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You Cannot Have the Cake and Eat It – How to Reconcile Liberal Fundamental Rights with Answers to the Climate Crisis

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Abstract: Our Western-style constitutional systems are not only built on 16th to 18th century social contract theory, but also mainly on a liberal understanding of individual human rights. They are an element of constitutions and international treaties and are increasingly used as a basis for claims of individuals against states for more action to tackle the climate change crisis. However, a human right to a sustainable climate meets plenty of challenges if understood as a classic human right. The question is whether human rights offer a solution to legal questions of the climate crisis by empowering people to demand specific measures from states. The authors demonstrate how the search for solutions has altered the understanding of human rights globally and will continue to do so. It sheds a light on whether the premises on the relationship between state and individual and burdens on individual freedom can still be answered by paradigms from social contract theories and whether the social contract needs to be enlarged by including non-human actors (like ecosystems) or future generations.

Keywords: social contract theory, climate change, rights of nature, right to a healthy environment, state obligation

1 Introduction

Some numerical magic to start. In the last years a group of recent anniversaries allow us to relate the present to the past of human rights and social contract theory. 2019, the year Fridays for Future brought the climate crisis to the attention of each and every one, was a year of several constitutional anniversaries: 40 years Interamerican Court of Human Rights (relying on the American Convention on Human Rights

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from 1969), 70 years of the German Constitution (Grundgesetz, GG), 100 years of its predecessor, the Weimarer Reichsverfassung, 330 years since the Déclaration des droits de l'homme et du citoyen was issued and since the US Constitution entered into force – and thus of ideas that are inseparably linked to liberal human rights theory and the idea of a hypothetical social contract concluded by all citizens that legitimises state power.

The idea to protect the environment and the climate also materialised about 40 years ago – both on an international and on a domestic level in several states shaped by Western-style constitutionalism in the tradition of classical social contract theory:[1] In 1979 the first UN-climate-conference took place, the German ecological political party 'Die Grünen' was founded, as was Greenpeace International. In the same year, the Staatsrechtslehrervereinigung[2] discussed how the societal need for 'protection of the environment' could be constructed as a central obligation of the modern state, and whether an individual fundamental right or rather an objective obligation for all state organs could and should be included in the German Constitution.[3] In Germany, it took another 25 years to develop the objective protection clause, Art 20a GG, which cannot be directly invoked by an individual before a court, but which, as a governmental duty, obliges the state to respect and protect the natural foundations of life, also for future generations.[4] It is explicitly addressed to and binding on all state organs on all levels of the federal state and give constitutional value to the environment as well as future generations. In its climate change decision of March 2021 the German Federal Constitutional Court (BVerfG) stressed that Art 20a GG includes an obligation of the state not only to aim for climate neutrality, but to take efficient measures to reduce its

1 On environmental constitutionalism and the changing perception globally see Francois Venter and Louis J Kotzé, 'The methodology of environmental constitutional comparison' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law* (Edward Elgar 2017) 246.

2 Association of professors of public law from Germany, Austria and Switzerland <www.vdstrl.de/> accessed 19 January 2023.

3 By this time, more than 50 states worldwide had already acted upon the increasing need to tackle environmental degradation on state level, see David Boyd, *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment* (Law and Society Series, UBC Press, Vancouver 2012) 49 f. However, the first constitution to actually include a provision on climate change was the Constitution of the state Niederösterreich (Lower Austria) in 2007 (Art 4 No 2): 'The protection of the climate is of significant importance'. On this see Wolfgang Kahl, 'Klimaschutz und Bayerische Verfassung' [2009] BayVBl 97, 98 f.

4 It reads: Article 20a [Protection of the natural foundations of life and animals] 'Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order'.

greenhouse gas emissions in time.[5] This includes the obligation to mitigate damages to the global climate, also by contributing to an international climate protection order, and to enact measures of adaptation within the boundaries of the German territory, both within the boundaries set by the constitutional order and especially human rights.[6] In other latitudes, such as Latin America, the environmental issue was first introduced through some regulations on natural resources, and later, especially during the 1980s and 1990s, through the inclusion of an environmental clause in the new constitutions.[7] Indeed, in the last two decades of the 20th century, several constitutions were reformed and included the recognition of this right and judicial guarantees in the event of its possible affectation.[8] Closer in time to this process are constituent processes in some Andean countries, particularly Ecuador (2008) and Bolivia (2009), which incorporate the concept of *Buen Vivir/Vivir Bien*.[9] It includes, in its environmental dimension, not only the right to a healthy environment but also the recognition of the rights of nature. This same perspective was debated in the Chilean constituent assembly.[10] However, the new constitutional text was not approved in the September 2022 referendum.

Thus, since the mid-1980s a 'human rights turn' in environmental law has been witnessed. At the moment, we seem to notice a further 'nature/ecological rights turn' also beyond Latin America, eg the US with the Erie Lake Bill of Rights, the *Mar Menor* in Spain or the Whanganui River via treaty and later parliamentary act.[11] On the international level there might not be an explicit human right,[12] but the right to

5 BVerfG, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18 –, Leitsatz 2, paras 197 ff. (available at: <www.bverfg.de/e/rs20210324_1bvr265618.html> accessed 19 January 2023).

6 BVerfG, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18 –, para 197.

7 For an overview, see David Boyd, *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment* (Law and Society Series, UBC Press, Vancouver 2012), 124 ff.

8 For example, Brazil 1988, Colombia 1991, Paraguay 1992, Perú 1993, Argentina 1994.

9 In a previous work some aspects related to these ideas for the field of law are analysed: Valeria M Berros, 'Socio-technical challenges for implementing rights of nature: the cases of Ecuador and Bolivia as the first experiences of an expanding movement' [2021] 238 Latin American Perspectives 48, Number 3.

10 Articles 103 and 127 of the final version of the draft constitution that was submitted to referendum explicitly enshrined the rights of nature. At the same time, an ombudsman for the rights of nature was created (article 148 and following).

11 Whanganui *Iwi and* The Crown (*August 30, 2012*). 'Tūtohu Whakatupua (treaty)'. See also Kenneth Kilbert, 'Lake Erie Bill of Right: Legally Flawed, but nonetheless Important' (2019) JURIST 3 <https://www.jurist.org/commentary/2019/03/kenneth-kilbert-lebor-important/> accessed 19 January 2023; David Boyd, *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment* (Law and Society Series, UBC Press, Vancouver 2012) 245 f.

12 However, in a document dated from 5 October 2021, the UN Human Rights Council considered the right to a clean, healthy and sustainable environment as a human right. UNGA Res 48/13 (8 October 2021) UN Doc A/HRC/RES/48/13, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/289/50/PDF/G2128950.pdf?OpenElement> accessed 19 January 2023.

health and life can be found in several UN-Conventions, inter alia the Convention on the Rights of the Child, which includes a right to be protected from adverse environmental conditions,[13] Art 37 EU-CFR further constitutes an objective obligation of the EU and its member states to prioritise environmental considerations, and Art 24 Banjul-Charter guarantees a right of all peoples to a generally satisfactory environment favourable to their development, mostly understood as a collective or group right.[14]

On the national level, about half of the states know some kind of fundamental right to a safe/healthy/sound environment, a right to livelihood, protection against unfavourable environmental conditions, and similar safeguards, a number becoming even higher, if jurisprudence on the right to life, health, or private and family life is included.[15] Those – often social or third generation – rights try to strike a connection between individual rights and the protection of a common good. The discussion, how to reconcile individuality and the need for restrictions in order to reach this goal, while safeguarding constitutional principles like the rule of law, separation of powers and representative democracy, had been fiercely conducted in the 1980s and 1990s. Yet, classical liberal fundamental or human rights (also called first and second generation rights), social contract theory, and even international law might not offer the solutions we are seeking in the present scenario.[16] The regular reports on climate change, biodiversity and other environmental problems are becoming more and more alarming. The latest IPCC report warns that many of the changes the planet will undergo as a result of greenhouse gas emissions will be

13 Silja Vöneky and Felix Beck, 'Umweltschutz und Menschenrechte' in Alexander Proelß (ed), *Internationales Umweltrecht* (De Gruyter Studium 2017), 176; Stephan Gerbig, 'Thank you, Greta & friends!: Procedural aspects on the climate crisis-related communication to the UN Committee on the Rights of the Child' (*Völkerrechtsblog*, 2 October 2019) <https://voelkerrechtsblog.org/thank-you-greta-friends/> accessed 19 January 2023; Susana Sanz-Caballero, "Childrens' Rights in a changing climate" [2013] 13 Ethics Sci Environ Polit 1.

14 Banjul Charter available in: 'African Charter on Human and Peoples' Rights' (African Commission on Human and Peoples' Rights) <https://www.achpr.org/legalinstruments/detail?id=49> accessed 19 January 2023. On the 'collective' understanding see Osita C Eze, *The African Charter on Rights and Duties and Enforcement Mechanisms* (Altius-Verlag 2009) 175 f; criticising thinking in groups Thaddeus Metz, 'African Values, Human Rights and Group Rights: A Philosophical Foundation for the Banjul Charter' in Oche Onazi (ed), *African Legal Theory and Contemporary Problems* (Springer 2014) 131, 135 f; 142 ff, on collective property rights/ownership of indigenous groups Anna Friederike Busch, *Protection of Traditional Cultural Expressions in Latin America* (Mohr Siebeck 2015) 372 ff.

15 See 'ENVIRORIGHTSMAP' <https://envirorightsmap.org/> accessed 19 January 2023.

16 Sceptical on human rights solutions in international and regional human rights regimes, eg Alan Boyle, 'Human Rights and the Environment – Where Next?' in Ben Boer (ed), *Enviromental Law Dimensions of Human Rights* (OUP 2015) 227 ff.

irreversible for centuries, even millennia.[17] Simultaneously, postponing measures now might lead to harsh restrictions on fundamental freedoms in the future as well as detrimental living-conditions, loss of livelihood and loss of homes, leading to further human rights violations.[18] In this context, it may be time to ask again some of the following questions on how to reconcile the challenges of the Anthropocene[19] with the requirements of Western-style constitutionalism:

1. What is the use of human rights in the age of climate crisis? How can and should we use it?
2. Do we need a specific (fundamental/human) right?
3. Will our Western-liberal understanding of fundamental rights, founded in the social contract theories of the 16th-18th century, be modified by legal adaptations to the climate crisis?
4. What would that mean for our constitutional order(s)?
5. Are we 'beyond human rights'?
6. Or should – once again – equality and solidarity prevail freedom?
7. What is the role of new legal perspectives on environmental problems involving the recognition of rights of nature or collective respectively superindividual rights?

In the following we will propose tentative answers to these questions by first revisiting classical social contract theories, mostly as put forward by *Locke*, as his theories are closest to our academic upbringing in law, as the foundation of Western-style constitutions and understanding of human rights (2.). We will then be turning to the challenges posed by the regulatory needs of climate change mitigation to these theories (3.) and already existing differing concepts like collective rights, rights of nature, or the concept of over-individualistic/diffuse violations of human rights and corresponding remedies (4.), which could act as an engine to promote change in

17 Reports available in: 'ippc' <www.ipcc.ch/reports/> accessed 19 January 2023.

18 See also BVerfG, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18 –, paras 182 ff and Felix Ekardt, 'BVerfG-Nichtannahmebeschluss zu den Landesklimaklagen' [2022] ZUR 287, 289.

19 The Anthropocene concept today calls upon several disciplines, including law. It is an idea that explains how our lifestyle has serious repercussions in terms of global warming and biodiversity loss. At the same time, it is certainly paradoxical because, on the one hand, it has achieved an important consensus to name and represent our era. But, on the other hand, it is beginning to be criticized by those who understand that it erases differences and inequalities in the production of damage. Thus there are currents of thought that begin to speak of capitalocene, technocene, Chthulucene. See eg Donna Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Duke University Press, Durham 2016).

European constitutional thinking. We will finally elaborate on whether a classical 'human rights approach' is the right mind-set to tackle the legal problems of climate change on domestic level (5.).

2 Social Contract Theory and Human Rights Revisited

The contractualists started from a fiction to try to explain life in common: to live in society, human beings – perceived as being free and equal by nature – enter into an implicit social contract. This contract grants them certain rights (and protection) in exchange for giving up the complete freedom they would have had in the state of nature. Simultaneously, being party to this social contract comes with the duty to partake in establishing what Rousseau referred to as *volonté générale* and therefore in democracy. Social contract theory therefore puts the individual in the centre: as the exercise of legitimate power rests on the voluntary and consensual transferal of individual power to the state, the state needs to justify all restrictions to freedom and equality of each individual.[20] Human rights are – as can already be found in the theories of *Locke* – those rights attributed to every human being due to the mere fact of being human, those rights that guarantee his or her autonomy, that need to be respected by state power and are at the same time individual, pre-state and inalienable.[21] Within the community established by the fictional social contract, the individual only has to accept restrictions to freedom that ensure the freedom of other individuals – this is part of the social contract that ended the state of nature.[22] This idea was already part of the French Déclaration des droits de l'homme et du citoyen (DDHC) in 1789, laying the fundament for modern Western human rights theory, including the balancing of different rights and the principle of proportionality. Art 4 DDHC condenses this fundamental premisses of liberal fundamental rights: 'Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law.' These laws must be established in a democratic process.

The provision contains mostly the idea that – apart from the very core of an ecological minimum of existence that is required by another philosophical and constitutional concept, human dignity,[23] – every fundamental right can be restricted

20 John Locke, *Two treatises of Government,* Book II, § 87, §§ 134 ff.

21 John Locke, *Two treatises of government,* Book II, § 87.

22 See Jakob Hohnerlein, Legitime Ziele von Grundrechtseingriffen, [2007] 56 Der Staat 227, 234 f.

23 Martin Kind, *Umweltschutz durch Verfassungsrecht* (Springer 1994) 235; Similar Heinhard Steiger, *Mensch und Umwelt. Zur Frage der Einführung eines Umweltgrundrechts* (Schmidt Verlag 1975) 75.

by balancing it with the legal freedom of other citizens and when it is essential to provide for the common good. For issues of environmental protection, so far, this has meant that their protection is relative, and that no general priority is given to the protection of the climate over individual freedom,[24] although this seems to change slightly both in constitutional provisions (eg Art 4 of the Constitution of Lower Austria) and case-law in climate change litigation: ecological interests are attached a greater value or even a general priority in the balancing process with (other) individual rights. In a certain sense, if the *volonté générale*, that mostly *Rousseau* thought as an expression of the laws we agree to abide by, is transformed in the face of climate change, discussions on the content of the social contract as well as on the (more active) role of the state are being renewed. However, the current demands for a new social contract or a more active role of the state need to be looked at cautiously,[25] if a society or constitution intends to put emphasis on ecological fundamental rights. It will be challenging to reconcile effective supra-individual climate change legislation and a priority of climate protection with the fundamental assumptions of liberal and thus individual fundamental rights.

At the core of this debate lies the relation of a fundamental right to society or even humankind and individual freedom[26] if a person uses a fundamental right altruistically for ecological purposes, it is questionable under classical social contract theory whether this could justify the restriction of another person's freedom. As all humans are perceived equal and free, restrictions can only be justified by the legitimate aim of colliding fundamental rights or human common welfare. However, with mitigation measures for climate change, this relation does not work in the same way: different even from typical environmental destruction, where it is rather easy to causally attribute a specific damage or pollution to a 'polluter'[27] and to restrict economic freedom in a balancing process between fundamental rights, everyone contributes to climate change to a certain amount by their daily lives. It is hard to

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This has not changed much, see, eg Felix Ekhardt, "Umweltverfassung und 'Schutzpflichten'" [2013] NVwZ 1105, 1106.

24 Tobias Linke, 'Der Schutz der natürlichen Lebensgrundlagen im Sinne von Art 20a GG im Spiegel der Rechtsprechung', in Timo Hebeler et al (eds), *Jahrbuch für Umwelt-und Technikrecht* (2017) 25, 69.

25 Cf Jan Hoffmann, 'Anthropozän und Recht – Reaktionsmuster am Beispiel des Umweltrechts' [2019] UPR 52, 54 ff.

26 On this debate, whether there is a legal duty of the individual to serve the common good or a duty of solidarity towards the community (as was claimed by Rousseau), or whether such an understanding contravenes social contract theory, because the individual cannot be free in this case, see eg Peter Saladin, *Verantwortung als Staatsprinzip* (Haupt-Verlag 1984) 68 f.

27 BGH, NJW 1988, 478, 478 f; Dietrich Rauschnig, 'Staatsaufgabe Umweltschutz' [1980] 38 VVDStRL 168, 183; with a more critical view Hansjörg Dellmann, 'Zur Problematik eines "Grundrechts auf menschenwürdige Umwelt"' [1975] DÖV 588, 590 f.

define the threshold for being not-responsible for climate change. The decision of the High Court in Den Haag in *Urgenda* demonstrates that a broad reading of a duty of protection for the life and health of all people living within the jurisdiction of a state, does not simply and exclusively oblige the state to take further climate protection measures.[28] Rather, these measures are linked to restrictions to fundamental freedoms for a multitude of citizens. It needs to be clarified whether the fundamental value of nature and a sound climate as a basis for (human) life can justify these restrictions, maybe by using the figure of a 'climate state of emergency'.[29] The German Federal Constitutional Court seems to be at least hesitant to do so when recurring to a figure of 'intertemporal protection of fundamental rights' and therefore claiming that the state needs to take effective measures now to prevent massive limitations of fundamental freedoms in the future in order to meet (international) climate protection goals.[30]

Since the 18th century, obviously, the resulting understanding of fundamental rights as a protection of the individual against infringements by the state, has developed further, including not only so-called third generation rights, but more importantly a – at least to some extent enforceable – duty of protection for the state. It has to protect the individual against encroachments upon life, health or property by another individual or by natural disasters. This works well in the typical situation of an emitting power plant or industrial complex and the (more or less) immediate neighbours.[31] In order to prevent that the 'victim' is without rights, while the 'polluter', who is not bound directly be fundamental rights, can claim his or her economic freedoms based on the right of property, the state must mediate by law between the legal positions of the two parties. This is more or less the content of most

28 Gerichtshof Den Haag, ECLI:NL:GHDHA:2018:2610, paras 73 ff.

29 Cf Heinhard Steiger, *Mensch und Umwelt. Zur Frage der Einführung eines Umweltgrundrechts* (Schmidt Verlag 1975) 75.

30 BVerfG, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18 –, paras 183 f.

31 On German Constitutional law see: BVerfGE 39, 1 (42); BVerfGE 49, 89, 132, 141 ff; Hansjörg Dellmann, 'Zur Problematik eines "Grundrechts auf menschenwürdige Umwelt"' [1975] DÖV 588, 590; Josef Isensee, in Isensee/Kirchhof (eds), *Handbuch des Staatsrechts* (Vol 9 2011) § 191 para 178; Annika Klafki, *Risiko und Recht* (Mohr Siebeck 2017) 24 ff. On the law of the European Convention of Human Rights see *López Ostra v Spain* App 17,798/90 (ECHR, 9 December 1994); *Budayeva* et al *v Russia* App No 15,339/02 (ECHR, 20 March 2008); *Öneryildiz v Turkey* App No 48,939/99 (ECHR, 30 November 2004) paras 73, 119 ff; *Kolyandenko* et al *v Russia* App No 17,423/05 et al (ECHR, 28 February 2012) paras 204 ff. See on this matter also Silja Vöneky and Felix Beck, 'Umweltschutz und Menschenrechte' in Alexander Proelß (ed), *Internationales Umweltrecht* (De Gruyter Studium 2017) 133, 146; Jens Meyer–Ladewig 'Das Umweltrecht in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte' [2007] NVwZ 25, 26; Foroud Shirvani, 'Umweltschutz und Eigentum' [2016] EurUP 112, 116; Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (CH Beck 7th ed 2021) § 25 para. 33.

human rights guarantees in connection with environmental and climate protection – no matter, whether they are part of international or domestic law.[32] However, this does not work in the case of climate change, where there is not one distinct polluter, but a lot of contributors (see below section 3.1).

Then and now, social contract theory furthermore obliged the state to look after the well-being of its citizens and to protect the common good by using democratic institutions and law – but did not see individual rights as a means to force the state to implement specific measures. Interpreting human rights as encompassing duties to act also contravenes another important idea: separation of powers and sovereignty of the people, represented by a parliament that realises the *volonté générale*. This leads us to the challenges that especially the climate crisis constitutes for this understanding of individual human rights.

3 Challenges for Modern, Western Constitutional Orders

Constitutions and human rights treaties are centred around the state and the human individual – their underlying ratio is to prevent an abuse of state power and to protect individual autonomy within the state. They are anthropocentric (even if they include nature as a basis for human life in their protection clauses) and include only the individuals living today and in the respective state. Although in legal philosophy there might be approaches to 'global social contracts', resting on the idea of a global Leviathan that could guarantee life, health and security for all humans globally and reasoning that the right to freedom in the Kantian way can only exist if all humans are free,[33] so far, neither in constitutional nor in international law these ideas are the basis of actual (enforceable) provisions. Inter- and intragenerational justice are not part of classic human rights treaties and constitutions, as they cannot be deducted from the funding principles of 16th to 18th century social contract theories and the conception of the 'state'.[34] Human rights in their classical perception therefore

32 See, eg Maria Adebowale, Chris Church, Beatrice N Kairie, Boris Vasylkivsky and Yelena Panina, *Environment and Human Rights: A New Approach to Sustainable Development* (2002) WSSD Briefing Papers 2.

33 See Jean-Christophe Merle, 'Menschenrechte und Weltstaatlichkeit' in Arnd Pollmann and Georg Lohmann (eds), *Menschenrechte – Ein interdisziplinäres Handbuch* (Stuttgart 2012) 369, 370 f, Thomas Mohrs, *Vom Weltstaat. Hobbes' Sozialphilosophie, Soziobiologie, Realpolitik* (Berlin 1995).

34 See also Louis Kotzé, 'Global Environmental Constitutionalism in the Anthropocene' in Louis Kotzé (ed), *Environmental Law and Governance for the Anthropocene* (Hart 2017) 189, 191 f, advocating for a separation between state and constitutionalism in order to find ways of global (environmental) constitutionalism.

protect the human individual against actual and specific deterioration of environmental goods, which at the same time infringes on life, health or property of a specific individual – either by direct state action, or, more commonly, due to state inaction, if, and only if, the damages suffered are sufficiently severe.[35] Future risks and damages, the protection of future generations and the protection against diffuse contributions to pollution or marginal detriments are often not addressed, as the resulting restriction of individual freedom of the 'polluter' cannot be justified under classical liberal human rights theory. Obviously, non-human actors were neither included in classical social contract theory. In the current century, however, some constitutional discussions go further and allow us to think of nature or animal populations as well as future generations as part of the social contract in their own right.

These new constitutions and laws, together with recent judicial decisions recognizing different ecosystems as subjects of rights,[36] nurture what is known as "new Latin American constitutionalism". This shift in the regional constitutional discussion also implies a debate about the social contract insofar as it incorporates nature as a subject. But, in turn, these experiences also recognize other worldviews present in the world, such as those of indigenous peoples, which also had no place in modern Western law, which is based on a dichotomous logic between nature and society. The space of pacts and agreements was the space of society. Now, if nature begins to be considered as a subject within the field of law, a series of important challenges open up. First, to revise the fictional contract that has structured societies and its implications for the recognition of human and non-human rights. Secondly, to construct the mechanisms of present and future representation of nature, considering the intra- and intergenerational spheres. Thirdly, to consolidate the principles, mechanisms and arguments on the basis of which to decide from a new constitutional pact that modifies the status of nature.

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35 This duty of protection against damages suffered by environmental deterioration is founded on the idea that fundamental rights do not directly oblige private parties. If they only guaranteed respect and non-infringement by the state, they would leave the aggrieved party without protection. This paradigm of indirect horizontal effect exists, with variations, in several legal orders, and has, for example, been developed by the German Federal Constitutional Court in its decision *Lüth* (BVerfGE 7, 198) and the Abortion cases (BVerfGE 39, 1, 42), on the construction see Josef Isensee, 'Das Grundrecht als Abwehrrecht und als staatliche Schutzpflicht' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts* (Vol 9, 3rd ed 2011) § 191 para 178 and Georg Hermes, *Das Grundrecht auf Schutz von Leben und Gesundheit* (Heidelberg 1987).

36 Information about law and judicial decisions on the topic is available in 'Programme' (*Harmony with Nature. United Nations*) <www.harmonywithnatureun.org/> accessed 23 December 2022.

3.1 Transnational, Diffuse, Collective, and Future Risks

The common individual approach is challenged by the very nature of risks attributed to climate change. As the often-cited example of the Peruvian farmer, who claimed damages from the German energy provider RWE,[37] illustrates, his rights are endangered by transnational effects, that cannot be easily traced back to one distinct 'polluter'. The case shows the multiple difficulties we are confronted with when trying to tackle the climate crisis by individual human rights: cause and effect are rarely limited to one state, so we need to find a justification for the extraterritorial effectiveness of fundamental rights or render international human rights law more enforceable. The direct causal link between the contribution of RWE to the rise of CO_2 in the atmosphere and the flooding of his village remains unclear – it is a diffuse risk and only a collectively attributable contribution. Different from the situation of the polluting coal power plant and the neighbour, there is not one polluter and one aggrieved party, but everybody contributes and everybody is aggrieved, however, globally speaking, not to the same amount.[38] Even if the general contribution of a company to global warming is considered sufficient in tort or private infringement proceedings like Shell[39] or RWE, the underlying problem of individualistic human rights and the safeguard thereof by the state remains, especially if a human rights obligation is constructed via a 'duty of care' in tort cases,[40] as it might lead to escaping the necessary balancing. Finally, a solely human rights perspective does not even include the ecosystem, animals, plants or the atmosphere as protected goods – as long as a single person cannot establish a direct link to their individual human right to life, health or a healthy environment.

However, in some legal systems, there have been important advances in the development of actions in which individuals can represent diffuse or collective interests. This is the case in several countries in Latin America, where court rulings

37 LG Essen, Decision of 15 December 2016, 2 O 285/15, ZUR 2017, 370.

38 This argument of 'being aggrieved in the same way' is, eg, made by the European Court of Justice, denying standing due to lack of a 'specific burden', and also by the Swiss Procedural Law, which would otherwise not have enabled them to exhaust remedies before going before the ECtHR. Therefore, in the Case *Verein KlimaSeniorinnen Schweiz and others v Switzerland* (App no 53600/20), Greenpeace Switzerland has chosen elderly women (Climate seniors), as they suffer more health threats due to global warming than other persons living in Switzerland. For the German legal order, there is no demand of being 'especially affected', see BVerfG, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18 -, para 110, VG Berlin, Judgment of 31 October 2019 – 10 K 412.18, para 73; see also BVerfG, Order of the Third Chamber of the First Senate of 21 January 2009 – 1 BvR 2524/06 –, para 43.

39 The Hague District Court, decision of 26/05/2021, ECLI:NL:RBDHA:2021:5339, para 4.4.5.

40 The Hague District Court, decision of 26/05/2021, ECLI:NL:RBDHA:2021:5339, para 4.4.9.

decide on the environmental conditions of thousands and even millions of people. An emblematic judicial decision is the 'Riachuelo'.[41] This is an *amparo* action – a constitutional guarantee – that was presented to the Supreme Court by a small group of people, but whose decision affects around 5 million inhabitants of the Matanza-Riachuelo basin. This is one of the most polluted river basins in the world and, after several years of proceedings, a clean-up plan had to be implemented by the state at different levels (national state, province of Buenos Aires and city of Buenos Aires due to the interjurisdictionality of the basin). The case is relevant because the state of contamination of the area dates back to around two centuries ago due to a large number of companies that were set up in different periods, which makes it difficult to establish causal links not only to the past but also to prevent damage in the future. This last aspect is an important point in environmental conflicts. Indeed, some damages do not occur today, or cannot be measured and attributed to a specific individual, not even to a specific generation. The precautionary principle is a long-established instrument in both international and national legislation[42] to tackle such unknown or future risks – however, classic human rights bear no answer on how to reconcile the freedom of those living today with the freedom of those possibly living tomorrow. The German Constitutional Court argues with the risk of having to endure stricter measures in the future, if no immediate action is taken now[43] – yet, this only blurs the fact that one can hardly argue that this is an infringement of an individual right of a person living here and today.

Finally, a new social contract theory would have to find a solution how a collective good – a planet capable of sustaining human life, to use the words of Judge Aiken in the climate litigation Juliana against the US[44] – can be protected by using individual rights. And if these rights include a right to a future – is this the individual future of every human being or the collective future of humankind on this planet?

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41 Mendoza, B v Estado Nacional y otros, Corte Suprema de Justicia de la Nación, 8 June 2008, M.1569.XL.

42 The 1992 Rio Declaration introduced a formulation of this principle that has influenced domestic laws, which is evident, for example, in several general environmental laws in Latin American countries. In one of the most recent regional agreements, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (2018), it has been incorporated as a principle in art 3. There are also constitutions that have recognized it, as is the case of the 2008 Constitution of Ecuador.

43 BVerfG, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18 –, paras 182 ff.

44 District Court Oregon, Case No 6:15-cv-01,517-AA, Juliana et al v United States of America, Opinion and Order of 15 October 2018.

3.2 Constitutionalism and Rule of Law

Protecting the environment means to protect a collective good – yet, as stated above, social contract theory is directed at the protection of individual rights. It is difficult (albeit not impossible) to argue why a collective interest must be prioritised and therefore justifies restrictions of individual freedom, especially if it cannot be directly linked to the exercise of individual rights. The exigence of an individual freedom being exclusively limited by another individual freedom, dating back to Art 4 DDHC and classical social contract theory, requires a case-by-case balancing process between those freedoms. In its original form, it therefore defies the idea that mitigation of or adaptation measures to climate change can be generally prioritised to individual freedom and social equality by law.[45]

In our opinion, this balancing process is essential and should not be readily abandoned by demanding a new social contract or ecological fundamental rights.[46] Widening the scope of a duty of protection for individual human rights by including collective or super-individual interests and obliging the state to take concrete measures means that the state can and must restrict individual freedom. It must, however, tread carefully, in order not to shake the system of justification of restrictions by proportional measures. Altruistic use of individual human rights for the protection of the climate does not fulfil the basic requirement that an individual only has to endure restrictions that guarantee the individual freedom of another human being.

If this conundrum of protection of a common good through individual rights can be solved by introducing a legally binding 'fundamental duty' to care for the environment, as some constitutions like the Portuguese already do, remains questionable. This would allow the state to justify limitations on fundamental rights in order to conserve sound climate conditions and would completely shift the underlying reasoning for the restriction of fundamental rights: where it used to be the requirement to tolerate a restriction in order to enable the freedom of another human being, it would now rather be tolerating a restriction to safeguard the foundations of life and therefore the basal requirements to enjoy freedom in the

45 Where such clauses exist, eg in Art 141 Bavarian Constitution, at least under German constitutional law, they are interpreted as mere appellative norms without binding character, see from a previous work Eva Julia Lohse, 'Staatsziel Umweltschutz' in Klaus Stern/Helge Sodan/Markus Möstl (eds), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund* (Vol 1 2nd ed CH Beck 2022), ch 34 para 29 and 57. However, this might be different in other legal orders.

46 For example, Klaus Bosselmann, *Ökologische Grundrechte* (Nomos 1998) 127 ff; Anthony R Zelle and others, *Earth Law* (Wolters Kluwer 2021), ch 3, at 78 ff and ch 16 at 444 ff, referring to Bruno Latour and Bruce Jennings.

future.[47] This is still an anthropocentric and not an ecocentric take on the guarantee of freedom – but one that would allow us to reconcile traditional human rights theory with demands of stronger ecological rights as it goes back to the original proposition that a free and equal community requires responsibility of each person to respect each other and to respect the basic foundations of life in this community.[48] Yet, such constitutional duties, which are understood to have more than just appellative character or to be more than just possible limitations to fundamental rights as required by the common good, must be seen sceptically.[49]

3.3 Human Rights and Access to Justice

Most national and international remedies against infringements of human rights demand that the claimant is a victim of a direct, individual and present violation of his or her human rights. In order to gain access to justice and get courts to review possible violations of human rights due to insufficient state action, one needs a way for altruistic complaints or class actions. They can empower the individual to claim transnational, diffuse or future risks to collective interests or rights – however, up to now, even if such class actions exist, like in the *Urgenda* and the Shell case under Book 3 Section 305a of the Dutch Civil Code (class actions of public interest groups), there are still only few cases where courts have accepted claims on the behalf of future generations or people living outside the scope of the respective jurisdiction or of nature as such.[50] The *Urgenda* decision rests on a duty of the state to protect the persons living in The Netherlands today: 'it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the *current generation of citizens* will be confronted with loss of life and/or a disruption of family life. […] it follows […] that the State has a duty to protect against this real threat'.[51] Also, the German Federal Constitutional Court – albeit confirming an objective duty of the state to take the rights of future generations into consideration – argued with

47 Jakob Hohnerlein, 'Legitime Ziele von Grundrechtseingriffen' [2017] 56 Der Staat, 227, 234 f; Eva Julia Lohse, 'Staatsziel Umweltschutz' in Stern/Sodan/Möstl (eds), *Das Staatsrecht der Bundesrepublik Deutschland im europäischen Staatenverbund* (Vol 1, 2nd ed CH Beck 2022) ch 34 paras 33 and 65 f and 'Grundpflichten' ibid (Vol 3), ch 93 para 63.

48 Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, (Vol III/2 1st ed 1994), § 88 IV 2 1057 f.

49 See also David Boyd, *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment* (Law and Society Series, UBC Press, Vancouver 2012) 67 f.

50 One example on climate litigation, future generations and rights of nature is the Columbian Case known as *Jóvenes v Colombia*, Sala de Casación Civil de la Corte Suprema de Justicia de Colombia, STC 4360/2018. To know more about rights of nature jurisprudence and law the Harmony with Nature UN Initiative can be consulted: <www.harmonywithnatureun.org/> accessed 23 December 2022.

51 Gerechtshof Den Haag, decision of 9/10/2018, ECLI:NL:GHDHA:2018:2591, para 45.

infringements of fundamental rights of those living today, if lax measures now inevitably had as a consequence very strict measures in the nearer future in order to meet the Paris Agreement Goals.[52] A change might be observed in the Dutch Shell decision, where the court found the class action admissible also on behalf of the interests of current and future generations of Dutch residents (but not of the world's population).[53]

Even if access to justice is granted, it still remains debatable whether human rights can be used before courts in order to enforce specific state measures. Whereas, in some jurisdictions, an enforceable duty to protect individual rights is understood as an obligation of the state to act, this means regularly only that the democratically legitimised organ, the parliament, is to pass a law to battle climate change. The specific measures still have to be determined by the democratically elected parliament as representative of the *volonté générale* and as the only state organ legitimized to decide on limitations of fundamental rights by passing laws – this holds even true for those court decisions, where existent laws or actions were deemed insufficient: in *Urgenda* as well as in the German Klimaschutzgesetz-case the courts only set goals to be reached and demanded to take (more) action. However, in some regions, some novel ideas are emerging, such as, for example, the creation of guardians of certain ecosystems[54] or of intergenerational agreements.[55]

4 Everything Changes…

These findings lead to two contradicting assumptions: either the existing human rights regime is not fit for providing legal solutions to the largest problem of our time, or the Western liberal model of human rights will change under the influence of international and regional law, as we are trying to find solutions to tackle the climate crisis. In our tentative opinion, we can see indications that the second is going to happen to some extent – here is a list of examples for changes already on the way in legal orders worldwide. They include:

- Altruistic/collective ways of enforcement of environmental or climate protection laws
- Obligation of democratic institutions (by courts) to act while including civil society

52 BVerfG, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18 –, paras 182 ff.

53 The Hague District Court, decision of 26/05/2021, ECLI:NL:RBDHA:2021:5339, para 4.2.4.

54 *Atrato River case*, Colombian Constitutional Court, 10 November 2016.

55 *Jóvenes v Colombia*, Sala de Casación Civil de la Corte Suprema de Justicia de Colombia, STC 4360/2018,

- Enforceable social rights in order to guarantee the use of individual freedoms
- Collective human rights and recognition of "diffuse" infringements
- Focus on inter- and intragenerational justice/equality and thereby the establishment of a new social contract globally or intertemporally
- Inclusion of animal populations, ecosystems, nature into a social contract (eg by giving them rights or standing in court proceedings)
- Justification of restrictions to freedom in order to enforce (inter- and intragenerational) equality, eg by special constitutional provisions that give nature, the environment or the climate priority in at least some of the balancing processes
- Use of the precautionary principle in order to better establish the limits of the duty of protection.
- Use of the *in dubio pro natura* and *in dubio pro aqua* principles in order to establish how to decide as favourably as possible on the protection of nature

To explore some of the examples given above, as they already exist in Western-style legal orders, we have chosen the following:

4.1 Altruistic and Collective Ways of Enforcement

There are some innovative ways to strengthen the administrative and judicial enforcement. Even though it is difficult to establish the results obtained, given the structural difficulty of the problems decided by different tribunals, it is also true that these ideas attempt to improve one of the main challenges for the enforcement of environmental sentences: their implementation. Again, a (human) rights approach could offer stronger enforcement mechanisms, as it renders violations of statutory duties by the state actionable and gives control to people.[56] However, this can only work, if there exist possibilities to collectively or altruistically claim violations of rights – as often either those affected cannot do so themselves or a causal link to a distinct human rights violation (attributable to a specific polluter) cannot be established. Furthermore, it is claimed that Western-style democracies are directed at the procedural enforcement of individual rights (backed up by the individual human rights in the respective constitutions), which makes collective or ecological rights a strange concept. However, in *Urgenda* it was argued that action can be brought forward on behalf of the current generation of Dutch nationals.[57] How to include

56 See, eg David Boyd, *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment* (Law and Society Series, UBC Press, Vancouver 2012) 149 f.

57 Gerechtshof Den Haag, decision of 9/10/2018, ECLI:NL:GHDHA:2018:2591, para 37.

collective rights and how to render them bearer of rights as a group is a difficult problem to solve, yet, it might become easier if the collective character of climate protection is considered, as it is already part of many governmental obligations, which demand priority over individual rights in a balancing process.[58]

In relation to the jurisdiction scope, further attempts have taken place, for example in Ecuador considering the rights of nature recognition. It was a judicial claim about the great oil spill that the oil company British Petroleum caused on the shores of the Gulf of Mexico in the United States in 2010.[59] An articulation of judicial claims was submitted due to the damages generated by the explosion. In 2015 the British Petroleum oil company agreed to plead guilty to 14 criminal charges and pay $4.5 billion in restitution to the U.S. government: 11 workers died and the sea was polluted. In parallel, on November 26, 2011 a group of people from different origins and nationalities submitted a judicial claim before the Ecuador Court of Justice based on an innovative argument: there being a Constitution that recognized the rights of nature and nature not knowing boundaries between States.[60] Thus the emphasis was on the protection of nature's rights, and the claim did not have economic content. This judicial presentation could be observed as a strategic use of law to put these innovative perspectives into discussion and to make visible the lack of an international protection system for Mother Earth's rights.

As regards future generations, some cases are emerging such as the aforementioned Colombian Supreme Court 2018 decision[61] and a previous case related to deforestation in the Philippines. In the latter, a group of children, also representing future generations and in turn represented by their parents, initiated legal action to stop the increasing deforestation in the country. The first paragraph of the Supreme Court decision affirms: 'this petition bears upon the right of Filipinos to a balanced and healthful ecology which the petitioners dramatically associate with the twin concepts of "inter-generational responsibility" and "inter-generational justice"'.[62] In the case it was argued in favour of the protection of the Philippine rainforest: 'The

58 Martin Kind, *Umweltschutz durch Verfassungsrecht* (Springer 1994) 208; Georg Lohmann 'Umweltzerstörung' in Georg Lohmann and Arnd Pollmann (eds), *Menschenrechte – ein interdizsplinäres Handbuch* (Metzler 2012) 442.

59 A comment about this case in: Brendan Selby, 'In re: Oil spill by the oil rig "Deepwater Horizon" on the Gulf of Mexico, on April 2010, Order, Aug 26, 2011' [2012] 36 Harvard Environmental Law Review.

60 Lawsuit filed before the Court of Ecuador: <www.derechosdelanaturaleza.org.ec/wp-content/uploads/casos/Ecuador/BP-spill-claim/Derrame%20de%20petroleo%20BP%20en%20Corte%20Constitucional%20Ecuador.INGLES.pdf> accessed 23 December 2022.

61 *Jóvenes v Colombia*, Sala de Casación Civil de la Corte Suprema de Justicia de Colombia, STC 4360/2018.

62 *Oposa v Factoran*, G R No 101,083, Supreme Court of the Republic of the Philippines (30 July 1993).

minors further assert that they "represent their generation as well as generations yet unborn"'.[63]

As far as standing is concerned, about 30 constitutions contain provisions that allow individuals to argue environmental rights before the (constitutional) courts[64] – even though fundamental rights to a healthy environment are often not considered to grant standing or do not exceed individual guarantees of health and life.[65] Additionally to the 'amparo' already mentioned above, ideas like 'public interest litigation' and class actions seem to gather ground[66] and intensify the demands of Art 9 Aarhus Convention in Europe and of Art 8 of the Escazu Agreement in Latin America to make ecological, collective and diffuse interests actionable.[67] In the Dutch Shell case the District Court found that the general class action in Book 3 sec 305 Dutch Civil Code could be used, as 'the common interest of preventing dangerous climate change by reducing CO2 emissions can be protected in a class action'.[68] This can be seen as a procedural dimension of a human right to a healthy environment that acknowledges that access to justice does not need to depend on a violation of an individual (human) right.

This is the spirit of several Latin American constitutions that allow individuals, non-governmental organisations or ombudsmen to take legal actions in defence of the environment. Although they differ from country to country, they have in common the possibility of litigation in situations in which the environment is affected, whether or not this causes damage to people's health or patrimony. To mention some examples of rules of this nature, we can cite the action of *amparo* in the Argentinean Constitution (art 43), which provides standing for the affected party, the ombudsman and organisations dedicated to the protection of the environment, consumers etc. In the case of Ecuador, the action of protection (art 88) is

63 Ibid.

64 David Boyd, *The Environmental Rights Revolution. A Global Study of Constitutions, Human Rights, and the Environment* (Law and Society Series, UBC Press, Vancouver 2012) 71 ff.

65 James R May, 'Constituting Fundamental Environmental Rights Worldwide' (2006) 23 Pace EnvtlLRev, 113, 134 ff; Erasmo Marcos Ramos, *Brasilianisches Umweltrecht als Biosphärenschutzrecht* (Shaker 2005), 128 ff. This even holds true if the provision is explicitly formulated as a right, like Art 39 (2) Constitution of Brandenburg, see Tobias Brönneke, *Umweltverfassungsrecht*, (Nomos 1999) 380 f; Steffen Iwers in Hasso Lieber, Steffen Iwers and Martina Ernst (eds), *Verfassung des Landes Brandenburg* (2015) Art 39 para 3; Rudolf Steinberg, 'Verfassungsrechtlicher Umweltschutz durch Grundrechte und Staatszielbestimmung' [1996] NJW 1985, 1986.

66 Like Art 52 Constitution of Portugal.

67 See also Maria Adebowale, Chris Church, Beatrice N Kairie, Boris Vasylkivsky and Yelena Panina, *Environment and Human Rights: A New Approach to Sustainable Development* (2002) WSSD Briefing Papers 3; Alan Boyle 'Human Rights and the Environment – Where Next?' in Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (OUP 2015) 201, 216 f.

68 The Hague District Court, decision of 26/05/2021, ECLI:NL:RBDHA:2021:5339, para 4.2.2.

even broader: it incorporates any community, people, nationality or collective as having standing to act.

4.2 Focus on Inter- and Intragenerational Equity and Inclusion of Animal Populations, Ecosystems and Nature into a Social Contract

Recognizing nature as a subject in a constitution or in a national or local law implies a big basic question: who were and who are the subjects that subscribe to our social contract? The experiences that stem from the Ecuadorian constitutional reform but are gaining ground in other parts of the world raise a central legal question (who can be subjects for the law?). At the same time, they can be seen as an emergent of a deeper contemporary process, though. They might even be considered an indicator of transformation in societal thinking[69] or the visibilization of worldviews marginalised from the spaces and discussions that structured modern societies. Dozens of anthropological contributions allow us to identify societies that have pacts and agreements with nature or its elements.

From this perspective, some Latin American legal innovations can be observed. The constitutional and legal proposals in Ecuador and Bolivia represent the first cases where nature is explicitly recognized as a legal entity: as *Pachamama* in the Constitution of Ecuador (2008), and as *Madre Tierra* in the Mother Earth Rights Act (2010) and the Framework Act on Mother Earth and Holistic Development to Live Well (2012) in Bolivia. The Ecuadorian Constitution affirms that 'Nature, or Pachamama, where life is reproduced and occurs, 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). For its part, the Bolivian legislation, in Mother Earth Rights Act (2010), defines a list of nature's rights: to life, to diversity of life, to water, to clean air, to balance, to restoration, to live free of pollution (art 7). Furthermore, this law directly relates the problem of climate change to this extension of rights: it is an obligation of the Plurinational State of Bolivia to develop policies to defend Mother Earth from the structural causes of global climate change (art 8). In both countries these juridical innovations included the purpose to reach *sumak kawsay* (good living) or *suma qamaña* (live well) as alternatives to projects of global capitalism. These ideas include socio-political, cultural and economic aspects as well as ecological ones.[70] The recognition of nature's rights is part of the proposition to live in harmony with nature and achieve a good way of living and the

69 Émile Durkheim, *De la division du travail social* (F Alcan, Paris 1902).

70 Francesca Belloti, 'Entre bien común y buen vivir. Afinidades a distancia' [2014] *48 Íconos. Revista de Ciencias Sociales*, 41–54.

climate change issue is also present not only in the constitution and legislation but also in the National Plans on environmental issues.

Thus, processes that are inspired by this type of viewpoint, such as the cases of Ecuador and Bolivia, also find societies that are more permeable to this type of regulations. If the future of the planet is at stake, modern law seems powerless to deal with the problem, it is easier to think of certain openings. Recognizing nature as a subject of rights makes it possible to review the foundations on which modern law was built and, in turn, to democratise the content of contemporary environmental law.

Other judicial decisions are opening up to these new perspectives, especially climate change litigation that involves not only future generations but also nature.[71] In particular, in Latin America, there is a process of articulation between climate change litigation, future generations rights and the recognition of the rights of nature.[72] Such is the case of the Colombian Amazon, in which the Supreme Court not only considered the effects of deforestation on the future of today's generations and generations to come, but also recognised the Amazon as a subject of rights.[73] One of the mechanisms established by the ruling is the elaboration of an intergenerational agreement between the affected parties and the State to decide on one of the main causes of emissions in the country: deforestation in the Amazon.

This case of climate litigation in Colombia led by a group of children and adolescents illustrates some ideas. First of all, it shows the seriousness of the climate issue not only for the future but also for current generations in the years to come. The intragenerational is directly linked to the intergenerational. But, in addition, the idea of an intergenerational agreement is also associated with the recognition of the Amazon as a subject of rights. This case puts on the table the type of pact that we could think of if we consider that nature is part of the contract and not an object to exploit or to take care of, as it has been until now.

On a more intragenerational note, concerning the extraterritorial application of constitutional rights and therefore moving towards a more global social contract, the German Federal Constitutional Court accepted the claims by claimants *inter alia* from Bangladesh that due to insufficient measures by the German government they

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71 *Asociación Civil por la Justicia Ambiental y otros v Província de Entre Ríos y otros*, Corte Suprema de Justicia de la Nación (2020, pending decision); *Jovenes v Gobierno de México* (2020, pending decision); *PSB* et al *v Brasil*, Supremo Tribunal Federal (2020, pending decision).

72 María Valeria Berros, Fernanda De Salles Cavedon-Capdevile and Humberto Filpi, 'Litigación climática, ecocentrismo y derechos de la naturaleza: un análisis de la experiencia Sudamericana' in Riccardo Perona and M Valeria Berros (eds) *Ragionamento e argomentazione giuridica: nuovi approcci per la tutela della natura, 'Diálogos' Incontri con la cultura giuridica latino-americana* (Accademia University Press 2023).

73 Sala de Casación Civil de la Corte Suprema de Justicia de Colombia, STC 4360/2018.

might be affected in their right to health and should therefore have standing.[74] However, it did not go so far as to oblige Germany to take effective mitigation measures, as the other states also have to take effective measures to protect their inhabitants – the obligation of Germany does therefore not go beyond its international responsibility and the constitutional obligation to reduce greenhouse gas emissions according to the Paris Agreement.[75]

4.3 A Move away from an Anthropocentric and Individual Approach of Infringements and Justifications

For many years, human rights have enabled courts to control the state whether it respects freedom when applying law. Yet, control by human rights, so far, was mainly possible if the violation of statutory law meant at the same time an infringement of an individual right of a specific right-holder. As stated above, the climate crisis (and the related loss in biodiversity and ecosystems) forces legal systems to find solutions to include future generations, nature as such as well as those humans affected by extraterritorial acts that cannot be causally attributed to a specific 'polluting' entity, like in the Llyua Case.[76]

One way to do so is the already mentioned granting of legal personality or some forms of guardianship for nature or future generations. This results in empowering them as legal subjects and thus introducing them in the existing structures of access to justice and participation in administrative decision-making in their own right.[77] There exist two ways to realise this: either, following a moderate ecocentric approach, granting rights to non-human beings or nature itself, or broadening the scope of application and introducing diffuse, supraindividual or collective human rights guarantees in order to render infringements of the foundations of life

74 BVerfG, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18 –, para 101. However, their complaints were not successful, as the Federal Constitutional Court did not rest its reasoning on an infringement of the right to health or life by substandard climate protection measures, but on the risk that in the future people living in Germany will have to endure massive restrictions on their freedom.

75 BVerfG, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18 –, paras 132, 173 ff.

76 LG Essen, Judgment of 15.12.2016, 2 O 285, NVwZ 2017, 734. On this see Michael Kloepfer and Rico David Neugärtner, 'Liability for climate damages, sustainability and environmental justice' in Wolfgang Kahl and Marc-Philippe Weller (eds), *Climate Change Litigation* (Beck Nomos Hart 2021) para 8.

77 See for example Anna Grear, 'The closures of legal subjectivity: why examining "law's person" is critical to an understanding of injustice in an age of climate crisis' in Anna Grear and Louis Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar, Northampton 2015) 79.

actionable without having to resort to a specific and individual right of a specific person.[78] For example, the Brazilian legal order knows "diffuse infringements" in cases of ecological detriments, therefore allowing court actions where the aggrieved party does not have to prove a causal link between polluter and damage and where a claim can be brought forward in order to argue a collective right to a healthy environment.[79] Also, several African and Latin American states have resorted to collective ownership of natural resources (mainly by indigenous or traditional groups), in order to defend collective goods from exploitation by individuals.[80] This shift in conceptions not only gives access to courts, but also introduces new issues into administrative decision-making[81] and the necessary balancing of interest.

Simultaneously, it could be a way to solve the problem that the rights of persons today cannot be restricted by the interests of future generations – unless they become bearers of rights themselves. The same model is increasingly applied by granting rights to non-human beings and nature. Christopher Stone has already argued in 1972 that Western legal orders have attributed legal personhood not only to humans (which, in the time of *Hobbes* and *Rousseau* did not necessarily include women or slaves), but also to companies and other entities.[82] This does also not

78 See Prudence C Taylor, 'From environmental to ecological human rights: A new dynamic in international law' [1998] Georgetown Int Env L Rev 309, 394 ff; Klaus Bosselmann, *Ökologische Grundrechte* (Nomos 1998) 80 ff; Heinrich v Lersner 'Gibt es Eigenrechte der Natur?' [1988] NVwZ 988; Jörg Leimbacher, 'Rechte der Natur – Argumente für eine Ökologisierung des Rechts' in Manuel Schneider and Andreas Karrer (eds), *Die Natur ins Recht setzen* (CF Müller 1992) 37, 42; Anthony R Zelle, Grant Wilson, Rachelle Adam and Herman F Green, *Earth Law: Emerging Ecocentric Law–A Guide for Practitioners* (Aspen Publishing, Frederick 2020) ch 9.

79 Steffen Kommer, 'Diffuse Umweltrechte in Brasilien am Beispiel von Kollektivklagen gegen ökologische Schäden durch queimadas' [2012] ZUR 459 ff.

80 Thaddeus Metz, 'African Values, Human Rights and Group Rights: A Philosophical Foundation for the Banjul Charter' in Oche Onazi (ed), *African Legal Theory and Contemporary Problems* (Springer 2014) 131, 135 f; 142 f; Anna Friederike Busch, *Protection of Traditional Cultural Expressions in Latin America. A Legal and Anthropological Study* (Mohr Siebeck, Tübingen 2015) 372 ff.

81 Christopher Stone, 'Should Trees have standing – towards legal rights for natural objects' [1972] South Cal L Rev 450, 458 f; Prudence C Taylor 'From environmental to ecological human rights: A new dynamic in international law' [1998] Georgetown Int Env L Rev 309 ff.

82 Christopher Stone 'Should Trees have standing – towards legal rights for natural objects' [1972] South.Cal.LRev 450, 458 f. From a similar perspective, at the beginning of the 20th century, the French jurist René Demogue argued that debates on extensions of rights are complex for two reasons. The first is that the theory of the subject of rights is one of the fundamental bases of traditional legal constructions. The second is that it has been thought to be a simple question (who can be a subject in the legal field?) when in fact the question is much more difficult and this is demonstrated by the variation in the number of rights holders throughout history. He mentions, for example, that slaves did not possess such ownership just as, more recently, legal persons did not. For these two reasons, he foresees that when rights are recognised for future generations and animals, there will again be

contravene the guarantee of human dignity that underlies many constitutions and human rights charters (even if it not explicitly spelled out as a fundamental right, like in Art 1 (1) GG) – establishing non-human rights, even on a constitutional level, does not mean to treat humans as objects.[83] This is even more true, if healthy climate conditions are accepted as a collective good of humankind that can be claimed by each and every one without having to prove a present and individual infringement.

One of the current experiences in Latin America is the recognition of the Atrato River as a subject of rights. This was a result of an ecocentric interpretation of the Colombian legal system where the rights of nature are not explicitly recognized. The Atrato river is part of the Chocó region in Colombia where the inhabitants are mostly afro descendants (87 percent of the inhabitants), indigenous communities (10 percent of the inhabitants) and farmers. They were pleaded by the Study Center for Social Justice, Tierra Digna, as representative of the community councils of the region. They were concerned about the river pollution due to illegal mining, which entailed serious consequences for the health and livelihoods of the residents. Thus, they filed a legal action in defense of both the inhabitants and the environment. In an innovative way, the Constitutional Court introduced the concept of biocultural rights,[84] recognized that the Atrato River is a subject of rights and appoints a guardian to represent the river: the guardians of the Atrato River.[85] It is a structure composed of a diversity of social actors and institutions. The national government was ordered to exercise the guardianship and legal representation of the rights of the river, through the institution designated by the President, in conjunction with the ethnic communities that inhabit the Atrato river basin in Chocó region. In parallel, and in order to ensure the recovery of the river, the Court ordered that these legal representatives of the river have an advisory team, formed by the Humboldt Foundation and the World Wildlife Fund Colombia. Thus, the river is both a subject of rights and an entity that needs to be endowed with representation through the figure of its guardians. Both

debates. René Demogue, *Notions fondamentales de droit privé. Essai critique* (Libraire Nouvelle de Droit et Jurisprudence, Paris 1911) 323.

83 See, however, Martin Kind, *Umweltschutz durch Verfassungsrecht* (Springer 1994) 281.

84 The decision affirms: 'the rights that ethnic communities have to administer and exercise sovereign autonomous authority over their territories – according to their own laws, customs – and the natural resources that make up their habitat. Their culture, traditions, and way of life are developed based on the special relationship they have with the environment and biodiversity. In effect, these rights result from the recognition of the deep and intrinsic connection that exists between nature, its resources, and the culture of the ethnic and indigenous communities that inhabit them, all of which are interdependent with each other and cannot be understood in isolation', Judgment T-622/16, Constitutional Court of Colombia, translated by, and available at the Dignity Rights Project: <delawarelaw.widener.edu/files/resources/riveratratodecisionenglishdrpdellaw.pdf> (page 35).

85 It is possible to follow the guardians' activities in: <https://www.guardianesatrato.co/>.

aspects become a reference in the regional legal field: other judges are inspired by this ruling to recognize various Colombian ecosystems as subjects of rights and create guardians involved in the execution of the sentence.[86]

5 Human and Nonhuman Rights 'for Future'?

In closing, we return to the questions at the beginning of our text. How are the uses of human rights in the age of climate crisis until now and which are the possibilities considering the process that are taking place in different contemporary legal systems?

If we still want to use human rights to tackle the climate crises from a legal perspective in future, we need a deep legal (and also larger) discussion: how human rights can be an instrument to altruistically claim an infringement of legal interests of a large number of human beings (living today and/or in the future) and of ecosystems? It is clear that our Western-liberal understanding of fundamental rights, founded in the social contract theories does not seem entirely appropriate for today's challenges. However, the idea of agreement among human, now also non-human beings, remains important for thinking about the climate crisis and possible responses from a legal point of view. The aim would be to oblige democratically legitimate institutions to take action, ideally including the participation of civil society, in order not to exclude the enjoyment of individual freedom and classical human rights. A special challenge is not only to incorporate appropriate institutional reforms and actions as well as civil society participation but also the future perspective. The possibility for humanity and non-human beings to continue living in the planet is in danger: how can we think in a contract that includes all these aspects? One possible way is to articulate the processes taking place in several latitudes in recent years: the enlargement of legal instruments to claim about collective infringement of legal interests, the future variable in present decisions and the implosion of new subjects of rights. These are constitutional and legal experiences and even judicial decisions that recognise nature and/or some of its elements as legal entities. In this way, some proposals attempt to articulate human rights with the rights of nature as a way to address environmental and climate problems.

86 The following rivers were recently recognized as subject of rights in Colombian jurisprudence: Atrato, Otún, Pance, Quindío, Magdalena, Cauca, Coello, Combeima, Cocora, La Plata. In turn, other ecosystems have also been recognized as such: a number of natural areas (Complejo Los Páramos las Hermosas, Los Nevados, Isla Salamanca), the Pisba Badlands, the Tota Lake and the Amazonia. The complete list of decisions is available in: <www.harmonywithnatureun.org/rightsOfNature/> accessed 23 December 2022.

Additionally, somehow it is also important to include and specially consider the aspect of equality and climate justice.

These processes and articulations involving a rethinking of the core categories of law seem a complicated task. However, and bearing in mind that it is not possible to achieve a single human right to a healthy climate, the possibility of identifying these transformations is relevant for thinking about a future in which the law, too, can contribute.