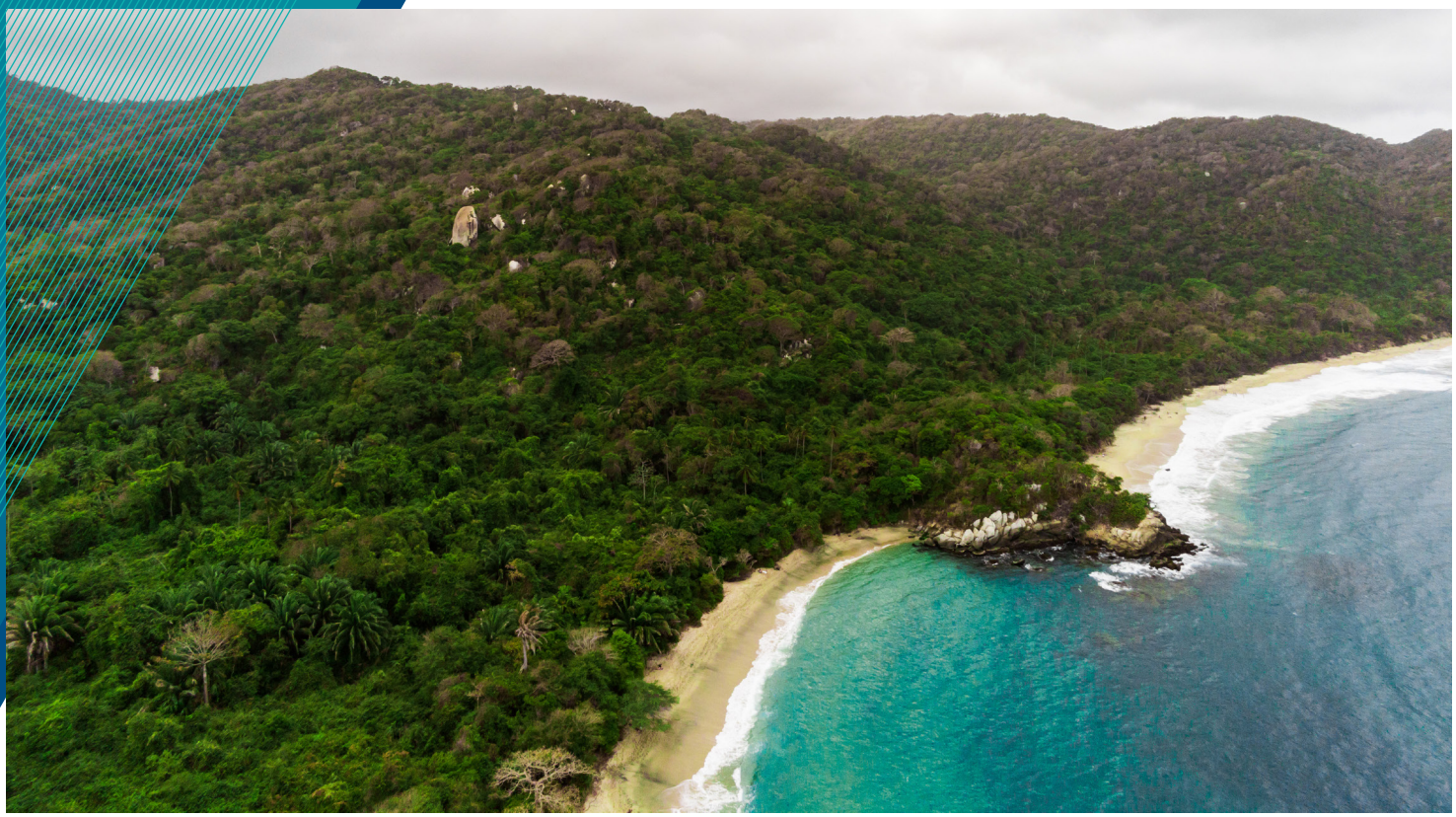
No 443 / August 2021

Facts & Findings

KONRAD ADENAUER STIFTUNG



Nature – a legal Subject

Could the Colombian model work for Germany?

Marie-Christine Fuchs, Levon Theisen

- In a series of sensational rulings, Colombia's High Courts have granted natural features such as the Atrato River and the Colombian Amazon legal personality.
- The judgments aim both to protect the environment and climate, and to safeguard indigenous and Afro-Colombian minorities whose traditional lifestyle is closely connected to nature, and who want to defend their natural resources.
- While the right to a healthy environment is recognized as a basic right, in Colombia this case law is lacking effective implementation and enforcement.
- Could these Colombian judgments recognizing the rights of rivers and other ecosystems be transferred to Germany? This idea raises a lot of unanswered questions. If nature was recognized as a subject of rights, would this help to promote climate protection?

Table of Contents

Climate lawsuits in Germany are currently on the rise. Some have provisionally culminated in partially successful constitutional challenges, drawing international attention to the case law in Colombia which grants rights to rivers, forests and animals. The progressive judgments in favor of the environment and climate also serve to safeguard indigenous and Afro-Colombian populations in regions exploited for mining, hydroelectric power generation and forest clearing. The German legal tradition is no stranger to recognizing rights in favor of entities that are not natural persons, for example legal persons. Why not in favor of nature, too? Granting subjective rights in favor of the environment might shift the sovereignty to interpret such rights from Berlin to Karlsruhe, however. This new legal fiction certainly offers Colombia a creative, progressive solution to a complex problem, but its application in Germany raises questions.

Introduction

Can a forest have rights? Why should it have them? To help protect the climate? What about a river? Who will speak up for it? What would its rights mean for us? The German Federal Constitutional Court (BVerfG – Bundesverfassungsgericht) did not directly address these questions in its sensational ruling of March 24, 2021. However, its climate decision means climate lawsuits are now taking center stage in terms of legal policy in Germany, too.

Legal personality for the Amazon region

Alongside courts in countries as varied as Ecuador, New Zealand and India, Colombia's Constitutional Court first began addressing these issues in 2016, and has granted subjective rights to the country's third longest river.[1] The country's highest civil court followed suit by granting legal personality to the entire Colombian Amazon region during proceedings about illegal deforestation there.[2] Other, similar rulings on different forests and rivers followed.[3] At first glance, the case law outlined above sounds odd. It certainly raises questions, such as how to demarcate the Amazon region legally and geographically. Why do only some forests have legal personality, and not all Colombian forests? In spite of – or perhaps thanks to – questions such as these, this Colombian case law has attracted attention around the world.

Right to a decent future

In many countries, people are seeking new ways to improve climate protection, even if this means going before the courts. The first constitutional challenges obligating German legislators to take stronger climate protection measures were filed in Karlsruhe as early as 2018. These also criticized the insufficiency of the Climate Protection Act passed at the end of 2019, which was supposed to implement the obligations under international law agreed at the 2015 Paris Climate Conference to reduce CO_2 emissions. This would violate the basic rights of the usually young plaintiffs, and in particular their right to a decent future. Even if these challenges were only partially successful, given the lack of adequate measures to further reduce emissions after the year 2031, the BVerfG has laid solid foundations concerning

the state's duty to protect the climate. Its decision has given huge impetus to the debate on the constitutional and judicial safeguarding of climate protection. The BVerfG itself noted that managing climate change is a global, joint task. So, can we learn from Colombia when it comes to climate protection? Should we challenge our legal definition of nature for the benefit of the climate?

Colombia: caught between mining, environmental protection and indigenous rights

Shortcomings in law enforcement

Colombia's legal tradition is a reflection of the huge social disparities found in a polyethnic, multicultural society. Indigenous peoples make up 4.4 percent of the Colombian population. There is also a large Afro-Colombian population, making up 10.62 percent of the overall population. Members of these groups tend to live in the country's poorer regions. The traditional lifestyle of the indigenous population, in particular, is closely connected to the natural environment they live within. Some natural areas are revered as sacred. The Colombian constitution recognizes this tradition and legal view, and grants indigenous peoples certain freedoms in how they administrate and use the natural resources on their own land. Since the majority of these regions are rich in mineral resources, areas housing indigenous and Afro-Colombian populations have always been legally – and illegally – exploited for mining, generating hydro-electric power and forest clearing. The state is noticeably absent in the poorer, remote regions, even since the Colombian civil war ended, making the lack of structural administration and law enforcement all the more apparent.

These realities in outlying parts of the country contravene both the constitution and regional treaties, according to international law.[4] To some extent, these treaties recognize the protection of the environment, climate, and indigenous peoples' living conditions as subjective, collective constitutional rights, and impose the corresponding protective obligations on the state. As early as 1992, the Colombian Constitutional Court used this to develop the idea of an "ecological constitution", which presupposes a fundamental right to a healthy environment.[5] The 2016 Atrato River ruling sent a clear message to the government – based in the capital, Bogotá – that it had failed to guarantee essential government services in the Chocó region, one of the poorest in the country. Unlike Germany, where citizens usually have to struggle through the stages of appeal first, Colombians whose fundamental rights have been violated have the right to file a direct constitutional complaint (a *tutel*a) parallel to proceedings before specialized jurisdiction.

Landmark rulings on the Río Atrato and the Amazon region

Protecting indigenous minorities

The groundbreaking ruling on the Atrato River was preceded by legal action by indigenous and Afro-Colombian communities and associations whose existence and cultural life along the riverbank was under threat. They were represented by a national environmental organization, the Study Center for Social Justice "Tierra Digna" (dignified earth). The ecosystems and population of the Chocó region were suffering the devastating effects of illegal mineral mining using mercury and cyanide, and of a large hydro-electric power project. Pollution in the river was causing skin diseases and miscarriages. In contrast, the way of life of the local Afro-Colombian communities, which live close to nature, was actually conserving and protecting thousands of unique plants and hundreds of endemic animal species around the Atrato river basin. Protecting Colombia's ethnic diversity is inextricably linked to protecting nature and its biodiversity.

During the proceedings, the Constitutional Court came up with the novel legal idea of "biocultural rights" ("*derechos bioculturales*"), which can be derived directly from the constitution. One of its central tenets is the preferential right of ethnic communities to administer their territories according to their own (natural) laws and customs, and to exercise autonomous custodianship over them. These "biocultural rights" therefore arise from recognizing the fundamental, intrinsic relationship between nature and ethnic communities. This cultural perspective has been accepted, thanks to the immense value placed on cultural and ecological diversity by the Colombian constitution.

To apply these rights effectively, the Atrato River must be treated as a legal entity with the same status as that understood by the ethnic communities: as a subject of its own rights, and not as an object there to serve mankind. Unlike the anthropocentric approach, an ecocentric worldview considers people and the environment to be equally important, with the corresponding legal ramifications. In the judges' view, this provides a framework for managing nature in a sustainable way. Thus, through the 13 directives it has addressed to the Colombian government and the communities living in the Atrato River area, the court is seeking to substantiate the river's right to recovery, care, conservation and protection. Alongside the symbolic value of their ruling, the judges' main priority was to identify a viable model that could solve the complex, structural problems of the Atrato River.

Alarming deforestation

In 2018, Colombia's highest civil court adopted the Río Atrato case law in response to the alarming increase in rainforest deforestation, which had risen by 44 percent between 2015 and 2016. Using the same ecocentric reasoning as the Constitutional Court, it granted subjective rights to the Colombian Amazon region and ordered measures to combat deforestation. Yet the plaintiffs in these proceedings were not indigenous tribes. They were in fact a group of 25 children and young adults, and were represented by noted Colombian NGO "Dejusticia", bringing the action on behalf of future generations. They asserted that the state had failed in its duty to protect nature and the climate for future generations,[6] arguing that it had neglected to take the action required to halt the illegal deforestation of the rainforest, also called the "lungs of the planet", thereby significantly contributing to the rise in CO_2.

Principle of solidarity

The court based its judgment to protect the climate for future generations on the constitutional principle of solidarity. From this, it derived a form of collective, moral obligation in terms of shared needs,[7] which should apply between people, towards nature, and to future generations. Contrary to the Río Atrato ruling, in which the subjective rights granted to nature reflected the way of life of the local Afro-Colombian population, the civil court discounted the consequences of deforestation for the many indigenous tribes in the Amazon. The court's arguments lacked the impact of the Río Atrato ruling, partly because of other outstanding issues, such as omitting to define the term "future generations".

Could the Colombian model work for Germany?

Without question, environmental and climate protection are some of the most pressing problems of the 21st century. The BVerfG confirmed this in a spectacular way, through its decision on the Climate Protection Act. The ruling has inspired wider discussion about whether, and how, environmental and climate protection should be better represented in constitutional law. This could give added momentum to the debate on whether nature itself should have rights. But does the figure of legal personhood in favor of individual ecosystems provide a greater level of protection than conventional legal instruments? Or are the Colombian judgments more symbolic jurisprudence than binding, enforceable landmark rulings Germany could use as a model directly?

Our jurisdiction likewise does not solely reserve rights for people, as is clear from the legal fiction of the legal person. It is precisely this which allows a German company to sue and be sued, and to cite certain basic rights such as professional freedom. Using the model of the legal person, we could similarly grant basic rights to nature, as long as these applied inherently to it.[8] Representatives determined by law could assert these rights.[9] Nature, as an entity with its own rights, would thus be entitled to a natural existence that protects it from negative human influence. But every legal entity, natural and legal person has obligations to fulfill in return. So, what would nature's obligations be? And what would be the consequences of granting rights to nature on the environmental protection, if its legal guardians or representatives were to bring actions on nature's behalf?

Which land would get rights?

Questions on the principle of equality also remain unanswered. Discussion is needed about the legal criteria for assigning subjective rights to individual areas of land: Why would one qualify, while another falls by the wayside? In any case, we cannot derive any consistent categorization using objective criteria from the Colombian rulings, such as the role of a forest in keeping CO_2 below a certain threshold. We would have to come up with admissible criteria for differentiation.

What is more, it currently seems that climate-related legal action only has prospect of success if some unlawful violation of the plaintiffs' basic civil liberties, such as their right to live, physical integrity, or property, can be proven. Legal standing therefore still seems to be bound to the harmful effects of environmental damage on humans. If interfering in the ecosphere of a natural area was in itself an infringement of rights, this would help future climate lawsuits, provided that the nature in question was important for the climate. And who's to say which forest or ocean is not important for our climate? Perhaps interference in nature could be challenged too, even if people's basic liberties were not violated?

Courts as "quasi legislators"

But in that case, wouldn't we just be opening Pandora's box? If we granted rights to nature, and even if we changed the constitution, the question would remain of who would decide on the content and scope of the rights of rivers, lakes, and forests. The German Federal Constitutional Court? This would further fuel the criticism that the BVerfG is declaring itself a – less democratically legitimized – "quasi legislator" in matters of climate policy. In Latin America, this is already the case to some extent. In the late 20th and early 21st centuries, social, collective and even environmental rights were added to many of the region's constitutions, initially in favor of people, then, as is the case in Ecuador's constitution, explicitly in favor of nature, too.[10] However, on a continent that depends on industrial mining and agricultural exports, and where corruption is rife, there is still a long way to go before these rights are effectively implemented in practice. Some lawyers have described these new rights as constitutional utopias,[11] and there is even talk about "legal fetishism". To date, constitutionally guaranteeing social and environmental rights has changed very few of the powers held by national governments in a region characterized by (excessively) powerful presidential systems. It therefore comes as no surprise that the detailed directives issued to the state following the Río Atrato and Amazon rulings have only been partially implemented to date, if at all.[12] This explains why one must also understand the meaning of Latin American court rulings on basic environmental rights in symbolic and ideological terms.

We can hardly blame the Latin American constitutional courts for understanding the new rights as a clear mandate to act. On a continent where extreme social inequality is the norm, the most senior judges often consider themselves to be the last bastion of values and standards in human rights. For many people, they are the last hope. In Germany the situation is completely different. The state already has a constitutionally secured, justiciable mandate to protect the natural foundations of life, mindful of its responsibility toward future gene-

rations (Art. 20a of the German Federal Basic Law [GG – Grundgesetz]). The decision of the German Federal Constitutional Court has just vehemently reinforced this. From this, we may also derive a "basic right to an ecological minimum subsistence level".[13]

Much more important, however, is the sub-constitutional legal form and implementation of this protection mandate at administrative level, which is often lacking in Colombia. Even where climate protection laws exist, they are often flouted, and rulings are not enforced. Colombia is currently witnessing the highest murder rate of human rights activists campaigning on environmental issues of any country in the world.[14] In most cases, the perpetrators go unpunished. In contrast, since the BVerfG climate decision, the German Federal Government has set new, ambitious targets, including for the period up to the year 2030. According to plans for the new Climate Protection Act binding targets will be set to reduce greenhouse gas emissions by 65 percent by then. Germany also intends to phase out coal-fired power generation by 2038, and to promote environmentally friendly mobility. Despite the criticism being leveled at politicians for insufficient climate protection measures, no one could accuse the German legislature or the administration of failing to act for environmental or climate protection overall.

Final thoughts

Creative solutions for specific cases

Although it might seem removed from the reality we live in, the idea of "nature as a legal subject" appeals to our inner poet. There is certainly a great deal to be gained from the idea that man's sovereignty over nature and creation is limited. In Colombia, the Atrato ruling can be attributed to the cultural environment and the cosmovision held by the indigenous and Afro-Colombian populations, who have always lived in harmony with nature and want to defend their natural resources against invasive, industrial companies. In the specific circumstances of this case, we can consider the judgment to be a creative, progressive solution to a complex problem. However, the Amazon judgment, which did not primarily focus on protecting the natural resources of indigenous peoples, but more generally on climate protection, already demonstrates that the Atrato ruling cannot be applied to other cases, areas or cultures without additional arguments. Could this case law be transferred to Germany? This idea raises a lot of unanswered questions.

For society as a whole, climate protection is perhaps the greatest challenge of our time. It will push us to change our individual mindsets, and find solutions that are global and progressive, but also balanced. Citizens, the economy and the state, politics and the judiciary are being challenged in equal measure. In its ruling, anyway, the BVerfG worked out how to skillfully use its existing constitutional tools to control legislators in matters of climate protection, without resorting to legal fictions in favor of nature. Now it is up to the politicians.

1 Colombian Constitutional Court, Judgment T-622/16 (Corte Constitucional de Colombia, Sentencia T-622/16).

2 Supreme Court of Justice of Colombia, Judgment STC4360–2018 (Corte Suprema de Justicia, Sentencia STC4360–2018).

3 For example, the Páramao de Pisba National Park and the Río de la Plata, Río Cauca, Río Pance, Río Combeima, Río Cocora, Río Otún und Río Magdalena rivers; Overview in: Macpherson E./Torres Ventura, J./Clavijo-Ospina F., Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia, in: *Biocultural Rights and Legal Subjects, Transnational Environmental Law Journal* Vol. 9 Issue 3 (2020), p. 3, online at: https://www.cambridge.org/core/journals/transnational-environmental-law/article/abs/constitutional-law-ecosystems-and-indigenous-peoples-in-colombia-biocultural-rights-and-legal-subjects/43A29974BD5A3E948AB0461003627951 (Accessed May 18, 2021).

4 For example, the American Convention on Human Rights and the Escazú Agreement, which came into force on April 22, 2021; see the Country Report by the Konrad-Adenauer-Stiftung: Stopfer, Nicole/Fuchs, Marie-Christine/Dufner, Georg (2021): Das Escazú-Abkommen – Licht und Schatten regionaler Umweltpolitik in Lateinamerika [The Escazú Agreement – Light and Shadow in Regional Enviromnental Policy in Latin America], online at: https://www.kas.de/de/laenderberichte/detail/-/content/das-escazu-abkommen-licht-und-schatten-regionaler-umweltpolitik-in-lateinamerika (Accessed May 18, 2021).

5 Colombian Constitutional Court, Judgment T-411/92.

6 The Colombian constitution also provides for a form of class action (*Acción popular*, Article 88 of the Colombian Constitution), which in fact takes precedence when enforcing collective basic rights, such as environmental protection and indigenous rights. However, since the violation of these collective basic rights is inextricably linked to the violation of individual basic rights, such as the protection of life and health, individual constitutional challenges are exceptionally admissible (Article 86 of the Colombian Constitution).

7 Art. 1 of the Colombian Constitution; Macpherson E./Torres Ventura, J./Clavijo-Ospina F., Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia, loc. cit., *Transnational Environmental Law Journal* Vol. 9 Issue 3 (2020) p. 15.

8 See Kersten, J., Natur als Rechtssubjekt [Nature – a Legal Subject]. Für eine ökologische Revolution des Rechts [In Support of an Ecological Revolution in Law], in: Bundeszentrale für politische Bildung [German Federal Agency for Civic Education], March 6, 2020, online at: https://www.bpb.de/apuz/305893/natur-als-rechtssubjekt (Accessed May 18, 2021); see also Palacio, J. I./Herrera, J. C., First Rivers, then Mountains, and Now the Amazon. Do "Things" Have Rights? In: iconnectblog.com, November 18, 2018, online at: http://www.iconnectblog.com/2018/09/first-rivers- then-mountains-and-now-the-amazon-do-things-have-rights (Accessed May 18, 2021).

9 See Fischer-Lescano, A., Natur als Rechtsperson [Nature – a Legal Person]. Konstellationen der Stellvertretung im Recht [Scenarios of Representation in Law], in: *Zeitschrift für Umweltrecht* [Journal of Environmental Law] 4/2018, p. 205–216.

10 Art. 10 (2) of the Constitution of Ecuador states, "Nature shall be the subject of those rights that the Constitution recognizes for it." Art. 71 states, "Nature, or Pacha Mama, 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. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate. […]."

11 See Nolte, D., Lateinamerika: flexible Verfassungen und starre Machtstrukturen [Latin America: Flexible Constitutions and Rigid Power Structures], in: GIGA Focus/Lateinamerika 8 (2015), p. 3.

12 See Deutsche Welle, Kolumbiens Jugend kämpft für den Amazonas – vor Gericht und auf der Straße [Colombia's Youth Fight for the Amazon – in Court and on the Street], online at: https://www.dw.com/de/kolumbiens-jugend-kämpft-für-den-amazonas-vor-gericht-und-auf-der-straße/a-49620479 (Accessed May 18, 2021); Calzadilla, P., LEAD Journal, 15/1 (2019), p. 58.

13 Calliess, C., Möglichkeiten und Grenzen eines "Klimaschutz durch Grundrechte" (Klimaklagen) [Possibilities and Limits of "Climate Protection through Fundamental Rights" (Climate Lawsuits)], Berliner Online-Beiträge zum Europarecht [Berlin Online Contributions to European Law] no. 129 (p. 16), online at: https://www.jura.fu-berlin.de/forschung/europarecht/bob/berliner_online_beitraege/Paper129-Calliess/index.html (Accessed: May 18, 2021).

14 See Wachenje, B., Defending Tomorrow. The climate crisis and threats against land and environmental defenders, in: *Global Witnes*s July 2020, online at: https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/ (Accessed: May 18, 2021).

List of references

C Calliess, C., Möglichkeiten und Grenzen eines „Klimaschutz durch Grundrechte“ (Klimaklagen), Berliner Online-Beiträge zum Europarecht, Nr. 129, S. 16, online unter: https://www.jura.fu-berlin.de/forschung/europarecht/bob/berliner_online_beitraege/Paper129-Calliess/index.html (letzter Aufruf: 18.5.2021)

Calzadilla, P., LEAD Journal, 15/1 (2019), S. 58.

D Deutsche Welle, Kolumbiens Jugend kämpft für den Amazonas – vor Gericht und auf der Straße, online unter: https://www.dw.com/de/kolumbiens-jugend-kämpft-für-den-amazonas-vor-gericht-und-auf-der-straße/a-49620479 (letzter Aufruf: 18.05.2021).

F Fischer-Lescano, A., Natur als Rechtsperson. Konstellationen der Stellvertretung im Recht, in: *Zeitschrift für Umweltrecht* 4/2018, S. 205–216.

K Kersten, J., Natur als Rechtssubjekt. Für eine ökologische Revolution des Rechts, in: Bundeszentrale für politische Bildung, 6.3.2020, online unter: https://www.bpb.de/apuz/305893/natur-als-rechtssubjekt (letzter Aufruf: 18.05.2021)

M Macpherson E./Torres Ventura, J./Clavijo-Ospina F., Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia, in: *Biocultural Rights and Legal Subjects, Transnational Environmental Law Journal* Vol. 9 Issue 3 (2020), S. 3, online unter: https://www.cambridge.org/core/journals/transnational-environmental-law/article/abs/constitutional-law-ecosystems-and-indigenous-peoples-in-colombia-biocultural-rights-and-legal-subjects/43A29974BD5A3E948AB0461003627951 (letzter Aufruf. 18.05.2021).

N Nolte, D., Lateinamerika: flexible Verfassungen und starre Machtstrukturen, in: GIGA Focus/Lateinamerika 8 (2015), S. 3.

P Palacio, J. I./Herrera, J. C., First Rivers, then Mountains, and Now the Amazon. Do “Things” Have Rights? In: iconnectblog.com, 18.11.2018, online unter: http://www.iconnectblog.com/2018/09/first-rivers-then-mountains-and-now-the-amazon-do-things-have-rights (letzter Aufruf: 18.05.2021).

S Stopfer, N./Fuchs, M.-Chr./Dufner, G. (2021): Das Escazú-Abkommen – Licht und Schatten regionaler Umweltpolitik in Lateinamerika, online unter: https://www.kas. de/de/laenderberichte/detail/-/content/das-escazu-abkommen-licht-und-schatten-regionaler-umweltpolitik-in-lateinamerika (letzter Aufruf: 18.05.2021).

W Wachenje, B., Defending Tomorrow. The climate crisis and threats against land and environmental defenders, in: *Global Witnes*s July 2020, online unter: https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/ (letzter Aufruf: 18.05.2021).

Imprint

The Authors

Levon Theisen is a legal intern for the Latin America Constitutional Democracy Program at the Konrad-Adenauer-Stiftung. He graduated with a Degree in Law from Martin Luther University in Halle-Wittenberg, Germany.

Dr. Marie-Christine Fuchs is a lawyer specializing in European and International Law. She heads the Latin America Constitutional Democracy Program at the Konrad-Adenauer-Stiftung based in Bogotá, Colombia.

Konrad-Adenauer-Stiftung e. V.

Dr. Katja Gelinsky (LL. M.)
Law and Politics
Analysis and Consultancy
T +49 30 / 26 996-3760
katja.gelinsky@kas.de

Postal address: Konrad-Adenauer-Stiftung, 10907 Berlin

Publisher: Konrad-Adenauer-Stiftung e. V. 2021, Berlin
Design and typesetting: yellow too, Pasiek Horntrich GbR
Translation: Philippa Carr
Produced with financial support from the German Federal Government.

ISBN 978-3-95721-965-7