Invisibilising Nature. Procedural Limits and Possibilities to Environmental Litigation in German Law

By *Elena Sofia Ewering* and *Tore Vetter*[*]

Abstract: An increasing number of countries are recognising rights of nature across the world. In Germany, however, such rights largely remain uncharted territory with respect to dogmatics. The German legal system is essentially based on an anthropocentric approach, which is ultimately also reflected in the concession of legal capacity. Still, without legal capacity, there is no possibility of being the addressee of one's own subjective rights and ultimately the paths to the courts remain blocked. This paper will first show that in Germany it is difficult to bring nature's interests before the courts. An Ecuadorian case, where the rights of nature are currently being negotiated will serve as a starting point. In the end, it becomes clear that the jurisprudential discussions point out possibilities for inclusion of rights of Nature in German law and that civil society engagement is pushing for the necessity of their implementation. In times of increasing environmental destruction and advancing climate change and the resulting social crises, rights of nature may not be an all-encompassing remedy, but they are at least a step in the right direction for Germany and for other countries.

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A. Introduction

With the inclusion of the rights of nature in the constitution, Ecuador was the first country to recognise subjective rights for nature in 2008.[1] Although discussed worldwide,[2] this concept has not yet found its way into German legal dogmatics. Using an original Ecuadorian case, which will be examined from the perspective of German law, this text aims to show the gaps in the latter and highlight the opportunities that the recognition of rights of nature in Germany brings with it.

* Elena Sofia Ewering and Tore Vetter are Research Assistants at the Centre of European Law and Politics (ZERP), Universität Bremen, Germany. This research was funded by the German Research Foundation (DFG), 421427080 – Die Natur als Rechtsperson, Andreas Fischer Lescano.

1 *Paola Villavicencio Calzadilla / Louis J. Kotzé*, Living in harmony with nature? A critical appraisal of the rights of Mother Earth in Bolivia, Transnational Environmental Law 7 (2018), p. 398.

2 See, UN Harmony with Nature, Rights of Nature Law and Policy, http://www.harmonywithnatureun.org/rightsOfNature/ (last accessed on 12 April 2021).

Without a doubt, the 21st century will show the traces of human influence on the climate and ecosystems of planet Earth like never before. Be it global warming and the several severe yet unforeseeable consequences it will bear for the fragile global balance or the plastic pollution of the seas[3] – "business as usual" has proven to no longer be a viable option. While nowadays most people are aware of the existence of global ecological crises as well as their human causes and effects, views on how to effectively avert these crises continue to diverge. Some seek salvation in the established structures of capitalism,[4] others call for a fundamental change in the modern global economic order[5] and the western, anthropocentric[6] "way of life."

What form should an ecological law take? In general, the role of law can be seen as stabilising social expectations and conditions, and structuring certain forms of behaviour, if necessary, by imposing sanctions. The question in the field of environmental law is, in particular, what role is accorded to natural non-human entities in legal discourse - whether they remain condemned to the status of mere objects of human action or whether they should receive legal recognition (and appreciation) within the framework of (partial) personification. Finally, it also concerns the question of the legal re-inclusion of the once-and-still-excluded.[7] While the legal discussion in environmental law has long revolved around the "protection" of certain natural entities, ecosystems or animals, the debate on a fundamental re-positioning of nature in law has gained momentum in recent years, with more and more voices discussing and demanding specific rights for nature itself.[8] However, before we take a closer look on this spectre haunting European environmental legal scholars, it should be noted that "rights of nature" are understood as a legal concept that should enable the interests of nature to be effectively incorporated into the law.[9] While this

3 For further informations e.g. see: the OceanCleanUp, https://theoceancleanup.com/oceans/ (last accessed on 12 April 2021); *L. Lebreton, B. Slat et. al*, Evidence that the Great Pacific Garbage Patch is rapidly accumulating plastic, Scientific Reports 8 (2018), https://www.nature.com/articles/s41598-018-22939-w.pdf (last accessed on 12 April 2021).

4 Such approaches are often proposed by neo-liberal, "close to economy" actors, e.g. the German Liberal Party (FDP), https://www.fdp.de/sites/default/files/uploads/2019/03/14/antrag-bundesvorstand-zum-70-ord-bpb-liberale-klimapolitik.pdf pp. 2, 7 (last accessed on 12 April 2021).

5 E.g. the German anti-coal activists from "Ende Gelände", https://www.ende-gelaende.org/en/?fallback_postid=21174&template=langfallback (last accessed on 12 April 2021); see also *Bruno Latour,* who suggests a radical reformative rethinking regarding capitalism, the same, On some of the affects of capitalism, lecture given at the Royal Academy Copenhagen on 24 February 2014, http://www.bruno-latour.fr/sites/default/files/136-AFFECTS-OF-K-COPENHAGUE.pdf (last accessed on 12 April 2021), p. 10.

6 For further notice see Andreas Gutmann / Viviana Morales Naranjo in this issue, p. 335 seq.

7 *Andreas Fischer-Lescano,* Natur als Rechtsperson, Konstellation der Stellvertretung im Recht, ZUR 29 (2018), p. 208.

8 For further reference see María José Narváez Alvarez in this issue, p. 370, 375.

9 For a broad overview of the concept, history and recent implementations of rights of nature: *Laura Schimmöller*, Paving the Way for Rights of Nature in Germany, Transnational Environmental Law 9 (2020), p. 586 seq.

idea might seem new to western legal systems, it has long been promoted by Western legal scholars as well, such as *Christopher D. Stone*.[10] When we are speaking about "nature" in this text, we do not understand it as a gathering of non-human entities separated from human "culture", but as a collective term, including all ecosystems as well as their human and non-human components.[11]

While some attempts to recognize rights of nature, such as Stone's avant-garde question, if trees should have standing or the lawsuit in the name of the seals of the North Sea ("Robbenklage") by German environmental organisations in the 1980s[12], had already failed prominently in the courts, rights of nature gained unprecedented legitimacy through recent inclusion in state constitutions, e.g. in Ecuador, and recognition by courts in India and New Zealand. The implementation of specific rights of nature in the 2008 constitution of Ecuador was widely seen as a vanguard approach to new ways of legal action against environmental destruction and liability and as such it is fit to shake the base of "western" anthropocentric legal systems to their very core. Since then, environmental NGOs, lawyers and legal experts all around the world are carefully observing, what the Constitutional court of Ecuador will decide regarding the scope and limits of rights of nature[13] and how the results of these lawsuits could be adapted into other legal systems.[14]

Yet there are also dissenting voices in legal theory especially among conservative constitutional scholars, some doubting the advantages of specific rights of nature,[15] some claiming rights of nature to be incompatible to anthropocentric[16] judicial systems centered on human dignity.[17]

10 *Christopher Stone,* Should Trees have a Standing, Toward Legal Rights for Natural Objects, Southern California Law Review 45 (1972), pp. 450-501.

11 To overcome the anthropocentric dichotomy of nature/culture, Bruno Latour suggests to get rid of the term "nature" at all and instead to envision human and non-human actors alike as members of collective ecosystems, *Bruno Latour*, Das Parlament der Dinge, Frankfurt am Main 2010, pp. 41 seq., 84; *Bernd Herrmann,* Das menschliche Ökosystem, Wiesbaden 2019, p. 34 seq.

12 For further notice see Gutmann / Morales Naranjo, note 6, p. 343 seq.

13 *María Valeria Berros,* Defending Rivers: Vilcabamba in the South of Ecuador, RCC Perspectives 6 (2017), pp. 37, 39 seq.

14 *Shannon Nelson*, The Dulcepamba River gets its day in court, https://www.greatlakeslaw.org/blog/2019/06/the-dulcepamba-river-gets-its-day-in-court-rights-of-nature-and-constitutional-law-in-ecuador.html (last accessed on 12 April 2021).

15 E.g. Regarding follow-up problems of possible corresponding "duties" and agency of nature: *Goutham Shivshankar*, The Personhood of Nature, https://lawandotherthings.com/2017/04/the-personhood-of-nature/ (last accessed on 12 April 2021).

16 *Rupert Scholz* e.g. tries to justify an alleged "overall anthropocentric view" of the German basic law, because "Man is entrusted with creation, creation serves him, and he is also responsible for the preservation of the resources of creation.", in: Theodor Maunz / Günter Dürig (eds.), Grundgesetz-Kommentar, München 2020, Art. 20a GG, Par. 40.

17 E.g. regarding to the German legal system and Art. 20a GG: *Klaus Ferdinand Gärditz,* in: Landmann/Rohmer (eds.), Umweltrecht, München 2020, Art. 20a GG, Par. 23.

To reveal the possibilities of rights of nature similar to the Ecuadorian approach in a "western" legal system, it seems fruitful to envision a recent case of rights of nature before Ecuadorian courts in another legal system. Performing this exercise is helpful in appreciating the changes that anthropocentric legal systems may have to undergo to ensure an effective legal protection against and recognition of the destruction of ecosystems and natural entities.

B. The case of San Pablo de Amali vs. Hidrotambo S.A.

In 2002, the Ecuadorian energy research firm, Corporation for Energy Research (CIE), together with Canadian, Ecuadorian and Spanish investors, founded the Hidrotambo S.A. The purpose of this corporation was to build a hydroelectric power plant for generating clean energy for the Ecuadorian grid and to sell pollution credits to the European carbon market. In 2003, Hidrotambo S.A. applied for a licence to harness the Dulcepamba River in the central Ecuadorian province of Bolívar for energy generation[18] and the national water authority (now named SEGNAGUA) gave its permission.

In 2005, Hidrotambo S.A. begun with the construction of the dam without consulting the communities – which identify themselves as indigenous – a process required by Ecuadorian and international law. The communities living along the Dulcepamba river objected vehemently against the hydroelectric project, because they were afraid that the diversion of the course of the river could lead to floods. One of these worried communities was the small hamlet of San Pablo de Amalí, which was especially affected because Hidrotambo S.A. had decided that the Dulcepamba River had to be diverted 200 meters closer to their village.

In 2015, the villager's concerns became a reality. A winter flood – until then a quite normal, recurring weather phenomenon in the region[19] according to local human rights organisations and scientists of the University of California, Davis[20] – caused devastating flooding, which destroyed several houses and killed three people. Since then, the community of San Pablo Amalí is in a permanent legal dispute with Hidrotambo S.A. While the company claimed the flooding a result of an extraordinary natural catastrophe which was neither linked to nor caused by the dam, the community argued, that the destruction caused by the flooding could only and directly be traced back to the alteration of the river stream. This claim was backed by the hydrological analysis of the University of California, Davis. The aim of the community's lawsuit is to enforce the human rights of the people affected

18 *Rachel Conrad*, How 'Green' Water Concessions Are Failing Ecuador, NACLA Report on the Americas 47 (4) (2014), p. 65.

19 INREDH, Cronología: Caso San Pablo de Amalí, https://www.inredh.org/index.php/noticias-inredh/actualidad/1317-cronologia-caso-san-pablo-de-amali (last accessed on 12 April 2021).

20 *Jeanette Newmiller, Wesley Walker, William Fleenor, Nicholas Pinter*, Dulcepamba River Hydrologic and Hydraulic Analysis, p. 38 f., https://watershed.ucdavis.edu/files/Dulcepamba_Final.pdf (last accessed on 12 April 2021).

by the disaster but also to sue in the name of nature against the negative consequences of the project. The community of San Pablo Amalí brought two cases to the Ecuadorian authorities or courts:

The first pertained to the water use licence of Hidrotambo S.A. The community demanded a new authorisation procedure because the current licence would lead to a total river wipe-out. Because of the massive water use of Hidrotambo S.A., several applications for water use by the upstream communities were unsuccessful or remained unanswered by SENAGUA. In addition, a new authorisation procedure is necessary because there were irregularities in the process, including the failure to base the licence on empirical studies. A study of the UC Davis Center for Watershed Sciences highlighted "that the water right allocated to Hidrotambo exceeded the actual flow of the river 83% of the time over the last ten years."[21] An administrative impugnment by the community is still ongoing.

In January 2019, Harold Burbano, the public ombudsman together with the Ecumenical Rights Commission (CEDHU), took a second case to court. With a "protective action", they accused several public agencies of violating constitutional rights both of the people living in the community of San Pablo de Amalí aswell as rights of nature. In particular, they criticised the negligent way in which the hydroelectric project was carried out, from planning to regulation of operation. This included the lack of studies, which could have pointed out that the shift of the Dulcepamba closer to the community of San Pablo de Amalí would lead to flooding, because of the incapability of the river to evacuate sediments and debris. All this resulted in the disaster of 2015, so argued by the public ombudsman and the CEDHU. The flooding caused by the dam was the reason for the violation of the human rights of the people living in the community of San Pablo de Amalí. Furthermore, Article 71 of the Ecuadorian constitution guarantees the continued existence of ecosystems and in the case of the Dulcepamba, Hidrotambo S.A. violated this right by changing the course of the river.

On the other hand, Hidrotambo S.A. asserted that the flooding was just a natural event without relation to the construction of the dam. This claim was proved wrong by the UC Davis Center for Watershed Sciences. In February 2019, a lower court in Chillanes, Ecuador accepted the submission of the defendant and ruled that there was no causal link between the flooding and the acts of Hidrotambo S.A. and the public agencies, therefore no constitutional right was violated. The appeal was also unsuccessful. The Provincial Court of Bolívar underpinned their reasoning on an administrative exhausting argument. Indeed, the court noted that the public agencies did request Hidrotambo S.A. to take security measures and even though Hidrotambo S.A. did not follow this order, the court decided that protective action is not constructive for forcing the public agency to take action.

21 *Shannon Nelson,* The Dulcepamba River gets its day in court, https://www.greatlakeslaw.org/blog/2019/06/the-dulcepamba-river-gets-its-day-in-court-rights-of-nature-and-constitutional-law-in-ecuador.html (last accessed on 12 April 2021).

On 25th April 2019, as a sort of last resort, Harold Burbano, the ombudsman, and the CEDHU submitted an "extraordinary protective action" against the ruling of the Provincial Court of Bolívar to the Constitutional Court. The Court accepted the claim, in a significant move for rights of nature jurisprudence. The court was free to refuse the claim because of the wide area of discretion. The acceptance of the submission is widely seen as a sign of the court's willingness to finally develop substantive rights, concerning rights of nature, on the constitutional level. The court stated that it will address the norms and limits regarding the exploitation of renewable and non-renewable resources. In this context, it will also evaluate at the behaviour of companies and what impact they have on nature and local communities. The Constitutional Court's decision in the Dulcepamba River case may lay out the framework and standards for future cases involving rights of nature.

C. Legal Means against Environmental Destruction in the German legal system

The case of the community of San Pablo de Amali against the Ecuadorian State and Hidrotambo S.A. revolving around the alteration of the Dulcepamba river's natural bed and flow is still one of the few cases in which the scale and possibilities of rights of nature in the Ecuadorian Constitution are being tested in court[22] since their implementation in Art. 71 seq. in 2008, yet it is but one of the latest developments in an ongoing debate in "environmental law" and the global struggle for natural and ecological preservation. The case as such is highly reminiscent of the first time an Ecuadorian Court applied rights of nature under the new constitution, which concerned the alteration of another river's course, the Vilcabamba river located in Ecuador's southernmost province of Loja. The river's course, too, was altered, after debris from a nearby road construction side was dumped in its bed.[23] The Provincial Court of Loja in its ruling on March 30, 2011 famously upheld a lawsuit by two residents, which claimed a violation of rights of nature on behalf of the river, stating the plaintiffs have standing without having to claim a violation of their own rights and obliged the authorities to restore the rivers natural course.[24] These cases show the impact, rights of nature can have on litigation possibilities, as in both cases the lawsuits were accepted without demand of individual human rights violations, which in anthropocentric legal systems, as we will try to show, often still is a major bottleneck for the successful legal persecution

22 For other cases brought to the court see: *Mari Margil,* Recent Developments in Ecuador: Rights of Nature, Common Dreams, 17 July 2020, https://www.commondreams.org/views/2020/07/17/recent-developments-ecuador-rights-nature (last accessed on 12 April 2021).

23 See *Natalia Greene*, The first successful case of Rights of Nature implementation in Ecuador, https://therightsofnature.org/first-ron-case-ecuador/ (last accessed on 12 April 2021).

24 Provincial Court of Loja, ruling of 30 March 2011, original Spanish version: https://elaw.org/system/files/ec.wheeler.loja_.pdf (last accessed on 12 April 2021); For an english review see: *Sofía Suárez*, Defending Nature, Centro Ecuatoriano de Derecho Ambiental/Friedrich Ebert Stiftung, https://library.fes.de/pdf-files/bueros/quito/10386.pdf (last accessed on 12 April 2021).

of environmental damages, even if they are forbidden and sanctioned by “objective” environmental law.

Imagine for a moment that a similar flooding occurred in Germany. What would be the possibilities of litigation against environmental destruction and degradation similar to that of the Dulcepamba River by Hidrotambo S.A.? Before approaching this question, we need to take a step back and outline the current status of the German legal system, which, at its core is a liberal system of subjective rights.

First, regarding the approaches to litigation, we have to discern who has actually acted in the context of the environmentally harmful conduct in question, in particular whether it is a question of conduct by private actors or state agencies. For actions against state actors, plaintiffs essentially – with some exceptions – have to primarily seek recourse before the administrative courts, which according to § 40 I of the Code of administrative court procedure (Verwaltungsgerichtsordnung, VwGO) in principle have jurisdiction in all disputes resolving around matters of non-constitutional public law.[25] If those legal remedies have been exhausted, individual plaintiffs can – as a kind of "last resort" – turn to the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) with a constitutional complaint claiming the violation of their constitutional rights. If plaintiffs on the other hand are challenging the conduct of private companies or the state has acted through private organisational forms, they have to turn to the civil jurisdiction.[26]

Secondly, it must be clarified what the plaintiffs seek to achieve through the litigation. Depending on the objective of the lawsuit, different types of litigation can be considered and different requirements must be met.[27]

25 *Ekkehart Reimer,* in: Posser/Wolff (eds.), Beck’scher Online-Kommentar VwGO (2021), § 40 VwGO, Par. 39 seq.

26 Another aspect, which we will not look into in this text, is the possibility of punitive actions of the state against individuals, whose actions fall under German criminal law, such as water pollution as per § 324 of the German penal code (Strafgesetzbuch). However, the authority to bring charges lies in principle solely with the public persecutor’s office, § 170 criminal procedures Code (Strafprozessordnung, StPO). Although § 395 StPO provides for the possibility of victims or members of victims of certain criminal offences to appear as accessory plaintiffs in criminal proceedings, yet environmental offences are currently not included in this category. Therefore, environmental associations or even representatives do not have the right to bring an accessory action.

27 The German Parliament's Scientific Services outlined legal possibilities of so-called "climate lawsuits" in a paper published in 2016. This shows the awareness of a possible increase of such lawsuits, as a result of climate change and artificial modification of river beds, Deutscher Bundestag – Wissenschaftliche Dienste, 3 August 2016, Rechtliche Grundlagen und Möglichkeiten für Klima-Klagen gegen Staat und Unternehmen in Deutschland, https://www.bundestag.de/resource/blob/459048/3bbbd712bc3d33d7cbbe851f032b3e01/wd-7-116-16-pdf-data.pdf (last accessed on 12 April 2021).

I. Claims against the State

In the following section, the different types of legal action against the State will be considered.

1. Administrate Court Action

The options for suing the State depend primarily on what the plaintiffs are specifically seeking. § 88 VwGO states, that the administrative courts, while not bound by the wording of the lawsuit, may not go beyond the specific relief sought by the plaintiffs. This is relevant, because different types of administrative action require different conditions to be admissible, let alone justified. In short, the determination of the correct type of action in a case on environmental destruction depends on whether and how the State took action or failed to take action in the specific case.

First of all, it is possible to challenge a certain state action in court, if the State has acted by means of administrative acts (action for annulment, "Anfechtungsklage", § 42 I Alt 1, VwGO).[28] In matters of environmental law this applies in particular to third-party challenges of official approvals, e.g. building permits or granting of specific licenses.[29] This approach would be particularly relevant for the cases similar to the first case against Hidrotambo S.A. claims concerning the granting of the water licence to the company. In the German administrative legal system, without going too much into the details, the granting of a licence for a hydroelectric power plant would be an administrative act pursuant to § 35 VwGO, which would primarily have to be challenged in court with a (third-party) action for annulment pursuant to § 42 I Alt. 1 VwGO.

The so to say "flip side" of an action for annulment is to oblige the State to act in a certain way, i.e. either to demand a certain administrative action with an action for an obligation ("Verpflichtungsklage", § 42 I Alt. 2 VwGO), e.g. official intervention against certain construction projects. Applying this to our case, such an approach would be possible, in order to induce the State to intervene under regulatory law against Hidrotambo S.A., if the dam were to pose a concrete danger to the legal interests of third parties. If the demanded action is not directed at the issuance of an administrative act, which is always defined by a specific "regulatory content", but only at the issuance of a so-called "real act" of the State, a "general action for performance" ("Allgemeine Leistungsklage", referred to in §§ 43 II, 111, 113 IV VwGO) can be considered.[30] In addition, it may be possible to claim injunctive relief against State actors to prevent acts in the future such as further construction.

28 *Thomas Schmidt-Kötters,* note 25, § 42 VwGO, Par. 10 f.

29 See also: *Peter-Christoph Storm*, Umweltrecht, Berlin 2015, paras. 427 seq., 522.

30 This approach can be considered, if plaintiffs e.g. want to achieve the dismantling of certain construction measures through a "real act" by the state authorities, e.g. the revision of river construction works, e.g. see: Administrative Court (VG) Frankfurt (Oder), Judgement of 27 February 2015, File Number: – 5 K 1240/10 –, Par. 78, 81.

All these types of action differ slightly regarding to individual requirements for admissibility. What they have in common, however, is the requirement of "standing" (“Klagebefugnis”) that characterises German administrative jurisdiction in general. According to this, actions before the administrative courts are only admissible if the plaintiff claims that his or her rights have been violated by the administrative act or by its rejection or omission (§ 42 II VwGO). Plaintiffs are thus only entitled to sue, if they can credibly claim a violation of their *subjective rights*. As such, § 42 II VwGO is an expression of the fundamentally subject-based German legal system of individual rights and act as *the* major bottleneck in German administrative law with regard to environmental procedures since a distinction is made between subjective rights protecting the individual and "objective" rights protecting the general public.[31] For individuals or entities to have standing, it is presupposed, that they can be holders of rights at all, i.e. that they are legal subjects.[32] In German law legal subjects can both be so-called "natural persons", meaning human beings, and, under certain circumstances, "legal persons", such as commercial companies (which, according to Art. 19 III GG, can also invoke fundamental rights, insofar as they are "by their nature" applicable to them), but also State entities such as municipalities.

In general, the requirement of standing precludes general actions by third parties in relation to asserted environmental violations if plaintiffs do not at the same time assert the violation of subjective rights, in particular of property[33], or of individual human rights such as life or physical integrity.[34] If individuals are not themselves directly addressed by administrative measures, they are usually only entitled to bring an action before the administrative courts if they can assert the possibility of infringement of a so-called "third party-protecting" norm. These norms include, e.g., norms in building laws that are specifically intended to protect neighbours (and in these cases only justify the neighbours’ standing), but explicitly not norms that serve to protect the "general public"[35] or, e.g., "nature" in general.[36]

For long this system of individual legal protection has been criticised by environmental lawyers and activists, because it requires a narrow class of plaintiffs, who are willing and able to claim a violation of their individual rights in order for environmental litigation to be effective. But, in view of the notoriously long duration of administrative courts proceedings, uncertain prospects of success and possible cost consequences in case of a rejected

31 For a general overview in to the context of German administrative law in english language see: *Florian Becker,* The Development of German Administrative Law, George Mason Law Review 24 (2017), p. 466 seq.

32 See also: *Schimmöller*, note 9, p. 586 seq.

33 E.g. BVerwG, Judgement of 21 September 1984, File Number: – 4 C 51/80 –, Par. 12.

34 *Schimmöller*, note 9, p. 586 seq.

35 E.g.: BVerwG, Judgement of 19 September 1986, File Number: – 4 C 8/84 –, Par. 11 seq.

36 E.g. Higher Administrative Court (Oberverwaltungsgericht, OVG) of the State Schleswig-Holstein, Judgement of 28 November 2019, File Number: – 5 LB 3/19 –, Paras. 50 seq., OVG Nordrhein-Westfalen, Judgement of 4 July 2018, File Number: – 8 A 47/17 –, Paras. 50 seq.

lawsuit[37], the hurdles for individual plaintiffs are much higher than for environmental organisations, that have dedicated themselves specifically to the fight against environmental destruction. Individual attempts to specifically transfer ownership of certain land areas, which were threatened by opencast coal mining, to nature conservation organisations were deemed "abusive of the law" by the Federal Administrative Court – with the consequence that even such threatened ownership of these so-called "Sperrgrundstücke" could not justify the organisations' standing.[38]

This difficulty in environmental litigation has gradually reduced, starting from the 1990s. Influenced by the second environmental movement as well by new diplomatic margins opening up in the aftermath of the Cold War, States globally agreed to improve the possibilities for environmental litigation and protection, some of which led to quite "groundbreaking" innovations in the field of environmental law, but the fundamental understanding of standing related to legal personhood as such has not changed.

One of the strongest driving factors was the signing of the *Aarhus*-Convention in 1998, in which the contracting States comprehensively committed themselves to facilitating public access to information as well as administrative and judicial control in environmental matters, and via Art. 9 of the AC even defined specific requirements for facilitating access to justice. In implementation of several EU-directives[39] issued in this regard in the meantime, § 64 of the Federal Nature Conservation Act (Bundesnaturschutzgesetz, BNatSchG) initially came into force at the level of German federal law in 2002 (then § 61)[40], which enables "recognised nature conservation associations" to lodge appeals in accordance with the Administrative Court Code against specific decisions listed in § 63 BNatSchG without having their own individual rights infringed.[41] This circle of "legal persons" entitled to bring certain environmental actions to court was expanded in 2006, when the "Environmental Remedies Act" (Umweltrechtsbehelfsgesetz, UmwRG) came into force implementing a corresponding directive[42] of the European Community responding to Art. 9 II AK[43].

37 Under § 154 Paragraph 1 of the VwGO the underlying part principally must bear the costs of the proceedings, see also: *Susanne Olbertz*, in: Friedrich Schoch / Jens-Peter Schneider (eds.), Verwaltungsgerichtsordnung: VwGO, München 2020, § 154, Paras 3,4.

38 BVerwG, Judgement of 27 October 2000, File Number: – 4 A 10/99 –, BVerwGE 112, 135-139.

39 Bundesgesetzblatt, Part I 2002, No. 22, 03.04.2002, p. 1193, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*[@attr_id=%27bgbl102s1193.pdf%27]#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl102s1193.pdf%27%5D__1615545086466 (last accessed on 12 April 2021).

40 *Martin Gellermann,* note 17, § 64 BNatSchG, Par. 1.

41 *Gellermann,* note 40, Par. 4; *Storm*, note 29, Par. 436.

42 Directive 2003/35/EC ("Public Participation Directive"), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0035 (last accessed on 12 Apil 2021).

43 *Thomas Bunge*, Die Verbandsklage im Umweltrecht, JuS 60 (2020), p. 741.

In 2017, the law was once again reformed[44] and the circle of associations authorised to file lawsuits and the privileged subject matters was expanded, mainly to comply with Art. 9 III AK.[45] Since then, according to § 2 I UmwRG, "recognised associations" without being concretely affected in their own subjective rights can also file legal remedies according to the VwGO against certain administrative decisions named in § 1 UmwRG, e.g. admission decisions, which require an environmental impact assessment according to § 1 I No. 1 UmwRG. These associations have standing, if they can cumulatively claim that the approval decision violates legal provisions relevant to the decision and that the decision violates their statutory remit of promoting the objectives of environmental protection. In addition, the claiming association must have been entitled to participate in the administrative procedure.[46]

And yet standing is not the only hindrance to effective legal protection in environmental matters before the administrative courts. Even if individual rights might be affected, depending on their specific target of action, plaintiffs must still be able to proof the facts of their claim. For suing in advance of possible dangers this means, they have to show that there are indeed factual indications of a danger in advance. If damage already has been done, like in the Hidrotambo case, plaintiffs will have to prove that a certain administrative action or omission was causal to the damage. Although the procedural requirements for the substantiation in this regard are not as strict as in civil proceedings due to the principle of official investigation per § 86 VwGO, the plaintiffs still must generally bear the consequences in the event of non-provability of a certain relevant fact (*non liquet* situation).[47] This is unlike in Ecuador where the Vilcabamba case decided by the Provincial Court of Loja reversed the burden of proof, clarifying that with respect to environmental law, the burden lies with the defendant to disprove violations of constitutional rights of nature.[48] Although there are some special features in German environmental law compared to general administrative law, such as the precautionary principle, which at the constitutional level is implemented in Article 20a GG, they are inconsistently structured in simple law and not comparable to the comprehensive Ecuadorian constitutional approach.

44 Bundesgesetzblatt Part I 2017, No. 32, June 1st 2017, p. 1298, https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117032.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl117032.pdf%27%5D__1615546851359 (last accessed on 12 April 2021).

45 *Bunge,* note 43*,* p. 742; also see the explanatory memorandum in the draft law of the federal government, Bundestag printed matter No. 18/9526 p. 32 seq. https://dip21.bundestag.de/dip21/btd/18/095/1809526.pdf (last accessed on 12 April 2021).

46 *Bunge,* note 43, p. 743.

47 Instead of all: *Günter Breunig*, in: Herbert Posser / Heinrich Amadeus Wolff (eds.), BeckOK VwGO (2021), § 86 VwGO, Par. 35; also Administrative Court of Appeal Munich (VGH München), Resolution of 25 May 2018, File Number: – 13a ZB 16.192, Par. 8.

48 *Suárez*, note 24, p. 8; Provincial Court of Loja, ruling of 30 March 2011, https://elaw.org/system/files/ec.wheeler.loja_.pdf, p. 2 (last accessed on 12 April 2021); also see Gutmann / Morales Naranjo, note 8, p. 348.

In summary, regarding our case this means that the inhabitants of a German municipality who fear dangerous environmental impacts from certain construction measures, even if "objective" legal norms are violated, can only defend themselves in court against construction projects if they can also claim that their subjective rights, e.g. their property, are affected, or if protective norms specifically protecting them could be violated. Otherwise, the only option would be to turn to recognised environmental or nature conservation associations.

2. Action before the Constitutional Court

In the Hidrotambo S.A. case, the plaintiffs invoked rights of nature enshrined in Art. 71 seq. of the Ecuadorian constitution. Accordingly, the question arises whether this would also be possible in Germany. As the "guardian of the constitution," the German Federal Constitutional Court solely monitors compliance with the GG (and of lately under certain circumstances with the Charta of basic rights of the Union).[49] Article 1 I GG grants human beings unrestricted and indefeasible legal subjectivity.[50] However, Article 19 III GG breaks down this basic assumption by also granting fundamental rights to legal persons if the fundamental rights are applicable to them by their very nature. Therefore, the question is if nature itself could have a standing like it does in Ecuador, where all Ecuadorian citizens have the right to enforce rights of nature (Art. 71 Ecuadorian Constitution). For an action to be successful before the Federal Constitutional Court, both the formal and the substantive requirements must be met.

a) Standing of Nature before the German Federal Constitutional Court

For German basic rights dogmatics, the idea of subjective rights of nature is a novelty. Even though the discussion about the question whether Art. 20a GG – which includes the state objective of protection of the natural foundations of life and animals – grants subjective rights to the nature is still ongoing,[51] the prevailing opinion is that there are no undisputed subjective rights granted to nature by the Basic Law.[52] This results in the consequential

49 BVerfG, Ruling of the Second Senate, 1 December 2020, file number.- 2 BvR 1845/18 –.

50 *Jens Kersten,* Die Rechte der Natur und die Verfassungsfrage des Anthropozän, in: Jens Soentgen / Ulrich M. Gassner / Julia von Hayek et al. (eds), Umwelt und Geseundheit, Baden-Baden 2020, p. 109.

51 For innovative proposals see, *Fischer-Lescano,* note 7, p. 213; *Malte-Christian Gruber,* Rechtsschutz für nichtmenschliches Leben, Baden-Baden 2006..

52 BT-Drs. 12/6000, S. 67; *Jens Kersten,* Natur als Rechtssubjekt, APuZ 11 (2020), p. 27; *Gärditz,* note 15, Art. 20a Rn. 23 ff.; The BVerfG has recently confirmed this position. Although it saw Article 20a GG as a "justiciable" legal norm, according to the court it does not convey any "subjective rights", BVerfG, Ruling of the First Senate, 24 March 2021, file numbers: – 1 BvR 2656/18 et al, par. 112; English press release available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html (last accessed on 14 June 2021).

problem that at the moment nature cannot invoke basic rights and that substantive requirements cannot be fulfilled.

Apart from this, there are obstacles to be overcome on the procedural-legal level. Assuming that natural rights can be asserted directly before the Federal Constitutional Court, the relevant type of action appears to be the individual constitutional complaint pursuant to Art. 93 I no. 4a of the GG, §§ 13 no. 8a, 90 et seq. of the Federal Constitutional Court Act (BVerfGG). For the individual constitutional complaint to be admissible, the formal requirements must also be fulfilled. Since the type of action is primary intended to give human individuals the opportunity to bring an action,[53] the requirements are also tailored to the human subject. As a result, when considering whether nature itself can bring an action before the Federal Constitutional Court, two admissibility criteria, in particular, seem to stand in the way of this idea.

The first criterion is the capacity to participate in the proceedings (Beteiligtenfähigkeit) pursuant to § 90 I BVerfGG, which has similarities to the requirement of "standing" in the context of administrative law court proceedings. Pursuant to § 90 I BVerfGG "Any person claiming a violation of one of his or her fundamental rights or one of his or her rights under Article 20 IV, Articles 33, 38, 101, 103 and 104 of the GG by public authority may lodge a constitutional complaint with the Federal Constitutional Court." In this context "any person" means natural and legal persons on the condition that they are holders of at least one of the mentioned basic rights.[54] The term "legal person" refers to Art. 19 III GG, which is not synonymous with the term used by the civil law. Its meaning is even more extensive.[55] This extensive definition could lead to the possibility that nature itself be considered as a legal person in the meaning of Art. 19 III GG. However, the constitutional border is reached, when a legal person has no legal capacity (Rechtsfähigkeit), i.e. is not a subject of rights and obligations.[56] Nature, according to prevailing opinion,[57] has none, so currently the admissibility criteria of the capacity to participate in the proceedings cannot be fulfilled.

As a further admissibility criterion, the requirement of procedural capacity also seems to be problematic. Neither does the BVerfGG contain any regulations on this, nor can the provisions of other procedural codes be relied upon without further ado.[58] Moreover, in the context of a constitutional complaint, it is a matter of whether the applicant is mature and

53 *Cornelia Grünewald*, in: Christian Walter / Benedikt Grünewald (eds.), BeckOK BVerfGG(2020), § 90 Rn. 2.

54 *Grünewald*, note 53, § 90 Rn. 14.

55 *Michael Sachs*, in: Michael Sachs (ed.), Grundgesetz, München 2018, Art. 19 Rn. 57 seq.

56 *Sachs*, note 55, Art. 19 GG, Rn. 65; *Christoph Enders,* in: Volker Epping / Christian Hillgruber (eds.), BeckOK GG (2020), Art. 19 GG Rn. 35; *Barbara Remmert,* in: Theodor Maunz / Günter Dürig (eds.), Grundgesetz-Kommentar, München 2020, Art. 19 GG Rn. 41.

57 With contrary opinion, *Fischer-Lescano*, note 7, p. 213; *Gruber*, note 51.

58 BVerfGE 1, 87 (88 f.); 19, 93 (100); 28, 243 (254). Other approach: The provisions of the ZPO or VwGO could only be applied in the respect of the constitutional process (*Gerd Morgenthaler*, in: Volker Epping / Christian Hillgruber (eds.), note 56, Art. 19 GG, Art. 93 GG Rn. 57).

capable of understanding the fundamental rights at issue.[59] Since the characteristic is obviously geared towards human entities, it does not seem to be possible without some reforms to recognise the capacity of nature to stand trial. However, this is not an insurmountable hurdle, as legal persons can also be represented.

In summary, this brief overview of the formal and substantive requirements of an action before the German constitutional court shows that complaints like the one filed on behalf of nature in the Hidrotambo S.A. case would face serious problems. How and why these problems could be solved will be discussed further below.

b) Indirect Standing through Human Complainants

Even if nature itself currently would not have standing before the German constitutional court, it could still be indirectly taken to court through the people's basic rights. In the Hidrotambo case the flooding caused the death of three people and destruction of several homes. This would, if it were to happen in Germany, enable the affected people to claim that they are affected in their fundamental right to life, Article 2 II GG and to property Article 14 I GG by the change in the course of the river. The problematic formal admissibility requirements regarding standing discussed above, are not problematic in the case of actions by human beings. Whether a lawsuit by the affected people in Germany would be successful cannot be affirmed without further ado.

This was also pointed out by the BVerfG in its "climate decision" of March 24, 2021. The BVerfG declared central parts of the German Climate Protection Act (CPA), which concerned the path of reduction of greenhouse gas emissions (§§ 3 (1), 4 (1) CPA in conj. with annex 2), as incompatible with the constitution. The reduction path would essentially have led to an almost complete exhaustion of the national CO2 budget for Germany by the year 2030 and would have made a close to immediate full-stop on emissions necessary in the time from 2031 on[60], if Germany did not want to miss Paris climate targets at all. But on a closer look, the court`s intervention was far from being a judicial "revolution"[61] or even "the most far-reaching decision ever made by a supreme court worldwide on climate protection".[62] What the court did, and in times like these, this can't be honoured enough, is to seriously receive and legally adapt the state of scientific knowledge on climate change – and to act on it. On a sober view, the BVerfG pursued its anthropocentric line of jurisprudence. The court first examined possible violations of the German state's duty to protect the rights to life (Art. 2 II GG) and property (Art. 14 I GG) - and rejected such violations, basi-

59 BVerfGE, 28, 243 (254 f.).

60 BVerfG, note 52, par. 192.

61 *Ulrich,* Die Befreiung der Freiheit, Zeit Online from 30. April 2021, https://www.zeit.de/politik/deutschland/2021-04/karlsruhe-bundesverfassungsgericht-klimaschutz-urteil-grundgesetz-freiheit (last accessed on 14. June 2021).

62 *Ekardt,* Clima Revolution with Weaknesses, Verfassungsblog from 08. Mai 2021, https://verfassungsblog.de/climate-revolution-with-weaknesses/ (last accessed on 14 June 2021).

cally on the grounds that, in addition to averting climate change by reducing emissions, to protect these rights the state could also, while not solely, turn to "adaptation measures".[63] On the other hand, the court regarded the small reductions in emissions by 2030 as an unjustifiable encroachment on "almost all civil liberties" of future generations in their "intertemporal dimension".[64] The BVerfG did not regard these interferences unjustifiable, because the emissions till 2030 were *per se* incompatible with the climate protection duties of the state contained in Art. 20a GG[65] and concretized by § 1 CPA[66], but rather because future generations in the period after 2030, could by Art. 20a GG be constitutionally obliged to tolerate far-reaching restrictions of their civil rights - the social “full stop”. The court considered this balancing of burdens *inter generationes* disproportionate.[67] Yet in German law there are further hurdles for human individuals trying to take an alleged violation of their constitutional rights to court. In contrast to Ecuador, the individual constitutional complaint is subsidiary to legal protection under fundamental rights by the specialised courts.[68] Therefore, the court will only take action if legal recourse has been exhausted and the principle of subsidiarity has been respected.[69] The requirement of exhaustion of domestic legal remedies is another hurdle for effective legal protection in environmental matters, as, while the constitutional protective action itself is exempt from legal costs, this does not apply to the previous instances in ordinary or administrative courts. In addition, similar to the decision of the lower court in Ecuador, the question whether the actions or omissions of the public agencies were actually causal for the violations of fundamental rights will arise. A final assessment cannot be made here. Rather, it should be made clear that only in the case of a simultaneous violation of basic human rights, in the present case the serious alteration of the riverbed could be asserted before the German Constitutional Court.

c) Provisional Result

The overview of the possibilities to bring nature's rights before the German Federal Constitutional Court makes it clear that the possibilities are very limited, if not non-existent. Only the action against the violation of basic human rights can, in the present case, lead to the change of the river course being brought indirectly before the Federal Constitutional Court. Yet this does not grant nature, or in this specific case the river and its surrounding ecosys-

63 BVerfG, BVerfG, note 52, par. 164 seq.

64 ibid, par. 182 seq.

65 ibid, par. 208 seq.

66 Art. 2 (1) no. a PA obliges the convention states to hold “the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels”. § 1 CPA is based on these objectives.

67 BVerfG, note 52, Par. 243 seq. 192. Seq.

68 *Morgenthaler,* note 58, Art. 93 GG Rn. 50; For the situation in Ecuador see Gutmann / Morales Naranjo, note 8, p. 346 seq.

69 *Morgenthaler,* note 58, Art. 93 GG Rn. 70 seq.

tem, comprehensive legal protection, as is the case in Ecuador. In Ecuador, nature not only has "the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes" (Art. 71 Ecuadorian Constitution), but also a subjective right to recovery according to Art. 72 Ecuadorian Constitution.

II. Claims against Private Actors

While possibilities for litigation against state actors in environmental matters are limited, even more problems arise concerning claims against private actors, such as energy companies f.e. In the case of San Pablo de Amali vs. Hidrotambo S.A. the plaintiffs sued the authorities as well as the private company operating the dam, Hidrotambo S.A. Although this perspective is not in the focus of this article, we will have to take a brief look on the options for civil litigation.

1. Public Law

In general, public law regulates the relationship between the state and the individual. Accordingly, public law does not lend itself to the direct assertion of rights against Hidrotambo S.A. as private persons, like the people of San Pablo de Amalí.[70] The State itself, on the other hand, could claim damages against Hidrotambo S.A., such as with reference to the Environmental Damage Act. How this could be done in concrete terms has already been explained above.

2. Civil Law

As Hidrotambo S.A. is a legal person in terms of the German civil law (§ 1 Aktiengesetz), the question arises, what claims under the German civil code (Bürgerliches Gesetzbuch BGB) could be raised by nature or the people. As mentioned above, the term “legal person” is narrower in the context of civil law than in constitutional law, ergo nature itself again cannot invoke rights or duties as a plaintiff. But again, it seems to be possible, that humans could assert the infringement of their rights and in doing so, also indirectly rights of nature.

With regard to civil claims, both injunctive relief and claims for damages may be considered. Concerning the latter, claims could arise from § 1004 I BGB. However, the prerequisite is the position of ownership or, by analogy, a possible violation of other protected

70 The basic rights are still predominantly understood as defensive rights against the state, not binding private actors, even though an “indirect third-party effect” of the basic rights has been recognised since the famous *Lüth*-decision of the BVerfG (BVerfG, Decision of 15 January 1958, file number: - 1 BvR 400/51). However, the debate on the binding of private actors is still ongoing and it has also been recognised in the case of the state acting through the form of “private” companies (BVerfG, Judgement of 22 February 2011, file number: - 1 BvR 699/06 – *Fraport*).

rights, such as the rights to life, liberty or physical integrity referred to in § 823 I BGB.[71] Concerning the changed course of the river this claim seems not promising, because the people likely miss the prerequisite to claim a violation of property. With regards to the destroyed property of the people, a legal right according to § 1004 I BGB doesn't lead to a re-establishment. It only caused the elimination of the source of impact for the future.[72] A danger for other protected rights such as life or health might be even more difficult to prove, since the burden of proof in principle is once again on the plaintiff.[73]

In a case like the one of San Pablo de Amali, where the damage has already been done, injunctive relief is no viable option of litigation to comply with the plaintiff's requests. Here an action for damages often is the appropriate kind of litigation. Regarding damages liability under tort law (Deliktsrecht) is the main option. According to § 823 I BGB Hidrotambo S.A. could be liable to make compensations to the people for the damage on life and property of the people, arising from an intentionally or negligently, unlawful, injuring behaviour. At this point it could be not foreseen how a German court would judge. In particular, the causality, which is a precondition, could be assessed as not fulfilled like the Ecuadorian court did. But on the other hand, the community of San Pablo Amalí explicitly warned of the risks and the danger of the project, and the causality can be proven by scientific analyses. The other requirements such as "justification" and "fault" cannot be affirmed or denied without further ado. Furthermore, the people could claim damages under § 823 II BGB. The provision makes it possible in particular to extend the numerically constantly growing standards of conduct of public law, such as environmental law, into civil law and to sanction their violation with claims for damages under civil law.[74] It is imperative that it is a legal norm which at least indirectly intends to protect individual interests[75] and that a commandment or prohibition is at least laid down in the legal norm.[76] Whether and which legal norms come into consideration cannot be discussed here to the necessary extent. As a matter of fact, similar problems arise as with § 823 I BGB.

On the whole, it would remain the case that, while people's rights violations could be asserted, nature is only taken into account to a limited extent in this way. This is also reflected in the compensation for damages. § 249 I BGB provides for the re-establishment of the previous condition. A monetary compensation of damages is only possible in exceptional cases, e.g. if humans have been injured or property has been damaged (§ 249 II) if the debtor has not restored the thing within a set time limit (§ 250 BGB), if this re-establish-

71 Instead others: BGH, judgement of 16 January 2015, file number: – V ZR 110/14, Par. 20.

72 *Jörg Fritzsche*, in: Wolfgang Hau / Roman Poseck (eds.), BeckOK BGB (2020), § 1004 Rn. 62.

73 *Thomas Raff*, in: Reinhard Gaier (ed.), Münchener Kommentar zum BGB, München 2020, § 1004 Rn. 324 seq.

74 *Gerhard Wagner,* in: Reinhard Gaier (ed.), note 73, § 823 Rn. 532; E.g., the 26. BImSchVO could be considerd as a norm in the sense of § 823 I Sentence 1 BGB.

75 With further evidence: *Christian Förster,* in: Wolfgang Hau / Roman Poseck (eds.), BeckOK BGB, (2021), § 823 par. 275.

76 ibid par. 276.

ment is not possible or if the restitution is impossible (§ 251 I) or just under disproportionate expenses (§ 251 II). This principle of German tort law, known as "in rem restitution," (Naturalrestitution) differs substantially from concepts of punitive damages known especially from anglo-american legal systems. However, the principle is limited by § 251 II Sentence 1 BGB, according to which the person liable in damages may compensate the obligee in money if restoration is only possible with disproportionate expenses. This means that the re-establishment of the course of the river, can anyway only be considered if it is not disproportionate.

D. Potential of Rights of Nature in Germany

Overall, it has become clear that rights of nature still seem to be a “foreign” matter to German legal dogmatics. Nevertheless, legal scholars such as *Andreas Fischer-Lescano,*[77] *Malte-Christian Gruber*[78] or *Jens Kersten*[79]*,* have shown, that this does not have to remain the case. On the contrary, the described insufficiencies of the legal status quo speak in favour of a radical change in German environmental law, as the current system of nearly exclusively individual rights-centered legal protection stands in the way of a transparent and effective legal framework for relations between humans and the rest of nature. Thus, the final step of this paper is to examine the potential which rights of nature could have in Germany.

I. Steps in the Right Direction

Even if a rather gloomy picture has been painted so far with regard to rights of nature in German law, there are promising approaches to be identified even today.

1. Representative Action – Breaking out of the Subjective Right of Action

As already explained above, the implementation of the Aarhus Convention into German law represents a special feature, as for the first time (even if only for recognised environmental associations) the possibility was created to file legal remedies under the VwGO against certain administrative decisions mentioned in § 1 UmwRG without being subjectively affected (§ 2 I UmwRG). Opponents of collective action often argue that it will lead to a flood of lawsuits, but this has turned out to not be the case, and in addition the success rate is above average.[80] In any case, the representative action makes it clear that the waiver of subjective concern is not impossible within the scope of the right to bring an action un-

77 *Fischer-Lescano,* note 7, p. 205.

78 *Gruber,* note 51.

79 *Kersten,* note 50, p. 27.

80 NABU, https://www.nabu.de/natur-und-landschaft/naturschutz/deutschland/16700.html (last accessed on 12 April 2021).

der § 42 II VwGO. Even though in Ecuador anyone is entitled to file a lawsuit in the name of nature, there has never been a flood of lawsuits, which might calm some anxious voices in Germany.

2. Art. 20a GG – toward to a Subjective Right of Nature?

At present, there is consensus that Art. 20a GG includes the state objective to protect the natural foundations of life and animals. Beyond that, *Andreas Fischer-Lescano* and *Malte-Christian Gruber* establish pathways how Art. 20a in conjunction with Art. 19 III GG or Art. 1 GG could open up the basic law to nature. *Fischer-Lescano* proves that the overall view of Art. 20a and Art. 19 III GG can justify the recognition of nature as a legal person.[81] Thus, with regard to the fundamental rights applicable to it, nature could be entitled to fundamental rights.[82]

Gruber on the other hand, sees Art. 20a GG as an argument for an ecocentric reading, making it clear that the constitutional protection of human dignity (Art. 1 I GG) is not limited to human life but also allows, if not requires, respect for non-human entities.[83] Both views would ultimately lead to nature being recognised as having subjective rights, which it could then also sue for. These approaches are particularly promising because at the moment a constitutional amendment, as proposed by *Kersten,* towards the recognition of subjective rights of nature does not seem very likely.

3. Constitutional Amendment

Nevertheless, even if it is an ambitious goal, such a constitutional amendment would offer the greatest legal certainty for nature. For *Kersten,* there are two ways to implement subjective rights of nature in the constitution: On the one hand a specific sentence such as "The rights of nature shall be respected and protected" could be included in basic law,[84] e.g. as an extension of Art. 20a. Another possibility would be to amend Article 19 III GG to explicitly recognise that the already existing fundamental rights also apply to nature insofar as they are applicable to it by their nature, in this case, the content of rights of nature would be shaped at the level of constitutional law.[85]

Incidentally, the discussion about constitutional amendment towards nature's rights is no longer a purely academic one. While not on the federal level, a petition in the state of Bavaria for a referendum "Rechte der Natur" (Rights of Nature) aims to impose nature's

81 *Fischer-Lescano,* note 7, p. 213 seq.
82 *Fischer-Lescano,* note 7, p. 214.
83 *Gruber,* note 51, p. 64.
84 *Kersten,* note 50, p. 31.
85 *Kersten,* note 50, p. 32.

rights in the Bavarian state constitution (BayVerf).[86] If the petition for a referendum is successful, this will be a decisive step towards the recognition of rights of nature in Germany.

Equally promising approaches can be seen on the European scale. Even if, in contrast to other countries in the world such as Ecuador, Bolivia,[87] New Zealand,[88] India[89] or Canada,[90] rights of nature have not yet been implemented in European laws, the discussion about rights of nature is closer than we think. Political parties such as the Green Party of England & Wales or the GroenLinks in the Netherlands have recognised the importance of rights of nature.[91] On a civil society level, organisations are campaigning for rights of nature throughout Europe,[92] but also within Germany.[93] In addition, the European Economic and Social Committee published a study on a possible EU-Charter of Fundamental Rights of Nature in December 2020[94] and in March 2021 the study "Can Nature Get it Right ?" commissioned by the EU Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee was published.[95]

Last but not least the successful climate lawsuit of Urgenda against the Netherlands or the lawsuit of the young Portuguese before the ECtHR against Germany and 32 other states show the necessity of a comprehensive legal regulation.

II. Advantages of Inherent Rights of Nature

Now that it has been made clear that it is much more difficult in Germany than in Ecuador to bring rights of nature before the German courts, it could also be objected that this could be countered by strengthening and differentiating German environmental law. Would this

86 Volksbegehren, https://gibdernaturrecht.muc-mib.de/ (last accessed on 12 April 2021).

87 *Calzadilla / Kotzé,* note 1 ,p. 399.

88 New Zealand Legislation, Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, http://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html (last accessed on 12 April 2021).

89 The High Court of Uttarakhand at Nainital, Writ Petition (PIL) No. 126 of 2014, Dated: March 20, 2017, https://www.nonhumanrights.org/content/uploads/WPPIL-126-14.pdf (last accessed on 12 April 2021).

90 UN Harmony with Nature, Rights of Nature Law and Policy, http://www.harmonywithnatureun.org/rightsOfNature/ (last accessed on 12 April 2021).

91 Green Party, Responsibilities & Rights, https://policy.greenparty.org.uk/rr.html (last accessed on 12 April 2021); GroenLinks, Verkiezingsprogramm, https://groenlinks.nl/verkiezingsprogramma (last accessed on 12 April 2021).

92 Rights of Nature Sweden, GARN Europe.

93 Netzwerk "Rechte der Natur".

94 *Michele Carducci / Silvia Bagni/ Vincenzo Lorubbio a.o.,* Towards an EU Charterof the Fundamental Rights of Nature, Study, 2020, https://www.eesc.europa.eu/de/our-work/publications-other-work/publications/towards-eu-charter-fundamental-rights-nature#downloads (last accessed on 12 April 2021).

95 *Jan Darpö,* Can Nature Get it Right? A Study on Rights of Nature in the European Context, 2021, https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282021%29689328 (last accessed on 29 September 2021).

not be enough to protect the nature while also combating the worsening climate crisis? Against this it can be directly argued that it is hardly the lack of legal regulations[96] but rather a perennial enforcement deficit that hinders the effective implementation of German nature conservation law.[97] According to *Ulrich Ramsauer*, this problem can be countered by recognising rights of nature as a "law enforcement claim."[98] The idea of rights of nature, however, goes far beyond this. Some might ask, whether Germany really need subjective rights of nature, a country that has no indigenous population like Ecuador.[99] This overlooks the fact that the recognition of the legal subjectivity of nature or pacha mama – part of indigenous cosmovisions – [100] also contributes to enriching the discourse on the legal subjectivity of nature beyond national borders.[101] Moreover, it should be noted that the abandonment of the dichotomy of nature and human or nature and culture is also being discussed in Western societies and cannot be reduced to "religious" beliefs or "cultural" traditions.[102] Not least, the accelerating pace of climate change makes it painfully clear that the destiny of humanity and nature are undeniably interwoven and, as *Bernd Herrmann* says, are part of a life-founding negotiation process.[103] Yet the German legal system – based on an anthropocentric approach – does not take this fact into account. This does not mean that German environmental law is indifferent to nature's needs. Among others, it is oriented towards the welcome principles of precaution[104] and sustainability[105] and as explained above, nature is recognized as an object of protection in Art. 20a GG,[106] but this has not led to counteracting ecological aberrations in the past, nor do they seem likely to do so in the future.[107] It can thus be concluded that the mute status of nature as a legal object cannot lead to an improvement and that the subordinate role of nature in relation to other legal subjects is maintained. Transcending the effective prevention of particular ecological damage, rights of nature can also stand for a revisited relation of humanity and nature, acknowledging na-

96 In this sense, *Ulrich Ramsauer,* Vom Umweltrecht zu Eigenrechten der Natur, in: Sabine Schlacke / Guy Beaucamp / Mathias Schubert (eds.), Infrastruktur-Recht, Berlin 2019, p. 467.

97 In this sense, *Gellermann,* note 40, vor §§ 63, 64 BNatSchG, para. 1.

98 *Ramsauer,* note 95, p. 467.

99 In this direction: *Klaus Ferdinand Gärditz,* Tierschutzverbandsklagen, EurUP 4 (2018), p. 488, there: sidenote 9.

100 *Andreas Gutmann,* Pachamama als Rechtssubjekt?, ZUR 2019, p. 613.

101 *Andreas Gutmann,* Hybride Rechtssubjektivität, in the course of publication.

102 E.g.: *Latour,* note 11; *Donna Haraway,* Simians, cyborgs, and women, London 1998; *Jane Bennett,* Vibrant Matter, Durham 2010.

103 *Herrmann,* note 11, p. 13.

104 Umweltbundesamt, Vorsorgeprinzip, https://www.umweltbundesamt.de/vorsorgeprinzip (last accessed on 12 April 2021).

105 With further evidence *Johanna Monien,* Prinzipien als Wegbereiter eines globalen Umweltrechts?, Baden-Baden 2014, p, 222 seq.

106 *Kersten,* note 50, p. 27 seq.

107 *Kersten,* note 50, p. 27.

ture's inherent value beyond economic measures. Proposing a radical change of view on the "things" of nature, *Latour* suggests, that the human/nature dichotomy is invalid and that we are instead in a constant process of negotiation in which both human and non-human beings are given a voice.[108] If we truly want to listen to this choir of natural entities surrounding us,[109] their voices must also be reflected in law. In a law based on subjective rights, "taking nature seriously" means granting nature subjective rights as well – with the possibility to sue for them. Even if the legal subjectivity of nature fills German legal doctrine with fear – which, according to *Kersten*, is the reason for the unnecessary reference to the constitutional order in Article 20a GG[110] – rights of nature do neither mean that they always prevail in considerations, nor that nature can claim every human right. However, it ensures that rights of nature are always considered and respected in the context of state action.

Rather than responding to it with unfounded fear, the recognition of nature's rights should therefore be seen as an opportunity to question our supposedly unalterable legal principles and to open ourselves up to new legal subjects in order to be able to do justice to both the ecological and social issues of our time.

108 *Latour,* note 11, p. 84, 165 seq.

109 *Cristy Clark / Nia Emmanouil / John Page / Alessandro Pelizzon,* Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance, Ecology Law Quarterly 45(4), p. 787.

110 *Kersten,* note 50, p. 27.