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A Non-Human Theory of Rights from Latin America

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Abstract: This paper contributes to the ongoing construction of non-human rights. I will argue that international law should move towards the recognition of animals and nature as subjects of rights (positive and negative). I will propose to combine two paths that show ways out of the anthropocentrism of international human rights law. The first is the capabilities approach of Martha Nussbaum that, while remaining indebted to Rawlsian liberalism, can provide a framework for the protection of non-humans in human rights practice through an understanding of rights as basic capabilities to flourish. The second path is the Earth Constitutionalism and jurisprudence in Latin America. Heavily influenced by indigenous legal philosophies, Latin American jurisprudence highlights ways in which we could move beyond the thin social goods of liberalism and promote human rights as a harmonizer force that protects nature as having worth by itself. These approaches combined pave the way for a postliberal approach to rights in which we move from the rationality-autonomy-freedom justification of rights towards a capabilities-harmony-sustainability approach to rights.

Keywords: rights of nature; animal rights; postliberalism

In an earlier period, we have been profoundly concerned with divine-human relations. In more recent centuries we have been concerned with interhuman relations. Our future destiny rests even more decisively on our capacity for intimacy in our human-Earth relations. Thomas Berry[1]

1 Thomas Berry, *The Great Work, Our Way into the Future* (Crown ed 1999).

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1 Introduction

A world in which human rights are perfectly implemented would still be an unjust world. The morality of human rights remains very anthropocentric, anchored in the Enlightened philosophy according to which only human beings who are rational, autonomous, and free deserve to be the subjects of rights. Thus, the Last Utopia, as Moyn calls human rights,[2] has coexisted almost amicably with environmental predation and animal abuse and exploitation. Animals continue to be 'man's instruments', and nature if at all a resource to be exploited.

At this pace, there will come a time in the not-so-distant future that we will have rights but no planet. According to the Intergovernmental Panel on Climate Change we are approaching a point of no return. Climate change has had widespread and pervasive impacts on ecosystems, people, settlements, and infrastructure attributable to increases in the frequency and intensity of climate and weather extremes, including hot extremes on land and in the ocean, precipitation events, drought and fire weather.[3] If global warming exceeds 1.5 °C in the coming decades or later, then many human and natural systems will face additional severe risks, and some will be irreversible, even if global warming is reduced.[4] Pursuant to the findings of the panel, 'many of the changes observed in the climate are unprecedented in thousands, if not hundreds of thousands of years, and some of the changes already set in motion, such as continued sea level rise, are irreversible over hundreds to thousands of years'.[5]

Further, pollution is also increasingly affecting our lives on the planet and destroying everything and everyone around us. According to the United Nations Special Rapporteur on Human Rights and the Environment, 'one in six deaths in the world involves diseases caused by pollution, three times more than deaths from AIDS, malaria and tuberculosis combined and 15 times more than from all wars, murders, and other forms of violence. Air pollution is the largest environmental contributor to premature deaths, causing an estimated seven million annually'.[6] In

2 Samuel Moyn, *The Last Utopia, Human Rights in History* (Belknap Harvard UP 2010).

3 H-O Pörtner et al (eds), *Intergovernmental Panel on Climate Change, Summary for Policymakers, in Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report*, (CUP 2021), 33 https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf accessed 5 May 2023

4 Ibid, B.6.

5 Giovanni Chiarini, 'Ecocide: From the Vietnam War to International Criminal Jurisdiction? Procedural Issues in Between Environmental Science, Procedural Issues In-Between Environmental Science', Climate Change, and Law (Cork Online L REV 2022) 21–22 <https://ssrn.com/abstract=4072727> accessed 10 May 2023.

6 UN, General Assembly, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, *The right to a clean, healthy and sustainable environment: non-toxic environment,* UN Doc A/HRC/49/53. (2022) 5–86.

this view, the current approaches to managing risks posed by pollution and toxic substances are failing and resulting in 'widespread violations of the right to a clean, healthy, and sustainable environment. The deeply disturbing evidence – millions of premature deaths, impaired health for billions of people and lives lived in the purgatory of sacrifice zones – demonstrates a systematic denial of dignity and human rights'.[7]

With respect to animals, only in the US, 10 million animals are abused to death annually, 65 % of them being dogs. In addition, 100,000 horses die every year to be consumed as meat.[8] Lab experiments around the world include over 115 million animals every year. Between 2000 and 2021 there were 35 incidents involving circus elephants attacking people while trying to run away from their lives in a small cage.[9] Approximately one quarter of the world's mammals and over 40 percent of amphibians are currently threatened with extinction.[10] Although human beings have caused the extinction of non-human animals for hundreds of years, by the late nineteenth century the rate of extinctions around the globe rose to around 30 thousand and this phase is projected to become earth's sixth great period of extinction ever.[11] These statistics might be under-reporting given that cruelty against animals is rarely denounced.[12] In sum, our relationship with nature and animals, has become, in Charles Patterson's words, 'an eternal Treblinka'.[13]

Efforts to develop non-human rights are of course not new. The animal rights movement has been advocating for rights for animals for more than forty years. However, their efforts have not been very successful, at least partly because it has conceptualized rights in a negative way. Thus, it has said much about the rights of animals not to be killed, confined, tortured and so on, but has said little about positive obligations we owe to animals. Such negative rights can hardly serve as guidelines for our relational duties with respect to animals.[14]

This paper contributes to the ongoing construction of non-human rights. First, I will urge that the limitations of rights approaches to date stem from their anthropocentrism, rather than their negativity: rights have not helped animals, because rights – both negative and positive – have been defined in reference to human

7 Ibid.

8 Terry Stancheva,'*33 heartbreaking animal abuse statistics to be aware of in 2022'*, (Pawsome Advice 2022) https://pawsomeadvice.com/pets/animal-abuse-statistics/ accessed 5 May 2023.

9 Ibid.

10 Martha C Nussbaum, *Justice for Animals, Our Collective Responsibility* (Simon & Schuster 2023).

11 Carolyn Merchant, *The Anthropocene & the Humanities, From Climate Change to a New Age of Sustainability* (Yale UP 2020).

12 Stancheva, (8).

13 Sue Donaldson & Will Kymlicka, *Zoopolis, A Political Theory of Animal Rights* (Oxford ed 2014) 2.

14 Ibid 7.

beings. Second, I will argue that international rights law should move towards the recognition of animals and nature as subjects of positive (as well as negative) rights.

The paper is structured as follows: in the first Section I will show how non-humans came to be excluded from the project of modern rights. From the Enlightenment period forward, rights have been defined by the triad of rationality, freedom, and autonomy, creating with this the human subject of liberal rights, but also creating right-less sub-humans and non-humans in the process. It thus became a speciesist philosophy putting man above all creation, as the only being with worth and dignity. All other living beings (including, for most of the history of human rights, women, and children) became either tools or instruments of man. In Section II, I will propose combining two paths that show ways out of the anthropocentrism of international human rights law. The first is the capabilities approach of Martha Nussbaum that, while remaining indebted to Rawlsian liberalism, can provide a framework for the protection of non-humans in human rights practice through an understanding of rights as basic capabilities to flourish. The second path is the *Earth Constitutionalism* and jurisprudence in Latin America. Heavily influenced by indigenous legal philosophies, Latin American jurisprudence highlights ways in which we could move beyond the thin social goods of liberalism and promote human rights as a harmonizing force that protects nature as inherently worthy of protection.

These approaches combined pave the way for a postliberal approach to rights in which we move from a justification of rights grounded in the purported or idealized rationality, autonomy, and freedom of human beings, towards an approach to rights premised on the desirability of maximizing harmony, sustainability, and the capability of all sentient beings to flourish. The final purpose of this article is to open a discussion on a new ideal of justice across species. The face of the other that demands justice, as Levinas would say, can no longer be only the human face.[15]

2 The Shadows of the Enlightenment

2.1 A Brief History of Human Rights: Human, all Too Human

Contemporary human rights, as we now understand them, have their origins in the Enlightenment movement. Although modern rights[16] are quite different than the

15 Olga Tomasello, L*evinas on the Origin' of Justice: Kant, Heidegger, and a Communal Structure of Difference* (Major Thesis, University of Central Florida 2014), <https://stars.library.ucf.edu/cgi/viewcontent.cgi?article=2801&context=honorstheses1990–2015> accessed 5 May 2023.

16 Authors like Samuel Moyn contend that human rights emerged in late modernity, during the 1970s. In his view, '*droits de l'homme et du citoyen*' meant something different from today's human rights. He contends that the rights of man implied a politics of citizenship at home, while modern

Enlightenment's 'rights of man', the conceptual foundation is the same: both are motivated by a conception of what it means to be 'human.'

The Enlightenment was the intellectual movement that spans at least from 1680 to 1800, and it came after the scientific revolutions and achievements of the previous century by scientists such as Johann Kepler, Francis Bacon, Rene Descartes, Galileo Galilei[17] and Isaac Newton (1642–1727), all of whom contributed to developing the idea of the rational character of nature.[18] The Enlightenment emphasized the universality of reason, as well as the belief that its application would bring social benefits. Enlightenment thinkers characteristically held that social structures 'ought to be justified rather than blindly accepted from habit and custom'.[19] Although not a homogeneous movement, and one that encompassed both rationalist and romantic thinkers[20] as well as a radical and moderate tradition,[21] its core thinkers nevertheless coalesced around a need for a revolution in the legal world, primarily by discarding religion as the foundation of social organization. The liberal subject of human rights was created, and with it, as I will explain below, animals and less rational humans were configured as the non-subjects of rights.

human rights are a politics of suffering abroad. In his view it was not until the 1970s, with the emergence of dissident movements in Eastern Europe that human rights enter common parlance and triumphed as a set of beliefs and the stimulus for new activities and institutions, particularly non-governmental organizations'. In my view, this confounds the moment of success of the idea or rights with its historical and philosophical origins. The idea of human rights, its architecture and philosophy were already consolidated in the 18th century. However, for historical reasons it was not until the late nineteenth century that the idea gained strength and became the new language of international politics. See Samuel Moyn, *The Last Utopia, Human Rights in History*, (Belknap Harvard UP, 2010) 12.

17 Ronald Love, *The Enlightenment* (E-Book Central Complete ed, 2008).

18 Ibid 3.

19 Jonathan Israel, *Democratic Enlightenment: Philosophy, Revolution, and Human Rights*, (OUP 2011), 1750–1790.

20 According to Israel the Anglo-American Enlightenment thinkers placed less emphasis on the role of reason and philosophy as an agent of change as was the case in France, Italy, and Germany. See Jonathan Israel, *Democratic Enlightenment: Philosophy, Revolution, and Human Rights*, (OUP 2011), 1750–1790. See for instance David Hume, *A treatise of human nature* (Online Library of Liberty, 1739), 282. See also, Adam Smith, *The Theory of Moral Sentiments*, (The Online Library of Liberty, 1759), 1.

21 Jonathan Israel for example distinguishes between moderate and radical enlightenment thinkers. While the former conformed more to the status quo or were able to compromise more with the existing order (for instance Burke thought that the idea of inalienable rights was just an empty abstraction), the latter wanted to provide solutions for unsolved social, legal, and political problems.

Thus, Rene Descartes famously positioned the human being as the center of creation when justifying his ego cogito.[22] By affirming in his famous Discourse of Method that 'I think, therefore I am' and that we are 'a substance the whole essence or nature of which is simply to think and which, in order to exist, has no need of any place nor depends on any material thing',[23] he effectively defined human nature based on a very disembodied rationality.[24] It is through our capacities for reason and knowledge that we make ourselves the masters and possessors of nature.[25] The self-sufficiency of reason,[26] as proposed by Descartes, combines an indubitable starting point (the particular ideas in the mind) with an infallible method (clear and distinct ideas) that lead to reliable and objective conclusions.[27]

Immanuel Kant, in turn, basically invented the ideal of autonomy. The autonomy that is so well known today, and which constitutes the bedrock of international human rights law, owes its origin to Kant. In 'What Is Enlightenment?' Kant underscores that the main point of the movement, as he understands it, is 'man's emergence from his self-imposed nonage,' by which he meant, put positively, the inability to use one's own understanding without another's guidance. Dare to know! (*Sapere Aude*) is, thus, the Kantian and Cartesian the motto of the Enlightenment.[28] In what is perhaps Kant's most famous holding, the individual ascertains for himself the moral law using his reason.[29] From there, the autonomous individual enters a social contract with other individuals, effectuating what then becomes only possible foundation of political authority.[30]

Kant and his *Critique of Pure Reason* provides a standard account of how to interact with non-human entities. According to Kant we have no way of knowing 'things in themselves' because perception is mediated by time, space, and causation. Science only talks about how things appear to us, not how they really are. Thus, non-

22 Charles Taylor, *Sources of the Self, The Making of Modern Identity* (Harvard UP, 1996) 145.

23 René Descartes, *Discourse on Method and Meditations on First Philosophy* (Hackett Publishing Company, 4th Ed 1999), 18–19.

24 In contrast, decolonial thinking for instance, proposes that 'I am where I do and think. That is, as Mignolo, explains that' you constitute yourself in the place you think.' We are, in his words, in the house of modernity/coloniality. Walter D Mignolo, *The Darker Side of Western Modernity, Global Futures, Decolonial Options,* (Duke UP, 2011), Preface xvi, 92, 94.

25 David Luban, *Legal Modernism*, (University of Michigan Press ed 1994), 26.

26 Santiago Castro-Gómez, *Critique of Latin American Reason*, (Columbia UP, 2021), 23; see also Enrique Dussel, *Filosofía de la Liberación* (Fondo de Cultura Económica ed, 2011) 19.

27 Judith Butler, *The Power of Religion in the Public Sphere*, in, Eduardo Mendieta et al (eds), (Columbia UP 2011), 55.

28 Immanuel Kant, *What is enlightenment* <https://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html> accessed 10 May 2023.

29 Michael Rosen, *Dignity, Its History and Meaning* (Harvard UP, 2012), 25.

30 Ibid 59.

human beings are never more than images or representations and as Kirsch argues 'we can never have access to their inwardness, to the worlds they inhabit. This is the real Severing, trapping us in our own subjectivity, and its inevitable consequence is the Anthropocene- a world in which nature exists only for us, not in its own right'.[31]

And finally, Rousseau contributed a definitive and explicitly anthropocentric revolution in jurisprudence. In his Social Contract, he developed the idea that the basis of authority is the social contract and that laws are essentially the conditions of civil associations. The purpose of this contract is the preservation of the contracting parties. Religion should no longer be understood to be the source of law – religion should be confined to the private sphere and a source of private morality.[32] In his words 'each man, while uniting with all, nevertheless obeys only himself and remains as free as before.'[33] In a similar vein, Montesquieu argued that 'Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied'.[34]

With these new ideas of human nature based on rationality (Descartes), autonomy (Kant) and freedom (Rousseau) the justification of socio-political orders was transformed. In 1789 the National Assembly of France proclaimed the 'natural, unalienable, and sacred rights of man', and established that 'the aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression' and that law should be 'the expression of the general will' and therefore 'it must be the same for all, whether it protects or punishes'.[35] It was a turning point in history, and from now on, Man, not God or the customs of history, would be the source of law.[36]

More than 10 years before the French National Assembly spoke, in 1776, the American Declaration of Independence and the Virginia Declaration of Rights were

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31 Adam Kirsch, *The Revolt Against Humanity; Imagining a Future Without Us* (Columbia Global Reports, ed 2023), 40.

32 Jean-Jacques Rousseau, *The Social Contract and The First and Second Discourses* (Sussan Dunn et al eds, 1st Ed Yale UP, 2022).

33 See Annelien de Dijn, 'Rousseau and Republicanism' (2018) 46/1 Political Theory 62. Further, according to Honneth, Rousseau sees intersubjectivity as a problem, rather than as an opportunity for individual subjects. Our encounter with the other creates uncertainty about one's own self. Seeking recognition entails subjecting ourselves to the dictatorial authority of public opinion. See Axel Honneth, *Recognition, A Chapter in the History of European Ideas* (CUP, 2021) 45–47, 52–67.

34 Charles de Montesquieu, *The Spirit of Laws* (Batoche Books ed 2011), 23.

35 Declaration of the Rights of Man and of the Citizen, (1789) <https://www.battlefields.org/learn/primary-sources/declaration-rights-man-and-citizen> accessed 10 May 2023.

36 Hannah Arendt, *The Portable Hannah Arendt*; *The Perplexities of the Rights of Man* (Peter Baerh, Penguin Classics ed, 2003), 31.

proclaimed. The 1776 Declaration of Independence established that 'all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness'.[37] For its part, according to the Virginia Declaration, 'all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety'.[38] There are several important differences between the French and American tradition of rights, the American version for instance remained dependent on an antique tradition of aristocratic rights stretching back to the Magna Carta, which merely reserved prerogatives 'negatively from the king rather than actually founding the polity 'positively' on rights principles'.[39] The French declarations of rights were not encumbered with this history of negativity. Further, the French allowed more room for equality and fraternity whereas the Anglo-American language of rights emphasized individual liberty and initiative more than equality or solidarity and was infused with a greater mistrust of government.[40] Notwithstanding these differences, they both relied on variants of the same liberal principles, and they were equally indebted to the same philosophical precursors of an anthropocentric understanding of the rights that were at their heart.[41]

2.2 Of Humans and Sub-humans

Proclaiming that the essence of human beings is rationality, and that the basis of authority and law is human reason, completely changed the previous foundation of laws whose main source was religion. However, it did not immediately change social inequalities. The 'rights of man' meant, literally, *men*. The social structures assumed that the rational subject *par excellence* was a man, not simply a human. Thus, we could say that the rational was equal to the masculine and the masculine was equal to

37 See American Declaration of Independence, (1776) <https://uscode.house.gov/download/annualhistoricalarchives/pdf/OrganicLaws2006/decind.pdf> accessed 10 May 2023.

38 Virginia Declaration of Rights, (1776) <https://www.archives.gov/founding-docs/virginia-declaration-of-right> accessed 10 May 2023.

39 Samuel Moyn, *The Last Utopia, Human Rights in History* (Belknap UP, 2010), 25.

40 Mary Ann Glendon, *A World Made New, Eleanor Roosevelt and the Universal Declaration of Human Rights*, (Random House, 2002) Preface xvii.

41 John Milbank, *Against Human Rights: Liberty in the Western Tradition*, (2012) 1/1 Oxford J L and Religion, 9.

the rational. Further, as suggested by Mills 'European humanism usually meant that only Europeans were human'.[42]

This hierarchy of the social structure was not new. Medieval Christianity, drawing from the thinking of Plato and Aristotle, had developed a ladder or chain of being that had God at the top and then descended from angels to humanity, men to women, then animals to plants and finally minerals. For Plato, 'men who fail in the effort of philosophy are punished by becoming women in their second lives. No woman can become a philosopher she must wait until after death, when her soul might be reincarnated in the body of a man'.[43]

Thus, the Enlightenment thinkers did not create this hierarchy of beings, and to some degree they contested it. Indeed, it was expected that after the dismantling of the divine foundation of laws and the recognition of the rights of man based on freedom and autonomy, more substantive equality would come. The rights of man were supposed to be completely 'incompatible with all ancient regime notions of social, racial, and religious hierarchy (…) the implications for women, religious minorities, the illegitimate, ethnic minorities, and homosexuals, as well as free blacks and black slaves, were bound to be far-reaching'.[44]

However, the emancipatory force of the Declaration of the Rights of Man was compromised. The philosophical foundations of rights were not equally emancipatory. To some extent only men could fulfill the fiction of disembodied reason, the central foundation of human freedom in this historical period. Thus, despite these new ideals of leaving behind traditional or religious justifications of law, old ideas about the social role of men, women, and the role of domination of man over animals and nature were consolidated or at least not changed.[45]

As Robin West explains, the ideal of rationality that presupposes the separation of human beings from the rest of natural world and human life becomes irretrievably masculine[46] because 'women are materially or potentially connected to other human life by the experience of pregnancy, the invasive and connecting experience of heterosexual penetration which may lead to pregnancy, the monthly experience of menstruation, which represents the potential for pregnancy; and the post-pregnancy experience of breast-feeding[47]', so they can never fulfill this standard of separation of

42 Charles W Mills, *The Racial Contract* (25th ed Cornell UP, 2022), 27.

43 Page Dubois, *Centaurs and Amazons, Women and the Pre-History of the Great Chain of Being*, (University of Michigan UP, 1982) 136.

44 Jonathan Israel, *Revolutionary Ideas, An Intellectual History of the French Revolution from The Rights of Man to Robespierre* (Princeton UP, 2015) 396. See also Juan José Tamayo Acosta (director), *Religión, género y violencia* (Colección Religión y Derechos Humanos, 2016), 28.

45 See Axel Honneth, *Recognition, A Chapter in the History of European Ideas* (CUP, 2021), 163.

46 See Enrique Dussel, *Filosofía de la Liberación*, (Fondo de Cultura Económica ed, 2011), 133.

47 See Robin West, 'Jurisprudence and Gender' (1988) University of Chicago L Rev 1, 3, 55.

the autonomous individual. According to West, women 'transcend physically the differentiation or individuation of biological self from the rest of human life trumpeted as the norm by the entire Kantian tradition'.[48]

For several decades, the feminist movement has shown that the idea of knowledge as independent of the subject, is the translation or naturalization of male political and social power.[49] It can be argued that the Enlightenment did not keep its promises for the emancipation of women, and they remained apart.[50]

But it is not only women who suffered because of this new 'rational' chain of beings. All individuals who needed to be taken care of, or who depended on others, or who could not exercise full autonomy, or who were perceived of as not having the capacity to use reason, or the same degree of rationality, became part of the category of sub-humans. This was the case or became the case, for example, for children, people with disabilities, black and indigenous individuals. All were somewhat protected, but they were not fully legal subjects. John Locke, who heavily influenced the epistemology of the Enlightenment, was of the view that if someone did not have a sufficient degree of reason as to be capable of knowing the law, he was not a free man. Therefore, he concluded, 'lunatics and idiots' are never set free from the government of their parents.[51] Further, in his view, lack of reason is equal to being legally and morally dead.[52] Traditional social contract theories from Rosseau to Rawls exclude persons with disabilities as active members of society for not being rational and autonomous enough to enter into a contract.[53]

Infamously, another category of sub-humans during the Enlightenment were black and brown people. Perhaps surprisingly, slavery not only continued but *flourished* during the Enlightenment.[54] This is in part because the prosperity of the colonies depended on the work of black enslaved people, but ideas mattered as well

48 Robin West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory', (2000) 15 Wis Women's L J, 149–215, 210.

49 Boaventura de Sousa Santos, *The End of the Cognitive Empire, The Coming of Age of Epistemologies of the South* (Duke UP, 2018) 4.

50 Cristina Molina cited in Celia Amorós, Ana Uriarte and Linda López McAlister, 'Cartesianism and Feminism. What Reason Has Forgotten; Reasons for Forgetting' (1994) 9/1 Hypatia, 160.

51 John Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, (Dover Thrift Editions, 2002), 27; *See also* Tim Stainton, 'Reason, Value and Persons: The Construction of Intellectual Disability in Western Thought from Antiquity to the Romantic Age in Roy Hanes' *in* Ivan Brown and Nancy Hansen, (eds) *The Routledge History of Disability*, (2017), 24.

52 Ibid.

53 See Jonas-Sebastien Beaudry, *The Disabled Contract, Severe intellectual Disability, Justice and Morality* (CUP, 2022) 290–294.

54 Andrew S Curran, *Anatomy of Blackness: Science and Slavery in an Age of Enlightenment*, (Johns Hopkins UP, 2011) 219.

as dollars, and black people was presumed to have less reason. One can recall for instance that according to Rousseau, 'humans only achieve their full potential in temperate climates'.[55] He had also declared that 'the organization of the brain is less perfect at the two poles. Neither *the nègres* nor the Laplanders have the intellect of Europeans'.[56] Kant had a similar view.[57] Furthermore, in *L'Esprit des Lois*, Montesquieu argued that 'there are countries where the excess of heat enervates the body, and renders men so slothful and dispirited that nothing but the fear of chastisement can oblige them to perform any laborious duty: slavery is there more reconcilable to reason (…)'.[58] In fact, several white planters who opposed the abolition of slavery employed Montesquieu's relativism of climate and conditions as counter-arguments to the Enlightenment-sounding claims of abolitionists.[59]

Similarly, Voltaire, although he denounced the injustice of the system of slavery, considered blacks to be inferior in intelligence. For example, in his Essay on the Custom and Spirit of Nations (1769) he argued that 'their round eyes, their flattened nose, their lips which are always large, their differently shaped ears, the wool of their head, that very measure of their intelligence, place prodigious differences between them and the other species of men (…)'.[60] In words of Sala-Molin, 'European Enlightenment philosophers railed against slavery *except where it literally existed*'.[61]

It is important to note that in spite of the rhetoric of the hierarchy of humanity, the Enlightenment did produce different efforts to abolish slavery, such as the one led by Condorcet, who through the *Societe des Amis des Noirs*, made a series of efforts to eliminate it gradually, especially in the French colonies.[62] Nevertheless, even the members of the society were convinced that Africans were inferior to them.[63] Even after abolishing slavery they did not expect blacks to obtain the same treatment as whites. How could that be if they were not as rational as them?

To summarize, the new definition of the human also created sub-humans. Most importantly for the purposes of this article, however, by linking subjective rights to

55 Ibid.

56 Ibid.

57 See Walter D Mignolo, *The Darker Side of Western Modernity, Global Futures, Decolonial Options*, (Duke UP, 2011) 199.

58 Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws*, (translated by Thomas Nugent, Book 7, 3, 1752) 265 <The Spirit of Laws (mcmaster.ca)>.

59 Jonathan Israel, *Revolutionary Ideas, An Intellectual History of the French Revolution from The Rights of Man to Robespierre* (Princeton UP, 2015), 403.

60 See *Voltaire*, volume 11, (3–156)

61 Susan Buck-Morss, *Hegel, Haiti, and Universal History* (University Pitt Press ed, 2009), 149.

62 See also Jonathan Israel, *Revolutionary Ideas, An Intellectual History of the French Revolution from The Rights of Man to Robespierre* (Princeton UP, 2015) 392–419.

63 Achille Mbembe, *Critica de la Razón Negra, Ensayo sobre el racismo contemporáneo*, (Nuevos Emprendimientos Editoriales, ed, 2016), 134.

agency and cartesian rationality, the non-human was completely excluded from the idea of rights.

2.3 Beasts and Nature

At the base of the Enlightenment philosophy's chain of being we find animals followed by nature. Man was a little secularized God who, with his transparent reason, sees everything, transforms, dominates, and oversees his less rational cousins. On the margins, these cousins at least retain a little humanity and a few rights, as long as they are well directed and governed.[64] But animals, unlike the sub-humans, were automata, like a clock, and nature a resource to be exploited and transformed.

Thus, human beings became more valuable than any other creatures.[65] For Kant, *only humans* have dignity, that concept so central to modern human rights discourse. In the Groundwork to the Metaphysics of Morals (1785) he explains that,

> Now, morality is the condition under which alone a rational being can be an end in itself, since only through this is it possible to be a law-giving member in the kingdom of ends. Hence morality, and humanity insofar as it is capable of morality, is that which alone has dignity.[66]

According to Kant, 'the fact that man can have the idea 'I' raises him infinitely above all the other living beings on earth. By this he is a person (…) a being altogether different in rank and dignity from things, such as irrational animals, which we can dispose of as we please'.[67] Thus, animals are man's instruments, and since they lack self-consciousness, or will, they cannot have an intrinsic worth. Only humanity and rationality are worthy of respect. The rest of nature is a set of tools.[68] This does not mean that Kant condoned cruelty to animals. On the contrary, he argued that violence and brutality against animals stupefies human compassion.[69] However, violence and brutality were to be condemned because of their deleterious impact on compassion, not because of the intrinsic worth or dignity of animals.

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64 Ramón Grosfoguel, 'The Structure of Knowledge in Westernized Universities: Epistemic Racism/Sexism and the Four Genocides/Epistemicides of the Long 16th Century' (2013) 11/1 Human Architecture, Journal of the Sociology of Self - Knowledge, 75.

65 James Rachels, 'Drawing Lines', in Cass R Sunstein, Martha C Nussbaum, *Animal Rights, Current Debates and New Directions* (2006) 167.

66 Immanuel Kant, 'Groundwork to the Metaphysics of Morals' (1785) cited by Michael Rosen in *Dignity, Its History and Meaning,* (Harvard UP, 2012) 21.

67 Christine M Korsgaard, *Fellow Creatures, Our Obligations to the Other Animals* (OUP, 2018) 77.

68 Nussbaum, et al (n 65) 300–306.

69 See Heike Krieger and José Martínez Soria, *The Protection of Animals in Wartime, Rationale and Challenges in Anne Peters, Animals in the International Law of Armed Conflict* (CUP, 2022) 58. See also Jurgen Habermas, *Justification and Application* (Polity Press ed, 1993) 105.

For Descartes, animals lack reason and for that reason alone we should be able to treat them however we choose.[70] For him, what confirms the point is that they lack language, which even stupid and dull men are capable of.[71] Thus, we could say that for Descartes, as for the liberal tradition, what does not speak has no rights.

Other Enlightenment thinkers showed considerable care for animals.[72] For example, in 'Animals' Voltaire presents a response to the Cartesian argument of animals as machines. In his words,

> What a sorry thing to have said that animals are machines bereft of understanding and feeling, which perform their operations always in the same way, which learn nothing, perfect nothing, etc! (…) That bird which makes its nest in a semi-circle when it is attaching it to a wall, which builds it in a quarter circle when it is in an angle, in a circle upon a tree, that bird acts always in the same way? That hunting-dog which you have disciplined for three months, does it not know more at the end of this time than it knew before your lessons? Does the canary to which you teach a tune repeat it at once? Do you not spend a considerable time in teaching it? Have you not seen that it has made a mistake and that it corrects itself?[73]

Similarly, in his Discourse on Inequality, Rousseau argued that our treatment of animals should be guided by sentience, not rationality. He even went on to say that animals have a certain intelligence; he called them 'ingenious machines'.[74] For Rousseau, a central element in the education of a child was to become sensitive and compassionate, and to do this he needs to learn how to treat animals.[75] For Rousseau, animals were also important to teach children about their own mortality.[76] The point for Rousseau and Voltaire was not so much that animals should have rights, but that the mistreatment of animals is evidence of human corruption.[77] Even for them, animals had no agency and therefore no rights.

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70 Nussbaum, et al (n 65) 6.

71 René Descartes, *Discourse on Method and Meditations on First Philosophy*, V (Hackett Publishing Company ed 1999), 32.

72 Raymond Giraud, *Rousseau and Voltaire: The Enlightenment and Animal Rights* <https://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1392&context=bts> accessed 10 May 2023.

73 Voltaire, *Animals, Philosophical Dictionary* <http://www.animal-rights-library.com/texts-c/voltaire01.htm)> accessed 10 May 2023.

74 Nathaniel Wolloch, *The Enlightenment's Animals, Changing Conceptions of Animals in the Long Eighteenth Century* (Amsterdam UP 2019) 63.

75 Jean-Jacques Rousseau, *Émile or Treatise on Education* (William H Payne Appleton and Company ed, Book Fourth 1901), 203.

76 As Nussbaum explains, Rousseau thought that 'his hypothetical pupil Emile might not see enough death to get the idea of his own vulnerability, so his imagined teacher begins talking about death by directing Emile to the deaths of small animals'. See Martha C Nussbaum, *The Monarchy of Fear, A philosopher looks at our political crisis* (OUP, 2012) 41.

77 Wolloch, (n 74) 67.

Jeremy Bentham, however, did indeed advocate for animal rights when he announced that a day will come in which we will grant animal creation the rights they deserve. And he argued that the threshold for this should be sentience, not rationality.[78] However, he represents an exception and not the rule to most of the liberal thinking regarding animals. Moreover, sentience is important but should not be the ultimate or only criteria for granting rights in an interspecies justice model. Otherwise, we fall back into the trap of reason or some other capacity, such as sentience, as 'threshold'. Who defines who has it and the extent to which it is possessed? How might we define sentience in relation to nature?

Nature, along with animals, was degraded during the Enlightenment. It came to be viewed as a resource. It was at best a challenge to the imagination of the ego cogito. Francis Bacon and Hume shared the belief that if humankind was distinct and above the natural world, then nature should be treated as our servant.[79] Bacon even compared the relationship between man and nature with the one held by a torturer and its victim. In his view, the scientist 'must force the apparent facts of nature into forms different to those in which they familiarly present themselves; and thus, make them tell the truth about themselves, as torture may compel an unwilling witness to reveal what he has been concealing'.[80]

Carolyn Merchant has argued that there is a relationship between the sub-humanization of women that occurs during the Enlightenment era and the treatment of nature. Although in the past both western and non-western cultures personified nature as a nurturing mother, with ethical implications, because one does not slay a mother or dig into her entrails for gold,[81] the Enlightenment gave way to a mechanistic world view, in which nature was reconstructed as dead and passive, to be dominated and controlled or transformed by humans. This did not necessarily mean leaving behind the image of nature as female. However, it comes to be conceived as a subject that must be subdued under a patriarchal structure. In this sense, Merchant explains that when Bacon uses the example of torture to show man's new relationship with nature, he seems to have in mind the interrogations of the witch trials and the mechanical devices used to torture witches.[82]

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78 Cass R Sunstein, Martha C Nussbaum, *Introduction, What are Animal Rights? in Animal Rights, Current Debates and New Directions*, (n 65) 6.

79 See Alexander Blum, *How the Enlightenment Separated Humanity from Nature*, (2018): <https://medium.com/arc-digital/how-the-enlightenment-separated-humanity-from-nature-c008881a61b0> accessed 10 May 2023.

80 Patrick J Deneen, *Why Liberalism Failed* (Yale UP, 2018) 72. See also the study on Bacon by Carolyn Merchant, *The Death of Nature, Women, Ecology, and the Scientific Revolution* (HarperOne ed 1989), 169.

81 Ibid.

82 Ibid 168.

In the Enlightenment, nature is a source of discomfort, something that needs to be transformed by human reason.[83] For most of the Enlightenment thinkers, the beauty of nature is linked to its fruitfulness and productivity.[84] During the Enlightenment, gardens became the symbol of the ideal relationship between man and nature. They are the maximum expression of the domestication of nature. The garden means literally to put nature in its place, domesticated and useful.[85] Nature is de-souled, and the non-human world comes to be seen as a mechanism to be exploited.[86] This contrasted with older views: Plato, for example, believed that the world had an 'anima mundi' that gave it unity, an idea that prevailed until the seventeenth century.[87]

It is true that thinkers like Rousseau had a more positive view of nature. Rousseau expressed an 'idyllic passion' for a solitary existence and, in his words, 'in living with myself and with nature, I tasted an infinite sweetness in the thought that I was not alone… .[88] He condemned the paradigm that insisted on man's right to exploit nature.[89] Nevertheless, he did not cease to enthrone reason, and he continued to maintain that man is at the top of the evolutionary scale due to his ability to reason and his freedom to act, in contrast to other forms of life.[90] That is, he was an anthropocentric thinker who loved nature but did not recognize its intrinsic worth.[91]

2.4 The Enlightenment, Philosophical Liberalism, and Human Rights Today

The Enlightened understanding of the subject of rights is still alive in contemporary human rights discourse, in two senses. First, the model for most human rights instruments today is the Universal Declaration of Human Rights (UDHR). The UDHR

83 Samuel Johnson, *A Journey to the Western Islands of Scotland*, (R Gordon ed, 1795) 51–52.

84 See *Human Beings and Nature in Enlightenment Thought* <https://www.lancaster.ac.uk/users/philosophy/awaymave/406/d06bl3.htm.> accessed 10 May 2023.

85 Richard Mabey, *Human Beings and Nature in Enlightenment Thought*, <https://www.lancaster.ac.uk/users/philosophy/awaymave/406/d06bl3.htm> accessed 10 May 2023.

86 Thomas Berry, *The Great Work, Our Way into the Future,* (Crown ed 1999), 78.

87 Ibid.

88 Kenneth William Singer, *Rousseau and Modern Environmentalism*, (University of British Columbia ed, 1991) 27. <https://open.library.ubc.ca/soa/cIRcle/collections/ubctheses/831/items/1.0100761> accessed 10 May 2023.

89 Ibid 84.

90 Ibid 36.

91 But see for instance Carolyn Merchant, *Reinventing Eden, The Fate of Nature in Western Culture,* (Taylor & Francis Group, ed 2013) 192, see also Carolyn Merchant, *The Anthropocene & the Humanities, From Climate Change to a New Age of Sustainability* (Yale UP, 2020), 127.

was based on the French and Anglo-American traditions of rights. Second, most contemporary, and influential justifications of international human rights law come from philosophical liberalism, which is itself a reformulation of Kantian philosophy. Let me briefly address this second point.

Liberal theories of personality are based on at least four foundational claims. The first is autonomy, the idea that because I am separate, my ends, life, path, goals, are necessarily my own (the separation thesis explained by West). The second is rationality as discussed above: rights holders are rational, which in turn is what grounds their claims to both rights and dignity. The third is equality of the person, the assumption that politics should owe equal respect to every person, and the fourth is liberty, of being able to choose one´s life path without undue interferences.[92]

This is basically the same 'human' that was discovered or created by the Enlightenment, comprised of Cartesian Rationality, Kantian Autonomy, and Rousseauian liberty. The original position in Rawls's theory, for example, according to Forst, is basically a reformulation of the Kantian moral standpoint of impartiality and universalization, although an improved version in which formal and material equality will follow from the experiment.[93] Others, such as Forrester, see in Rawls a revival of Rosseau and the liberal social contract tradition. In the original position, persons behind a veil of ignorance agree on the principles of how a just society should be organized.[94]

Thus, although there are significant departures, Rawlsian liberalism reinvigorates and modernizes the Enlightenment idea of the human as the possessor of rights and the beneficiary of a just regime. By so doing, he emphasizes, as did the Enlightenment thinkers, the importance of rationality and the capacity for moral choice as foundational to rights. And it is precisely because of this that he denies the possibility that his theory of justice could be extended to animals.[95]

Likewise, both philosophical liberalism and our international human rights law embrace an Enlightened understanding of autonomy. As Sandel explains, rights are overly indebted to Kantian autonomy. Rights are prior and independent to any good. Thus, moral law does not consist in the fact of promoting some goal. It is an end in

92 Martha Nussbaum, Robin West, *Jurisprudence and Gender: Defending a Radical Liberalism* (1992) 75 University of Chicago LR, 3.

93 Rainer Forst, *Contexts of Justice, Political Philosophy beyond liberalism and communitarianism* (California University Press, 1994), 7.

94 Katrina Forrester, *In the Shadow of Justice, Post-war Liberalism and the Remaking of Political Liberalism* (OUP 2019), 1.

95 Martha C Nussbaum, *Beyond 'Compassion and Humanity', Justice for Nonhuman animals* in Cass R Sunstein, Martha C Nussbaum, Animal Rights, Current Debates and New Directions, (Oxford University Press, 2005) 302.1.

itself.[96] Rights are important, not because the activities they protect are especially worthy, but because they respect the capacity of persons to choose their own beliefs.[97] He recalls that for Rawls, 'rights secured by justice are not subject to the calculus of social interests' and for Dworkin, rights are 'trump cards held by individuals'.[98]

Defending autonomy this way leads to a very individualistic approach to rights, or a kind of rightism, as Greene calls it,[99] because it closes the deliberative process and even the balancing between rights. In my view, this is a consequence of understanding rights as trumps and defending autonomy as the untouchable sphere of the individual self, which not only reproduces but even goes beyond the Kantian understanding of autonomy. Kant himself viewed moral law as self-given but importantly connected to certain social goods. It was not merely, as today, the capacity of individuals to choose the course of their own lives.[100]

Of course, much has changed since the adoption of the French Declaration, the Declaration of Independence, and the Universal Declaration. In a sense, it can be argued that the entire human rights boom since the promulgation of the Universal Declaration of Human Rights and especially since 1970 has been an attempt to deconstruct the subject of human rights of the Enlightenment. In the past 'women, children, non-European and so on, were not proper subjects of rights, but nowadays in international human rights law we talk about children rights, LGBTIQ rights, women rights, disability rights, indigenous people's rights, collective rights and so on'.[101]

As a matter of fact, according to some authors the problem we face nowadays is that we have too many rights, and in the past few decades, 'the rights industry has grown faster than an Internet IPO in the late 1990s'.[102] The human right catalogue has become very expansive and can include anything from the right to internet[103] to the

96 Michael J Sandel, *Liberalism and the Limits of Justice,* (Cambridge University Press, 1998), 7–8.

97 See Michael J Sandel, *Democracy's Discontent, A new edition for our perilous times* (Belknap Harvard UP, 2022) 217.

98 Sandel, *Liberalism and the Limits of Justice*, i (n 96) 9.

99 Jamal Greene, *How Rights Went Wrong, Why Our Obsession with Rights is Tearing America Apart* (Houghton Mifflin Harcourt, ed 2021).

100 Michael Rosen, *Dignity, Its History and Meaning* (Harvard UP 2012) 25.

101 Derrida, Jacques, *Deconstruction and Human Rights* (1994). <http://www.youtube.com/watch?v=7s8SSilNSXw> accessed 10 May 2023.

102 Francis Fukuyama, *Our Posthuman Future, Consequences of the Biotechnology Revolution*, Farrar, Straus and Giroux (Picador ed 2002) 106.

103 See also UN General Assembly, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,* Frank La Rue, UN Doc A/HRC/17/27, (2011).

right to job security.[104] For these authors, the proliferation of types of human rights claims has the appearance of a reductio ad absurdum that threatens the very foundation of the concept's legitimacy'.[105]

Without a doubt, human rights have developed and expanded. For instance, we now have four regional systems for the protection of human rights. The United Nations universal system supervises compliance with at least 11 human rights treaties[106] and has 45 thematic mandates[107] and 13 country mandates[108] to monitor human rights around the world. The European System of Human Rights includes at least 25 human rights treaties,[109] the Inter-American System includes at least 11 treaties,[110] the African System enforces at least four human rights treaties[111] and two other regional systems are starting to slowly develop: the Arab System, born out of the Arab Charter on Human Rights (2004)[112] and ASEAN, which approved in 2012 the non-binding ASEAN Human Rights Declaration.[113] However, this expansion does not mean that we have overcome the deficits of the subject of rights of the Enlightenment-liberal philosophy. The deconstruction of the subject of human rights is still incomplete since the overall strategy for ascribing rights to individuals or collectives is still too embedded in the logics of liberalism: the more autonomy and reason the more rights one can get. Thus, we still have the burden of showing our humanity via our capacity for reason and our ability to choose our own destiny.

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104 Lagos del Campo v Peru, Preliminary objections, merits, reparations and costs, (2017), IACHR, 141.

105 David Stamos, *Myth of Universal Human Rights: Its Origin, History, and Explanation, along with a More Humane Way* (Routledge ed 2014) 18.

106 See OHCHR, *Monitoring the core international human rights treaties*, <https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx.> accessed 10 May 2023.

107 UN, Office of the High Commissioner, *Thematic Mandates*: <https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?Type=TM.> accessed 10 May 2023.

108 See UN, Office of the High Commissioner, *Country Mandates*: <https://spinternet.ohchr.org/ViewAllCountryMandates.aspx.> accessed 10 May 2023, i.

109 See Council of Europe, Human Rights treaties: <https://www.coe.int/en/web/conventions/by-subject-matters1?module=treaties-full-list&CodeMatieres=44> accessed 10 May 2023.

110 See IACHR, *Basic Documents in the Inter-American System* <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basic_documents.asp> accessed 10 May 2023.

111 (1)The African Charter on Human and People's Rights (1981) and its Protocol on the Rights of Women in Africa; (2) the African Charter on the Rights and Welfare of the Child (1990); (3) the African Youth Charter; (4) the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009).

112 There are currently 21 State parties to the Arab League.

113 See ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (ASEAN Secretariat, 2013) <https://asean.org/wp-content/uploads/2021/01/6_AHRD_Booklet.pdf> accessed 10 May 2023.

It is important to note that from the early stages of the drafting process of the Universal Declaration of Human Rights, members of the drafting committee tried to overcome this 'liberal bias'. A universal statement of rights could not be conceived only in terms of the values of Western Europe and America.[114] Thus, for example, the proposal Article 1 of the Declaration was that 'All men are brothers. Being endowed with reason and members of one family, they are free and equal in dignity and rights.' But as Glendon recalls, one of the most influential framers of the Declaration, Peng-Chun Chang, a Chinese philosopher, insisted that Article 1 ought to include the word 'ren' in addition to reason, which meant 'two-man mindedness which might be expressed in English as sympathy or consciousness of one's fellow men, a word which expressed an entire worldview.[115] However, due to a lack of an equivalent English word, his idea 'was rendered awkwardly by adding the words 'and conscience' after 'reason' and the approved text reads that 'all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.[116]

Further treaties also tried to move beyond liberalism. For example, the African Charter on Human and Peoples' Rights recognizes not only the rights of individuals, but of people as well, and asserts that the values of African Civilization should inspire their concept of human and people's rights.[117]

As philosopher Jacques Maritain said, to allow for pluralistic interpretations of human rights, the Universal Declaration has an open texture of rights, and in his words, 'many different kinds of music could be played on the document thirty strings (articles)'.[118] Nevertheless, it seems that we ended up again playing the concert of philosophical liberalism. It might be time to go back to the dream of accommodating different cultures and philosophies in the implementation of human rights throughout the world. Those different cultures may in fact provide us with a more sustainable way of living.

The Enlightenment is the philosophy of man's dominion, and still is the core of mainstream philosophical liberalism. Although it is the great invention of the eighteenth century, and in large measure we owe to them the individual rights that we can now enforce nationally and internationally, it has also had undesired consequences: its overemphasis or obsession with autonomy, or its idolization of

114 Glendon, *A World Made New, Eleanor Roosevelt and the Universal Declaration of Human Rights*, (Random House ed´ 2002), 222.

115 Ibid.

116 UN, *Universal Declaration of Human Rights*, (1948) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 10 May 2023.

117 African Charter on Human and People's Rights, (1981): <https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf> accessed 10 May 2023.

118 Glendon, *A World Made New, Eleanor Roosevelt and the Universal Declaration of Human Rights*, (n 114) 222.

rationality, lead to the exclusion of several individuals as proper subjects of law, given that for their set of beliefs, not all human beings had the same degree of rationality or autonomy. Still today, the yardstick against we measure legal subjectivity is male rationality and autonomy. The more a subject resembles that ideal, the more rights it can claim and enforce.

By the same token, for most versions of philosophical liberalism, and certainly for the strand that has had more influence in law, non-human subjects get virtually no protections because rights belong exclusively to humans, the only beings that can guide their destiny by their practical reason.

In brief, Enlightenment, and for that matter philosophical liberalism as well, can become the tyranny of one species over others. It puts man above other creatures and living beings and consolidates an ethics of domination over the world by a supposed transparent rationality. It has become a type of speciesism.

I do not blame the human rights movement for the tremendous environmental degradation and destruction that we are seeing today in the world, but I think its philosophical justifications and practice render it completely unable to fight against several catastrophes taking place. What is the point of having thousands of rights if we are without a planet? If human rights truly want to be the last utopia,[119] they need to be able to see the world through different eyes. Living beings are more than tools, more than resources, more than machines, more than property.

3 Towards a Non-human Tradition of Rights

Both the human species and the constructors of rights need to move beyond the mainstream liberal understanding of humanity and its philosophical justifications of human rights law. Specifically, we need to move away from the rationality-autonomy-freedom paradigm of human rights towards a capabilities-harmony-sustainability approach to rights, for at least two reasons. The first is practical: Climate change, environmental degradation and depredation, and the killing of thousands and hundreds of innocent animals is virtually unchecked. International human rights have been no more effective than domestic legal regimes in preventing these injustices. The second is theoretical: The reason for this speciesism is our rights' traditions' anthropocentric biases and working methods.

First, I address the practical reasons. Ascribing rights to nature and animals can be a powerful tool to prevent environmental catastrophes and promote a more harmonious and just relationship of individuals with other living beings. Human

119 As Moyn calls them. See for instance Samuel Moyn, *The Last Utopia. Human Rights in History,* (Belknap Harvard UP, 2010), 227.

rights are now the language of politics and international relations, as well as international law. Talking about rights is talking about obligations, and this gives them a rhetorical force that no other legal tradition has ever accomplished.[120] If nature and animals can have their day in court, so to speak, and if individuals who threaten the environment could be punished or sanctioned in some way, law could better contribute to the protection of the environment and animals and discourage the depredation of the planet. None of that can happen in any meaningful way, though, unless and until nature and animals become rights-bearing.

Some say that, instead of talking about animal rights and nature, we should talk about humanity's duties to the world of nature. However, this strategy has not worked. For many decades we have talked about the obligations of States to protect the environment, without favorable results. On the contrary, the situation has worsened significantly. This surely has to do with the fact that modern rights lack a language of duties. Duty is just a distant memory, as Moyn says.[121]

For instance, recently Spain recognize the Mar Menor (minor sea) as a subject of rights. Part of the reason of this move was that despite the strong regulations that have been enacted over the last twenty-five years, there is a socio-environmental, ecological, and humanitarian crisis in the Mar Menor and its surroundings.[122] Our present humanist conception of rights has failed to deliver a sustainable way of living. Thus, we need to think of alternatives to this worldview.

It is not only a question of effectiveness, but of raising the option of a philosophy other, that reflects the particular sense of life of millions of peoples throughout the world. Indigenous cosmos for instance 'consists of an organic totality whose center is not the ego of every person'.[123]

Defending that animals and nature are subjects of rights implies advancing towards a more authentic universalism of human rights, which not only reflects the vision of the world of philosophical liberalism, but of other traditions and cultures. Further, acknowledging the legal subjectivity of animals and nature is not equal to saying that animals-nature-human are the same either. It is based on a notion of justice linked to ethical responsibility towards the other even when that other is incomprehensible or radically different,[124] in which legal subjectivity is not equal to

120 See Martha C Nussbaum, *Women and Human Development, The Capabilities Approach,* (CUP, 2000), 101.

121 Samuel Moyn, *Rights vs Duties, Reclaiming Civic Balance*, Books & Ideas, (2016) Boston L REV, 46.

122 See Ley 19/2022, *Reconocimiento de personalidad jurídica a la Laguna del Mar Menor y su cuenca* (October 3, 2022) (Spain) BOE-A-2022-16019 Ley 19/2022, de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca accessed 10 May 2023.

123 See Rodolfo Kusch, *Indigenous and Popular Thinking in America* (Duke UP, 2010) 2.

124 Tomasello, *Levinas on the 'Origin' of Justice: Kant, Heiddeger, and a Communal Structure of Difference.'* University of Central Florida, (2014).

the ability to reason, agency or autonomy, but rather a reflection of being worthy of esteem, respect and having enforceability claims within the framework of social relations that should be protected by the State and respected by individuals and communities.

Following these lines of concerns, practical and philosophical, in the next sections I propose to combine two paths that show ways out of the anthropocentrism of international human rights law.

3.1 Martha Nussbaum and the Capabilities Approach

As stated above, the Enlightenment-liberal philosophy justified human rights based on the triad rationality-autonomy-freedom, which for the reasons explained, excludes non-humans. However, Martha Nussbaum, an American moral philosopher influenced by Amartya Sen, recovers a tradition of capabilities that goes back to Aristotle, and presents a political justification of human rights that revitalizes the Rawlsian liberal tradition.[125] For Nussbaum, human rights are essential human capabilities to function or substantive freedoms that 'should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires.[126] This articulates an anti-metaphysical and political justification of human rights in which the basis of human rights claim is a person's existence and their aspiration to flourish within the community.[127] In her view,

> we can arrive at an enumeration of central elements of truly human functioning that can command a broad cross-cultural consensus (One way of seeing this is to think about the ways in which tragic plots cross cultural boundaries: certain deprivations are understood to be terrible, despite differences in metaphysical understandings of the world). Although this list of central capabilities is somewhat different in both structure and substance from Rawl's list of primary goods, it is offered in a similar political-liberal spirit: as a list that can be endorsed for political purposes, as the moral basis of central constitutional guarantees, by people who otherwise have very different views of what a complete good life for a human being would be (…).[128]

Nussbaum argues that 'there is waste and tragedy when a living creature has the innate or basic capability for some functions that are evaluated as important and

125 See Martha C Nussbaum, *Aristotle, Politics and Human Capabilities: A response to Antony, Arneson, Charlesworth and Mulgan*, (University of Chicago Press, Ethics, Vol 111, No 1, 2000) 119.
126 Martha C Nussbaum. *Women and Human Development, The Capabilities Approach*, (n 120) 5.
127 Martha Nussbaum, *Frontiers of Justice, Disability, Nationality, Species Membership*, (Belknap Harvard UP, 2006) 258.
128 Ibid 74.

good, but never gets the opportunity to perform those functions.[129] For example, she argues that 'failures to educate women, failures to provide adequate health care, failures to extend the freedom of speech and conscience to all citizens-all these are treated causing a kind of premature death, the death of a form of flourishing that has been judge to be worthy of respect and wonder'.[130] Nussbaum's list of capabilities is not exhaustive, but includes at least 10 capabilities:

(1) Life, being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
(2) Bodily health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
(3) Bodily integrity. Being able to move freely from place to place; having one's bodily boundaries treated as sovereign, ie, being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
(4) Senses, Imagination and Thought. Being able to use the senses, to imagine, think, and reason-and to do these things in a 'truly human' way.
(5) Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger.
(6) Practical Reason, being able to form a conception of the good and to engage in critical reflection about the planning of one's life.
(7) Affiliation, being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction.
(8) Other species. Being able to live with concern for and in relation to animals, plants, and the world of nature.
(9) Play. Being able to laugh, to play, to enjoy recreational activities.
(10) Control over one's environment: A. Political. Being able to participate effectively in political choices that govern one's life, having the right of political participation, protection of free speech and association. B. Material. Being able to hold property (both land and movable goods), not just formally but in terms of real opportunity; and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure.[131]

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129 Nussbaum, B*eyond 'Compassion and Humanity', Justice for Nonhuman animals* in Cass R Sunstein, Martha C Nussbaum (eds), *Animal Rights, Current Debates and New Directions*, (n 95) 305.
130 Ibid.
131 Nussbaum, *Women and Human Development, The Capabilities Approach*, (n 120), 78–8.

Nussbaum proposes to extend the capabilities approach to animals. This is based on her idea that law should value our animality, and not just our rationality. She claims that our dignity and rationality precisely are those of a certain sort of animal. In her view, Kantian starting points distort this and give us a mistaken view of our ethical relation to other animals.[132] But she argues that 'there is something wonderful and wonder-inspiring in all the complex forms of animal life'.[133]

For Nussbaum each creature capable of having 'a subjective point of view on the world and feeling pain should have the opportunity to flourish in the form of life characteristic of that creature'.[134] Further, she notes that species are becoming extinct because human beings are killing their members and damaging their natural environments, therefore, this individual damage should be the focus of the ethical concern within the capabilities approach.[135] Thus, Nussbaum proposes this list of basic capabilities that should be granted to animals:

(1) Life. All animals are entitled to continue their lives, whether or not they have such a conscious interest. All sentient animals have a secure entitlement against gratuitous killing for sport […] Respectful paternalism supports euthanasia for animals in pain.
(2) Bodily health. Laws banning cruel treatment and neglect […] in current practice animals being raised for food are not protected in the way other animals are protected. This asymmetry must be eliminated.
(3) Bodily integrity. Animals have direct entitlements against violations of their bodily integrity by violence, abuse, and other forms of harmful treatment […]
(4) Senses, imagination and thought. Free movement in an environment that stimulates and pleases the senses […] reject close confinement and regulate the places in which animals of all kinds are kept for spaciousness, light and shade, and the variety of opportunities they offer the animals for a range of characteristic activities […]
(5) Emotions. They are entitled to lives in which it is open to them to have attachments to others, to love and care for others, and not to have those attachments warped by enforced isolation or the deliberate infliction of fear.
(6) Practical reason. Capacity to frame goals and to plan its life […] to the extent that this capacity is present, it ought to be supported.

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132 See Nussbaum, *Aristotle, Politics and Human Capabilities: A response to Antony, Arneson, Charlesworth and Mulgan*, (n 125) 122.

133 Nussbaum et al Beyond '*Compassion and Humanity', Justice for Nonhuman animals, Animal Rights, Current Debates and New Directions,* (n 95) 306.

134 Nussbaum, *Justice for Animals, Our Collective Responsibility*, (n 10) Introduction xxv.

135 Nussbaum et al, *Beyond 'Compassion and Humanity', Justice for Nonhuman animals; Animal Rights, Current Debates and New Directions,* (n 95) 308.

(7) Affiliation. […] Animals are entitled to opportunities to form attachments and to engage in characteristic forms of bonding and interrelationship. They are also entitled to relations with humans, where humans enter the picture, that are rewarding and reciprocal, rather than tyrannical.
(8) Other species […] gradual formation of an interdependent world in which all species will enjoy cooperative and mutually supportive relations with one another.
(9) Play. […] Provision of adequate space, light, and sensory stimulation in living places, and, above all, the presence of other species members.
(10) Control over one's environment. […] entitlements directly, so that a human guardian has standing to go to court, as with children, to vindicate those entitlements […] the analogue to property rights is respect for the territorial integrity of their habitats, whether domestic or in the wild.[136]

The capabilities approach has many strengths and a few weaknesses. Nussbaum takes us from the liberal tradition of rights based on rationality-autonomy-freedom, towards an alternative liberal tradition based on capabilities-autonomy-freedom. This means that rights will no longer be granted based on rationality, but on the faculties that agents, including non-human beings, can develop throughout their existence for their flourishing and happiness. This approach presents a better justification for animal rights than those that currently exist. Namely, it goes beyond the traditional approaches, the Benthamite, that would grant rights based on sentience, and the negative rights approach that would only advance the rights of animals to not suffer violence. It is also an improvement with regards to the 'like us' approach advanced by authors such as Steven Wise, that would grant rights to animals because they are similar to human beings. The limitation here is that it is deeply anthropocentric, and it would lead us to protect only the 'More Human' Animals, completely ignoring the Otherness of the Animal Kingdom and the fact that each form of life is different.[137] In some instances, the capabilities approach requires leaving animals alone, but in some other it would mean the active intervention of humans for the betterment of their lives. Sentience is relevant, but the ultimate criteria is potential, what agents can become with or without human intervention.

Furthermore, Nussbaum also goes beyond the idea of thin social goods of philosophical liberalism, or the list of primary goods proposed by Rawls.[138] For Rawls, not even the human rights recognized in the Universal Declaration of Human Rights

136 Ibid 316.
137 Nussbaum, *Justice for Animals, Our Collective Responsibility*, (n 10) 33, 97.
138 Nussbaum, *Aristotle, Politics and Human Capabilities: A response to Antony, Arneson, Charlesworth and Mulgan*, (n 125) 128.

could be justified, much less all the new rights recognized today, let alone non-human rights.[139] Since his aim was to propose rights that would be acceptable by all people, he relies on a sort of minimalism that leads him to consider human rights to be a very restricted class of urgent rights that would be acceptable to non-liberal peoples, such as the right to subsistence and to security, the right to liberty, the right to personal property and liberty of conscience.[140] For the capabilities approach, the list of primary goods is thicker. However, this is also not a comprehensive theory since it still works with the framework of an overlapping consensus across cultures to agree on the list of human rights law.

In addition, with Nussbaum we also leave behind the Kantian-Rawlsian experiments in which only abstract people intervene. The capabilities approach/list is based on the experience of the author talking with disadvantaged people in India and other places.[141] This is not the original position, in which the participants suspend their backgrounds and position in society. Thus, the point of departure seems to be formal and substantive equality. As Nussbaum notes, a judge needs to hear real people's problems to understand how the law should react. For example, 'if one cannot imagine what women suffer from sexual harassment on the job, one won't have a vivid sense of that offense as a serious social infringement that the law should remedy'.[142] For Nussbaum, then, the distribution of social goods and capabilities are inspired by the needs and suffering of people that she saw in other cultures. This is important because in real life the point of departure is not formal and substantive equality, but on the contrary, radical inequalities and the unjust distribution of goods.

Interestingly, Nussbaum notes that although Rawls's original position is not supposed to be an actual historical situation, it might be a fantastic way to understand the bargain or contract process involving both humans and nonhuman animals.[143] Thus, in a quasi-literary way, Nussbaum draws an image in which we can picture humans and animals coming to a table to articulate the position that would correspond to them and to us in a just society.

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139 John Rawls, *The Law of Peoples, in The Politics of Human Rights* (Belgrade Circle ed Verso, 2022) 32.

140 Jeffrey Flynn, *Reframing the Intercultural Dialogue on Human Rights, Routledge Studies in Contemporary Philosophy* (Routledge, 2014) 47.

141 See Martha C Nussbaum, *The Cosmopolitan Tradition, A Noble but Flawed Ideal*, (Belknap Harvard UP, 2019) 243. See also, Martha C Nussbaum, *Sex and Social Justice* (OUP 1999) 6.

142 Martha C Nussbaum, *Poetic Justice, The literary Imagination and Public Life* (Beacon Press Books, ed 1991) 91.

143 Nussbaum et al, *Beyond 'Compassion and Humanity', Justice for Nonhuman animals*; *Animal Rights, Current Debates and New Directions,* (n 95) 301.

Now, a central weakness of the capabilities approach for a theory of non-human rights is that she still puts great weight on the value of liberal autonomy,[144] a concept that I have criticized throughout this article.

The early Nussbaum (1992) justifies her list of capabilities through an analysis of what can be considered essential human traits. The later Nussbaum (2011) holds that her list of capabilities is justified because they promote human dignity.[145] But reading the human capabilities list, it still seems that she is promoting some sort of human homogeneity, 'the liberal human',[146] that I criticized previously.

There are other critiques against the capabilities approach applied to animals. For example, Donaldson and Kymlicka argue that the problem with Nussbaum theory is that it tends to focus on the flourishing of animals as if they were living completely separately from humans, when it is the case that we are living in interspecies communities. Therefore, they argue that we need a conception of flourishing that is more sensitive to interspecies community membership and intraspecies individual variation that is also open to evolution.[147] However, this criticism can be remedied, as Nussbaum herself acknowledges that her list of capabilities can be amended. In this sense, what she states is that the ideal of regulation is those policies that promote the flourishing of animals. She acknowledges that we live in interspecies communities and that we can affect the flourishing of other beings since we control the earth, the seas, and the skies, and she now talks about 'symbiotic capabilities'.[148] Thus, what that flourishing is, is still open for discussion and can of course consider the capabilities that promote our wellbeing within our interspecies communities.

But in my view, the greater challenge when applying the capabilities approach to a non-human theory of rights is that her theory of justice can only apply to sentient animals, but not to nature. In her most recent book on the rights of animals, she contends that 'a necessary and sufficient condition for being a subject of a theory of justice is what she calls 'the standard animal package': sentience, emotion, cognitive awareness of objects, movement toward the good and away from the bad'.[149] Further,

144 Robin West, *Normative Jurisprudence, An Introduction* (Cambridge Introductions to Philosophy and Law, CUP 2011) 35.

145 Stanford Encyclopedia of Philosophy, *The Capability approach* <https://plato.stanford.edu/entries/capability-approach/> accessed 5 May 2022.

146 Ricardo Crespo, *Theoretical and Practical Reason in Economics: Capacities and Capabilities, History and Methodology of Economics* (PhD Thesis University of Amsterdam, 2011) 52 <https://pure.uva.nl/ws/files/1392424/94759_Dissertation_Ricardo_F_Crespo_Theoretical_and_Practical_Reason_in_Economics.pdf> accessed 10 May 2023.

147 Sue Donaldson & Will Kymlicka, Zoopolis, *A Political Theory of Animal Rights* (Oxford, 2014) 99.

148 Nussbaum, *Justice for Animals, Our Collective Responsibility*, (n 10) 153.

149 Ibid 138.

in her view, although the natural environment has ethical importance, both instrumental because it supports the capabilities of sentient creatures, and intrinsic as well, and we have ethical duties to protect it, it is not the same kind of duties as with creatures or individuals.[150]

The goal of her theory of justice is to protect individuals, and it is a version of justice that tends towards atomism and individualism. However, if we combine her idea of basic capabilities, with other traditions of rights that not only protect the individual, but also communities and the planet, we can arrive at a sustainability approach to rights capable of responding to global challenges. To do this, next I explore Latin American efforts to promote ideas of biocentric rights, which protect the human, the animal, and the world of nature.

Although I am aware that there are important developments in other regions regarding the rights of animals[151] and nature[152] , the examples of Latin America are more telling, because not only are they seeking to promote changes in the anthropocentric world culture of human rights, but they do so from a decolonial perspective that denounces the oppressions to which they have been subjected, and the failure of liberalism to protect the planet. Faced with this, the worldviews of indigenous peoples present another vision of the cosmos, an organic totality in which the center is not the ego of human beings but the harmony between everything living.[153]

3.2 Earth Constitutions and Jurisprudence in Latin America

The capabilities approach took us from rationality-autonomy-freedom, towards capabilities-autonomy-freedom, which I argued is still not enough for a theory of non-human rights. However, Earth Constitutions and jurisprudence in Latin America present an alternative to rethink the foundations of rights. Based on or highly influenced by indigenous philosophies, they promote substantive moral goals that emphasize the rights of nature and the concept of harmony between species in

150 Ibid 152.

151 See for instance Stellina Jolly and KS Roshan Menon, *Of Ebbs and Flows: Understanding the Legal Consequences of Granting Personhood to Natural Entities in India,* (Transnational Environmental Law, 2021, 10:3) 472.

152 One can find examples in the United States, India, New Zealand, Australia, Spain. See for instance Gabriel Eckstein, Ariella D'Andrea, Virginia Marshall, Erin O'Donnell, Julia Talbot-Jones, Deborah Curran & Katie O'Bryan, 'Conferring legal personality on the world's rivers: A brief intellectual assessment', (2019) 1 Water Int'l; See also Law 19/2022 from Spain that confers rights to the Mar Menor (minor sea) <https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-16019> accessed 10 May 2023.

153 See Rodolfo Kusch, *Indigenous and Popular Thinking in America* (Duke UP, 2010).

the world. Although autonomy and liberty are still important, sustainability also is. Thus, the individual is still important but is, to a degree, decentered from the legal systems.

Next, I will discuss the Constitutions of Ecuador and Bolivia, as well as decisions by tribunals in Ecuador, Argentina and Colombia that shows ways to protect non-human rights, including animals and nature.

3.2.1 The Biocentric Constitution of Ecuador

The Constitution of Ecuador was approved in 2008 and it represents an early example of the adoption and institutionalization of the rights of nature.[154] The inclusion of these provisions resulted from the activism of 'a diverse array of indigenous, environmental, and leftist organizations'[155] who wanted to propose alternative visions of development, having in mind the negative effects that the exploitation of nature had on the general population, specifically indigenous communities. The preamble of the Constitution establishes,

> We women and men, the sovereign people of Ecuador
> RECOGNIZING our age-old roots, wrought by women and men from various peoples, CELEBRATING nature, the Pacha Mama (Mother Earth), of which we are a part and which is vital to our existence,
> INVOKING the name of God and recognizing our diverse forms of religion and spirituality,
> CALLING UPON the wisdom of all the cultures that enrich us as a society,
> AS HEIRS to social liberation struggles against all forms of domination and colonialism
> AND with a profound commitment to the present and to the future,
> Hereby decide to build
> A new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the sumak kawsay;
> A society that respects, in all its dimensions, the dignity of individuals and community groups;
> A democratic country, committed to Latin American integration-the dream of Simon Bolivar and Eloy Alfaro-peace and solidarity with all peoples of the Earth;
> And, exercising our sovereign powers, in Ciudad Alfaro, Montecristi, province of Manabi, we bestow upon ourselves the present […].[156]

The first notable aspect of this preamble is that it does not follow one of the fundamental rules of philosophical liberalism: that is, the secular foundation of the State, based on the notion according to which naming God will generate violence or

154 Craig M Kauffman, Pamela L Martin, *The Politics of Rights of Nature, Strategies for Building a more sustainable future* (MIT UP 2021) 59.

155 Ibid 79.

156 See Constitución de Ecuador (Constitution 2008) (Ecuador): <https://www.constituteproject.org/constitution/Ecuador_2021?lang=en> accessed 10 May 2023.

intolerance in a democratic state of law. In fact, it names both the Pacha Mama (Mother Earth) and God (seemingly the Christian God) as important foundations of the Constitution. It is true that the previous Constitution of 1998 also invoked the name of God,[157] however the liberal expectation is that a modern constitution leaves behind its theological foundations and defends the 'religion of secularism'[158] as one American judge called the secular foundation of State.

In my opinion, the idea of religion in the Constitution of Ecuador closely follows the decolonial Latin American philosophical understanding of religion, or a kind of theology of the global south.[159] Dussel, for example, argues that the problem is not, as philosophical liberalism contends, religion in public life or religion per se, but the religion of the empire, the religion of power, the supra-structural religion that Marx criticized, which justifies and validates the status quo and conceals domination. It is this religion, the author explains, that legitimized in the past coups d'état, torture and deaths in Brazil, Argentina, Chile, Uruguay and Nicaragua, in much of Latin America.[160] However, he explains that there is another religion, the infra-structural, which constitutes an emancipatory practice, a more spiritual religion, which questions injustice, the status quo, and colonization, and which will exist as long as there are men obsessed by the responsibility of the other, the poor, the oppressed.[161]

It seems that it is this infra-structural religion that is reflected in the Ecuadorian Constitution, insofar as it indicates that both religion and the wisdom of all the cultures that enrich us as a society are heirs to social liberation struggles against all forms of domination and colonialism. Or maybe it is an example of an ecological theology, like the one advanced by Moltmann or Boff.[162] Moltmann contends that, modern theology has always seen the earth only as something which human beings are supposed to subdue, but premodern theologies, for example, saw the human being as simultaneously a person but at the same time as a 'hypostasis of the whole cosmic nature'. In his view, 'today is the time to move the sacredness of the earth into the center and for us to integrate into the earthly community'. This does not

157 See Constitución de Ecuador (Constitution 1998) <https://www.cancilleria.gob.ec/wp-content/uploads/2013/06/constitucion_1998.pdf> accessed 10 May 2023.

158 See Opinion by Justice Clark in School of Abington Township, Pennsylvania v Schempp, 374 US 203 (1963).

159 See Juan José Tamayo, *La internacional del odio ¿Cómo se construye? ¿Cómo se deconstruye***?** (Icaria, Antrazyt ed 2022) 10.

160 Enrique Dussel, *Religión, Sociológica conceptos*, (Edicol ed, 1977) 32 <https://enriquedussel.com/txt/Textos_Libros/30.Religion.pdf> accessed 10 May 2023.

161 Ibid 48.

162 See also Leonardo Boff, *Cry of the Earth, Cry of the Poor* (Ecology and Justice Series, Orbis Books ed, 1997).

necessarily imply the deification of nature or earth but instead viewing earth as a living organism that brings forth life.[163]

I do not intend to analyze the theo-political imagination of the Ecuadorian constitution here but do want to highlight that it does not neatly fit into the model of a liberal constitution. This is not only because it does not strictly follow the rule of secularism, but also because the idea of the social good is thick. The social contract does not focus only on preventing the state from interfering in the personal autonomy of individuals as is the case with the thin liberal constitutions. On the contrary, as we can see from the preamble, it advances the idea of development in harmony with nature, to achieve the good way of living, the sumak kawsay.

The sumak kawsay is a phrase by the indigenous Quechua people from South America, usually translated as 'good living' or 'living well'. According to the Ecuadorian planning agency, cited by De Souza, this concept 'seeks to achieve the satisfaction of needs, the attainment of the quality of life and a dignified death, to love and be loved, the healthy flourishing of all, in peace and harmony with nature and the indefinite flourishing of different human cultures.'[164]

For De Souza both the sumak kawsay of Ecuador and the suma qamaña in Bolivia, which will be discussed below, reflect an emancipatory horizon as well as a non-Cartesian, non-Baconian conception of nature in which nature is not a natural resource, but rather a living being and source of life.[165] It is with this idea of a new model of development that the rights of nature are regulated in the Ecuadorian constitution. Pursuant to Article 71,

> 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.
> The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem'.[166]

Nina Pacari, Quechua leader and Ecuador's former minister of foreign affairs explains that for the Quechua people, 'all beings of nature are invested with an energy

163 See Jurgen Moltmann, *The Spirit of Hope, Theology for a World in Peril* (Westminster John Knox Press, 2019) 25–35. See also, Saint Francis of Assisi, *The Canticle of the Sun*, in Fr Paschal Robinson, *The Writings of Saint Francis of Assisi* (The Dolphin Press ed, 1905) 153.

164 Boaventura de Sousa Santos, *The End of the Cognitive Empire, The Coming of Age of Epistemologies of the South* (Duke UP, 2018) 239.

165 Ibid 10.

166 See Constitución de Ecuador (Constitution 2007) <https://constituteproject.org/constitution/Ecuador_2021> accessed 10 May 2023.

that we call samai and, as a consequence they are living beings: a rock, a river (water), a mountain, the sun, the plants, that is, all beings are alive'.[167] However, as indicated above, the Constitution does not regulate only Quechua philosophy, but combines it with Western philosophy (starting with the idea of rights). It is an example of a 'post-liberal philosophy of human rights' inasmuch as' strictly speaking, it would make no sense to attribute rights to nature within indigenous philosophies, for nature is the source of all rights.[168]

For Ramiro Avila, the Pachamama and Sumak Kawsay in Ecuador represent the Andean utopia, since they propose a paradigm which is totally different from the dominant one: sentient reasoning is opposed to scientific rationality; decoloniality to coloniality, Sumak Kawsay to capitalism.[169] For Andean philosophy, humanity and nature are one. Pachamama is in us and we in Pachamama.[170]

In Ecuador, the rights of nature model revolutionized judicial approaches to adjudication. Although in certain periods politicians tried to undermine the model (in 2009 the government passed the Mining Law and moved quickly to expand industrial mining), by 2019 judges were already applying the rights of nature framework, for example, to ban mining operations.[171] In one case, the Constitutional Court ruled that the rights of nature are transversal and affect all other rights, including property rights, reflecting a 'biocentric vision that prioritizes Nature in contrast to the classic anthropocentric conception in which the human being is the center and measure of all things, and where Nature was considered a mere provider of resources'.[172]

In 2022 the Constitutional Court of Ecuador applied the rights of nature framework to decide the application of habeas corpus to Estrellita, a woolly monkey that had lived 18 years in a human house with a woman (Ana) who perceived herself as

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167 David R Boyd, *The Rights of Nature, A Legal Revolution that could save the world* (ECW Press, 2017) 172.

168 See Boaventura de Sousa Santos, *The End of the Cognitive Empire, The Coming of Age of Epistemologies of the South*, (Duke UP, 2018) 9–11.

169 Ramiro Ávila Santamaría, 'Otro mundo es necesario y posible: la utopía andina y el derecho. Una mirada desde cien años de soledad y La Caverna', (2019) 31 Foro: Revista De Derecho, 168. See also Ramiro Ávila Santamaria, *El derecho de la naturaleza: fundamentos,* (Universidad Andina Simón Bolívar, 2010) <https://repositorio.uasb.edu.ec/bitstream/10644/1087/1/%c3%81vila-%20CON001-El%20derecho%20de%20la%20naturaleza-s.pdf> accessed 10 May 2023; Ramiro Ávila Santamaria, *La Utopía del Oprimido, Los derechos de la Pachamama (Naturaleza) y el Sumak Kawsay (Buen vivir) en el pensamiento crítico, el derecho y la literatura*, (Universidad Andina Simón Bolívar Akal/Inter Pares ed 2019) 12.

170 Walter D Mignolo, *The Darker Side of Western Modernity, Global Futures, Decolonial Options*, (Duke UP, 2011) 168.

171 Craig M Kauffman, Pamela L Martin, *The Politics of Rights of Nature, Strategies for Building a more sustainable future*, (MIT Press, 2021) 82.

172 Ibid 102.

her mother. Ana filed the writ of habeas corpus to regain custody of Estrellita, however, she died in the Eco Zoo 23 days after the transfer. Despite this, the Court decided that Estrellita's rights to physical and mental integrity were violated while she lived with Ana because she did not have her basic nutritional needs met or an adequate environment. She was in a state of malnutrition and had other skin, fur, and teeth conditions. It was further noted that her confinement in a zoo by state authorities in 2019 violated her right to life because the authorities did not afford her the specialized care and assistance she required.[173]

Moreover, the Court issued binding criteria on the protection of animals. In particular, it stressed that animals are protected by the Ecuadorian constitution, and they must be protected not only from an ecosystem perspective but also from the standpoint of their individuality and intrinsic worth.[174] The Court clarified that when protecting animals, one has to consider the specific needs of each species. For instance, the right to food of an Andean condor is not protected or guaranteed in the same way as it is with a pink dolphin of the Amazon, since both species have different demands and feeding behaviors.[175]

The Court also established general criteria for judges who have to decide animal-related cases. In particular, (i) animals must have access to adequate water and food to maintain their health and vigor in their dwellings; (ii) the environment in which they live must be suitable for each species, with adequate shelter and resting conditions. They must be allowed freedom of movement; (iii) animals must be guaranteed adequate sanitary conditions to protect their health and physical integrity; (iv) animals must be afforded sufficient space and relationship conditions to ensure the possibility of the free development of their animal behavior; (v) animals must be guaranteed life in an environment free from violence and disproportionate cruelty, fear, and distress.[176]

3.2.2 The Decolonial[177] Constitution of Bolivia

Bolivia's 2009 Constitution is also highly influenced by social and indigenous organizations. Vega Camacho argues that this is the result of the 'indigenous

173 Case No 253-20 JH, Const Court Ecuador, *Derechos de la naturaleza y animales como sujetos de derecho*, ('Mona Estrellita', 2022) para 147 (Ecua).

174 Ibid para 79.

175 Ibid para 98.

176 Ibid para 137.

177 According to Catherine Walsh, 'decoloniality denotes ways of thinking, knowing, being, and doing that began with, but also precede, the colonial enterprise and invasion. It implies the recognition and undoing of the hierarchical structures of race, gender, heteropatriarchy, and class that continue to control life, knowledge, spirituality, and thought, structures that are clearly intertwined with and constitutive of global capitalism and Western Modernity'. See, Catherine E Walsh, *On Decoloniality, Concepts, Analytics, Praxis* (Duke UP, 2018) 17.

irruption or plebeian subversion because the major political protagonists were the people left behind'.[178] The preamble of the Constitution States that,

> In ancient times mountains arose, rivers moved, and lakes were formed. Our Amazonia, our swamps, our highlands, and our plains and valleys were covered with greenery and flowers. We populated this sacred Mother Earth with different faces, and since that time we have understood the plurality that exists in all things and in our diversity as human beings and cultures. Thus, our peoples were formed, and we never knew racism until we were subjected to it during the terrible times of colonialism […].
>
> We have left the colonial, republican and neo-liberal State in the past. We take on the historic challenge of collectively constructing a Unified Social State of Pluri-National Communitarian law, which includes and articulates the goal of advancing towards a democratic, productive, peace-loving, and peaceful Bolivia, committed to the full development and free determination of the peoples.
>
> We women and men, through the Constituent Assembly (Asamblea Constituyente) and with power originating from the people, demonstrate our commitment to the unity and integrity of the country. We found Bolivia anew, fulfilling the mandate of our people, with the strength of our Pachamama and with gratefulness to God. Honor and glory to the martyrs of the heroic constituent and liberating effort, who have made this new history possible.[179]

Again, we are presented with an almost creational myth that founds a 'plurinational state', on the strength of 'the Pachamama and God' (although it later acknowledges that the State is independent of religion[180]). The plurinationality is a demand for the recognition of peoples that were inhabiting the territory before the foundation of the nation-state, whose existence has been invisibilized by colonization. It implies at the very least the right to self-government and self-determination. It challenges the idea that the nation state, as currently conceived, serves as the legitimate basis for extending democratic citizenship rights and responsibilities, or maybe the uneven distribution of rights through the liberal organization of the State.[181]

In any case, the Constitution presents a strong critique of the idea of the liberal nation state as savior, or the view that its secularism and neutrality will bring peace

178 Oscar Vega Camacho et al, *Decolonization and Plurinationality*; *Latin America Since the Left Turn* (University of Pennsylvania Press ed, 2018) 313.

179 Constitution of the Plurinational State of Bolivia, (2009) <https://www.constituteproject.org/constitution/Bolivia_2009.pdf?lang=en> accessed 10 May 2023.

180 Ibid.

181 Deborah J Yashar, *Contesting Citizenship in Latin America, The Rise of Indigenous Movements and the Postliberal Challenge* (CUP, 3, 2005) 282. See also Walter D Mignolo, *The Darker Side of Western Modernity, Global Futures, Decolonial Options* (Duke UP, 2011) 33.

and stability.[182] In a sense modernity is equated with colonialism as proposed by decolonial philosophy, according to which Western Civilization from the Renaissance to today, is a constitutive dimension of colonialism.[183] In fact, Mignolo considers that in the Americas 'the initial moment of the colonial revolution was to implant the Western concept of nature as resource and to rule out the Aymara and Quechua concept of Pachamama'.[184]

Later in the Constitution we find the constitutional recognition of robust social goods that the State will promote. Namely, Article 8 establishes that:

I. The State adopts and promotes the following as ethical, moral principles of the plural society: ama qhilla, ama llulla, ama suwa (do not be lazy, do not be a liar or a thief), suma qamaña (live well), ñandereko (live harmoniously), teko kavi (good life), ivi maraei (land without evil) and qhapaj ñan (noble path or life).
II. The State is based on the values of unity, equality, inclusion, dignity, liberty, solidarity, reciprocity, respect, interdependence, harmony, transparency, equilibrium, equality of opportunity, social and gender equality in participation, common welfare, responsibility, social justice, distribution and redistribution of the social wealth and assets for well-being.[185]

The notion of *suma qamaña* represents the worldview of the Aymaras, indigenous people from the Andes and Altiplano regions of South America and alludes to the importance of living in harmony with others, in community and nature. Yampara, one of the main protagonists in the elaboration of the term, explains,

> When I returned to the countryside after university studies, I could not understand the ayllu with the tools I was given by the university. Class struggle, Marxism, socialism, capitalism, liberalism – they did not explain anything; people's lives [in Aymara communities] had different paths… The paradigm of life of our [indigenous] ancestral… matrix is Suma Qamaña, whereas the paradigm of life of the Western… matrix is development… People don't talk about development; they rather talk about Suma Qamaña; that is, well-being and harmony.[186]

The Bolivian constitution is not as explicit as the Ecuadorian one when conferring rights to nature, although Article 33 states that 'everyone has the right to a healthy,

182 See William T Cavanaugh, *Theopolitical Imagination, Discovering the Liturgy as a Political Act in an Age of Global Consumerism* (T&T Clark, 2001).

183 See Walter D Mignolo, *The Darker Side of Western Modernity, Global Futures, Decolonial Options*, (Duke UP, 2011) 2.

184 Ibid 11.

185 Constitution of the Plurinational State of Bolivia, (Bolivia, 2009), art 4 <https://www.constituteproject.org/constitution/Bolivia_2009.pdf?lang=en> accessed 10 May 2023.

186 Eija Ranta, *Vivir bien as an Alternative to Neoliberal Globalization, Can Indigenous Terminologies Decolonize the State?* (Routledge, 2018) 68.

protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way'.[187] Further, in 2010 Bolivia enacted a Law on the Rights of Mother Earth, which states in Article three that Mother Earth is 'the dynamic, living system made up of the indivisible community of all life systems and living beings, interrelated, interdependent, and complementary, which share a common destiny. Mother Earth is considered sacred from the perspective of the cosmologies of original indigenous peasant nations and peoples'.[188] According to the Law, Mother Earth has at least seven rights:

(1) To life. The right to maintain the integrity of living systems and the natural processes that sustain them, and the capacities and conditions for regeneration.
(2) To the diversity of life. The right to preserve the variety of beings that make up Mother Earth, without being genetically altered or structurally modified in an artificial way, so that their existence, functioning or future potential would be threatened.
(3) To water. The right to preserve the functionality of the water cycle, its existence in the quantity and quality needed to sustain living systems, and its protection from pollution for the reproduction of the life of Mother Earth and all its components.
(4) To clean air: the right to preserve the quality and composition of air for sustaining living systems and its protection from pollution, for the reproduction of the life of Mother Earth and all its components.
(5) To equilibrium: the right to maintain or restore the interrelationship, interdependence, complementarity, and functionality of the components of Mother Earth in a balanced way for the continuation of their cycles and reproduction of their vital processes.
(6) To restoration: the right to timely and effective restoration of living systems directly or indirectly affected by human activities.
(7) To pollution-free living: the right to preserve Mother Earth's components from contamination, as well as toxic and radioactive waste generated by human activities.[189]

187 See Constitution of Bolivia, (Bolivia 2009) <https://www.constituteproject.org/constitution/Bolivia_2009?lang=en> accessed 10 May 2023.

188 See Ley N° 071 Derechos de la Madre Tierra, [Law of the Rights of Mother Earth] (Bolivia, 2010) <http://www.planificacion.gob.bo/uploads/marco-legal/Ley%20N%C2%B0%20071%20DERECHOS%20DE%20LA%20MADRE%20TIERRA.pdf> accessed 10 May 2023.

189 David R Boyd, *The Rights of Nature, A Legal Revolution that could save the world,* (ECW Press, 2017) 192-193Ley N° 071 Derechos de la Madre Tierra, [Law of the Rights of Mother Earth] (Bolivia) (n 188) art 7.

Bolivia also has a Law for the Defense of Animals, which establishes that animals have at minimum the following rights: (1) to be recognized as living beings; (2) to a healthy and protected environment; (3) to be protected against all kinds of violence, mistreatment, and cruelty; (4) to be helped and cared for. Similarly, this law makes the cruel treatment and 'biocide' of animals a criminal offense. The latter involves cruelly or futilely killing an animal and is punishable by 2–5 years in prison.[190]

In Bolivia, the implementation of the rights of nature has been slower than in Ecuador due to political instability as well as challenges with regards to the scope of the concept of 'living well'. In this respect, Ranta argues that 'the concrete incorporation and usage of the notion of Vivir Bien in Bolivian politics and state policy making has been a highly contested process, involving multiple difficulties, contradictions, and exclusions. They demonstrate that Vivir Bien has become a battlefield over contested meanings'.[191]

However, the recognition of the rights of nature and animals has had some influence on how the violation of rights is overseen. For example, in 2021 the national ombudsperson issued a press release in which he condemned and expressed his alarm over the 'biocide' of a dog that had previously been tortured by its owner, the poisoning of several dogs and pigeons in different neighborhoods and the biocide of a jaguar in eastern Bolivia. The ombudsperson asked the national and local authorities to respect the Law for the Defense of Animals and the Political Constitution, to develop specific regulations at the departmental and municipal levels regarding the protection of domestic fauna such as cats and dogs, as well as the promotion of the owner's responsibility of the same, with the offenders having to comply with the corresponding sanctions.[192]

3.2.3 Judges for the Non-human in Colombia and Argentina

The constitutions of Colombia and Argentina do not explicitly recognize the rights of animals or nature. In the case of Colombia, Article 79 of the 1991 Constitution establishes that 'Every individual has the right to enjoy a healthy environment. An Act shall guarantee the community's participation in the decisions that may affect it. It is the duty of the State to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the

190 UN FAO *Ley N°700, Ley para la Defensa de los Animales* (Bolivia, 2015) <https://faolex.fao.org/docs/pdf/bol146525.pdf> accessed 10 May 2023.

191 Eija, *Vivir bien as an Alternative to Neoliberal Globalization, Can Indigenous Terminologies Decolonize the State?* (n 186) 154.

192 'Defensoría del Pueblo condena biocidio y maltrato animal, pide sanciones conforme señala la ley' (*Defensoría del Pueblo, Estado Plurinacional de Bolivia*, August 9, 2021) <https://www.defensoria.gob.bo/noticias/defensoria-del-pueblo-condena-biocidio-y-maltrato-animal,-pide-sanciones-conforme-senyala-la-ley> accessed 10 May 2023.

achievement of these ends.'[193] Additionally, pursuant to Article 80, 'it is the duty of the State to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends'.[194]

In the case of Argentina, pursuant to Article 41 of the Constitution, 'All inhabitants enjoy the right to a healthful, balanced environment fit for human development, so that productive activities satisfy current needs without compromising those of future generations and have the duty to preserve the environment. Environmental damage shall generate as a priority the obligation to repair it under the terms that the law shall establish'.[195]

Both Argentina and Colombia, through judicial adjudication, have taken steps to move beyond the 'human only' tradition of rights as I will show in the examples below.

3.2.4 Chucho the Bear with Specs Loses His Battle in a Court in Colombia

Chucho is a spectacled bear native to the Andes Mountains in Western South America. When he was a cub, he was taken together with Clarita, his sister, to live in the Rio Blanco Natural Reserve as part of the 'repopulation of the Andean Bear' program. They grew in captivity, in an 'area of half a block, surrounded by barbed wire and an electrical fence'.[196] In 2008 Clarita passed away from cancer. Consequently, Chucho started suffering from depression, and became very sedentary and overweight. He also began to run away into the nearby city of Manizales. This prompted environmental authorities to order his transferred to the Barranquilla Zoo, after living for more than 18 years in the reserve. In the Zoo, his captivity was even more strict, and his condition thus worsened.[197]

In 2017 an individual filed a writ of Habeas Corpus in favor of Chucho, arguing that the transfer to the zoo condemned Chucho 'to permanent captivity, behavior that the legislator wanted to eradicate through the principle of animal protection indicated in (…) Law 1774 of 2016. For this reason, he requested his transfer to a

193 Constitución de Colombia (Constitution of Colombia) (1991 with Amendments through 2015) <https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en> accessed 10 May 2023.
194 Ibid.
195 Constitución de Argentina (Constitution of Argentina) (1853 with Amendments through 1994) <https://www.constituteproject.org/constitution/Argentina_1994?lang=en> accessed 10 May 2023.
196 See Carmen Mandel, '*Chucho, The Spectacled Bear Triumphs in the Supreme Court of Justice*,' (Non-Human Rights, 30 July 2017): <https://www.nonhumanrights.org/wp-content/uploads/Chucho-Semana-news-translation-Carmen-Mandel.pdf> accessed 10 May 2023.
197 Ibid.

nature reserve, and specifically that he be transferred to the La Planada reserve in the Department of Nariño'.[198]

At First Instance, the Civil Chamber of the Superior Court of Manizales denied the petition, arguing that both custodianship and habeas corpus are mechanisms inherent to human beings; therefore, they cannot be requested to protect an animal.[199] The decision was appealed and in the second instance, the Supreme Court granted the request, after determining that Chucho is a subject of law and that, as a sentient being, he also has rights. In view of the Court,

> What is at stake is not the question of whether to give the same rights to non-human subjects capable of feeling as to humans, equating them in every way in the mistaken belief that bulls, parrots, dogs, trees, etcetera have their own tribunals, their own holidays, and their own festivities. (…) What is at stake is the importance of providing a universal morality to the living chain of being, a global and ecological public order that grants creatures the respect they deserve, by virtue of the interdependence and interaction between men and nature, especially given the assault of irrational activity by contemporary humans which destroys our habitat.
>
> Animals must be kept free of discomfort, without hunger or thirst, and free to display their natural behaviors, taking into account differences—for instance, between herbivores that spend most of their lives in areas where they can forage, and carnivores in areas with prey to hunt; or the sociability of some, compared with the solitude of others. Most importantly, they must be kept free of fear and anguish, because captivity produces fear, stress, and other negative reactions. In the same way, animals must be kept free of illnesses, and both overcrowding and negative alterations to diet must be avoided.[200]

The decision of second instance marks a historic milestone in the adjudication of animal rights, as it grants them legal personality and emphasizes the need to go beyond anthropocentric approaches in the concession of rights and change the relationship between humans and non-humans and nature. At the same time, it is revealing that although part of the analysis suggests that Chucho must have rights since he is also a subject capable of suffering, the reasoning that I show in the previous quote also reflects a sort of capabilities approach. A section titled 'the freedom of animals' indicates that animals must be free from hunger or thirst and free to develop their behaviors according to their potential.

However, this decision was appealed and after a series of remedies, in January 2020 the Constitutional Court reversed it for procedural reasons, indicating that

198 See Supreme Court of Justice of Colombia, AHC-4806-2017, (2017), Opinion of Justice Luis Armando Tolosa Villabona <https://s3-aws-semana.s3.amazonaws.com/semana/upload/documents/radicado-n-17001-22-13-000-2017-00468-02.pdf> accessed 10 May 2023.

199 See Carmen, *Chucho, The Spectacled Bear Triumphs in the Supreme Court of Justice*, (n 196).

200 See Supreme Court of Justice of Colombia, AHC-4806-2017, (2017), Opinion of Justice Luis Armando, (n 198).

habeas corpus is not the adequate remedy to protect animal welfare since it is aimed at protecting the freedom of people and in this case the question does not focus on the illegality or arbitrariness of the detention of a person.[201] Despite the legal setback, I consider that the decision did not close the debate on animal subjectivity, and that, although Chucho lost his battle in the Courts, the second instance decision communicated an important message from Chucho to the world: Animals can suffer injustice and their needs and claims must be part of the morality that sustains international human rights law.

Also noteworthy is the dissenting vote of Justice Diana Fajardo Rivera, who directly indicates that a great framework to determine whether animals have rights and which rights those are the capabilities approach of Martha Nussbaum. Considering this, she urged political and legislative authorities to carry out a study on the capacities of each species for the flourishing of their lives.[202] Precisely, Nussbaum proposes that the list of capabilities that should be guaranteed to each animal will depend on the things that matter most for each type of animal. An example she provides is the Elephant Ethogram compiled by Joyce Poole and others for the African savanna elephant, which incorporates all the available knowledge about the elephant form of life: communication, movement, activities. From there we can suggest her most central list of capabilities.[203]

3.2.5 Cecilia the Chimp Is Given Non-human Rights in Argentina

In contrast to the final decision in the case of Chucho, Cecilia had better luck in Argentina. Cecilia, a 36-year-old chimpanzee, remained in a zoo in Mendoza for decades, where her physical and emotional state deteriorated progressively due to the deplorable conditions of her captivity.[204] She lay alone on a concrete floor with a blanket after her only companions Charlie and Xuxa died in 2014 and 2015.[205]

In 2016, an animal rights activist presented a habeas corpus action before the Third Court of Guarantees in Mendoza arguing that Cecilia has been illegally and

201 See, Case SU016/20, Colombia (2020): <https://www.corteconstitucional.gov.co/relatoria/2020/SU016-20.htm> accessed 10 May 2023.

202 See Case SU016/20, Colombia (2020), vote by Justice Diana Fajardo Rivera, 44–88. <https://www.corteconstitucional.gov.co/relatoria/2020/SU016-20.htm> accessed 10 May 2023.

203 Martha C Nussbaum, *Justice for Animals, Our Collective Responsibility* (Simon & Schuster, 2022) 102.

204 Tutela Action, Botanical and Zoological Foundations of Barranquilla (FUNDAZO) vs SCJ, Luis Guillermo Guerrero Pérez, Judgement SU016/20, (2020) (Colombia) <https://www.nonhumanrights.org/wp-content/uploads/NhRP-Letter-re-Translated-Chucho-decision.pdf> accessed 10 May 2023.

205 See Case No P-72.254/15, Third Court of Guarantees of Mendoza (2016): <https://www.nonhumanrights.org/wp-content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf> accessed 10 May 2023.

arbitrarily deprived of her freedom of movement and a decent life by the authorities of the zoo of Ciudad de Mendoza, Argentina. He complained that her physical and emotional state deteriorated and worsened each day that she remained at the Zoo. He also requested that she be transferred to Chimpanzee Sanctuary of Sorocaba located on the Estado de Sao Paulo, Brazil, or a similar habitat.[206]

Cecilia's legal representative, also argued that her living conditions were truly aberrant, not only because of the circumstances mentioned before, but because 'these hominids that are sentient beings, they organize in social groups, are gregarious animals that live in big family groups with a determined hierarchy, they also possess self-consciousness, they have specific abilities like being able to recognize themselves, make tools and even have a 'culture' that is passed from parents to children.[207]

In November 2016, the Third Court of Guarantees of Mendoza granted the habeas corpus in favor of Cecilia, after determining that Cecilia is a sentient non-human person with rights and that her conditions were not adequate. The Judge ordered the transferred of Cecilia to the Sanctuary in Brazil. In view of the Judge,

> It is undeniable that great apes, like the chimpanzee, are sentient beings and therefore they have non-human rights. Such a category in no way distorts the concept put forward by the doctrine. A chimpanzee is not a thing, he is not an object that can be disposed of like a car or a building. Great apes are legal persons, with a legal capacity but are incompetent to act as is corroborated by the evidence in this case that chimpanzees reach the intellectual capacity of a 4-year-old child.
>
> (…) This Court made a surprise inspection to the Mendoza Zoo and confirmed that Cecilia was in a corner of the facilities in the only place with sunlight, the water dispenser was empty, and Cecilia had few elements for her entertainment like balls, rope, car tires, etc. However, it was observed in the sad and sorry image that in the cement walls there were drawings of trees and bushes, awkwardly trying to imitate the natural habitat of the ape. And we say awkwardly, not because the zoo hasn't cared for the animal, but because it is beyond this city's financial and administrative possibilities to give Cecilia an appropriate environment.[208]

This decision constitutes a regional step forward in the protection of non-human rights. However, it is important to note that its reasoning is centrally based on showing that Cecilia's life as a chimpanzee resembles that of human beings in many ways. It thus makes the mistakes of the 'like us' approach that I criticized before. Therefore, this reasoning cannot be used in other cases in which arguing for the animal's humanity has no chance of success.

206 Ibid.
207 Ibid.
208 Ibid.

3.2.6 A River Surges into the Tribunal

Another important decision on non-human rights is a 2016 ruling issued by the Colombian Constitutional Court, which determined that the Atrato River is a subject of rights. The Atrato rises to the west of the Andes Mountain range, in the Cerro Plateado at 3900 m above sea level and flows into the Gulf of Urabá, in the Caribbean Sea. The banks of the Atrato are home to multiple Afro-Colombian and indigenous communities. Both the river and the communities have been negatively impacted by various methods of mining and logging.[209]

The most interesting part of the ruling for the purposes of this article is that the Court determined that the Atrato has rights and ordered the creation of a commission of guardians of the river, in the following terms:

> The Court declares the Atrato River to be a subject of rights, which implies its protection, conservation, maintenance, and in the concrete case at hand, restoration. (…) the Court mandates that the Colombian State exercise guardianship and legal representation of the rights of the river, together with the ethnic communities living in the basin of the Atrato River in Chocó; in this way, the Atrato River and its basin—effective immediately—will be represented by a member of the acting communities as well as a delegate from the Colombian State. Additionally, and with the objective of assuring the protection, recuperation, and proper conservation of the Atrato River, both parties must plan and create a commission of guardians, whose composition and members will be elaborated upon in the section of orders issued by the current judgement.
>
> As a complement to what is decreed above, it is necessary to recall that the concept of bioculturality and biocultural rights is founded on the central premise of a relationship of profound unity between nature and the human species. This relationship expresses itself in other, related arguments such as that: (i) the multiple forms of life expressed as cultural diversity are inextricably linked to the diversity of ecosystems and territories; (ii) the richness expressed by the diversity of cultures, practices, beliefs and languages is the product of a coevolutionary interrelation of human communities with their environments, and constitutes an adaptive response to environmental change; (iii) the relations of different ancestral cultures with plants, animals, microorganisms and the environment actively contribute to biodiversity; (iv) the spiritual and cultural connections of indigenous peoples and local communities with nature form an integral part of biocultural diversity; and (v) the conservation of cultural diversity leads to the conservation of biological diversity, such that the design of politics, legislation and jurisprudence must focus on conserving bioculturality. These elements, going forward, must be considered as parameters for a protection of the rights of environment and nature from a biocultural perspective.[210]

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209 Ruling T-622/16, (Constitutional Court of Colombia 2016) <https://archivo.minambiente.gov.co/images/Atencion_y_particpacion_al_ciudadano/sentencia_rio_atrato/Sentencia_T-622-16._Rio_Atrato.pdf> accessed 15 May 2023.

210 Ibid.

This decision is important because, as I explained, it combines two possible approaches to the protection of nature: the personhood model that recognizes nature as a subject of rights and having value and worth in itself, as well as the trust model, in which nature is protected through guardians with fiduciary duties who will speak for them in Court.[211] This is a good response to the critiques of authors such as Barnes, who question the efficacy of the personhood model and argues that it is weaker than the trust model because it is not the same to speak for nature and its rights and having the power to protect them through legal mechanisms.[212]

In a later decision in 2018, the Supreme Court of Colombia decided that the Colombian Amazon is a subject of rights. The decision was in response to a suit filed by 25 children and youth against the President and other authorities, claiming that deforestation in the country's Amazon region and the resulting greenhouse gas emissions threaten their rights to a healthy environment, life, health, food, and access to water.[213]

The Court noted that preservation of the Amazon is a national and global obligation. It has been called the lung of the world. However, between 2015 and 2016, deforestation in the Amazon region increased by 44 %, going from 56,952 to 70,074 damaged hectares, which generates imminent damage to the claimants, Colombians in general, as well as native flora and fauna of that region. Therefore, the Court decided that,

> In order to protect this vital ecosystem for the global future, just as the Constitutional Court declared the Atrato River, the Colombian Amazon is recognized as an entity, 'subject of rights', holder of protection, conservation, maintenance, and restoration to responsibility of the State and the territorial entities that comprise it.
>
> Consequently, the assistance will be granted, and the Presidency of the Republic, the Ministry of Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development will be ordered so that, in coordination with the sectors of the National Environmental System, and the participation of the plaintiffs, the affected communities and the interested population in general, within four months following the notification of this provision, formulate a short, medium and long-term action plan, which counteracts the rate of deforestation in the Amazon, where the effects of climate change are addressed. It also ordered the creation of an intergenerational pact for the life of the Colombian Amazon, where measures are adopted to reduce deforestation and greenhouse gas emissions to zero, which must have national, regional and local execution strategies (…).[214]

211 Peter Barnes, *Ours, The case for universal property* (Politybooks, 2021) 50.

212 Ibid.

213 STC 4360-2018, *Colombian Supreme Court Rules to Protect Future Generations and Amazon Rainforest in Climate Change Case.* <https://www.escr-net.org/caselaw/2019/stc-4360-2018> accessed 10 May 2023.

214 Ibid.

The Court also ordered the subscription of an intergenerational pact for the life of the Colombian Amazon, where measures are adopted to reduce deforestation and greenhouse gas emissions to zero, which must have national, regional, and local execution strategies.[215] The decision is extremely important with respect to the climate change litigation, but it also combines the rights of nature jurisprudence with an approach that clarifies who is responsible for their protection. This has been a challenge in the context of the case, because when responsibilities are scattered, it is difficult to determine the tasks that correspond to each authority. For instance, in November 2018 the President issued a directive charging particular government agencies with specific tasks to ensure the fulfillment of the Supreme Court's decision.[216] Other challenges in the enforcement of the case consist in defining the scope and binding nature of the Intergenerational Pact for the Life of the Colombian Amazon, the involvement of communities who inhabit the Amazon in the execution of the orders and the strengthening of the environmental authorities to reach the goal of zero deforestation.[217]

The model of judicial adjudication of non-human rights shows practical ways in which these rights can be implemented. However, in the Colombian case, it also raises the complexity of enforcing new rights not recognized in the constitutions or ordinary laws, inasmuch as there is some degree of uncertainty as to the available and adequate remedies.[218] For instance, five years after the ruling on the Atrato River, its orders have not been fully complied with.[219] Moreover, with vague legislation, usually limited to punishing animal abuse or environmental degradation, it is more complex to guarantee these rights, since this largely depends on the composition of the courts.

4 Conclusion: A New Ideal of Global Justice

In this paper I proposed to combine two approaches to rethink rights and protect the rights of animals and nature. The first model, Nussbaum's philosophy, leads us to

215 Ibid.

216 Ibid.

217 Ibid.

218 See also, Natalia Urzola, *Derechos de la naturaleza: un camino hacia la construcción de la paz ambiental en Colombia, en Jurisdicción Especial para la Paz, Conflicto Armado, medio ambiente y territorio: Reflexiones sobre el enfoque territorial y ambiental en la jurisdicción especial para la paz*, (Jurisdicción Especial para la Paz ed 2022) 40: <https://www.jep.gov.co/Paginas/PageNotFoundError.aspx?requestUrl=https://www.jep.gov.co/Infografas/docs/libroterritorial2022.pdf> accessed 10 May 2023.

219 Ibid 48.

think of rights as basic capabilities to flourish, and with this, it proposes an ethics of human rights that goes beyond the rule of assigning rights based on the idea of human conscience or rationality. As stated, this model takes us from a philosophy of rights that derive from rationality-autonomy-freedom to a new philosophy based on capabilities. To move beyond the Enlightenment-liberal subject of rights is important but not enough. It still does not present a sustainable ethics of rights and would not solve the issue that I mentioned in the introduction of this paper, the overemphasis on autonomy and almost complete disregard for substantive moral goals that could be promoted by the State, such as sustainability and living in harmony with nature. Nussbaum cannot take us beyond the liberal notion of autonomy, but the second approach combined with the idea of capabilities can.

The earth's constitutions and jurisprudence in Latin America provide us with a vision of rights linked to more substantive social goals such as 'living well'. Individual freedom and autonomy is not enthroned as the only social value, nor is it the human by nature ontologically superior. Human flourishing and progress are important as long as they don't affect other human beings, don't lead to environmental depredation or cruelty to animals or transcend the planetary boundaries. Human beings have dignity, but so do animals and nature. This allows the use of human rights as a mechanism of inter-species social emancipation. As Morton J. argues 'the most promising way to ensure that rights may be used on behalf of the socially weak is to ground rights theory in a substantive conception of the good society[220] and this is precisely the effort undertook by earth constitutionalism in Latin America.

With Nussbaum we get a better philosophy of individual human rights that is not based on any questionable theory of natural law, but on the mere intuition that we cohabit the world together, and that individuals want to flourish and develop their potential and capabilities. And with the earth's constitutionalism we broaden the foundation of human rights by linking them to the world of the non-human and to community and planetary justice. Rights are no longer individual self-possessions, but guidelines for social relationships that allow us to live more harmoniously. The two approaches combined allow us to reach an ideal grounding of rights based on the triad capabilities-harmony-sustainability.

This foundation also links human rights to a notion of global justice, but a kind of justice that is more than human. The international human rights law movement was meant to be a project of global justice. It seeks to achieve a bare minimum of rights or principles that should be respected and guaranteed to individuals and communities in every corner of the earth based on the dignity and worth of the person. But the project is currently failing. What kind of justice is only promised for one species among the thousands and thousands that inhabit the planet?

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220 See Morton J Horwitz, *Rights*, (1988) 23 Harvard CL L Rev, 406.

The pursuit of global justice requires that we protect our fellow humans and their aspirations to a decent life but also interspecies[221] fairness and care.[222] As the preamble of the 2000 Earth Charter states, 'it is imperative that we, the peoples of the Earth, declare our responsibility to one another, to the greater community of life, and to future generations'.[223]

221 A kind of interspecies cosmopolitanism as suggested by Eduardo Mendieta.

222 Sunstein & Nussbaum, (n 65) 319.

223 The Earth Charter, *Earth Charter Commission* (2000) <https://earthcharter.org/wp-content/uploads/2020/03/echarter_english.pdf?x79755> accessed 10 May 2023.