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Interdisciplinary Perspectives on the Interplay between Human Rights and Sustainability

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Preface

The following collection of manuscripts emerged from an interdisciplinary virtual exchange held during the Winter semester of 2023/2024 at the Environmental Campus Birkenfeld, organized by Prof. Dr. Milena Valeva and Prof. Dr. Kathrin Nitschmann. Additionally, Prof. Dr. Héctor Bombiella Medina, a lecturer of anthropology in the Department of World Languages and Cultures at Iowa State University, contributed to the virtual exchange and supervised case studies 3 and 4, bringing his extensive experience in this field and facilitating the international exchange. Within the elective module on Human Rights, students from the Bachelor's programs "Nonprofit and NGO Management" and "Environmental and Business Law," as well as the Master's program "Energy and Corporate Law," explored the interconnections between human rights and sustainability.

In an era marked by unprecedented environmental challenges and profound social transformations, the intersection of human rights and the rights of nature has emerged as a critical area of inquiry and debate. Today, as we face the dual crises of climate change and biodiversity loss, the traditional boundaries between human and environmental rights are increasingly blurred. This confluence demands a fresh, interdisciplinary approach to understanding and addressing the complex and interrelated issues at hand.

Human rights, fundamental to the dignity and freedom of individuals, are deeply impacted by environmental degradation. Communities worldwide are experiencing firsthand the devastating effects of polluted air, contaminated water, and deforested landscapes, all of which undermine basic human rights to health, livelihood, and well-being. Conversely, recognizing the rights of nature — the intrinsic value of ecosystems and species — challenges us to reconsider our legal, ethical, and philosophical frameworks. It calls for a paradigm shift from an anthropocentric worldview to one that embraces the interconnectedness of all life forms.

Engaging in robust discussions and research on these topics is essential in today's context. By exploring interdisciplinary perspectives, we can forge innovative solutions that honor both the rights of individuals and the integrity of nature. This special issue aims to contribute to this vital discourse, providing insights and fostering dialogue on how we can collectively navigate the complex landscape of human rights and environmental sustainability.

The first chapter „Human rights and SDGs in the context of democracy“ examines the significance of international human rights in today's context and links them to new value systems like sustainability.

The second chapter, the case study „Rights of Nature“ explores the concept of granting legal rights to nature itself by comparing laws from various countries to show how it combats environmental exploitation.

The third chapter, the case study „Traditional coca leaf consumption and drug trafficking in Colombia“ delves into the complex issues surrounding coca cultivation in Colombia, highlighting its economic, social, and political impacts.

The fourth chapter, the case study „The artisanal fishing community of Chorrillos, Peru“ aims to provide theoretical insights and recommendations for improving the livelihoods of artisanal fishing communities in Peru, considering legal, ethical, and environmental perspectives as well as how economic liberalization, privatization, and deregulation affect the community's socio-economic conditions.

Ecology and the protection of fundamental rights: status quo and development potential in the light of the precautionary principle

Author: Prof. Dr. Kathrin Nitschmann

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1 Introduction

Already more than 50 years ago, against the backdrop of the "earth science" findings of the time, voices could be heard in the legal literature expressing concern about the planet's carrying capacity, calling for consistent political rethinking and action and explicitly questioning consumer behavior and the ongoing pursuit of economic growth (Rehbinder, 1970). The realization that the limits of environmental resources must be respected, and that growth must be shaped effectively within this framework has therefore been omnipresent not only since the "Our Common Future" report by the "World Commission on Environment and Development", or "Brundtland Commission" for short, in 1987 (United Nations General Assembly, 1987). Nevertheless, the current planetary status quo shows that the era of environmentally friendly economic development has by no means been effectively ushered in since then; on the contrary, implementation deficits or a lack of effectiveness of environmental protection measures against the excessive use of ecological resources are to be deplored. The demand for an ecological transformation of society is one of the most urgent on the political agenda and continues then as now, albeit partly with new terminology, at the level of jurisprudence: Currently, it is discussions about intertemporal freedom rights, nature's own rights and the greening of law that dominate the picture. However, the demand for ecologically oriented protection of fundamental rights is not new: the idea of protecting nature from excessive human behavior - also with a view to the generations of tomorrow and their chances of realizing a life in freedom in the future - is reflected not least in the precautionary principle, which is internationally

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recognized as a legal principle. Its ecological potential will be briefly explored below, culminating in an overview of constitutional tendencies towards an ecologically oriented protection of fundamental rights from a German perspective. This overview at the same time serves as an introduction for selected legal, ethical and social aspects of case studies in Latin America done by students in the context of a Human Rights interdisciplinary seminar in Wintersemester 2023/2024.

2 The precautionary principle as a corrective with potential in ecological contexts

"Better safe than sorry" - this approach, which has been much discussed at European and international level, has played an explicit role as a guiding principle in global environmental and climate policy since the 1970s and can be found as the "precautionary principle" both in relevant declarations and framework conventions of the United Nations (UNFCCC, 1992; Rio Declaration, 1992) and at European level in the Treaty of Maastricht in Art. 191 TFEU, where it is linked to sustainability via the integration clause in Art. 11 TFEU. In Germany, the precautionary principle has also been emphasized as a guiding principle of environmental policy since the 1970s and has been continuously substantiated in environmental reports; as a normative requirement for dealing with ecological impact limits, it is intrinsic to the state protection objective of Art. 20a GG or substantiates it and can be found in numerous provisions of German environmental law (Calliess, 2001; Calliess, 2022a).

In this way, the precautionary principle transports the findings of earth system science on planetary boundaries into law as a normative component and can contribute to ensuring an "ecological subsistence minimum" recognized under constitutional law by aiming to avoid critical burdens and tipping points and not to exhaust ecological limits (Calliess, 2021a, p. 19 et seq.). Applied in consistent and transparent interaction with the relevant sciences, it is thus able to make a contribution to approaching the "equality of the starting point as an opportunity to realize freedom" in general and goes beyond the formula of reconciling the freedom of one person with the freedom of another by including the freedom-related question of realization - in our context also for future generations or the "expected number of inhabitants" (Böckenförde, 1991 esp. p. 266, 270 et seq.; Calliess, 2021b, p. 329).

On closer inspection, the precautionary principle and its national and international formulation give rise to several questions of both a legal and practical nature, including, for example, the scope of its content, the resulting obligations and limits of action for the responsible actors and the interaction with the principle of proportionality.

The potential of the precautionary principle to give full weight to ecological interests within the framework of a fair balancing of interests seems immense, but this "fair" framework also proves to be its biggest stumbling block. This is because traditionally, except in the case of mandatory legal requirements, no interest is to be given preference; at best, a planning *optimization requirement* can be derived from Article 20a of the Basic Law, according to which the natural foundations of life are to be protected as well as it is legally and factually possible without making the realization of other public tasks impossible (Murswiek, 1997). However, environmental impairment can regularly be justified under certain circumstances with another conflicting objective. This is probably not least because the precautionary principle always involves a certain degree of uncertainty in terms of prognosis.

At the same time, however, precisely this uncertainty component inherent in the principle can prove to be its strength if it is brought to bear in a future-oriented manner in favor of the natural foundations of life as the Federal Constitutional Court did in its much-noticed 2021 climate decision. The court refers to the special duties of care arising from the state objective of Art. 20a of the Basic Law by explicitly pointing out that, despite existing scientific uncertainty about environmentally relevant causal relationships, the possibility of serious or irreversible adverse effects must be considered if there is reliable evidence (BVerfGE, 2021, para. 229). The decision of the Federal Constitutional Court manifests the dependence of law on other sciences - in this case climate or earth science - in the sense of a structural link in order to constitute the legal decision in the first place.

Article 20a of the Basic Law opens literally door for science into the law; in this sense, the BVerfG states: *"Article 20a of the Basic Law imposes a permanent duty on the legislature to adapt environmental law to the latest developments and findings in science (BVerfGE, 2021, para 212)."*

3 German tendencies towards an ecologically oriented protection of Human Rights

The reception of the precautionary principle in German legislation and its development in literature and case law are exemplary indications that the lamentably hesitant implementation of environmental and climate protection and the failure to fully develop the steering potential of legal regulations in the last quarter of the 20th century are not fundamentally due to a lack of positive legal regulation or even legislative awareness.

The latter is hardly conceivable in view of the recurring political calls since the 1970s for positive legal concepts to strengthen environmental protection under constitutional law, with reference to the increasingly obvious ecological damage and enforcement deficits. On the background of political and legal rejection of a fundamental right to environmental protection (Calliess, 2021b; Calliess, 2022b Art. 20a, para. 10-18; see Wolf, 1984) - the Federal Administrative Court explicitly stated in 1977: *"Under federal constitutional law, there is no 'fundamental environmental right' that provides more extensive protection under subjective law than that provided by Basic Law Art. 2 et seq. in favor of specific protected goods."* (BVerwGE, 1977) - efforts at least led to the introduction of the state objective of environmental protection in Art. 20a of the Basic Law in 1994 (Federal Law Gazette, 1994).

The discussion about a "fundamental ecological right" or a "fundamental right to environmental protection" picked up speed again in 2021 with *Ferdinand von Schirach's* proposal to include a fundamental right to environmental protection in the UN Charter of Fundamental Rights (agreeing Klinger, 2021; critically referring to Callies, 2021b; also Kersten, 2022; critical Wegener, 2022). In view of the legal-dogmatic difficulties of such a fundamental right, the proposal has been received in the academic literature as a "sympathetic and justified climate policy plea", but at the same time, similar to a "human right to healthy climate", which is being discussed in the context of climate lawsuits, it gives rise to adjustments (Calliess, 2021, p. 323). All in all, such impulses should in any case be beneficial to the further discussion on the ecological development of the law.

Regarding the lack of determinability of a fundamental right to the environment, *Calliess* (2021) points out that the fundamental right to an ecological minimum subsistence level can be used here, which, derived from Art. 1 para. 1 in conjunction with Art. 2 para. 2 and Art. 20a GG, can be interpreted as being aimed at preserving a viable and liveable environment (BVerfGE, 2021, para. 113-115; critical Calliess, 2021b). This would result in a judicially controllable mandate to act, which - in line with the precautionary principle - obliges the responsible parties to develop an effective and long-term protection concept, among other things (Calliess, 2021).

In favor of a substantively effective fundamental right to the environment, *Callies* explains, with recourse to the function of fundamental rights as duties to protect, how a substantively effective fundamental right to environmental protection can be constructed as an environmentally protective partial guarantee of individual fundamental rights such as life, health and property. In the context of environmental impairments, this focuses in particular on the right to life and physical integrity under Article 2 (2) sentence 2 of the Basic Law and once again draws a link to the precautionary principle. This is because effective health protection as a duty of the state under Art. 2 para. 2 sentence 1 includes not only current impairments, but also preventive health care (Calliess, 2021b; with reference to BVerfG, 2009). *Calliess* (2021b, p. 331) emphasizes the idea of a procedural environmental law in view of the difficulties of a substantively conclusive determination of a fundamental right to environmental protection and with a view to the impetus of international and European law: *"Everyone has the right to a clean and healthy environment, as well as its preservation and protection. This is guaranteed by the right to information, participation in administrative proceedings and effective access to justice."*

Kersten's (2022) recent proposal for an ecological German Basic Law, which should be cosi-

> Turning away from the decades-long primacy of the pursuit of material prosperity is long overdue and a natural resource- and risk-based lifestyle change in line with the precautionary principle is urgent.

dered in the context of the international debate on the rights of nature, shows that there is still room for mankind to move towards more ecology in law, starting at the constitutional level. The natural state of the Anthropocene, into which humans have manoeuvred themselves through their ecologically irresponsible actions, requires a social contract to be concluded with nature and its rights to be recognized; a challenge that he sees as similar to that of declaring "capital" to be legal persons, which is therefore acceptable. *Kersten* (2022, p. 52) consistently argues for an ecological constitutional order that overcomes the distinction between anthropocentric and ecocentric nature conservation and provides "rules, concepts and institutions for the Anthropocene". He drafts such an order on the basis of the preamble, which has been expanded to include the principle of ecological responsibility and explicitly recognizes mankind's responsibility for nature as a task for the future, thus creating a powerful example of an ecological transformation of law at the highest national level (Kersten, 2022, p. 63 et seqq.).

Finally, in the context of the national discussion on improving the legal protection of natural resources, German legal literature also includes the demand for nature's own rights, which emerged on a global level in the 1970s (see Wolf, 2022; Gutmann, 2019; Mührel, 2022). The need for nature to be granted subjective rights is understood from a holistic naturalistic perspective in view of the natural interconnectedness of humans and nature and is discussed internationally in some societies at a political level with recourse to indigenous ideas and cosmovisions of an animated nature, and in some cases institutionalized at a legal level. Prominent examples with an impact that have been discussed internationally include the New Zealand Whanganui River, the Colombian Río Atrato and, most recently, the Mar Menor in Spain or the "Pacha Mama", which is revered by indigenous cultures in South America and can probably be understood with various nuances as an expression of a holistic cosmovision (Hsiao, 2022; Doran and Killean, 2022). The latter is legally enshrined at the highest level in the Ecuadorian constitution: the existential significance of the "Pacha Mama" is already stated in the preamble and humans are named as part of it; in Art. 71, the "Pacha Mama", again vividly and processually described as the source of life, is ascribed a legal status that goes hand in hand with the right of everyone to claim this right: *"La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos. Toda persona, comunidad, pueblo o nacionalidad podrá exigir a la autoridad pública el cumplimiento de los derechos de la naturaleza."*

While it may be possible to understand such a development as an expression of anti-colonial cultural tradition and as a response to modern industrial societies and their arrogant treatment of nature, the question is rightly raised as to how such an ecocentric or biocentric counter-image can be integrated into legal systems that are traditionally based on an anthropocentric understanding of nature without causing distortions that could ultimately impair the coherence of these humanistic systems (Wolf, 2022; Mührel, 2022). At this point, it will be necessary to reflect on a "certain cultural relativism" or the "cultural underpinning of every legal system", which, although not fundamentally opposed to a normative consensus of the global community, nevertheless calls for "interdisciplinary research into the genesis and implementation of norms"(see Jung, 2009). If the phenomenon of "nature as a legal subject" is to be successfully adopted, then only on the basis of the assumption that law is also a cultural phenomenon (Jung, 2017, p. 1 et seqq.; Seelmann, 2007, p. 121 et seqq.) and on the basis of careful comparative law, taking into account cultural circumstances - without re-

sorting to an excessive cultural comparison-, state structures, policies, institutions and sources of law (Schmidt-Aßmann, 2018; Kraski, Prityi and Münster, 2019). Nevertheless, it must be admitted that such an approach certainly has its appeal and that initiatives in the direction of ecocentrism, such as those being promoted in Germany, are worthy of note and should stimulate reflection and further discussion (Ewering and Gutmann, 2021). From the perspective of modern industrial societies and perhaps in general, it remains true that the core issue is the control of human behavior for the purpose of preserving its natural conditions of existence. The above-mentioned draft of an ecological constitution is an approach for such an ecological precaution, with a view to preserving opportunities for freedom in the future and the possibility of making the entire system more ecological.

Although since the introduction of Article 20a of the Basic Law, the mandate to the legislator to enact suitable environmental protection regulations that safeguard the civil liberties of future generations in line with the precautionary principle has been accentuated under constitutional law, it was for a long time partly considered ineffective and lacking in control (Calliess, 2022b, para. 139; Kersten, 2022). However, it was not until the Federal Constitutional Court's climate protection ruling of 29.04.2021 (BVerfGE, 2021) that the effectiveness of the state objective in conjunction with the principle of proportionality "like a hitherto closed flower" (Schlacke, 2021, p. 915) was developed in a precautionary manner in the sense of the freedom-related question of realization: *"Under certain conditions, the Basic Law obliges to secure freedom protected by fundamental rights over time and to distribute opportunities for freedom proportionately over the generations (BVerfGE, 2021, para. 173)."* The Federal Constitutional Court fully applies the precautionary principle in conjunction with Article 20a of the Basic Law and the rights to freedom by recognizing that cumulative, uncertain and long-term impairments of fundamental rights are also conceivable and that, in the worst case, namely in the event of serious, irreversible damage, fundamental rights protection could be rendered ineffective in the future (Ekardt, Heß and Wulf, 2021). The court thus addresses the factual intertemporal connection between environmental earth systems and their significance for the individual and points to the need for fair intertemporal allocation (Siebert, 1986). *"The protection mandate of Article 20a of the Basic Law includes the need to treat the natural foundations of life with such care and to leave them to posterity in such a condition that future generations cannot continue to preserve them only at the price of radical abstinence (BVerfGE, 2021, para. 193)."* This finding is implemented in terms of legal doctrine at the level of intervention in the light of Article 20a of the Basic Law by linking the defensive and protective duty dimensions of civil liberties and the explicit addition of the intertemporal component and thus overcoming the presentness criterion in conjunction with the standards of evidence control; without, of course, fundamentally affecting the fundamental right dogma of the duty to protect (BVerfGE, 2021, para. 169, 186 et seq.; see Schlacke, 2021). In concrete terms, the Federal Constitutional Court succeeds with the construction of an "intervention-like pre-effect" (BVerfGE, 2021, para. 183) in moving the objective-law intergenerational protection obligations of Article 20a of the Basic Law into a subjective-law dimension and creating a new future-oriented fundamental right to intertemporal freedom protection, which has met with a broad positive response in the literature (Schlacke, 2021; Kersten, 2022; Faßbender, 2021; Ekardt, Heß and Wulf, 2021; Britz, 2022; Breuer, 2022; Hofmann, 2021). *Kersten (2022, pp. 35-39) summarizes* this in the fundamental rights formula: *"Art. 2 para. 1 GG (as a subjective dynamization factor) + Art. 20a GG (as na objective dynamization factor) = intertemporal safeguarding of freedom."* It remains to be seen how the new dogmatic figure will develop and whether it should be transferable to other areas (Franzius, 2022; Schlacke, 2021; Uechtritz and Rutloff, 2022).

4 Conclusion

It is to be expected that government decisions in the ecological context will in future more and more likely also imply the necessity of renunciation and thus the restriction of fundamental freedoms and the status quo which has become taken for granted in western industrial societies; a consequence that will by no means simply reflect a social consensus. Turning away from the decades-long primacy of the pursuit of material prosperity is long overdue and a natural resource- and risk-based lifestyle change in line with the precautionary principle is appropriate. Such a step cannot be expected through legal control alone, but must also be based on cooperative, consensual, informational processes involving society. A law that is consistently shaped human rights orientated could contribute to changing the awareness of society if the law becomes the living expression of an ecologically and socially fair constituted state. An assumption that could be made for any nation, which leads to the announced selected aspects from the student's international case studies.

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Endnote

For more on the understanding, see Gutman (2019), p. 613 et seq.; Bachmann and Navarro (2021), p. 357 et seq.; O'Bryan (2022), p. 769 et seqq.; Epstein S./Dahlén, M./Envist, V. and Boyer E. (2022), Liberalism and Rights of Nature: A Comparative Legal and Historical Perspective, Law, Culture and the Humanities; Kraski, Prityi and Münster (2019), p. 127 et seqq.; for Europe see European Parliament Study requested by the JURI committee (2021) Can Nature get it right? A Study on Rights of Nature in the European Context, PE 689.328.

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