from Germany is examined through the lens of Ecuadorian law and one from Ecuador through that of German law. The texts show which environmental procedural instruments exist in both countries and shed light on the ways in which RoN can open up access to justice in environmental matters.

This is done on the basis of politically controversial cases. *Narváez* considers a case on open-pit lignite mining in Germany's Hambach Forest, a project that has been the subject of both civil society protests and various legal remedies. While the German activists had to develop elaborate legal constructions to get their day in court, at least the issue of access to justice would have been easier to resolve under Ecuadorian law. Nevertheless, Ecuadorian RoN also pose a major challenge, as *Narváez* shows.

The text is written in Spanish. By publishing a Spanish-language text in the otherwise English-language special issue, we attempt a compromise between engaging in a global discourse and mapping linguistic diversity, as well as addressing the exclusionary effects of ever-expanding linguistic standardization.

The Ecuadorian case, to which *Ewering/Vetter* apply German law, involves the construction of a hydroelectric power plant that led to flooding, threatening not only various ecosystems but also human communities settled along the Dulcepamba River. The case is paradigmatic of the complexity and multipolarity of environmental conflicts; here, for

example, green energy interferes destructively with nature. RoN, *Ewering/Vetter* conclude, offer a way to hear the diversity of affected voices in such constellations.

E. On the background of this special issue

This special issue contains some of the first results of the group of researchers working together in the project "Nature as a Legal Person", funded by the German Research Fund (DFG).²⁹ The project is carried out in cooperation between the University of Bremen, Germany and the Instituto de Altos Estudios Nacionales (IAEN) in Quito, Ecuador. It examines how new legal personalities emerge and how the law deals with these innovations, using the example of RoN, which was introduced by the Ecuadorian Constitution of 2008.

Although RoN are enjoying growing interest – also in European literature³⁰ – there are still numerous open questions. In particular, there is clearly too little research on the extent to which Western legal systems can or even should learn from the Ecuadorian example. In part, this question is answered in the negative with reference to the indigenous background of Ecuadorian RoN;³¹ in part, an orientation to the Ecuadorian model is demanded somewhat hastily, without taking its specific background into account.³² The project aims to counter this with a thorough theoretical and dogmatic examination of Ecuadorian constitutional law. In the sense of postcolonial theories,³³ specific views are to be critically questioned and non-Western visions made visible. The diversity of legal traditions is to be recognized as valuable and mutually enrich the legal systems under consideration.³⁴ The aim is to learn from Ecuadorian law and thus to overcome the one-sidedness prevailing in

29 See <https://www.uni-bremen.de/jura/fachbereich-6-rechtswissenschaft/fachbereich/personen/prof-dr-andreas-fischer-lescano-llm-eui-florenz/nature-as-a-legal-entity> (last accessed on 4 August 2021).

30 See for example the recently edited volumes *Daniel Corrigan / Markku Oksanen* (eds.), *Rights of Nature: A Re-examination*, London 2021; *Cameron La Follette / Chris Maser* (eds.), *Sustainability and the rights of nature in practice*, Boca Raton 2020; *Frank Adloff / Tanja Busse* (eds.), *Welche Rechte braucht die Natur? Wege aus dem Artensterben*, Frankfurt am Main 2021, in press or the study „Towards an EU Charter of the Fundamental Rights of Nature” published by the European Economic and Social Committee in 2020, <https://www.eesc.europa.eu/en/our-work/publications-other-work/publications/towards-eu-charter-fundamental-rights-nature> (last accessed on 4 August 2021).

31 *Klaus Ferdinand Gärditz*, *Tierschutzverbandsklagen*, *Zeitschrift für Europäisches Umwelt- und Planungsrecht* 16 (2018), p. 488.

32 *Mari Margil*, *The Standing of Trees: Why Nature needs Legal Rights*, *World Policy Journal* 34 (2017), pp. 8 et seqq.

33 *See Philipp Dann / Felix Hanschmann*, *Post-colonial Theories and Law*, *VRÜ* 45 (2012), p. 123.

34 *David Enriquez*, *Interculturalismo y transdisciplinariedad: coordinadas en el mapa del derecho comparado sustentable*, *Boletín Mexicano de Derecho Comparado* (2011), p. 1094 et seq.

classical comparative law, which assumes a global development towards a "Western" legal model.³⁵

So, while much has been written about the (im)possibility of legal transplants, South-North transplants have barely featured. It is possible that RoN will change things. After all, such rights – also with reference to the Ecuadorian experience – are currently being demanded in numerous Western countries as well. The topic has become omnipresent.

Given the scale of the current environmental threats, it is not surprising that profound changes are also being sought in the field of law. Radical changes are needed to stop the rampant environmental destruction. The search for innovations beyond the boundaries of one's own legal system could therefore be promising.

Interestingly enough, a meeting between members of the German and Colombian constitutional courts took place in July 2021, only a few months after publication of the climate judgment. Topics included the Corona crisis and RoN.³⁶

35 *Upendra Baxi*, The colonialist heritage, in: Pierre Legrand / Roderick J. C. Munday (eds.), *Comparative legal studies*, Cambridge 2003, p. 49 et seq.

36 Bundesverfassungsgericht Deutschland, Pressemitteilung Nr. 65/2021, 28 Juli 2021.