ABHANDLUNGEN / ARTICLES

Should the Absentees Have Standing? The Fundamentals that Justify Nature Accessing Justice in Germany and Ecuador

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Abstract: The law is deeply anthropocentric and tends to exclude nature from court proceedings. Consequently, in most states, pollution and destruction of ecosystems or animal abuse cannot be challenged directly by nature. This has been challengend constantly by environmental, indigenous, and other social movements. Rights of Nature (RoN) have become one of their favorite tools to contest law's anthropocentrism. The idea bases on the assumption that access to justice in environmental issues would become more effective, if nature had autonomous rights that can be claimed before courts.

This paper focuses on giving voice to absentees by using the sociology of absences and emergences, developped by Boaventura de Sousa Santos. It investigates how so called rights of nature were born out of different non-hegemonic views on nature and the collaboration of different social movements. It focusses on two constitutional orders (Germany and Ecuador) that heavily diverge regarding the consideration of nature's claim in order to show how legal systems deal with emerging bio- and ecocentric demands.

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A. Introduction

It is widely believed that the law's response to the ecological crisis is deficient. These deficiencies might be rooted in the anthropocentric attitude[1] of modern law. Anthropocentrism conceives humans as seperated from so called nature. Humans therefore play a distinct

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This research was funded by the German Research Foundation (DFG), 421427080 – Die Natur als Rechtsperson, Andreas Fischer Lescano.

1 *Joshua J. Bruckerhoff,* Giving Nature Constitutional Protection, Texas Law Review 86 (2008), p. 618.

role within the world. Nature can be used and transformed for human purposes. In this worldview, environmental law has to fulfil human needs, e.g., protect human health. These underlying assumptions of environmental law often limit access to legal procedures.

Eduardo Gudynas points out that, under the classic approach, questions about environmental matters are settled in relation to human rights, or the implications for people. Thus, environmental justice corresponds to an object Nature, and therefore its perspective is anthropocentric.[2]

As a way out of these structural weaknesses of environmental law, the idea of so-called rights of nature (RoN) is increasingly gaining popularity. The idea is based on the assumption that access to justice in environmental issues would become more effective, if nature had autonomous rights that can be claimed before courts. While Christopher Stone's question "Should Trees have Standing?"[3] was denied by the U.S. Supreme Court almost 50 years ago, rights of nature are now found in many places around the world, such as Ecuador,[4] Bolivia[5] and New Zealand[6]. The idea of RoN travels around the world. Civil society movements play an important role here and form a global movement.[7]

The objective of this investigation is to determine the ethical foundations used by the movement in defense of nature to justify nature accessing justice and to claim its rights. Through a diatopic hermeneutics that recognizes the diversity and plurality of heterogeneous societies, advances in access to justice of nature in countries with different political, legal, economic and cultural realities are investigated. Thus, the primary purpose is to "make the most of the mutual incomprehensialness of cultures through dialogue with one foot in one culture and the other foot in the other".[8] Therefore, we will rely on a

2 *Eduardo Gudynas*, La senda biocéntrica: valores intrínsecos, derechos de la naturaleza y justicia ecológica, Tabula Rasa 13 (2010), p. 56.

3 *Christopher D Stone*, Should Trees Have Standing? – Towards Legal Rights for Natural Objects, Southern California Law Review 45 (1972), p. 450.

4 See *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, Oxon: 2021, pp. 36 et seqq.; *Andreas Gutmann,* Hybride Rechtssubjektivität: Die Rechte der "Natur oder Pacha Mama" in der ecuadorianischen Verfassung von 2008, Baden-Baden 2021.

5 Ley N°071, Ley de Derechos de la Madre Tierra; Ley N°300, Ley Marco de la Madre Tierra y del Desarrollo integral para Vivir bien, 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. 59.

6 *Elaine C. Hsiao,* Whanganui River Agreement – Indigenous Rights and Rights of Nature, Environmental Policy and Law 42 (2012), pp. 371 et seqq.; *Laura Schimmöller,* Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador, TEL 9 (2020), pp. 569 et seqq; *Mihnea Tanasescu,* The Rights of Nature as Politics, in: Daniel Corrigan / Markku Oksanen (eds.), Rights of Nature: A Re-examination, Oxon: 2021, pp 73 et seqq.

7 See *Andreas Gutmann,* Der globale Trend zu Rechten der Natur: 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 133 et seqq., in press.

8 *Raimon Panikkar*, The Intrareligious Dialogue, New York 1999, p. 33.

dialogue between normative and epistemological regimes that may be seen to collide when brought into interaction with one another.[9]

This research focuses on giving voice to absentees and abandoning metonymic reason. We use the sociology of absences, developed by Boaventura de Sousa Santos, that reveals the multiplicity of social practices which challenge the exclusive credibility of hegemonic habits.[10] Santos hopes that todays multiple crisises can be faced by unveiling a multitude of practices and epistemologies. This methodology is based on the premise that reality cannot be reduced to what can be seen with the naked eye. There are realities that have been invisibilized and that need to be brought to light.[11] Therefore, Santos wants to "transform impossible objects into possible".[12] Indeed, in this investigation we will see that the rights have been attributed to a limited number of holders (human being, legal persons[13], states[14]), which at the same time excludes other entities from access to direct protection by the Law. For example, under the sociology of absences it can be noted that nature has not been considered as part of the moral community that deserves tutelage by the State, except in those cases in which ecosystems and their elements have been seen as a way to guarantee human rights.

On the other hand, we use the sociology of emergences that allows us to look for alternatives that fit the horizon of concrete possibilities.[15] The sociology of emergences is based on the idea that alternatives to harmful practices – such as environmental degradation – already exist and must be brought to light. It faces the exclusionary patterns that have been identified by the sociology of abscences with "anticipatory awareness and nonconformity"[16] and searches for more inclusisve alternatives. Thus, all those who feel unhappy with the imposition of the rules of hegemonic modernity that commodifies nature, seek alternative horizons based on experiences that already exist but have been suppressed or at least hidden.[17] Therefore, under the sociology of emergencies, the defenders of nature show that rights can be attributed to subjects historically excluded from the tutelage of the State, in this case, nature. In addition, we will see that the lawsuits, protests and institutional

9 See *Catherine Walsh,* Interculturalidad, estado, sociedad: Luchas (de) coloniales de nuestra época, Quito 2009, p. 44.

10 *Boaventura de Sousa Santos*, El milenio huérfano: Ensayos para una nueva cultura política, Madrid 2005, p. 162.

11 *Boaventura de Sousa Santos*, Refundación del estado en América Latina: Perspectivas desde una epistemología del sur, Quito 2010, p. 47; *Boaventura de Sousa Santos*, Epistemologien des Südens – Gegen die Hegemonie des westlichen Denkens, Münster 2018, p. 239.

12 *Santos*, note 10, p. 160.

13 Corte Interamericana de Derechos Humanos, opinión consultiva 22/16, 26 de febrero de 2016.

14 Ecuador, Corte Constitucional, sentencia 282-13-JP/19, 4 de septiembre de 2019.

15 *Santos*, Epistemologien, note 11, p. 273.

16 *Santos*, note 10, p. 170.

17 Cf. *Boaventura de Sousa Santos*, Sociología jurídica crítica: Para un nuevo sentido común en el derecho, Madrid 2009, p. 461.

requests in defense of the earth make it clear that the law can be used as a tool to stop the excessive appropriation, commercialization and destruction of nature; this is seen as the counter-hegemonic use of law.[18]

B. Exclusion and demands for inclusion

The absence of nature in judicial proceedings is not "natural" but occurs through an active exclusionary process.[19] Non-existence occurs when an entity becomes invisible or incomprehensible.

As Santos reminds us, contra hegemonic epistemologies are always there but suffer from invisibilization.[20] The same applies with regard to nature's role within the law. This paper shows that different actors have always tried to agitate for nature's interest within court proceedings. Nevertheless, the law often tends to invisibilize such claims by denying access to justice.

Therefore, how can we eliminate exclusionary practices that restrict nature from accessing justice? The answer needs to consider alternative epistemological foundations of "fundamental rights"[21], "subjective rights"[22] or "human dignity"[23]. It is required to accept the biocentric and ecocentric ethics that have been built on the basis of the practices of human groups – peasants, indigenous, animalists and urban environmentalists – who maintain harmonious relations with their biodiverse territories or/ and the species that inhabit them. In addition, this ethic is based on scientific advances that confirm that the importance of maintaining and protecting life cycles and evolutionary processes and recognizing the intrinsic value of each element present on earth.

Precisely, the movement in defense of nature - named by Cullinan *the earth jurisprudece movement*-[24] shows that there are non-anthropocentric forms under which humans can relate to other living elements. The main role of this movement is to translate

18 *Boaventura de Sousa Santos,* El uso contra-hegemónico del derecho en la lucha por una globalización desde abajo, Anales de la Cátedra Francisco Suárez 39 (2005), p. 363-420.

19 Cf. *Santos*, note 10, p. 160; *Santos*, Epistemologien, note 11, p.244.

20 *Santos*, note 10, p. 160 et seqq.

21 *Luigi Ferrajoli,* Epistemología jurídica y garantismo, México, Fontamara, 2008, p. 19: Ferrajoli refers to "fundamental rights" as those that universally correspond to all human beings as endowed with statuses of persons, citizens or persons with the capacity to act.

22 *Ramiro Avila Santamaría*, El derecho de la naturaleza: fundamentos, in: Alberto Acosta / Esperanza Martínez (eds.), La naturaleza con derechos: De la filosofía y la política, Quito 2011, p. 181: when talking about "subjective rights", reference is made to the human being and at best to the communities, but never to nature; for a discussion whether the concept of subjective rights is appropriate for nature see *Gutmann*, Pachamama, note 4.

23 Under the foundation of "human dignity", there is a widespread premise that only those who hold autonomy of will can be subject to rights. Thus, no one can be a means of fulfilling the purposes of others – a general rule – unless being average is an end at the same time.

24 *Cormac Cullinan*, Wild Law. A manifesto for the justice of the land, 2nd ed., Vermont 2019.

the pretensions and needs of nature into the language of rights. The lawsuits filed by the RoN- movement permanently challenge the gap between law and justice and make visible violations of human and ecological rights that result from polluting activities. They try to shift the law from its anthropocentric approach towards a more inclusive orientation that embraces bio- and ecocentric worldviews.

I. Theoretical Foundations On The Protection Of Nature: Understanding biocentrism and ecocentrism

Ramiro Ávila, legal scholar and Judge of the Ecuadorian constitutional court sees RoN as a specific reaction to western modernity and its understanding of nature. Under modernity, the capitalist logic is progressively consolidated, opposed to other possible understandings of human socialization. "In this way, hegemonic modernity is committed to a scientific rationalism, as an exclusive form of knowledge; by capitalism, as a form of human relationship; for coloniality, as a mechanism of cultural imposition; and for the colonization, as a form of exercise of power." Under this logic, nature is seen as a mere resource that can be used by humans and remains passive of cultural imposition; and for the colonization, as a form of exercise of power."[25]

Consequently, in most states, pollution and destruction of ecosystems or animal abuse cannot be challenged directly by nature.[26] On the contrary, it is required to prove the affectation of human beings and nature only participates indirectly, which causes a permanent exclusion of nature.

II. Bio- and Ecocentrism

Both biocentrism and ecocentrism imply an epistemological change in the anthropocentric way of relating to nature. Bio- and ecocentric contributions – which develop the content of the ethics of the earth – present certain differences that deserve to be analyzed separately and then intertwined through the discourse of RoN. On the one hand, under the biocentric perspective, the human being is aware that the moral relationships it maintains with the natural world must be based on respect for the interests of each individual.[27] This affirma-

25 *Ramiro Ávila,* La utopía del oprimido, los derechos de la naturaleza y el buen vivir en el pensamiento crítico, el derecho y la literatura, México D.F., Akal 2019, p. 136-137.

26 Cf. *Francine Rochford,* "Rights of Nature" in a Water Market, in: Daniel Corrigan / Markku Oksanen (eds.), Rights of Nature: A Re-examination, Oxon 2021, pp. 55 et seqq; *Michael Kloepfer*, Art. 20a, in: Wolfgang Kahl / Christian Waldhoff / Christian Walter (eds.), Bonner Kommentar GG, 116th ed., München 2005, marginal number 103; *Dieter Sterzel*, Ökologie, Recht und Verfassung, Kritische Justiz 25 (1) (1992), p. 20; for the US still relevant the classic *Christopher D. Stone*, Should Trees Have Standing? – Towards Legal Rights for Natural Objects, Southern California Law Review 45 (1972), pp. 450 et seqq.

27 *Arne Naess*, Une écosophie pour la vie, Paris 2013, p. 120 et seqq.; *Naess*, the *promoter of deep ecology,* developed the 7 principles of ecosophy being one of these biospheric egalitarianism. This

tion does not advocate for an untouched nature. Humans can make use of all the natural elements that are necessary for human life to be perpetuated[28] without forgetting that there are ecological dynamics that are ineffective, competitive, predation, etc., which implies the possibility of satisfying the vital needs by serving the quality of life according to their original formulations.[29]

On the other hand, ecocentrism is the proposal of moral philosophy that focuses on the holistic protection of ecosystems. Ecocentrism goes beyond biocentrism by including complete ecological systems and their abiotic aspects. Ecocentric ethics are embodied in both several indigenous epistemologies and scientific theories of Western origin, so it is necessary to analyze ecocentrism under an intercultural perspective.[30] In the Andean philosophy of *sumak kawsay* or *Suma Qamaña*[31]; or, in the Hindu philosophy of *isha Upanishad*[32], communities live in harmony with nature, that engenders, feeds and shelters them and has their own life, and values of their own, beyond the human being.[33] These groups use the elements of their biodiverse territories to meet their daily needs while respecting the productive and reproductive cycles of the land.[34]

From the above, it can be derrived that both biocentrism and ecocentrism have clear bridges of dialogue. Biocentrism points to the individual guardianship of life forms without leaving aside protection to the spaces in which they live. Ecocentrism also protects life in all its forms, so, if ecosystems are effectively protected, the elements of these ecosystems are also protected in addition.

principle implies deep respect - even veneration - for different forms and ways of life, where everyone has an equal right to live and flourish.

28 *Santiago Vallejo*, La considerabilidad moral: fundamento ético del reconocimiento de la naturaleza como sujeto de derecho, Letras Verdes 26 (2019), p. 22; *Val Plumwwod*, Decolonizing relationships with nature, in: Martin Mulligan / William Mark (eds.), Decolonizing nature, London 2003, p. 61 demonstrates that the notion of "intouched nature" has a colonial impetus.

29 *Gudynas*, note 2, p. 55.

30 To deepen into the dialogue between cultures on the protection of nature see, *Adriana Rodríguez / Viviana Morales*, Los derechos de la naturaleza en perspectiva intercultural en las Altas Cortes de Ecuador, La India y Colombia. Hacia la búsqueda de una justicia ecocéntrica, Quito 2020.

31 See: *Andreas Gutmann / Alex Valle Franco,* Extraktivismus und das Gute Leben, Kritische Justiz 52 (2019), p. 58 et seqq.

32 *Vandana Shiva*, Manifiesto para una democracia de la tierra, Barcelona 2006, p. 17: *Isha Upanishad implies* that individual life must learn to enjoy its own benefits by being part of the system in a close relationship with other species.

33 *Eduardo Galeano*, La naturaleza no es muda, in: Alberto Acosta / Esperanza Martínez (eds.), Derechos de la Naturaleza. El futuro es ahora, Quito 2009, p. 25 et seqq.

34 *Rodríguez/Morales*, note 30.

III. The relationship between humans and nature

Throughout the twentieth and twenty-first centuries, under the ecocentric and biocentric approach, numerous groups have established a common identity framework[35] and various mobilization strategies aimed at countering pollution and the destruction of nature through the reappropriation of non-anthropocentric types of relationship between human beings and nature. The movement in defense of nature consists of a number of rural - peasant and indigenous - and urban - environmental and animalistic - organizations. Among these groups there are countless strategic alliances. Despite their different backgrounds, they manage to identify "partial connections".[36]

It should be noted that not all groups in defense of nature emerged at the same time or for the same purposes; therefore, within the earthjurisprudence movement there are several axes with different foundations: animalists groups and their defense of sentient beings[37], peasants groups in defense of land and water[38], indigenous groups in defense of the right to self-determination and respect for collective rights[39]; and, ecological collectives with complaints about the deterioration of natural and human ecosystems and in defense of a cultural political model that promotes other ways of relating to nature.[40] The so called rights of nature were born out of these connections and currently have become a tool to tackle law's anthropocentrism.

35 *Alberto Melucci*, Getting Involved: Identity and Mobilization in Social Movements, in: Bert Klandermans / Hanspeter Kriesi / Sidney Tarrow, From Structure to Action: Comparing Social Movement Research Across Cultures, Greenwich 1998, p. 342: Collective identity refers toelements shared by individuals within a group. It also sets out the opportunities and limitations that individuals face within the group.

36 *Andrea Sempértegui,* Indigenous Women's Activism, Ecofeminism, and Extractivism – Partial Connections in the Ecuadorian Amazon, Politics & Gender 2019, p. 1 et seqq.

37 See: *David Boyd,* Los derechos de la naturaleza: Una revolución legal que podría salvar al mundo, Bogotá 2020, pp. 21 et seqq.

38 See*: Stalin Herrera*, De la lucha por la tierra a la modernización conservadora, Quito 2015, pp. 75 et seqq.; *Adriana Rodríguez / Viviana Morales*, La protección de los manglares a la luz de los derechos de la naturaleza y de los derechos colectivos en Ecuador, in: Miguel Angel Pacheco/ Adriana Travé Valls (eds.), Interculturalidad, derechos de la naturaleza, paz, valores para un nuevo constitucionalismo, Valencia 2021, pp. 203 et seqq.

39 See: *David Cordero,* Social movements as source of constitutional law: the case of the indigenous movement in plurinational state of Ecuador, PhD thesis, Cornell University, 2018.

40 See: *Ana María Varea / Carmen Barrera / Ana María Maldonado,* Ecologismo ecuatorial, conflictos socioambientales en ciudades, tomo II, Quito 1997.

1. The rural axis of nature's movement

Biodiversity is mainly found in rurality because the impact of industries, urbanization and the consequent destruction of nature has mainly focused on large cities.[41] In addition, biodiverse territories are more likely to be preserved when they are administered by communities that maintain close ties to nature. These practices underpin biocultural rights.[42] Indeed, in the face of the processes of resistance to extractivism that advances steadily into jungles, moors, forests, mangroves, etc.[43], peasant and indigenous resistances appear.

The claims of these groups are also cultural claims because they are publicly confronted with political apparatuses in the name of the new cultural codes[44] where nature is not seen as an object but as a subject with the inexorable relationships of correspondence, complementarity, relationality and reciprocity with humans.[45]

2. The indigenous movement and its perception of nature

Indigenous peoples are – at least within the Latin American context – an important actor in environmental politics. Many authors argue, that RoN are based on indigenous philosophy.[46] Such assumptions have to be aware of not reproducing the colonial stereotype of the noble savage who is living in innocent harmony with nature. A homogenous indigenous thinking does not exist. Nevertheless, many indigenous people relate to nature in a different way than western culture does. According to Andean cosmovisions, the cosmos is a living entity.[47] There is no separation between nature and culture.[48] Humans are part of

41 *David Harvey*, Ciudades rebeldes. Del derecho de la ciudad a la revolución urbana, Salamanca 2013, p. 14: The traditional city has died, killed by unbridled capitalist development, a victim of its insatiable need to have overaccumulated capital avid for investment in rapid and unlimited urban growth regardless of the possible social, environmental or political consequences.

42 *Kabir Sanjay Bavikatte / Tom Bennett*, Community stewardship: the foundation of biocultural rights, Journal of human rights and the environment 6 (2015), p. 7 et seqq: biocultural rights are those that connect communities, land and their ecosystems through traditional territorial property rights.

43 To delve into extractivist practices in Ecuador and its human rights and nature concerns, see *Rodríguez / Morales*, note 30.

44 *Alberto Melucci*, Acción colectiva, vida cotidiana y democracia, México 2010, p. 69.

45 *Ávila Santamaría*, note 25, p. 122 et seqq.

46 For the background see *Mihnea Tănăsescu*, The rights of nature in Ecuador: the making of an idea, International Journal of Environmental Studies 70 (2013), p. 846 et seqq.

47 *Josef Estermann,* Filosofía andina – Sabiduría indígena para un mundo nuevo, 2nd ed., Quito 2015, p. 205.

48 *Atawallpa Oviedo Freire*, Ruptura de dos Paradigmas – Una lectura de la Izquierda desde la Filosofía Tetrádica Andina, in: Atawallpa Oviedo Freire. (ed.), Bifurcación del buen vivir y el sumak kawsay, Quito 2014, p. 148.

the cosmos, called *Pacha*.[49] This living network is based on numerous relations and interdependences that exist between human and non-human entities.[50] This worldview based on relationships (relationality) is crucial for Andean indigenous thinking.[51] According to this idea, the whole world is a complex living network, consisting of different forms of life. Single entities, such as humans or members of other species, can only exist within this network. Every entity performs a specific role and has specific tasks that sustain the totality.[52]

3. The urban axis in defense of nature

The term "political ecologism" emerged in the 1970[53] to theorize the struggle of collectives that make visible the contradictions and weaknesses of hegemonic modernity. The scientific evidence[54] was a decisive factor in civil society organizing and reporting economic growth, consumer society, the crisis of technocratic productivism, and the depletion of natural resources. The position of ecologists is fundamentally ecocentric as they focus on requiring guardianship of the life cycles and evolutionary processes of human and non-human ecosystems.

Another relevant player of the urban axis is the animal movement that was consolidated from the 1970s as a form of resistance of organized civil society to the increase in the numbers and forms of animal abuse that occur since the second half of the twentieth century. Under a biocentric approach, animalists base their political discourse on ethical

49 *Raúl Llasag Fernández*, Derechos de la naturaleza: una mirada desde la filosofía indígena y la Constitución, in: Carlos Espinosa Gallegos-Anda / Camilo Pérez Fernández, Camilo (eds.), Los Derechos de la Naturaleza y la Naturaleza de sus Derechos, Quito 2011, p. 78.

50 *Ricardo Claverías Huerse*, Cosmovisión y planifiacación en las comunidades andinas, Lima 1990, p. 143.

51 *Estermann*, note 47, p. 143.

52 *Raúl Llasag Fernández*, El sumak kawsay y sus restricciones constitucionales, Foro: Revista de Derecho 12 (2009), p. 115.

53 *Guillermo Castro Herrera*, Socialidad y colonialidad en la cultura de la naturaleza en nuestra América, in: Héctor Alimonda / Catalina Toro Pérez / Facundo Martín (eds.), Ecología política latinoamericana pensamiento crítico, diferencia latinoamericana y rearticulación epistémica, Buenos Aires 2017, p. 299. From the 1970s onwards, visions of the world that did not recognize mere economic growth as evidence of the fruits of progress and progress towards civilization through development were already encouraged. On the contrary, they expressed growing concern about the clearly unsustainable nature of this development based on the constant expansion of the export of raw materials to other economies.

54 *Donella H. Meadows / Dennis L. Meadows / Jørgen Randers / William W. Behrens III,* The Limits to Growth, New York 1972, was conducted by a group of researchers from the Massachusetts Institute of Technology (MIT) on the ecological risks of industrialization and pollution.

theories that develop the ethical and scientific category of sentience[55] as a variable to be taken into account by law.[56]

4. Bridges of dialogue

From the above, it can be concluded that the ecocentric and biocentric discourse creates bridges of dialogue between the various urban, rural, and indigenous organizations. All groups defending nature promote the idea that political, legal and technical instruments simultaneously must respect invisibilized epistemologies of indigenous and peasant peoples and collectives, the contributions of contemporary groups - youth movements, feminists, animalists - and advances in science on the complexity of ecosystems[57]; in order to stop degradation of ecosystems and protect cultural identities that maintain non-anthropocentric links with nature.

All of these movements face severe restriction by the exclusionary character of the law. Nevertheless, strategic litigation – i.e. vesting their demands in the form of rights – has become a preferred tool of many social-, indigenous-, and environmental groups.

C. Knocking on Justice's Door: Ron Gain Importance

How can the law cope with eco- and biocentric demands? These worldviews hardly fit into court-proceedings. Nevertheless, the law has become a favorite battlefield of environmental organizations. The former absentees raise their voice before courts. The transnational movement for animal rights may serve as an example for how grassroots movements address the gap between (anthropocentric) law and a notion of justice that embraces both humans and nonhumans. In many places, animal rights are alleged by these movements. They claim habeas corpus[58] for caged animals or state that animals possess personality and are therefore protected by fundamental rights,[59] that in a conventional view only

55 *Kenneth E Goodpaster*, On Being Morally Considerable, Journal of Philosophy 75 (1978), p. 316: sentience is an adaptive feature of living organisms that provides them with a better ability to anticipate, and thus avoid, threats to life.

56 For the background see *Viviana Morales*, Deconstruir la cultura taurina para construir los derechos de los animales, Foro review 34 (2020), p. 200: There are theories like Tom Regan's deontologism, Mark Rowlands' contractualism or Peter Singer's utilitarianism. All pursue the recognition of sentient beings as part of the moral community and the need for the state to ensure the welfare of the animal.

57 *Fikret Berkes,* Sacred Ecology: Traditional ecological knowledge and resource management, 2nd ed., New York 2008, shows an interest in merging traditional ecological knowledge from native peoples with Western scientific knowledge.

58 Argentina judgment about Sandra Orangutan (EXPTE. A2174-2015/0), Colombia judgment about Chucho bear (AHC4806－2017), Ecuador judgment about Estrellita Singe (Case 253-20-JH).

59 In Switzerland, the Federal Court (Bundesgericht) upheld a popular petition filed in the canton Basel-Stadt that suggests to include a provision into the cantonal constitution that grants great apes a fundamental right to bodily and mental integrity, see Bundesgericht, 16.9.2020 - 1C_105/2019.

protect humans.[60] Even if most of these lawsuits fail, some bear success and have become emblematic.

Not only animals but also entire nature should get its day in court, as many ecologists claim. RoN have become a much-debated legal instrument that raises expectations all over the world.[61] For example, there are peasants who demand the protection of their agricultural lands[62], indigenous cultures[63], montubios collectives[64] and afro-descendants[65] who demand the protection of their traditional ways of life; and inhabitants of urban areas who demand the protection of green areas[66] and plant species[67] in the cities. The following intercept will investigate two constitutional orders (Germany and Ecuador) that heavily diverge regarding the consideration of nature's claim in order to show how legal systems deal with emerging bio- and ecocentric demands.

I. Exclusion of Nature: A German example

The German legal system is a clearly anthropocentric one.[68] Environmental issues have only played a minor role within the constitutional framework. Whether there will be a change due to the groundbreaking constitutional judgment on climate change that was issued by the Federal Constitutional Court (BVerfG) this year,[69] remains to be seen.[70] The

60 In Germany, PETA filed a constitutional complaint (Verfassungsbeschwerde) in the name of male piglets, claiming that castration without anesthesia violates their fundamental rights. They argue that the human rights granted by the German constitution at least partly also apply for pigs, see *Martin Klingst*, Sind Tiere auch nur Menschen?, ZEIT 21 November 2019, p. 9; *Jasper Mührel,* Standing for Piglets, Verfassungsblog, https://verfassungsblog.de/standing-for-piglets/ (last accesd on 10 June 2021).

61 For the global RoN-movement see *Cristina Espinosa*, Bringing about the global movement for the rights of nature: sites and practices for intelligibility, Global Networks 17 (2017), p. 463-482.

62 Ecuador, Corte Constitucional, Caso de selección No. 502-19-JP, 6 de mayo de 2019.

63 Ecuador, Corte Constitucional, Caso de selección No. 273-19-JP, 21 de octubre de 2019.

64 Ecuador, Corte Constitucional, SENTENCIA N.° 065-15-SEP-CC, 11 de marzo de 2015.

65 Colombia, Corte Constitucional, SENTENCIA N.° T-622 de 2016, 10 de noviembre de 2016.

66 Ecuador, Corte Constitucional, 1236-13-EP, 17 de julio de 2013.

67 Ecuador, Unidad Judicial Multicompetente de Santa Cruz, 20332-2015-0127, 12 de marzo de 2015.

68 See *Ewering / Vetter*, this issue pp. 376 et seqq. According to *Wilfried Erbguth / Sabine Schlacke*, Umweltrecht, 6th ed., Baden-Baden 2016, p. 33 environmental law protects "the basic means of livehood for humans" ("die elementaren Lebensgrundlagen des Menschen"); *Ferdinand Gärditz*, GG Art. 20a, in: Martin Beckmann et al. (eds.), Landmann/Rohmer Umweltrecht, 92th ed., Munich 2020, marginal number 23 points out, that the focus of the German legal order on human dignity precludes RoN.

69 BVerfG Judgement of 24.4.2021 - 1 BvR 2656/18, see English press-release at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html (last accessed on 18 May 2021).

70 Rather optimistic: *Felix Ekardt,* Climate Revolution with Weaknesses, Verfassungsblog, https://verfassungsblog.de/climate-revolution-with-weaknesses/ (last accesd on 18 May 2021): "probably the

Grundgesetz (basic law, GG) does not even explicitly provide a human right to clean or healthy environment. Nevertheless, some aspects of such a right, that has been recognized by many legal orders and even by international human rights law, are covered by the right to bodily integrity (art. 2 GG) or property (art. 14 GG).[71]

1. Slightly shifiting towards ecocentrism?

In the 1990s art. 20a was introduced into the German constitution. It requires the state to care for the environment, animals and future generation but does not – at least following the predominant reading[72] – contain enforceable rights.[73] Art. 20a therefore constitutes "a legal guiding State principle which is more than a mere programme, but less than an applicable individual legal interest that allows private persons to raise a claim."[74] Certainly the abovementioned climate judgment demonstrates that art. 20a in connection with human fundamental rights[75] can become a mighty tool for environmental protection. However, this approach is still based on human liberty and therefore anthropocentric. Nevertheless, German environmental law is shifting slightly towards a less anthropocentric orientation. Primarily nature conservation law and animal wellfare law tend to protect nature[76] or animals[77] for their own sake. Having said that, human interests still prevail over nature and it remains difficult to raise voice in the name of the non-human environment.

Environmental law in Germany is highly technical. Loads of regulations treat environmental issues in a very detailed way.[78] Nevertheless, it is a commonly shared position, that environmental law suffers a lack of enforcement (Vollzugsdefizit).[79]

most far-reaching decision ever made by a supreme court worldwide on climate protection"; see also *Matthias Goldmann,* Judges for Future, Verfassungsblog, https://verfassungsblog.de/judges-for-future/ (last accessed on 18 May 2021).

71 *Erbguth / Schlacke*, note 68, p. 65.

72 Nevertheles art. 20a might serve as a gateway for rights of nature, see *Andreas Fischer-Lescano*, Natur als Rechtsperson – Konstellationen der Stellvertretung im Recht, Zeitschrift für Umweltrecht (4) (2018), p. 213.

73 *Erbguth / Schlacke*, note 68, p. 59; *Alfred Rest*, International environmental law in german courts, Environmental Policy and Law 27 (1997), p. 410.

74 *Rest*, note 73, p. 410.

75 BVerfG Judgement of 24.4.2021 - 1 BvR 2656/18, para 183.

76 *Rainer Wolf,* Natur- und Artenschutzschutzrecht, in: Winfried Kluth / Urlich Smeddinck (eds.), Umweltrecht, Wiesbaden 2013, p. 255.

77 *Gärditz*, note 68, marginal number 20.

78 For an (outdated) English compilation of German environmental statutes see *Gerd Winter*, German Environmental Law, Dordrecht 1994.

79 *Kloepfer*, note 26, marginal number 103; *Ulrich Ramsauer*, Allgemeines Umweltverwaltungsrecht in: Hans Joachim Koch (ed.), Umweltrecht, 4th ed., München 2014, § 3 marginal numbers 170 et seqq.

Both anthropocentrism and the Vollzugsdefizit are challenged by environmental movements. Trying to contest exclusionary legal anthropocentrism requires what *Boaventura de Sousa Santos* calls the sociology of the absences and emergences. The famous German Robbenklage demonstrates, how the technique suggested by *Santos* can be used as a tool for strategic litigation. It unveils that the law actively excludes certain demands by only focusing on human affections. At the same time, it proposes an alternative way that does not imply a radical break but relies on slight shifts within the legal framework.

2. The Robbenklage

In the late 1980s, seals living in the North Sea died in great numbers.[80] In this time, the North Sea served as a waste disposal site for German industry, which disposed of chemical wastes by dumping it into rivers that runs to the sea or directly into the sea. The high mortality rate of the seals was just one of many ecological side effects.[81] Juridically the situation was quite paradox: Even though it was likely that the permissions hold by the polluters were illicit, there was no way to challenge them before a court. In order to file a complaint before German administrative courts, one needs to be affected personally in one's own rights (§ 42 para 2 administrative procedure code, VwGO).[82]

This bears a resemblance to the US *locus standi* (standing) doctrine. Following this doctrine, claimants must prove that they are at least indirectly affected in order to challenge an administrative action.[83] Whether trees should have standing was the central question of the lawsuit Sierra Club vs. Morton before the US Supreme Court. The debate about legal remedies against a large-scale project that would have destroyed large parts of the Mineral King Valley national park was enriched by Christopher Stone's seminal article that is considered as the foundational document of the RoN-movement. Finally, the Supreme Court dismissed the claim. Nevertheless, debates about locus standi for non-human entities continue until today. However, due to the incidence of public opinion and the Sierra Club's strategic litigation, the case was mediated, causing the entertainment park to never be built and the Mineral King to be declared in 1978 as part of the Sequoia National Park.[84]

In the German North Sea-case, humans could not claim to be affected personally, since the deadly outcome of the maritime waste disposal took place on high sea, far away from

80 *Hanfried Blume*, Robbenklage – Eigenrechte der Natur, Huy-Neinstedt 2004, p. 8.

81 *Hendrik Stephan Ley*, Das Instrument der Tierschutz-Verbandsklage, Berlin 2018, p. 81.

82 *Kloepfer*, note 26, p. 720; *Martin Kellner,* Citizen Participation in Environmental Law Enforcement in Nicaragua, Verfassung und Recht in Übersee 42 (2009), p. 395.

83 *Peter Hay*, Law of the United States, München 2016, p. 54.

84 *Jason Henry Schultz*, Inaccessible: the sierra club's changing attitude toward roadbuilding, Thesis University of Maryland, 2008, p. 95 et seqq.

human settlements, no human person was affected personally.[85] For this reason, several environmental organizations filed a complaint against the permissions in the name of "the seals of the North Sea".[86] They chose an emblematic species that attained high attention rates within media in order the represent the maritime ecosystem of the North Sea. This challenged the division-line between ecocentric and biocentric approaches: A single animal specie raised its voice in the name of its habitat.

The Hamburg administrative court (VG Hamburg) finally dismissed the claim, since "it is alien to the German legal system […] to transfer the ability to have rights and duties to animals".[87] It denied access to justice for the seals and therefore reproduced their exclusion. Nevertheless, the Robbenklage was successful. Due to public attention disposing of dilute acid into the North Sea was ended and the maritime ecosystem partly recovered.[88] Furthermore, it revealed law's anthropocentrism. It clearly showed, how the absence of nature is actively produced by a legal order, that only focusses on humans. The claim of the seals both affirms the law by vesting its demands in a legal proceeding and tackling the unlawfullness of the permissions. By the same time, it transcends the law by raising the voice in the name of entities that were eventually excluded. It therefore tries to bridge the gap between law and justice by inventing a more ecocentric law.

II. Theoretical Inclusion: The Ecuadorian case

Recently some jurisdictions have granted rights to animals or to nature.[89] Apart from the symbolic significance of such an act, which should not be underestimated, and the idea that nature's interests would be given more weight, these efforts are driven by the desire to grant nature access to justice.

Probably the most far-reaching case of such a non-anthropocentric notion of legal subjectivity can be found in the Ecuadorian Constitution (CRE) that gives certain rights to Nature or *Pacha Mama*. This Constitution is the result of a historical struggle of the jurisprudence movement in Ecuador formed by peasant, indigenous, animalistic and urban collective voices that were present with their proposals during the elaboration of the

85 This is an outcome of many environmental cases, see *Franziska Grashof,* The Different Roads to Judicial Coherence in Public Environmental Law, Review of European Administrative Law 8 (2015), p. 251.

86 *Blume*, note 80, p. 7.

87 VG Hamburg, NVwZ 1988, p. 1058.

88 *Christopher D. Stone,* Should trees have standing? Law, morality, and the environment, 3rd ed., New York 2010, p. 133.

89 *David R. Boyd*, Recognizing the Rights of Nature – Lofty Rhetoric or Legal Revolution, Natural Resources & Environment 32 (4) (2018), p. 13 et seqq.

supreme norm in 2008.[90] As a result of the long debates in Montecristi-Ecuador, art. 71 of the constitution indicates:

> *Nature or Pacha Mama, where life is reproduced and carried out, has the right to have its existence fully respected and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes. Any person, community, people or nationality may demand that the public authority comply with the rights of nature.*

The Ecuadorian Constitution maintains an ecocentric approach because it recognizes the right of nature to have its life cycles and its evolutionary processes respected, which implies a holistic legal protection for ecosystems. At the same time, the supreme norm recognizes that the State must promote respect for all elements of the ecosystem, which implies the acceptance of a biocentric approach where each form of life has an intrinsic value that makes it worthy of state protection. By mentioning *Pacha Mama* it also embraces indigenous philosophy that conceive humans as deeply interconnected with their nonhuman environment.[91] Analyzing the Ecuadorian case through the lens of *Santos'* sociology of absences we see a constitutional recognition both of indigenous cosmovisions and nature that were previously placed outside the law. Indigenous voices but also animal defenders, peasants and urban ecologist groups have gained strength that could not be ignored by judges, legislators, and public policy planners. Similarly, there are a series of infra-constitutional norms that recognize that nature is the subject of rights.[92]

However, the Ecuadorian case also exemplifies that constitutional recognition is only a first step to open access to justice for formerly excluded entities. Exclusionary legal patterns can also survive constitutional changes. On certain occasions, RoN lawsuits are rejected by courts based on anthropocentric approaches that radically misinterpret the Ecuadorian Constitution, for example, in a case where the Constitutional Court made the right to private property prevail over the rights of nature.[93] However, there are cases in which the high courts of Ecuador have recognized the rights of nature. For example, in a case that dealt about the protection of an ecological reserve, the Constitutional Court indicated:

> *[...] the Constitution of the Republic enshrines a double dimensionality on nature and the environment in general, by conceiving it not only under the traditional*

90 *Alberto Acosta*, in: Liliana Estupiñan 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. 155 et seqq.

91 *Gutmann*, Pachamama, note 4.

92 Ecuador's penal code (2014) contains an entire chapter on crimes against the environment and nature. Similarly, the law on water resources and water use (2014) and the Organic Code of the Environment (2018) recognize that nature is subject of rights, etc.

93 Ecuador, Corte Constitucional, SENTENCIA N.° 065-15-SEP-CC, 11 de marzo de 2015.

> *paradigm of object of law, but also as a subject, independent and with specific or own rights. The foregoing reflects within the nature-humanity legal relationship, a biocentric vision in which nature is prioritized in contrast to the classic anthropocentric conception in which the human being is the center and measure of all things where nature was considered a mere provider of resources.*[94]

It is important that the defenders of nature remain active, on the one hand, demanding the effectiveness of the rights of nature; and, on the other hand, influencing public awareness so that people understand the importance of protecting the biodiverse territories in Ecuador. As *Alberto Acosta* states, civil society must appropriate the constitution. This is an ongoing process.[95]

D. RoN and mechanisms to protect them

This process also takes place before courts. How would proceedings that allow nature to appear in the courtroom look like? In addition to the normative dimension of environmental and ecological justice, Cappeletti and Garth recognize a second dimension of the concept of access to justice. It is a factual dimension on the aspects related to the procedures aimed at ensuring the exercise of access to justice. In general terms, access to ecological justice includes the right to claim, through the institutional mechanisms existing in a community, the effective protection of the rights of nature.[96]

In its procedural dimension, ecological justice implies access to the competent administrative and judicial institutions to resolve the issues that arise in people's daily lives[97]; access to a good justice service that provides a fair judicial or administrative ruling in a reasonable time; the knowledge of rights by citizens and the means to exercise them;[98] the gratuitousness of justice in terms of payment of procedural costs and expert opinions in order to prevent the victim of contamination from being defenseless due to lack of economic resources; a geographic approach to justice so that marginalized populations that represent nature do not see the courts as remote places with difficult access; and, guarantees of protection for those who defend nature in order to avoid the criminalization and silencing of the defenders of mother earth.[99] Hence, it is necessary to explain the rights of nature in

94 Ecuador, Corte Constitucional, SENTENCIA N.° 166-15-SEP-CC, 20 de mayo de 2015.

95 *Alberto Acosta*, No hay un camino para la Constituyente, la Constituyente es el camino, in: Alberto Acosta et al. (eds.), Entre el quiebre y la realidad, Quito 2008, p. 12.

96 *Mauro Cappelletti / Bryant Garth,* Acceso a la Justicia. Movimiento mundial para la efectividad de los derechos, La Plata 1983, p. 117.

97 Ibid.

98 *Lucila Larrandart*, Acceso a la Justicia y tutela de los derechos ciudadanos, Buenos Aires 1992, p. 19.

99 *Haydée Birgin / Natalia Gherardi* (eds.), La garantía de acceso a la justicia: aportes empíricos y conceptuales, México 2011, https://www.corteidh.or.cr/tablas/28920.pdf (last accessed on 27 July 2021).

Ecuador and the institutional mechanisms to make these rights effective under an ecological justice approach.

I. The rights granted to nature in Ecuador and the mechanisms to ensure that nature accesses justice

Following ecocentric and biocentric approaches, the Ecuadorian Constitution recognizes that nature has the right to have its existence fully respected and the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes; that is based on the principle of prevention and caution, the right to the protection and maintenance of nature is guaranteed.[100] In addition, the right to restoration exists and it is independent of the obligation of the State and polluting companies owners to compensate a person or a group that is affected by pollution.[101]

It should be noted that the degree of protection to nature is not absolute because there is a margin of apreciation that authorizes humans to carry out economic activities that have an impact on nature. The different laws and regulations establish the authorized economic activities and the ways to minimize the risk of pollution. For example, oil or mineral extraction is allowed in Ecuador if an environmental authorization is provided and only if the extraction of natural resources is not carried out in a restricted area. Only if the guidelines established by the Constitution and the law are not respected, the trials (administrative, constitutional and criminal) can be activated to stop the violation of the rights of nature and to repair the damage caused.

It is obvious that nature needs to be represented by humans in order to be present in court. Within the human legal system nature always needs human representation. RoN and Verbandsklage therefore find common ground in that both enable human individuals or groups to speak on behalf of nature. In Ecuador, legal actions to denounce the violation of RoN can be filed by any person or collective interested in defending nature.[102] The Ecuadorian constitution therefore allows innumerable representations of nature which can trigger a pluralist discurse[103] that also enables formerly silenced voices.[104]

This approach also avoids the rejection of the claim on matters of active standing. One of the procedural advantages of ecological justice in Ecuador is that the law contemplates a

100 Constitución de Ecuador, art. 71, for the content of these rights see *Gutmann,* Hybride Rechtssubjektivität, note 4, pp. 205 et seqq.

101 Constitución de Ecuador, art. 72.

102 For an overview of the legal proceedings to claim nature's rights see *María José Narvaez A.,* this issue, p. 352 et seqq.

103 *Mihnea Tanasescu,* The Rights of Nature as Politics, in: Daniel Corrigan / Markku Oksanen (eds.), Rights of Nature: A Re-examination, Oxon 2021, p. 69 therefore states: "the rights of nature are not about nature, but rather about the political relations between different groups of people".

104 See *Gutmann,* Hybride Rechtssubjektivität, note 4, pp. 194 et seqq.

series of administrative and judicial channels to resolve issues of violation of RoN. Consequently, since 2008, many legal mechanisms have been implemented so that the rights of nature can be claimed in two moments. First, before the damage occurs, this means that nature is respected through preventive measures; and, secondly, once the ecological damage has already been carried out, the implementation of reparation and sanction measures is ordered to prevent such behavior from being committed again.

Claiming RoN in Ecuador is free of charge, which includes the possibility of having a public lawyer. In addition, based on the reversal of the burden of proof, the obligation to prove that there is no environmental damage does not fall on the plaintiff but on the defendant or the economic operator, therefore, it is the company who must pay the expert opinions that allow to prove the origin of the contamination. Additionally, lawsuits for violation of the rights of nature can be filed in the place where the act or omission originates or where its effects occur; it usually happens that the polluting action is generated in a specific place, but its effects are triggered in various parts, sometimes far away from the place where the damage originated. Thus, the plaintiff can present the action, either before the judge of the place where the polluting conduct is carried out or before the judge of the place where the effects of the violation of the rights of nature are visible.[105] However, there is admittedly a problem in how this works in Ecuador: the criminalization of defenders of RoN has been used as a social control mechanism to intimidate, neutralize, inhibit and harass any type of conduct that may put at risk or that questions the prevailing expressions of power, whether they come from the State, as well as from other private actors.[106]

Following Boaventura de Sousa Santos' theoretical contributions, it is possible to see that in Ecuador from the adoption of the Constitution, new ethical theories (biocentrism and ecocentrism) have emerged for justifying the creation of administrative and criminal rules of non-anthropocentric approach. The Constitution recognizes that, in addition to protecting human rights, the State has an obligation to protect nature's intrinsic value. The ethical approach to biocentrism and ecocentrism eliminates the legal blindness that characterized judges, legislators and public policymakers who for years saw nature – which they called the environment – as an object that deserved to be preserved only for human's sake.

Santos invites us to think that, through the sociology of emergencies, non-hegemonic ways of using law are made visible; for example, the law can be seen as a tool to claim the rights of historically excluded groups. The lawsuits presented by the Ecuadorian earth-jurisprudence movement show the ethical pact with nature of certain indigenous groups, peasants, animalists and ecological organisations is not chrematistic. We are facing a

105 Ibid., pp. 251 et seqq.

106 *Rodrigo Trujillo Orbe / Mélida Pumalpa Iza*, Criminalización de los Defensores y Defensoras de Derechos Humanos en Ecuador, Quito 2011, p. 77 et seqq.

movement that supports solidarity, empathy and reciprocity with the other natural elements with which we share the planet and from which we benefit daily to meet our basic needs.[107]

II. Rights used to protect nature in Germany and mechanisms to guarantee access to environmental justice

Comparing Ecuador with Germany, the situation seems paradoxical. German environmental regulations are much more extensive and detailed than in Ecuador. The difficulty, however, as the Robbenklage shows, is to enforce these regulations in court. With regard to every single regulation, it must be asked anew whether it establishes subjective rights of an individual that can be claimed before courts. So, do limits on emissions from an industrial plant also protect its neighbors? (Yes![108]) Does nature conservation law also protect the people who seek recreation there? (No![109])

Even today, several decades after the Robbenklage, "public interest actions in environmental matters in Germany have a limited scope."[110] Probably the most promising way to claim nature's interests before court is the so called Verbandsklage (association action) that is provided by nature conservation law and provides an important exemption of the above mentioned principle of individual legal protection.[111] The Verbandsklage is a legal remedy to enforce environmental law, that was triggered by international law, mainly the Arhus Convention and its implementation into EU-law.[112] It can be seen in line with vivid legislative activity in environmental law that emerged as a response to raising public concern about environmental degradation since the 1970s.[113] Its scope of application is restricted for two reasons: Firstly, it only applies for a definitive list of cases, that is enumerated

107 About the meanings of water: *Carmen Amelia Trujillo / José Alí Moncada Rangel / Jesús Ramón Aranguren Carrera / Kennedy Rolando Lomas Tapia*, Significados del agua para la comunidad indígena Fakcha Llakta, cantón Otavalo, Ambiente & Sociedade journal, Vol. 21, pp. 2 et seqq. About the meanings of animals: *Eduardo Viveiros de Castro*, La mirada del jaguar: introducción al perspectivismo amerindio, Buenos Aires 2013. About the meanings of the moors and glaciers: *Adriana Rodríguez / Viviana Morales*, Los derechos de la naturaleza en diálogo intercultural: una mirada a la jurisprudencia sobre los páramos andinos y los glaciares indios, Deusto Journal of Human Rights 6 (2020), p. 99 et seqq.

108 Federal Adminstrative Court (BVerwG), NVwZ 2004, 610 (611).

109 *Ralf Brinktrine,* BNatSchG § 1, in: Ludger Giesberts / Michael Reinhardt (eds.), BeckOK Umweltrecht, 57th ed., München 2021, marginal numbers 109 et seqq.

110 *Nicolas de Sadeleer / Gerhard Roller / Miriam Dross*, Access to Justice in Environmental Matters Country Reports and Case Studies: Part II Germany – Italy – The Netherlands, ENV.A.3/ETU/2002/0030, https://ec.europa.eu/environment/aarhus/pdf/accesstojustice_final.pdf (last accessed on 27 July 2021), p. 1.

111 Ibid.; *Michael Kloepfer / Rico David Neugärtner*, Umweltrecht, 4th ed., München 2016, p. 729.

112 *Kellner*, note 82, p. 395 et seqq.

113 Ibid., p. 394 et seqq.

by the respective nature conservation act.[114] Secondly, only registered NGOs that comply with certain requirements are enabled to file a Verbandsklage.[115] Nevertheless, like in the US,[116] environmental organizations now play an important role for the development of environmental law via the judiciary.

Some authors draw parallels between the altruistic Verbandsklage and RoN. At least a kind of Verbandsklage that is less restrictive than the recent German model, might imply RoN or serve at least a functional equivalent. The Verbandsklage is viable, to claim "nature conservation provisions or provisions that are also meant to serve the interests of nature and landscape conservation."[117] Apparently it is meant to protect nature's vested interests. Nevertheless, there is a fundamental difference between the two legal instruments. The Verbandsklage serves to enforce existing laws, e.g. the prohibition of killing vertebrates without reasonable motives or air pollution that exceeds a certain limit. Such legal provisions, although they should not be underestimated, are always schematic, abstract and therefore curtailing. RoN are different. As Anne Peters points out in regard to legal animal rights, such rights are always open ended.[118] Like human rights, they do not protect a limited set of legal norms, but specific spheres of autonomy that are essential for human self development. The same applies for RoN. They increase the need for justification of environmental interventions and set limits where concrete regulations are lacking.

III. A window of oportunity?

Will environmentalists elsewhere in the world also succeed in making nature present before courts? Will the law be able to listen to the voice formerly absent entities such as animals, rivers, or trees? In Germany the animalist organization PETA claimed the right of male piglets not to be castrated without anesthesia.[119] Although it seems doubtful whether this claim really represents the piglets interest (if we could ask them, they would probably militate against all forms of castration or stockbreeding as such and not just against the way castration is currently performed) it opens the scope of court proceedings. Although the piglet's claim did not bear success and was rejected by the court without any reasoning,[120] it can be seen as the emergence of a formerly absent actor who seeks access to justice. Even

114 In German federalism both the federation (Bund) and the states (Länder) can legislate in environmental issues. The Bund introduced the Verbandsklage in 2002, most of the Länder had done this before, see *Kloepfer / Neugärtner*, note 111111, p. 731.

115 See *De Sadeleer / Roller / Dross,* note 110, p. 5; *Kellner*, note 82, p. 395 et seqq.

116 *Grant M. Hayden*, American Law: An introduction, New York 2017, p. 120.

117 *De Sadeleer / Roller / Dross,* note 110, p. 5.

118 *Anne Peters*, Tier-Recht im Zeitalter des Menschen, in: Bernd Renn / Jürgen Scherer (eds.), Das Anthropozän, Berlin 2015, p. 71.

119 See *Klingst*, note 60, p. 9; *Mührel*, note 60.

120 BVerfG, Nichtannahmebeschluss ohne Begründung, 14.5.2021 - 1 BvR 2612/19.

if the court refuses listening to these voices within the formalized procedure, it opens a space for discussions on legal personhood and access to justice of non-human beings.

Some authors see such an opening not only in the aforementioned art. 20a GG, but also in the relatively new provision of § 90a BGB (Bürgerliches Gesetzbuch, German Civil Code), according to which "[a]nimals are not things". Even if animals can still only be heard in legal proceedings in a rather indirect way, the complete exclusion of animals from the law is called into question here. In any case, animals are no longer completely absent.

E. Conclusions

The claims in defense of nature have historically been led by human groups that, through political-legal actions, make visible the need to widen the scope of legal procedures. The political and epistemological contributions on RoN come from the peasants who defend sustainable agriculture, the indigenous peoples who fight for the defense of their biodiverse territories, the animalists who do not cease to make visible the need to stop animal abuse and the urban ecologists who, from the cities, demand the protection of urban forests, the strict regulation of fixed and mobile sources of pollution and the fight against global warming.

This research evidenced the foundations that justify nature accessing ecological justice focused on the protection of human-nature relationships that are interwoven from rurality and cities. It makes visible that there are other ways of being and being in the world, not from superiority nor from dichotomy, but from equality in diversity.

The law is neither petrified nor blind. The global emergence of RoN shows how contra hegemonic ways of seeing nature can become visible within a legal setting. Different civil society movements have played an important role in this process. In some countries such as Ecuador, entities and worldviews that had formerly been absent in legal proceedings have emerged and can now be heard before courts. Nevertheless, most legal systems maintain nature's exclusion. This paper has made an attempt of using the sociology of absentees and emergences in order to show how law's exclusionary character is permanently challenged. Legal actions such as the Robbenklage or claiming habeas corpus rights for caged animals unveil law's anthropocentrism and point at "concrete possibilities"[121] that end the exclusionary character of access to justice and transform it into an emancipatory tool.

121 *Santos*, note 10, p. 169.