BRILL

INTERNATIONAL JOURNAL OF PROCEDURAL LAW
14 (2024) 73–98

International Journal of **Procedural Law**

Civil Litigation for Environmental Damages

Are the So-Called Rights of Nature an Alternative?

Guillermo Schumann Barragan[1]
Assistant Professor of Procedural Law (Civil and Criminal),
Complutense University of Madrid, Madrid, Spain
gschuman@ucm.es

Abstract

This paper aims to analyse civil litigation for environmental damages and whether the so-called rights of nature are a viable alternative *de lege ferenda*. To this end, it examines (*i*) the participation of civil society in environmental protection through public enforcement mechanisms in the Spanish legal order; (*ii*) the cause of action for environmental damage claims; and (*iii*) whether rights of nature are a good option to enhance the protection of nature in civil justice.

Keywords

civil justice – rights of nature – environmental damage claims – Aarhus Convention – *Actio Popularis*

Resumen

El trabajo tiene como finalidad analizar la litigación civil por daños al medio ambiente y, en específico, si los denominados derechos de la naturaleza son *de lege ferenda* una alternativa viable para encauzarla. Para ello se examinará (*i*) la participación que *de lege lata* tiene la sociedad civil en la protección del medio ambiente a través

1 Professor of Procedural Law at the Complutense University of Madrid. Member of the International Association of Procedural Law, awarded with the Mauro Cappelletti Prize in 2023.

 | DOI:10.1163/30504856-14010004
 | ISSN: 2034-5275 (print) 3050-4856 (online)

del *public enforcement* atribuido a la administración pública; (*ii*) las acciones civiles por daños medioambientales; y (*iii*) si los derechos de la naturaleza son una opción técnicamente adecuada para potenciar la reparación de los daños medioambientales en la justicia civil.

Palabras Clave

proceso civil – derechos de la naturaleza – acciones por daños al medio ambiente – Convención de Aarhus – *Actio Popularis*

1 Introduction

On the 3rd of October 2022, Law 19/2022 on the recognition of the legal status of the Mar Menor lagoon was published in the Spanish Official State Gazette (BOE). The law attributes the lagoon legal status (Article 1 Law 19/2022) and certain rights: the right to exist, protection, conservation and restoration (Article 2 Law 19/2022). Furthermore, according to Article 6, "any natural or legal person has the right to defend the ecosystem of the Mar Menor". Depending on the nature of the action, criminal, civil or administrative courts will have subject-matter jurisdiction (Article 4 Law 19/2022).

The attribution of legal status to elements of nature – *e.g.* a river, a forest, a mountain or a coral reef – is not new on the international scene. This theory, which is unknown in European legal orders, is known as the *rights of nature*.

As a result of public concern about climate change, environmental protection has become one of the EU's political priorities. A good example of this is the European Commission's package of measures known as the Green Deal.[2] Renewable energy and environmental have become a *leitmotiv* on the European political agenda.

In this context, this paper aims to analyse civil litigation for environmental damages and whether the so-called rights of nature are a viable alternative *de lege ferenda*. To this end, it examines (*i*) the participation of civil society in environmental protection through public enforcement mechanisms in the Spanish legal order; (*ii*) the cause of action for environmental damage claims; and (*iii*) whether rights of nature are a good option to enhance the protection of nature in civil justice.

2 Communication from the Commission. The European Green Pact [COM(2019) 640 final].

2 The Protection of the Environment by Public Authorities: The Public Enforcement

The protection of the environment has traditionally been carried out by public authorities through public enforcement. Depending on the powers granted to it, the administration will monitor or sanction non-compliance with environmental regulations. This control is carried out through administrative procedures and can be challenged in the administrative courts.

2.1 *The Aarhus Convention and the Spanish Law 27/2006: Access to Justice in Environmental Matters*

To increase the effectiveness of the public enforcement attributed to public authorities, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) was signed on 25 June 1998. The Convention was ratified by Spain and the EU itself in 2004 and 2005, respectively.

The main objective of the Aarhus Convention is to institutionalise civil society participation in decision-making and access to justice in environmental matters. This is achieved by giving certain individuals the right to have access to environmental information held by public authorities (Article 4 Aarhus Convention), the right to participate in decision-making procedures that may affect the environment (Article 6 Aarhus Convention) and the right to access to justice in environmental matters (Article 9 Aarhus Convention).[3]

Access to justice has two aspects in the Convention.[4] On the one hand, it requires States to ensure that members of the public have access to a review procedure before a court to protect the rights recognised in the treaty – *i.e.*, the rights to information and participation [Articles 9(1) and 9(2) Aarhus Convention]. On the other hand, States are required to ensure that "members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene

3 A summary of the Convention can be found in UNITED NATIONS ECONOMIC COMMISSION FOR EUROA, *Quick Guide to the Aarhus Convention* [Available at: https://www.miteco.gob.es/es/ministerio/servicios/informacion/guiarapidadelconvenioaarhus_tcm30-102246.pdf]. It should be noted that the Convention requires signatory States to attribute these rights to the "public": "one or more natural or legal persons and, in accordance with national law or custom, associations, organisations or groups constituted by such persons" (Article 2.4 Aarhus Convention).

4 LÓPEZ SÁNCHEZ, J., "Legitimación procesal en materia de medio ambiente" in EMBID IRUJO, A., *El derecho a un medio ambiente adecuado*, Iustel, Madrid, 2008, p. 420.

provisions of its national law relating to the environment" (Article 9.3 Aarhus Convention).

To fulfil the obligations of the Convention, the EU adopted Directive 2003/4/EC on public access to environmental information and Directive 2003/35/EC on public participation and access to justice in environmental matters.[5] These Directives were transposed into the Spanish legal order by Law 27/2006 which regulates the rights of access to information, public participation and access to justice in environmental matters.

Regarding the right of access to justice – and in line with the Convention – Law 27/2006 recognises, on the one hand, the right to administrative and judicial protection of the rights to information and participation (Articles 3 and 20 Law 27/2006).[6] On the other hand, it creates a "popular action in environmental matters" which makes it possible to challenge acts and omissions *of public authorities* "that contravene environmental regulations" (Article 22 Law 27/2006). The legal standing to exercise this *actio popularis* is limited to NGOs and non-profit legal entities that meet the requirements set out in Article 23 of Law 27/2006.[7]

> For example. The Ministry of Energy authorizes the construction of a new nuclear power plant (Article 28 Law 25/1964). Pursuant to Article 10 of Law 27/2006, an environmental NGO requests the public authority to provide it with information contained in the administrative file to assess the impact of the activity on the environment.
> Madrid City Council amends its urban mobility plan. According to Article 17 of Law 27/2006, an environmental association asked the Council for a public consultation period to express its views on the proposed changes.

5 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

6 LÓPEZ SÁNCHEZ, J., "Legitimación procesal en materia de medio ambiente", *op. cit.*

7 Article 23 Law 27/2006: "Any non-profit-making legal entity that can prove that it meets the following requirements may bring the collective action provided for in Article 22: a) that the purpose of its statutes includes the protection of the environment in general or one of its components in particular; b) that it has been legally constituted for at least two years prior to the bringing of the action and has been actively carrying out the activities necessary to achieve the purposes set out in its statutes; c) that, according to its statutes, it carries out its activity in a territorial area affected by the administrative act or, as the case may be, the administrative omission" (own translation).

A chemical industry company is dumping waste in the Styx Lagoon. Although this activity is punishable, the administration does not initiate sanction proceedings. Pursuant to Article 22 of Law 27/2006, an environmental NGO filed a lawsuit against the authorities´ inaction (Article 25.2 Law 29/1998).

2.2 *The* Actio Popularis *in Environmental Matters: Civil Society as a Quasi-supervisor of the Public Enforcement*

Although the protection of the environment through public enforcement is attributed to the *public* authorities, it is possible that, for various reasons, they do not carry out the control and supervision. It is not uncommon that the polluting activity has been previously authorised by the administration itself, that it lack the resources to carry out effective control, that is economically involved in the activity in some way, or that institutionalised corruption is directly blocking its functioning.[8]

The *actio popularis* in environmental matters turns civil society – *rectius*, the entities with legal standing (Article 23 of Law 27/2006) – into a quasi-supervisor of public enforcement. This participation of individuals in the control of public authorities is justified by the risk of inaction or misguided action.[9]

Insofar as the activity of the administration is controlled – and thus, indirectly, the application of environmental regulations – administrative courts have subject-matter jurisdiction to judge this *actio popularis* (Article 23 Law 27/2006). In principle, legal entities with legal standing can challenge "[t]he acts and, where appropriate, the omissions *attributable to the public authorities*". For this reason, the actions of private individuals cannot be directly controlled.

The control of the activity of the public authorities indirectly presupposes the control of the activity of private persons who do not comply with the environmental regulations. However, their actions cannot be challenged directly. The object of the *actio popularis* is the acts and omissions of the public authorities themselves. It is therefore necessary to *control the actions of private persons indirectly through the control that the public authorities should exercise over them.*

8 In this sense, GARCÍA ÁLVAREZ, L., *Daños ambientales transnacionales y acceso a la justicia*, Dykinson, Madrid, 2016, p. 95.

9 In this regard, SALAZAR ORTUÑO, E., *El acceso a la justicia ambiental a partir del Convenio de Aarhus*, Aranzadi, Cizur Menor, 2019, pp. 80–81.

It should also be noted that, despite its name, the "popular action in environmental matters" provide for in Article 22 of Law 27/2006 is not an *actio popularis*.[10] Popular actions are characterised precisely by the fact that *everyone* has legal standing.[11] By definition, as soon as legal standing is restricted, the action ceases to be popular.

> There are several *actio popularis* in the Spanish (administrative) legal order. Among them, are those regulated in Article 62 of the Law on Land, Article 47.3 of the Law on the Court of Auditors, Article 8.2 of the Law on Spanish Historical Heritage or Article 109 of the Law on Coasts.[12] All of them can be qualified as (genuine) popular actions, since the legal standing to exercise them is not restricted.

It has been questioned whether Article 22 of Law 27/2006, by limiting the legal standing to bring a "popular action", complies with the requirements of Article 9(3) of the Aarhus Convention. Of course, an examination of this question – and the possible direct application of the Convention – is beyond the scope of these lines. Nevertheless, it should be said that it is clear that the Aarhus Convention and Law 27/2006 establish a system in which civil society becomes a participant – *rectius*, a controller – in the application of public enforcement in environmental matters.

2.3 *The Spanish Law 26/2007: the State's Monopoly on Repairing Environmental Damage*

Still at the level of public enforcement is Law 26/2007 on Environmental Liability, which transposes Directive 2004/35/EC into the Spanish legal order. The law establishes liability for environmental damage caused by individuals

10 In this sense, LÓPEZ SÁNCHEZ, J., "Legitimación procesal en materia de medio ambiente", *op. cit.*, pp. 416–419; PONS PORTELLA, M., "La acción popular en asuntos medioambientales", *Revista de Administración Pública*, 206, 2018, pp. 188–193.

11 Therefore, it has been said that "[e]n la acción popular […] cualquiera puede impugnar el acto lesivo. No se exige condición alguna especial para estar legitimado activamente. Cualquiera puede demandar del órgano jurisdiccional competente la anulación del acto que infringe el Ordenamiento jurídico […] [e]l carácter público de la acción excluye cualquier limitación subjetiva" (GONÁLEZ PÉREZ, J., *Comentarios a la Ley de la Jurisdicción Contencioso-Administrativa. I.* Citivas, 5th ed., Cizur Menor, 2008, p. 534 and 539). In the same sense, GIMENO SENDRA, V., MORENO CATENA, V., SALA SÁNCHEZ, P., *Derecho procesal administrativo*, Editorial Centro de Estudios Ramón Areces, 2001, pp. 48–50; XIOL RIOS, J. A., *et al.*, *Derecho procesal administrativo. Tomo II*, Bosch, Barcelona, 2013, pp. 464–472.

12 An exhaustive list can be found in GONÁLEZ PÉREZ, J., *Comentarios I*, *op. cit.* p. 535.

and for the threat of such damage (Article 3 Law 26/2007). In this way, the "polluter pays" principle is enforced.

The law establishes a system of strict liability – *i.e.*, no fault or negligence is required – . The aim is to achieve compensation and repair for "pure environmental damage", *i.e.*, damage caused directly to the environment itself (*vid. infra*). Law 26/2007 focuses on the reparation of this type of damage and, therefore, does not regulate the exercise of actions for damages suffered by other persons as a consequence of the polluting activity (Article 5 Law 26/2007).[13] In fact, according to the law, individuals "may not claim reparation or compensation for environmental damage caused to them, to the extent that such damage is repaired by the application of this law" (Article 5.2 Law 26/2007).

> In order to assess the real scope of this regime, special attention should be paid to the cases of unenforceability of the obligation to repair the environmental damage regulated in article 14 of Law 26/2007.[14] Among them, the operator "shall not be obliged to bear the costs attributable to the measures of prevention, avoidance and repair of damage" when he proves that "the event that is the direct cause of the environmental damage constitutes the express and specific object of an administrative authorization granted in accordance with the applicable regulations" [Article 14.2.a) Law 26/2007].

Administrative procedures for environmental liability "shall be initiated either *ex officio* or at the request of the operator or any other interested party". They may also be initiated at the request of certain non-profit legal entities that meet the requirements established by the law (Article 41 Law 26/2007 and Article 4 of Law 39/2015).

If the administrative procedure is initiated, the decision may be challenged in court by the interested parties (Article 25 Law 29/1998).[15] If the public

13 In relation to Article 5 of Law 26/2007 *vid.*, CARRASCO PEREA, Á., "El régimen civil de la responsabilidad por inmisiones ambientales preexistente a la ley" en LOZANO CUTANDA, B. (coord.), *Comentarios a la ley de responsabilidad medioambiental*, Aranzadi, Cizur Menor, 2008, pp. 158–160; DE MIGUEL PERALES in VV.AA., *Practicum daños*, Aranzadi, Cizur Menor, 2014, p. 444.

14 DÍEZ-PICAZO, L., *Fundamentos del Derecho civil patrimonial V*, Civitas, Cizur Menor, 2011, pp. 446–447.

15 In Germany, Directive 2004/35/EC was transposed by the *Gesetz über die Vermeidung und Sanierung von Umweltschäden* (*Umweltschadensgesetz*). Sections 10 and 11 of the *USchadG* regulate the right of affected persons and certain associations to request the initiation of the administrative procedure and to challenge decisions taken in the administrative procedure in court.

authorities do not initiate the administrative procedure, the inaction of the public authorities can be challenged in court on the basis of Law 26/2007 or through the "*actio popularis*" of Law 27/2006.

In this way, civil society is also recognised as having a quasi-supervisor function for demanding liability for environmental damage. Law 26/2007 is another mechanism that allows citizens to participate in public environmental enforcement.[16]

3 Civil Litigation in Environmental Matters

Because of the limitations of public enforcement mechanisms, NGOs have in recent years been exploring new ways to strengthen environmental protection in civil justice.[17] The main aim is to control the polluting activities of others, without having to do so indirectly by controlling the acts or omissions of public authorities (*vid. supra*).[18]

> For example. X is a chemical company operating in Spain which discharges substances into the Styx Lagoon. Y, an environmental association, sues X seeking an injunction to cease the polluting activity and to repair the environmental damage.

Many types of litigation could be subsumed under the term "civil litigation in environmental matters". In addition to the actions for damages, other actions could be included, such as claims for unfair practices or misleading advertising – greenwashing – .[19] Also, the so-called climate change litigation, *i.e.*, the type of litigation – generally against public authorities – whose purpose is the adoption of public policies to curb global warming – e.g., for example by

16 GARCÍA ÁLVAREZ, L., *Daños ambientales transnacionales*, *op. cit.*, pp. 90–95.

17 An interesting database of environmental damage litigation can be found at *Climate Change Litigation Database* [http://climatecasechart.com/] and at *Climate Change Laws of the World* [https://climate-laws.org/].

18 WELLER/NASSE/NASSE, "Climate change litigation in Germany" in KAHL/WELLER, *Climate change litigation*, Beck-Hart-Nomos, München, 2021, pp. 380–381.

19 In relation to these, VENDRELL CERVANTES, C., SUANZEZ DÍEZ, C., "Greenwashing y prácticas desleales con los consumidores: la propuesta de Directiva relativa al empoderamiento de los consumidores para la transición ecológica a la luz del contexto actual y algunos casos recientes en el derecho comparado", *Actualidad jurídica Uría Menéndez*, núm. 60, 2022, pp. 161–173. In this regard, *vid. Proposal for a Directive on substantiation and communication of explicit environmental claims* (Green Claims Directive) [COM(2023) 166 final].

adopting measures to enable compliance with the Paris Agreement. This paper focuses only on *civil actions for environmental damages*.

Before examining the substantive and procedural issues of this litigation, it is useful to consider the types of damage that can theoretically be caused by a polluting activity.[20]

3.1 *Type Of Damage: Personal Injury and Pure Environmental Damage*

In principle, the polluting activity may cause *damage to the property or health of an individual or a group of individuals*.[21] In such cases, they may claim under the civil liability regime the reparation *in natura* or compensation for the damage suffered and, in any case, the cessation of the polluting activity (*vid. infra*).

> For example. X is a farmer who irrigates his land with water from the Styx Lagoon. Y, a company, pours chemical substances into the lagoon. As a result, X suffers damage to his crops. Y then sues X seeking compensation and the cessation of the harmful activity.
>
> Z lives in a village and consumes the water from the Styx Lagoon into which X discharges substances. As a result, Z suffers from poisoning, which leads to a chronic illness. Z sues X seeking compensation and the cessation of the harmful activity.

In these civil lawsuits, what individuals seek is the *protection of their legal sphere*. It is the reparation or compensation for damage *to their person or property* that is sought.

> In theory, if the damage has been caused to a group of individuals – *i.e.*, collective damage – compensation or reparation could be sought through a class action. However, *de lege lata* in Spanish legal order class actions are limited to the protection of consumers rights.[22]
>
> In France, on the other hand, Article 60 of the LOI n° 2016-1547 and Article L142-3-1 of the *Code de l'environnement* expressly provide for the

20 GARCÍA ÁLVAREZ, L., *Daños ambientales transnacionales*, *op. cit.,* pp. 33–123; DÍEZ-PICAZO, L., *Fundamentos V*, *op. cit.*, p. 432.

21 DE MIGUEL PERALES, *Practicum daños*, *op. cit.*, p. 436.

22 LÓPEZ SÁNCHEZ, J., "Legitimación procesal en materia de medio ambiente", *op. cit.*, p. 397; HERRERO PEREZAGUA, J. F., "Contaminación acústica y tutela inhibitoria en el proceso civil" in EMBID IRUJO, A., *El derecho a un medio ambiente adecuado*, Iustel, Madrid, 2008, pp. 446–447; CARRASCO PEREA, Á., "El régimen civil de la responsabilidad por inmisiones ambientales", *op. cit.*, p. 158.

possibility of bringing collective actions – *l'action de groupe* – before the civil courts for collective environmental damage.[23] Legal standing is limited to certain associations whose purpose is to defend victims of damage or to protect the environment.[24]

Pure environmental damage – *reiner ökologischer Schäden* – is damage caused to the natural environment as such – *e.g.* the pollution of water or the deforestation of a forest – .[25]

For example. A company pours chemicals into the Styx Lagoon. The pollution of the water and the damage to its flora and fauna are pure environmental damage.

Once this typology of damage has been established, it is possible to examine some procedural and substantive aspects of civil litigation arising from polluting activities.

3.2 *Civil Liability for Damages to Individuals: Causes of Action*

Personal injury produced by polluting activities is a case of *tort liability*.[26] The plaintiff usually seeks compensation or reparation and the cessation

23 Article L142-3-1 Code de l'environnement: «II. - Lorsque plusieurs personnes placées dans une situation similaire subissent des préjudices résultant d'un dommage dans les domaines mentionnés à l'article L. 142-2 du présent code, causé par une même personne, ayant pour cause commune un manquement de même nature à ses obligations légales ou contractuelles, une action de groupe peut être exercée devant une juridiction civile ou administrative».

24 Article L142-3-1V Code de l'en"vironnement: «IV. - Peuvent seules exercer cette action: 1° Les associations, agréées dans des conditions définies par décret en Conseil d'Etat, dont l'objet statutaire comporte la défense des victimes de dommages corporels ou la défense des intérêts économiques de leurs membres; 2° Les associations de protection de l'environnement agréées en application de l'article L. 141-1»

25 GARCÍA ÁLVAREZ, L., *Daños ambientales transnacionales*, *op. cit*, pp. 35–47; WAGNER/ARNTZ, "Liability for climate damages - Germany as an international pioneer?" in KAHL/WELLER, *Climate change litigation*, Beck-Hart-Nomos, München, 2021, p. 423; Recital 24 of the Rome II Regulation considers that "[e]nvironmental damage" should be understood as adverse change to a natural resource, such as water, soil or air, impairment of a function performed by that natural resource for the benefit of another natural resource or of the public, or impairment of variability among living organisms».

26 GARCÍA ÁLVAREZ, L., *Daños ambientales transnacionales*, *op. cit.*, pp. 57–59.

of the harmful activity.[27] The legal basis for these actions is Article 1902 Civil Code (CC) – and, in some cases, other provisions such as Articles 7.2 or 1908.2 CC – .[28]

As in any other tort case, the plaintiff has the burden of proving the existence of an act or omission, damage, causality and fault or negligence.[29] As can be imagined, the main difficulties in this type of litigation are related to the proof of damage and its relationship with the polluting activity.[30]

> For example. X is a farmer who irrigates his land with water from the Styx Lagoon. Y, a company, pours chemicals into the lagoon. As a result, X's crops are damaged. In a case like this, the causal link between the damage and the polluting activity seems clear.
> X is a farmer living in Asturias. Y, a company involved in the coal industry, produces fumes in the mining area. X suffers from lung cancer, which he believes is the result of the high levels of substances in the air that he has been breathing for decades. He therefore sues Y seeking compensation and the cessation of the harmful activity. In this case, it will be difficult to proof the casualty of the damage.

27 YZQUIERDO TLSADA, M., *Responsabilidad civil extracontractual. Parte general*, Dykinson, 3rd ed., Madrid, 2017, pp. 597–604; HERRERO PEREZAGUA, J. F., "Contaminación acústica y tutela inhibitoria en el proceso civil", *op. cit.*, pp. 423–457. In the German legal order *vid.*, WAGNER/ARNTZ, "Liability for climate damages - Germany as an international pioneer?", *op. cit;* CARRASCO PEREA, Á., "El régimen civil de la responsabilidad por inmisiones ambientales", *op. cit.*, p. 149.

28 LÓPEZ SÁNCHEZ, J., "Legitimación procesal en materia de medio ambiente", *op. cit.*, pp. 391, 393; CARRASCO PEREA, Á., "El régimen civil de la responsabilidad por inmisiones ambientales", *op. cit.*, p. 149. In Germany, WELLER/NASSE/NASSE, "Climate change litigation in Germany", *op. cit.*, pp. 398–403; WAGNER/ARNTZ, "Liability for climate damages - Germany as an international pioneer?", *op. cit.,* pp. 406–428.

29 CARRASCO PEREA, Á., "El régimen civil de la responsabilidad por inmisiones ambientales", *op. cit.*, p. 152.

30 DE MIGUEL PERALES, *Practicum daños*, *op. cit.*, pp. 439–441; CARRASCO PEREA, Á., "El régimen civil de la responsabilidad por inmisiones ambientales", *op. cit.*, pp. 153–156; WELLER/NASSE/NASSE, "Climate change litigation in Germany", *op. cit.*, p. 402; WAGNER/ARNTZ, "Liability for climate damages - Germany as an international pioneer?", *op. cit.,* pp. 427–428.

Because of the legal and practical limitations of the traditional civil liability regime, attempts have been made to find other legal basis for actions: in particular, the regimes for the protection of fundamental rights or the liability of companies for due diligence obligations.

In this regard, the ECHR has held that there is a violation of the right to life and the right to respect for private and family life (Articles 2 and 8 ECHR) when individuals are exposed to harmful polluting activities.[31] The exposure must have a *direct and serious* effect on their health or family life – victim status – .[32] The interpretation of these rights by the ECHR is integrated [Article 10.2 of the Spanish Constitution (SC)] into the right to life (Article 15 EC) and the right to privacy (Article 18 EC) recognised in the Spanish Constitution. Therefore, when these rights are violated by individuals, judicial protection can be sought before the civil courts [Article 249.1.2º Ley de Enjuiciamiento Civil (LEC)].

> In this context, the decision of the German Constitutional Court of 24 March 2021 (*Neubauer* case) is of particular interest.[33] This decision is part of the so-called climate change litigation, *i.e.*, the type of litigation – generally against public authorities – whose purpose is the adoption of public policies to curb global warming – e.g., for example by adopting measures to enable compliance with the Paris Agreement – . In the present case, the Court finds that the right to life and physical integrity [Article 2(2) *GG*] gives rise to positive obligations of protection on the part of the State in the face of risks arising from polluting activities.[34] These protection obligations, which arise from the objective and subjective dimension of the fundamental right, are linked to the state's

31 In this regard, *vid. Guide to the case-law of the European Court of Human Rights* (2022) [Available at: https://ks.echr.coe.int/web/echr-ks/environment]. In the same sense, *Guide on Article 8 of the European Convention on Human Rights* (2022). [Available at: https://ks.echr.coe.int/web/echr-ks/article-8]. Likewise, DE MIGUEL PERALES, *Practicum daños*, *op. cit.*, pp. 446–449.

32 Judgment ECHR (Grand Chamber), Verein Klimaseniorinnen Schweiz and others v. Switzerland (Application no. 53600/20); *Guide to the case-law of the European Court of Human Rights* (2022), pp. 23–29,

33 Beschluss vom 24. März 2021 - 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.

34 «Der Schutz des Lebens und der körperlichen Unversehrtheit nach Art. 2 Abs. 2 Satz 1 GG schließt den Schutz vor Beeinträchtigungen grundrechtlicher Schutzgüter durch Umweltbelastungen ein, gleich von wem und durch welche Umstände sie drohen. Die aus Art. 2 Abs. 2 Satz 1 GG folgende Schutzpflicht des Staates umfasst auch die Verpflichtung, Leben und Gesundheit vor den Gefahren des Klimawandels zu schützen. Sie kann eine objektivrechtliche Schutzverpflichtung auch in Bezug auf künftige Generationen begründen» (Leitsätze 1º, Beschluss vom 24. März 2021 - 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20).

duty to protect the environment (Article 20a GG). Although the latter is not a fundamental right – but a political guiding principle – it is a norm from which obligations are derived that are legally protected – *justiziable Rechtsnorm* – .[35] Similar conclusions could be drawn in our legal system based on Articles 15 (right to life) and 45 (right to an adequate living environment as a guiding principle of policy) of the Spanish Constitution.

It is important to stress that these rights give rise to *positive protection obligations* on the part of the State. The public authorities must adopt the necessary measures to protect human life from polluting activities carried out by other individuals – or by the State itself – . Therefore, if the measures to prevent the damage are not taken or if these fundamental rights are not judicially protected, the victim may seek protection before the Constitutional Court through a *recurso de amparo* or before the ECHR.[36] Of course, she has the burden of proving the violation of the rights recognised by ECHR: the serious damage to his or her health or life – victim status – and the causal link between the polluting activity and the lack of protection by the State.[37]

It should also be noted that there is a clear trend in Europe towards the creation of civil liability regimes for damages resulting from non-compliance with human rights and environmental due diligence obligations. A good example of this is the case of the Directive on corporate sustainability due diligence. The Directive makes companies civilly liable (Article 22) for failure to comply with their prevention obligations (Article 7) and obliges them to remedy environmental damage (Article 8). This new framework, which is still under development at European level, will provide a further legal basis for seeking redress for environmentally damaging activities.

Germany already has a supply chain due diligence law – *Lieferkettensorgfaltspflichtengesetz* – which includes due diligence obligations in relation to the protection of human rights and the environment (§ 2 *LkSG*).[38]

35 «Art. 20a GG verpflichtet den Staat zum Klimaschutz. Dies zielt auch auf die Herstellung von Klimaneutralität (Leitsätze 2º, Beschluss vom 24. März 2021 - 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20).

36 Judgment ECHR (Grand Chamber), Verein Klimaseniorinnen Schweiz and others v. Switzerland (Application no. 53600/20); *Guide to the case-law of the European Court of Human Rights* (2022), pp. 78–80.

37 *Guide to the case-law of the European Court of Human Rights* (2022), pp. 30–38.

38 Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz - LkSG).

> However, in contrast to the Directive, the law explicitly excludes any civil liability for breach of these duties [§ 3(3) *LkSG*]. In principle, § 11 allows certain trade unions or national NGOs to seek the judicial enforcement of the duties of care on behalf of the victims.[39] However, it is considered that there is no individual situation that can be legally protected – *Geschützte Rechtspositionen* – due to the nature of the duty of care imposed on the environment.[40] Thus, the European Directive on Corporate Sustainability Due Diligence will require the adaptation of German law in this respect.[41]
>
> France also has a law on human rights and environmental due diligence – *LOI No 2017-399 relative au devoir de vigilance des société* – .[42] However, the French law does include a civil liability regime for breaches of due diligence obligations.[43]

In short, tort regimes are the legal basis for seeking compensation or reparation for damage suffered by individuals because of polluting activities. The progressive development of a (fundamental) right to an adequate environment and the Directive on Corporate Sustainability Due Diligence will strengthen the reparation of these damages.

---

39 § 11 LkSG: "(1) Wer geltend macht, in einer überragend wichtigen geschützten Rechtsposition aus § 2 Absatz 1 verletzt zu sein, kann zur gerichtlichen Geltendmachung seiner Rechte einer inländischen Gewerkschaft oder Nichtregierungsorganisation die Ermächtigung zur Prozessführung erteilen.
(2) Eine Gewerkschaft oder Nichtregierungsorganisation kann nach Absatz 1 nur ermächtigt werden, wenn sie eine auf Dauer angelegte eigene Präsenz unterhält und sich nach ihrer Satzung nicht gewerbsmäßig und nicht nur vorübergehend dafür einsetzt, die Menschenrechte oder entsprechende Rechte im nationalen Recht eines Staates zu realisieren".

40 In this sense, JOHANN-SANGI "§ 11" in *LkSG*, Nomos, Baden-Baden, 2023, Rn. 5, 1; LEYENS, § 11 LkSG in HOPT (dir), *Handelsgesetzbuch*, C. H. Beck, 42nd edition, München, 2023, Rn. 1.

41 JOHANN-SANGI "§ 11 LkSG", *op.cit.*, Rn. 25–30.

42 LOI no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

43 LOI no 2017-399: "Art. 225-102-5. - Dans les conditions prévues aux articles 1240 et 1241 du code civil, le manquement aux obligations définies à l'article L. 225-102-4 du présent code engage la responsabilité de son auteur et l'oblige à réparer le préjudice que l'exécution de ces obligations aurait permis d'éviter. L'action en responsabilité est introduite devant la juridiction compétente par toute personne justifiant d'un intérêt à agir à cette fin"; JOHANN-SANGI "§ 11 LkSG", *op. cit.*, Rn. 23.

3.3 *Civil Liability for Purely Environmental Damage: Causes of Action*

As mentioned above, polluting activities usually cause damage to the natural environment itself. In principle, there is no provision in the legal order that authorises individuals to seek compensation for purely environmental damage. In fact, they are prevented from doing so (Article 5.2 Law 26/2007), since in our legal order it is the State that has the monopoly to seek its reparation (*vid. supra*).[44]

It can therefore be said that, from a civil law perspective in the case of *purely environmental damage, there is no individual legal position that can be protected*. There is no legal basis for the action and therefore no legal standing for seeking any judicial relief.[45]

> For example. X is a company that dumps its waste into the sea. As a result, it damages a marine coral reef. Y and Z, members of an NGO, sue X for an injunction to stop the polluting activity. In this case, the case is dismissed because there is no harm to the plaintiffs or any other cause for the action.

Private law – and therefore civil justice – protects individuals – *rectius*, his person and his property – against polluting activities.[46] This is the *legal position that is protected*: "without a victim, there is no damage" to be repaired.[47]

---

44 To the extent that it is Article 3.3 of Directive 2004/35/EC itself that excludes the recognition of rights to individuals derived from pure environmental damage, the same limitations are found in other European countries. In this sense, *vid.* MüKoBGB/Wagner, "§ 823", Rn. 1047–1050.

45 GARCÍA ÁLVAREZ, L., *Daños ambientales transnacionales*, *op. cit.*, pp. 35–43; DÍEZ-PICAZO, L., *Fundamentos V*, *op. cit.*, pp. 432–435; CARRASCO PEREA, Á., "El régimen civil de la responsabilidad por inmisiones ambientales", *op. cit.*, pp. 156–157.

46 "Der eigentliche Schaden an der Umwelt als kollektivem Rechtsgut, der sog. ökologische Schaden, wird vom privaten Umwelthaftungsrecht nur erfasst, sofern er sich zugleich als eine Verletzung individueller Rechtsgüter darstellt" (MüKoBGB/Wagner, "§ 823", Rn. 1046).

47 "Y es que bajo los presupuestos clásicos de la responsabilidad civil, para que esta exista debe existir un daño; pero este no puede existir en abstracto sino en relación a una persona que lo padece [...] sin víctima no hay daño" (GARCÍA ÁLVAREZ, L., *Daños ambientales transnacionales*, *op. cit.*, p. 42). In the same sense, it has been said that "La protección de la responsabilidad civil de modo primero es a la propiedad y a la salud de las personas. De ellos se deriva, indirectamente (pero no por ello menos eficazmente), una protección al medio ambiente, pero sólo en cuanto hay un bien patrimonial o personal que ha sido dañado. De no darse tal daño, el ordenamiento jurídico dispone de otros medios para reacción, a través de los Derechos administrativo y penal" (DE MIGUEL PERALES, *Practicum daños*, *op. cit.*, p. 436); CORDERO LOBATO, E., "Intereses privados y daños ambientales" en ATAZ LÓPEZ, J., *et al.*, *Cuestiones clásicas y actuales del Derecho de daños Tomo I*, Aranzadi, Cizur Menor, 2021, pp. 1605–1606.

As is well known, the victim of damage can seek for different judicial reliefs: its reparation *in natura* or compensation and the cessation of the harmful activity. Thus, if an individual has suffered damage, he or she could seek the cessation of the polluting activity – *acción negatoria* – .[48] Only in this way could the legal protection of the individual have some – rather small – impact on the protection of the environment itself.[49]

> For example. A carries out a polluting activity that causes damage to B. B can seek an injunction to stop the harmful activity. If the claim is upheld, B will get A to stop polluting.[50]
>
> In any case, this is a rather limited form of environmental protection. As already mentioned, as a general rule, individuals "may not demand reparation or compensation for [pure] environmental damage caused to them" (Article 5.2 Law 26/2007).

In short, the protection of the environment as a public good is monopolized by the State through a public law regime (*vid. supra*).[51]

48 "Einen Ersatz ökologischer Schäden an nicht privat zugeordneten Naturgütern [... Soweit solche Naturgüter beeinträchtigt werden, liegt es nahe, eine Anspruchsberechtigung des Staates und seiner Untergliederungen als «Treuhänder» der Allgemeinheit für den Ersatz solcher Schäden zu begründen" (LANDMANN-ROHMER/REHBINDER, "§ 16 UmweltHG", *Umweltrecht*, C. H. Beck, München, 2022, Rn. 5).

49 «Son estas razones las que llevan a afirmar que, cuando lo que se daña es el ambiente y no a la persona o sus bienes, el Derecho civil y el sistema de responsabilidad poco pueden a ver, salvo permitir la utilización de acciones de carácter individual, que tutelan intereses individuales, pero que de manera indirecta o refleja pueden proteger el medio ambiente» (DÍEZ-PICAZO, L., *Fundamentos V, op. cit.*, p. 434); "Weite Bereiche der ökologischen Schäden lassen sich eigentumsrechtlich erfassen und Privatpersonen zuordnen, sodass der normale Deliktsschutz eingreift [...] In der Sache hat der europäische Gesetzgeber davon abgesehen, den haftungsrechtlichen Schutz der Umwelt mit Hilfe privater Schadensersatzklagen zu bewirken, sondern stattdessen auf behördliche Maßnahmen gesetzt" (WAGNER, G., "Haftung für Menschenrechtsverletzungen", *RabelsZ*, No. 80, 2016, pp. 753–754).

50 DÍEZ-PICAZO, L., *Fundamentos V, op. cit.*, p. 434.

51 That is why it has been said in Germany that the law on liability for environmental damage (USchadG) "steht in einer Komplementärbeziehung zum UmweltHG und zum privatrechtlichen Umwelthaftungsrecht: Während das UmweltHG und § 823 die Verletzung privater Rechtsgüter und Interessen "über den Umweltpfad", dh durch Kontamination von Umweltmedien, erfassen, konzentriert sich das USchadG auf den Schaden an der Natur selbst. Das UmweltHG und § 823 sind einer anthropozentrischen Sicht verhaftet, das USchadG verfolgt hingegen einen ökozentrischen Ansatz" (MüKoBGB/Wagner, "§ 823", Rn. 1048).

3.4 *Excurso: International Environmental Litigation*

Civil environmental litigation often has an international dimension due to the cross-border nature of the damage caused to individuals or the environment. In this context, it is interesting to examine how this type of litigation is regulated in European regulations.

According to the Brussels I *bis* Regulation, the courts of the Member State where the defendant is domiciled (Article 5 Brussels I *bis*) and those of the place "where the harmful event occurred or may occur" (Article 7.2 Brussels I *bis*) shall have jurisdiction.[52]

> For example. X is a multinational company operating in Poland and discharging chemicals into the atmosphere. Y, a German NGO, sues X in Germany for compensation for damage to the health of certain individuals caused by the pollution. In this case, Y can justify the jurisdiction of the German courts on the grounds that X is domiciled in Germany or that the damage has occurred in Germany.

In this type of litigation, it is common to attempt to refer the dispute to the courts of those states that are more aware of environmental issues and more advanced in legal terms – *forum shopping* – . It will therefore not be uncommon for a cross-border element to be identified or "created" just to justify the jurisdiction of a particular State.

Article 7 of the Rome II Regulation determines the law applicable to "environmental damage or damage suffered by persons or property as a result of such damage".[53] Accordingly, the applicable law is that of "the country in which the damage occurs" (Article 4.1 Rome II) or "the country in which the event giving rise to the damage occurred" (Article 7.1 Rome II).[54] It will also be common for the plaintiff to seek the application of the law which is more favorable to the success of his claims. This *facultas alternativa* is indeed encouraged by the Regulation.

---

52 WELLER/NASSE/NASSE, "Climate change litigation in Germany", *op. cit.*, pp. 387–31.

53 "Art. 7 Rome II covers two types of damages: first, it covers damage to the environment itself, and second, it covers both damage to persons and property if they are the result of the damage to ecology and consequence of human activity. The latter is to say, that personal injuries, damages to property and private economic losses are included in Art. 7 if, and only if, they result from damages to the environment" [FUCHS, A., "Article 7" in HUBER, P. (ed.), *Rome II Regulation*, Sellier, Munich, 2011, p. 212)].

54 WELLER/NASSE/NASSE, "Climate change litigation in Germany", *op. cit.*, pp. 392–398; FUCHS, A., "Article 7", *op. cit.*, pp. 202–226.

At present, the application of certain laws to damage caused by polluting activities is based on the argument that the damage was caused by commercial decisions taken at the company`s headquarters. This makes it possible to apply the law of the state where the company is based – usually in European or Western countries – to damage caused in other parts of the world.[55]

> For example. X is a multinational company operating in Poland and discharging chemicals into the atmosphere. Y, a German environmental NGO, sues X in the German civil courts seeking X to stop the harmful activity. In this case, Y is interested in the application of German law because it believes that the German BGH interprets §§ 823 and 1004 of the BGB in a certain favorable way. As X is based in Germany, Y argues that the polluting activity in Poland is the result of business decisions taken in Germany. Therefore, according to Article 7(1) of the Rome II Regulation, German law is applicable.

Thus, the forum and law shopping associated with this type of litigation – which is still evolving – mean that the European rules on jurisdiction and applicable law play a major role.[56]

4 Rights of Nature

It has already been explained that individuals who suffer *damage to their person or property as a result of* polluting activities can seek the cessation of such activities and repairment *in natura* or compensation. However, as has already been said, there is no legal basis *de lege lata* for seeking reparation for pure environmental damage before a civil court: the State retains the monopoly of protecting the environment through public enforcement mechanisms.

However, it must be borne in mind that it is possible that *the public authorities do not control polluting activities or do not control them as they should* (*vid. supra*). This inaction will simply mean a lack of repair of damage and protection of the environment. *De lege ferenda*, it is reasonable to consider whether it makes sense for public authorities to have a monopoly on environmental protection.

55 MANTOVANI, M., "Private International Law and Climate Change: the «Four Islanders of Pari» Case" in *EAPIL Blog*, 2023 [Available at: https://eapil.org/2023/01/10/private-international-law-and-climate-change-the-four-islanders-of-pari-case/].

56 In this regard, MANTOVANI, M., "Private International Law and Climate Change", *op. cit*.

In the current political and social context, it might make sense to strengthen environmental protection by "empowering civil society" – *i.e.*, giving it legal tools to act – . Of course, this requires the creation of causes of actions and procedural mechanisms to do so. It is within this framework that the so-called rights of nature come into play.

The so-called theory of the rights of nature holds that some elements of nature – such as a river, a forest, a jungle or a coral reef – should have legal status and rights that can be legally enforced. In this way, the natural element is transformed from a (merely) protected legal interest to being a subject of law with legal status.[57] Law 19/2022, which recognises the legal status of the Mar Menor lagoon, is part of this trend.

> The origin of this theory can be found in Prof. Stone's well-known article "Should Trees Have Standing? Towards Legal Rights for Natural Objects" (1972).[58]
>
> The attribution of legal status to elements of nature is not an unknown in the international panorama. Pachamama or Mother Nature in Ecuador, the Amazon in Colombia, the Whanganui River or Te Urewera National Park in New Zealand or the Gangotri Glaciers in India, among others, are all given legal status and rights in one way or another.[59]

It will now be examined how this technique fits into the outlined legal framework and to what extent it is an appropriate way to promote environmental protection *de lege ferenda* in civil justice.

---

57 BORRÀS PENTINAT, S., "Los derechos de la naturaleza en Europa: hacia nuevos planteamientos transformadores de la protección ambiental", *Revista de Derecho Comunitario Europeo*, 65, 2020, pp. 79–120; SANZ LARRUGA, F., J., "El mar menor ¿sujeto de derechos? Algunas propuestas para la mejora de la aplicación del Derecho ambiental" in CANO CAMPOS, T., *et al.* (dirs), *El patrimonio natural en la era del cambio climático*, Centro de publicaciones del Institucional Nacional de administración Pública, Madrid, 2022, pp. 225–233; VARGAS CHAVES, I., RODRÍGUEZ, G.A., *et al.*, "Recognizing the Rights of Nature in Colombia: the Atrato River case", *Revista Jurídicas*, 17 (1), 220, pp. 13–41; MCKENZIE, A., "Rights of Nature: The Evolution of Personhood Rights", *Joule: Duquesne Energy & Environmental Law Journal*, 9, 27, 2020–2021.

58 STONE, C., "Should Trees Have Standing? - Towards Legal. Rights for Natural Objects", *Southern California Law Review*, 45, 1972, pp. 450–501. On the influence of STONE's article on the U.S. Supreme Court decision *Sierra Club v. Morton*, 405 U.S. 277 (1972) see MOORE, T., "Should Trees Have Standing? Toward Legal Rights for Natural Objects", *Fla. St. U. L. Rev.*, No. 672, 1974, pp. 672–675.

59 More examples can be found at BORRÀS PENTINAT, S., "Los derechos de la naturaleza en Europa", *op. cit.*, pp. 85–91; SANZ LARRUGA, F., J., "El Mar Menor ¿sujeto de derechos?", *op. cit.*, pp. 227–228; VARGAS CHAVES, I., RODRÍGUEZ, G.A., *et al.*, "Recognizing the Rights of Nature in Colombia", *op. cit.*, pp. 20–22; MCKENZIE, A., "Rights of Nature: The Evolution of Personhood Rights", *op. cit.*

4.1 *The "Personification" of the Elements of Nature: A Useful Legal Fiction?*

The theory of the rights of nature aims at a shift from an anthropocentric to a biocentric perspective.[60] These philosophical approaches are undoubtedly important and interesting, but they cannot and should not be dealt with in these pages. What is relevant here is to examine whether, from a technical point of view, the rights of nature are a useful way of achieving an objective that can be considered *politically* desirable: the creation of a mechanism for seeking judicial protection of the environment within civil justice.

The starting point is a truism: the law is a human creation. As such, it is an artificial instrument that helps to articulate life in society, preserving human dignity and justice. Beyond certain principles or insurmountable limits, the legal order is mostly the result of decisions taken by legislators based on assessments and political views that change at a given historical moment.[61]

The attribution of legal status to all individuals – *i.e.*, their consideration as subjects of law – is a question that is directly connected to human dignity (Article 10.1 CE). This is an inalienable minimum – a "natural" or rational principle, as we usually call it – which does not require any further analysis.[62]

On this basis – which fortunately seems obvious to us today – it is not unusual for the legal order to give legal status to certain realities, other than human existence itself. Companies, associations or foundations are entities to which we give legal status in so far as this gives us a social or economic benefit that we consider desirable.

Of course, giving legal status these entities does not mean giving them the same legal status as human beings. It will be up to the legislator to define their *status*.[63] *Societas delinquere non potest* … until the legislator decides for reasons of policy that the legal person is criminally liable (Article 31 *bis* Criminal Code).

60 A critique of modern anthropocentrism can be found in the *Encyclical Letter Laudato Si' of the Holy Father Francis on Care for the Common Home*, pp. 90 *et seq*.

61 DE LA OLIVA SANTOS, A., *El papel del Juez en el proceso civil. Frente a ideología, prudentia iuris*, Aranzadi, Cizur Menor, 2012, pp. 39–42; DE LA OLIVA SANTOS, A., "El papel y los poderes del juez en el proceso civil", *Teoría y Derecho. Revista de Pensamiento Jurídico*, no. 7, 2010, p. 39.

62 STONE traces the development of the attribution of legal personality and rights to persons throughout history. It is important to remember, for example, that in Rome legal personality was linked to the status of free citizen. This means that individuals, such as slaves, are regarded as things (STONE, C., "Should Trees Have Standing?", *op. cit.*, pp. 450–457). Nor should we forget the responsibility attributed to certain animals or inanimate objects in ancient Greece and Rome (STONE, C., "Should Trees Have Standing?", *op. cit.*, pp. 450–457. Footnote 98).

63 STONE, C., "Should Trees Have Standing?", *op. cit.*, p. 481.

From a technical point of view – and it must be emphasized that philosophical or political views are left aside here – the attribution of legal status and rights to natural elements is perfectly permissible. There is no constitutional or technical obstacle to this.

In the framework exposed, the technique of the rights of nature has a concrete utility. By attributing legal status and rights to it, *the natural element itself is legally protected – Geschützte Rechtspositionen* – . This personification creates a *substantive substratum for its protection against individuals*. In short, if "without a victim there is no damage" to be repaired, the rights of nature theory "create one".

4.2 *The Legal Standing of the Natural Element*

Once legal status and rights have been attributed to the natural element, it remains to be determined how its legal protection is to be sought.

In principle, the granting of legal status to the natural element presupposes that it has the capacity to be a party in the proceedings (Article 6 LEC). In this regard, Article 6 of Law 19/2022 provides that actions for the judicial protection of the lagoon must be brought "on behalf of the ecosystem of the Mar Menor *as the real* interested *party*". However, since the natural elements are not capable of carrying out valid procedural acts on their own, *i.e.*, they do not have the legal capacity to appear in court, it is necessary to regulate who will act on their behalf – representation in court – .[64]

The rights of nature theory argues that a guardian or certain persons should represent the natural element in court.[65] In this regard, Law 19/2022 states that "*any* natural or legal person shall have the right to defend the ecosystem of the Mar Menor and to enforce the rights and prohibitions of this Law and its regulations by means of an action brought before the competent court" (Article 6 Law 19/2022). If the party to the proceedings is the Mar Menor Lagoon, it must be understood that the individuals act as *procedural representatives* of the natural element.[66] Since this representation can be held by anyone, it is a special case of "popular procedural representation" in civil justice.

64 On the capacity to be a party, legal capacity to appear in court and the necessary representation *vid.*, GASCÓN INCHUSTI, F., *Derecho Procesal Civil. Materiales para el estudio*, 4th ed., 2022, pp. 162–172 [Available at: https://eprints.ucm.es/id/eprint/74258/].

65 STONE, C., "Should Trees Have Standing?", *op. cit.*, pp. 464–475.

66 In this regard, GARCÍA-ROSTÁN CALVÍB, G., "Aspectos procesales de la personalidad jurídica del mar menor en la jurisdicción civil" en DÍAZ PITA, M.ª P. (dir.), *Horizonte Justicia 2030*, Tecnos, Madrid, 2022, pp. 326–330.

> Law 19/2022 establishes a case of popular procedural representation; and not, as the law erroneously qualifies, of extraordinary legal standing. It must be stressed that the party to the proceedings is the Mar Menor Lagoon – the action is brought on its behalf "*as the real interested party*" (Article 6 Law 19/2022). Individuals are not suing on behalf of themselves or others, but directly on behalf of the lagoon. This is not an *actio popularis* in which individuals sue in their own name in defence of the general interest (*vid. supra*).[67]

The "popular procedural representation" allows any individual to claim legal protection on behalf of the natural element. As a result, the protection of the environment in civil justice is maximised. The State loses its monopoly on the protection of the natural environment, thus overcoming the limitations of the current environmental administrative law, which is linked to the necessary action of public authorities. This allows civil society to control the polluting company directly, without having to do so indirectly through the control – or lack of control – exercised over it by the public authorities.

The rights of nature, therefore, have a clear utility. At the end they are a system of environmental protection in the hands of civil society. The care of the environment, which today is attributed exclusively to the public authorities – usually with little incentive or means to act – is shared.[68]

4.3 *Rights of Nature: A Reasonable Alternative* De Lege Ferenda*?*

It is now appropriate to analyse whether, despite the advantages and practical usefulness already examined, the rights of nature are an appropriate way to enhance environmental protection in civil justice *de lege ferenda.*

A closer look reveals that one of the main obstacles to the theory of the rights of nature is the need to identify the natural elements that can be "personified" and to determine the content of their rights. Indeed, there are certain natural elements that constitute an ecosystem in their own: a set of elements that form a unit with a certain entity by itself. This "individuality" could justify their "personification" and the legal protection of their natural

67 CORDÓN MORENO, F., "Legitimación sustantiva, procesal y administrativa para la defensa del Mar Menor personificado como sujeto de Derecho" in *Análisis Gómez-Acebo y Pombo*, October, 2022.

68 The *public enfocement* as it is regulated "implica que cualquier posibilidad de reparación pase por la acción correcta de las Administraciones públicas, cosa que, desafortunadamente, no debería presumirse […] el principio "quien contamina paga" queda supeditado a la actuación de la Administración en todo lo que no sean daños individuales" (GARCÍA ÁLVAREZ, L., *Daños ambientales transnacionales*, *op. cit.*, p. 91).

equilibrium. That is why the first thing that Law 19/2022 does in Article 1 is to define the "biogeographical unit" that is being personified.[69]

A generalisation of the rights of nature would require the identification of different "biogeographical units". This requires, firstly, the establishment of certain scientific criteria for individualisation. And, secondly, to assign legal status to each of them – e.*g.*, to the Sierra de Guadarrama in Madrid (?), the Doñana Natural Park (?) or the Atlantic Islands of Galicia (?). The need to identify the biogeographical units to be personify is a major obstacle to the generalisation of nature rights.

> In these proceedings, should be proven the natural equilibrium of the "biogeographical unit". For example, by determining by means of expert opinions the pH or the eutrophication index of the water in a lagoon to determine whether a particular activity is disturbing the natural balance of the ecosystem.

Also, some problems can also be identified in relation to the procedural representation of the natural element and the limits of *res judicata*.[70] If the litigant is the natural element itself, the dismissal of the claim prevents any other person from bringing another claim with the same subject matter. Therefore, bad faith – *e.g.* concerted action of the plaintiff with the defendant – or technical imperfection of the defence of the procedural representative will ultimately hinder the effective protection of the natural element.

However, the main problem with the theory of the rights of nature is that it is completely unknown in European legal orders. This theory is new in Europe. Its consolidation in the different Member States and in the European legal

69 Article 1 Law 19/2022: "For the purposes of this Law, the Mar Menor basin shall be understood to be made up of: a) The biogeographical unit consisting of a large inclined plane of 1.600 km2 in a north-west-south-east direction, bounded to the north and north-west by the last eastern foothills of the Betic mountain ranges formed by the pre-coastal mountain ranges (Carrascoy, Cabezos del Pericón and Sierra de los Victorias, El Puerto, Los Villares, Columbares and Escalona), and to the south and southwest by coastal mountain ranges (El Algarrobo, Sierra de la Muela, Pelayo, Gorda, Sierra de La Fausilla and the Cartagena-La Unión mining range, with its last foothills at Cape Palos), and including the water basin and its drainage networks (wadis, watercourses, wetlands, crypto-wetlands, etc.). b) All the aquifers (Quaternary, Pliocene, Messinian and Tortonian) that may affect the ecological stability of the coastal lagoon, including the intrusion of Mediterranean seawater" (own translation).

70 GARCÍA-ROSTÁN CALVÍN, G., "Aspectos procesales de la personalidad jurídica del mar menor", *op. cit.*, pp. 331–332.

mentality will necessarily require time and a political consensus at European and national level.

4.4 *Collective Redress as a Tool for Environmental Protection*

One option that would make it possible to strengthen the protection of the environment in civil justice, overcoming the disadvantages identified, is to consider that the enjoyment of an adequate environment is a collective interest protected by the civil courts (Article 45 Spanish Constitution).[71]

The technique of protecting collective interests in civil justice is well-known in European legal orders. It is common for European and national legislators to promote the realisation of certain interests by creating coordinated systems of *public* and *private enforcement.* In this way, individuals become quasi-cooperators of the state in the achievement of certain objectives that are considered socially desirable. This is the idea behind the various collective redress systems in consumer law (Article 54 TRLCU), the defence of fair competition (Article 33.3 Law 3/1991) or advertising law (Article 6.2 Law 34/1988).[72]

The recognition of a collective interest in the protection of the environment enforceable by the civil courts would make it possible, *de lege ferenda*, to strengthen environmental litigation based on instruments already known and used by legal operators throughout Europe. The creation of new mechanisms based on already established figures will facilitate their consolidation and implementation.

> In this context, it is interesting to note the regime of *civil* liability for pure environmental damage – *préjudice écologique* – set out in Articles 1246 *et seq*. of the French Civil Code (FCC). According to it, any person is liable for pure environmental damage and is obliged to repair it (Article 1246 CCF).[73] Actions may be brought by, among others, by associations that

71 Article 45.1 Spanish Constitution: "Everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it" [Translation available at: https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf]. In favor of this option, AVIÑO BELENGUER, D., "Responsabilidad civil por daños al medio ambiente" en CLEMENTE MEORO, M. E. *et al.* (dirs.), *Derecho de daños. Tomo II*, Tirant lo Blanch, Valencia, 2021, pp. 1565–1566.

72 For an exemplary list of those civil collective remedies in the Spanish legal order *vid*., GASCÓN INCHUSTI, F., *Derecho Procesal* Civil, *op. cit.*, p. 177.

73 Under Article 1247 French Civil Code it is considered environmental damage, «une atteinte non négligeable aux éléments ou aux fonctions des écosystèmes ou aux bénéfices collectifs tirés par l'homme de l'environnement».

> have been established for more than 5 years and whose purpose is the protection and defence of the environment (Article 1248 CCF).[74] Among the possible legal remedies, priority is given to reparation *in natura* and, only if this is not possible, can compensation for the damage caused be chosen (Art. 1250 CCF).

Of course, for this technique to be useful, the content of this collective interest should be made as concrete as possible. Particularly, with regard to the prevention and repair of purely environmental damage.

In this respect, this interest could be linked to the Directive and future national law on corporate sustainability due diligence (*vid. supra*). In particular, considering that there is a collective interest in demanding the effectiveness of the *duties on environmental protection* obligations – prevention and reparation – imposed on companies operating in the market.

> In this way, civil environmental protection would benefit from the political impetus that corporate sustainability due diligence has and will have. Enforcing compliance with these obligations through the civil courts would make it possible to ensure the effectiveness of environmental protection obligations (Articles 7 and 8 of the Directive on due diligence).

The legal standing to seek the protection of this collective interest could be attributed to legal persons whose purpose is the protection of the environment – acting in their own name, although in defence of a collective interest – . The judicial enforcement of the obligations and the wide legal standing for seek it would create a powerful system for the protection of the environment in civil justice.

This is a technique that is not currently recognised in our legal system.[75] However, further action by the legislator will be needed, whether it opts for the natural rights theory or the collective redress mechanisms proposed here. If we really want to consolidate new ways of protecting the environment – and not just an anecdotal solution for a particular region – further action will still

74 Article 1248 CCF: «L'action en réparation du préjudice écologique est ouverte à toute personne ayant qualité et intérêt à agir, telle que l'Etat, l'Office français de la biodiversité, les collectivités territoriales et leurs groupements dont le territoire est concerné, ainsi que les établissements publics et les associations agréées ou créées depuis au moins cinq ans à la date d'introduction de l'instance qui ont pour objet la protection de la nature et la défense de l'environnement».

75 In this regard, SALAZAR ORTUÑO, E., *El acceso a la* justicia, *op. cit.*, p. 204.

be needed; and it is reasonable to invest the necessary political impetus and time in those measures that will be most effective.

Thus, although the rights of nature theory is an alternative that strengthens environmental protection, it is not rationally the best option. The need to identify "biogeographical units" and the unfamiliarity of this technique in Europe are real obstacles to its consolidation. It is more efficient in terms of time and political impetus to opt for the collective redress mechanism. *De lege* ferenda, this option presupposes a powerful instrument for the protection of the environment in civil justice that is in line with the legal tradition and mentality in Europe.

5 Conclusion

The rights of nature theory argues that certain natural elements that make up a biogeographical unit – *e.g.* a river, a forest, a jungle or a coral reef – should have legal status and rights: that is, they should be subjects of law. Law 19/2022, which recognises the legal status of the Mar Menor lagoon, is part of this trend.

The rights of nature theory has two main problems. First, there is the need to identify and personify the different biogeographical units that make up the national territory. Secondly, and more importantly, it is a new technique that is still unknown in European legal culture. Its consolidation in the various EU Member States will take time – which we may not have.

It is reasonable to argue that *de lege ferenda* the state should no longer have a monopoly on demanding the reparation of pure environmental damage. To this end, it is necessary to create instruments in the hands of civil society to protect the environment in civil justice. In this sense, the most effective approach is the recognition of a collective interest to enjoy a suitable environment. The content of this right could be integrated, among others, through the duties of care and protection imposed on companies. In this way, civil environmental protection would benefit from the political impetus already given to corporate sustainability due diligence and collective redress.

There is a risk that the rights of nature will remain an anecdotal solution to respond to a particular local problem. That is why we must make use the tools already known and consolidated to strengthen environmental protection. Time is pressing.