This contribution was originally published in:

**Environmental Law for
Transitions to Sustainability**
ISBN 978-1-78068-929-6

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Backes and M. van Rijswijk
(eds.)**

Published in April 2021 by Intersentia
www.intersentia.co.uk

For more information on the book or to purchase

<https://intersentia.com/en/environmental-law-for-transitions-to-sustainability.html>

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RIGHTS OF NATURE AS AN UNLIKELY SAVIOUR FOR THE EU'S THREATENED SPECIES AND HABITATS

A Critical Introduction to a Revolutionary Idea

Hendrik SCHOUKENS

1. WHAT IF?

Imagine one of the last wild hamsters, an EU protected species, wandering around on an empty and pesticide-ridden piece of cropland in Belgium.¹ Or take the case of a young she-wolf, straddling the borders between Belgium, the Netherlands and Germany. Let us assume a male following her all the way into Belgium and the pair having cubs together in spring. Five months later, the male reportedly stopped bringing food to the den; the she-wolf had disappeared. Rumour has it that some hunters agreed to secretly kill the she-wolf and her cubs in order to rid their hunting grounds of 'invaders'. This leaves the male wolf a 'lone wolf'.²

Who should speak up for these 'harmed' species that are strictly protected under Union law? In both instances, our legal order does not allow nature to stand up for its own rights. It is to remain voiceless. Nature does not possess legally enforceable rights, not even moral rights. Although wolves and wild hamsters are protected by the 1992 EU Habitats Directive,³ they can only be indirectly represented in court by environmental organisations or governmental bodies. Yet can one really be serious about the protection of the intrinsic value

¹ See more on this: J. O'Brien, 'Saving the common hamster (*Cricetus cricetus*) from extinction in Alsace (France): potential flagship species conservation or an exercise in futility?' (2015) 26(2) *Hystrix (the Italian Journal of Mammalogy)* 89.

² This is based on actual facts that happened in Flanders. See: *Brussels Times*, 1 October 2019, <https://www.brusselstimes.com/all-news/belgium-all-news/70979/flemish-hunters-organisation-accused-of-killing-wolf-naya-to-sue-for-libel/>.

³ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

of species without granting them explicit substantive rights?⁴ Faced with the underperformance of the existing governance structures,⁵ the obscure idea of granting legal rights to nature has garnered more attention lately, with explicit recognition of rights of nature in numerous jurisdictions, such as New-Zealand⁶ and Ecuador.⁷ With rivers and wider ecosystems being endowed with legal personality and legal rights elsewhere in the world, this chapter critically engages with this novel discourse and explores to what extent it can further the protection of the environment in the European Union. It contemplates the specific role of law in the fundamental transition to a sustainable future, straddling the border between morality, on the one hand, and positive law on the other hand.

2. SYSTEMIC DEFICIENCIES AND RIGHTS OF NATURE AS A NEW NORMATIVE AND MORAL DISCOURSE

The starting point of this analysis is the existing EU environmental legislation, which is the result of many years of growing environmental awareness. Unfortunately, the biodiversity decline in the EU⁸ has not yet been stopped in spite of minor successes in terms of the recovery of certain large predators.⁹ Poor enforcement and a lack of proper implementation can certainly be singled out as the prominent causes of this glaring underperformance.¹⁰ However, a growing number of authors claim the anthropocentric nature of the existing regulatory schemes lies at the heart of their failure.¹¹ Many critical observers would automatically agree that even the much heralded 1992 EU

⁴ S. Emmenegger and A. Tschentscher, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law' (1994) 6 *Georgetown International Environmental Law Review* 545, 571–572.

⁵ See more on this: C. Wood, *Nature's Trust. Environmental Law for a New Ecological Age*, Cambridge University Press, Cambridge 2014.

⁶ A. Hutchison, 'The Whanganui River as a Legal Person' (2014) 39(3) *Alternative Law Journal* 179, <https://doi.org/10.1177/1037969X1403900309>.

⁷ L. Kotze and P.V. Caldzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6(3) *Transnational Environmental Law* 401.

⁸ European Environment Agency, *The European Environment: State and Outlook 2015: Synthesis Report*, 2015.

⁹ See: G. Chapron et al., 'Recovery of large carnivores in Europe's modern human-dominated landscapes' (2014) 346 *Science* 1517.

¹⁰ Milieu Ltd., *Evaluation Study to support the Fitness Check of the Birds and Habitats Directives*, Final Report March 2016.

¹¹ See for instance: C. Cullinan, *Wild Law. A Manifesto for Earth Justice*, Green Books, Cambridge 2011.

Habitats Directive does not explicitly grant legal rights or personhood to endangered species. And although it can have sharp teeth when effectively applied, it appears inherently incapable of halting the exacerbated biodiversity losses in recent times. In part, this is because the 1992 EU Habitats Directive is incapable of reversing the myriad of institutional, legal and policy-related lock-ins that prioritize short-term economic gains over environmental considerations and extinction risks. It still is easier to win elections with the promise of more jobs and economic prosperity than the prospect of saving some species from imminent extinction.

Thus, the question arises who is to speak up for species whose survival is threatened by human actions? As Advocate-General Sharpston put it in the *Trianel* case, 'The fish cannot go to Court.'¹² Action needs to come from stakeholders representing the public interest, such as concerned citizens or, as the case may be, non-governmental organisations (NGOs). Within the framework of the 1998 Aarhus Convention,¹³ environmental NGOs are granted standing in environmental cases so as to ensure a better enforcement of environmental legislation. But environmental NGOs also have to make difficult and tough strategic choices, meaning that not every ecological encroachment can be litigated in court.¹⁴ Concerned citizens are often not granted automatic standing in environmental cases, which might generate certain loopholes in environmental protection. It is therefore not surprising to see a growing number of environmentalists becoming increasingly eager to champion or at least contemplate a more rights-based approach to nature conservation and environmental governance as a whole.¹⁵ Under this novel template, the intrinsic value of ecosystems and nature is acknowledged and placed at the centre of the legal order. In furtherance of this approach, ecosystems are granted legal personhood, meaning that appointed guardians can enforce their substantive rights.¹⁶ Likewise, their right to exist is explicitly recognised in positive law and can be enforced through court actions.¹⁷

¹² This is a quote from the oral hearing in the Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen (intervening)* Opinion of AG Sharpston, [2011] ECR I-03673 ECLI:EU:C:2010:773.

¹³ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, 25 July 1998 ('Aarhus Convention') (1999) 2161 UNTS 447.

¹⁴ See: Wood, above n. 5, pp. 115–117.

¹⁵ See amongst others: D. Boyd, *The Rights of Nature, A Legal Revolution that Could Save The World* (ECW Press, Toronto 2017).

¹⁶ For an overview, see: D. Shelton, 'Nature as a legal person' (2015) *Vertigo –La Revue Electronique en Sciences de L'environnement* (Hors-Série 22), <https://journals.openedition.org/vertigo/16188>.

¹⁷ Ibid.

3. WHERE DOES THE IDEA STEM FROM?

Christopher Stone's ground-breaking article 'Should trees have standing?'¹⁸ is to be regarded as one of the catalysts for the rights of nature movements. To quote his own words, Stone was 'quite seriously proposing that we give legal rights to forests, oceans, rivers and other so-called "natural objects" in the environment – indeed, to the natural environment as a whole'.¹⁹ This was no less than a paradigm shift in the legal discourse back in the 1970s. According to Stone, the concept of legal personhood has to be viewed as one end of a continuum granting an entity certain rights based on its intrinsic value rather than its instrumental or economic value to others. However, the often prevailing Cartesian and dualistic thinking is notable for reducing nature to a mere 'commodity' or a 'machine', ready to be explored by scientists and turned to good use for mankind.²⁰ Even so, it is important to understand that Stone's approach, which was subsequently translated into a plea for 'biotic rights' by Nash,²¹ was that of a lawyer, not that of a philosopher. Stone had to come to terms with the decision of the Ninth Circuit Court of Appeals that had ruled that the Sierra Club Legal Defense Fund lacked legal standing to halt the proposed development of the Mineral King Valley in the Sierra Nevada Mountains by Walt Disney Enterprises, Inc.²² He opined that if the Mineral King Valley had been recognised as a rights holder, it would have been an affected party and the Sierra Club might be authorised to represent it before court.²³

Ultimately, the U.S. Supreme Court was not swayed by Stone's last-minute plea.²⁴ However, Stone still managed to convince the Supreme Court Justice William O. Douglas, who paid extensive lip service to this groundbreaking thesis.²⁵ In turn, Stone further fleshed out his theory. He argued that since streams and species have no rights under the terms of the existing normative framework, they do not have standing. Second, they also lack strict substantive protection in the face of significant destruction. And even if they are indirectly protected through a court ruling, there appears to be no certainty that they will ultimately be the beneficiary of a favourable judicial decision.²⁶ In order to remedy these inherent flaws of the existing legal system, Stone proposed a radical new guardianship approach, which would not only enable

¹⁸ C.D. Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects' (1972) 45 *Southern Californian Law Review* 450.

¹⁹ *Ibid.* p. 456.

²⁰ *Ibid.* pp. 17–18.

²¹ J. Nash, 'The case for Biotic Rights' (1993) 18 *Yale Journal of International Law* 235.

²² *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), *aff'd sub nom. Sierra Club v. Morton*, 405 U.S. 727 (1972).

²³ Stone, above n. 18, pp. 470–475.

²⁴ *Sierra Club v. Morton*, 405 U.S. 727 (1972).

²⁵ *Ibid.*, at 741–742 (Douglas, J., dissenting).

²⁶ Stone, above n. 18, pp. 480–481.

guardians to initiate lawsuits on behalf of threatened species or ecosystems, but also would endow the latter with inherent rights, including the right to exist.²⁷ As a result, private citizens are also afforded the possibility to enforce the legal protection duties linked to ecosystems.

4. A LOGICAL COUNTERMOVEMENT?

Stone's work draws on previous insights from influential thinkers like Charles Darwin. In his ground-breaking work, Darwin noted that the history of man's moral development is to be regarded as a continued expansion of his 'social instincts and sympathies'.²⁸ In a similar vein, Charles Darwin observed the difference between humans and other animals to be one 'of degree, not of kind'.²⁹ Likewise, Aldo Leopold's landmark work 'The Land Ethic', which contemplated 'the right to continued existence' of not only animals and plants but waters and soils as well, clearly impacted Stone's writing.³⁰ Reference should also be made to the Australian philosopher Tom Regan, who explicitly advocated the granting of certain substantive rights to animals, including the fundamental right to be treated with the respect that, as possessors of inherent value, they are due as a matter of strict justice.³¹

In the past decades we have also noted a sharp rise in the so-called 'Earth Jurisprudence' movement. One of the most vocal champions of this new environmental movement, Thomas Berry, submitted that 'there can be no sustainable future, even for the modern industrial world, unless the ... inherent rights of the natural world are recognized as having legal status'.³² According to his approach, mankind is merely a part of nature rather than outside of it. This approach was subsequently refined by authors like Cormac Cullinan.³³

Against this backdrop, it is not surprising to see rights of nature specifically emerge in jurisdictions where indigenous people like the Maori and Native Americans are granted more explicit legal recognition.³⁴ One of the first laws in which legal personhood was granted to a river was passed in New Zealand, when the New Zealand government decided in 2017 to promulgate a bill recognising

²⁷ Ibid. pp. 471–472.

²⁸ C. Darwin, *The Descent of Man and Selection in Relation to Sex*, revised edn. American Publishers Corp, New York 1874, p. 41.

²⁹ Ibid. at 98.

³⁰ A. Leopold, 'The Land Ethic' in Leopold, *A Sand County Almanac*, Oxford University Press, New York 1949, pp. 204–211.

³¹ T. Regan, *The Case for Animal Rights*, University of California Press, Berkeley CA 1983 (Updated 2004), pp. 328–329.

³² T. Berry, *The Great Work: Our Way into the Future*, Bell Tower, 1999, pp. 60–61.

³³ Cullinan, above n. 11, pp. 100–110.

³⁴ E.C. Hsao, 'Whanganui River Agreement – Indigenous Rights and Rights of Nature' (2012) 42(6) *Environmental Policy and Law* 371.

the Whanganui River as holding rights and responsibilities equivalent to a person.³⁵ In the provisions of the law, the river's ecosystem is recognised as a spiritual living being.³⁶ A similar evolution has been noted in Ecuador, where from 2008 onwards Article 71 of the redrafted constitution states that Mother Nature not only has the right to exist but also to have the 'maintenance and regeneration of its life cycles, structures, functions, and evolutionary processes' respected.³⁷ Rights of nature have recently also manifested themselves in the United States and Columbia, where, outside the specific context of the struggle of indigenous peoples for more recognition and political rights,³⁸ the clear-cut link between rights of nature and non-Western approaches to nature cannot be denied.

5. WHAT DOES IT EXACTLY ENTAIL?

In recent years, Earth Jurisprudence has been translated into positive law in an increasing number of jurisdictions, bridging the gap between moral and legal rights. The new normative framework of granting legal personhood has yielded different manifestations of legal rights of nature, which are succinctly presented below.³⁹

5.1. SCOPE OF THE PERSONHOOD?

When lawmakers or judges decide to grant legal personhood to nature, they usually opt to conceptualise nature in a very broad manner. For instance, the Ecuadorian Constitution decided to grant rights to Pacha Mama, 'where life is reproduced and occurs'. No specific delimitation of nature is put forward here.⁴⁰ However, in most other jurisdictions, parliaments as well as national courts have opted to grant certain legal rights to specific ecosystems. In New Zealand, for instance, this was the case for the Whanganui River (Te Awa Tupua Act) and the forest Te Urewera (Te Urewera Act).⁴¹ It is notable that none of the recently adopted legislation contemplates an explicit recognition of the rights of particular endangered species, although some lawsuits have already been

³⁵ Te Awa Tupua Act 2017, Public Act, no. 71.

³⁶ Ibid, section 12.

³⁷ Ecuadorian Constitution (as revised in 2008). Art. 71.

³⁸ For an overview, see: C.M. Kauffman and P.L. Martin, 'Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand' (2018) 18(4) *Global Environmental Politics* 43, 53–55.

³⁹ Ibid. pp. 48–52.

⁴⁰ Ibid. 49.

⁴¹ E.L. O'Donnell and J. Talbot-Jones, 'Creating legal rights for rivers: lessons from Australia, New Zealand, and India' (2018) 23(1) *Ecology and Society* 7.

initiated on behalf of an endangered species.⁴² As for the lawsuits initiated on behalf of captive chimpanzees and killer whales, they have received a non-favourable appraisal by the U.S. courts until now.⁴³ In Argentina, similar claims related to animals held in captivity received a more positive treatment,⁴⁴ and an Indian court recently upheld that 'like humans, animals also have natural rights which ought to be recognized'.⁴⁵

5.2. WHAT TYPE OF LEGAL RIGHTS ARE RECOGNISED?

The next question that arises is which substantive rights are to be granted to nature. As of today, a diverse picture emerges. The Ecuadorian Constitution, for instance, shows a remarkably progressive approach, granting nature the right to exist, to maintain its integrity as an ecosystem, and to regenerate 'its life cycles, structure, functions and evolutionary processes'.⁴⁶ In addition, nature also has the right to be restored.⁴⁷ Interestingly, some U.S. ordinances go one step further and explicitly recognise the right of nature to flourish,⁴⁸ while the legislation in New Zealand basically restricts itself to recognising said ecosystems as legal persons with 'all the rights, powers, duties and liabilities of a legal person'.⁴⁹

5.3. STANDING AND GUARDIANSHIP?

A last point to be addressed is the issue of standing, which was central to Stone's plea for granting rights to nature. In jurisdictions like Ecuador, everyone can and should defend the environment.⁵⁰ This could be framed as an '*actio popularis*' approach, while in other jurisdictions specific guardians are appointed, either

⁴² See this case brought by Greenpeace in the Supreme Court of Argentina: <https://www.theguardian.com/environment/2019/jul/19/jaguar-argentina-legal-rights-gran-chaco-endangered>.

⁴³ For an overview, see: A. Staker, 'Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals' (2017) 6(3) *Transnational Environmental Law* 485.

⁴⁴ City Court of Buenos Aires (21 October 2015). 'Argentinian court decides if keeping orangutan in zoo is a human rights violation', *The Independent*, 15 May 2015, <https://www.independent.co.uk/news/world/americas/argentinian-court-decides-if-keeping-orangutan-zoo-human-rights-violation-10252010.html>.

⁴⁵ Islamabad High Court (21 May 2020). <https://www.24newshd.tv/21-May-2020/Elephant-wins-case-in-islamabad-high-court>.

⁴⁶ Ecuadorian Constitution, Article 71.

⁴⁷ Ibid. Article 72.

⁴⁸ Kaufmann and Martin, above n. 38, pp. 49–50.

⁴⁹ Ibid.

⁵⁰ Ecuadorian Constitution, Article 71.

by the court or the legislation. In New Zealand a mixed guardianship approach prevailed. For instance, the rights of the river Te Awa Tupua are to be defended by representatives both of the Maori communities and of the New Zealand government.⁵¹

5.4. HIERARCHY OF NORMS AND NATURE?

Recognising the rights of nature does not imply that these rights will automatically prevail. Evidently, the inclusion of rights of nature in the constitutional legal order will enhance its legal relevance. This is the case in Ecuador, where more recent case-law has illustrated the transversal character of the rights of nature, which also allows them to override property rights in some instances. Even so, this jurisprudence is still in flux.⁵² At the other end of the spectrum, New Zealand's Te Awa Tupua Act seems to underscore the systemic premise it is based on: the river now enjoys statutory personhood and can no longer be privatised for private economic interests. However, this has not yet led to a transfer of the existing property rights in the riverbed.

6. THE BROADER LEGAL-PHILOSOPHICAL DEBATE

It is fair to say that Stone's ideas did not pass unnoticed. Stone himself proactively anticipated some of the predictable criticism that would befall him.

Throughout legal history, each successive extension of rights to some new entity has been ... a bit unthinkable. We are inclined to suppose the rightlessness of rightless 'things' to be a decree of Nature, not a legal convention acting in support of some status quo.⁵³

Yet how should we appraise the most common and persistent objections?

6.1. A SOCIAL CONTRACT VERSUS CONTRAT NATUREL?

An often recurring argument is that nonhumans are not part of the social contract that is underpinning our society. For instance, when dealing with a claim filed

⁵¹ See for instance: Te Urewera Act 2014, Public Act, no. 51, section 21.

⁵² For a detailed analysis see: C.M. Kaufmann and P.M. Martin, 'Can Rights of Nature Make Development More Sustainable? Why some Ecuadorian Lawsuits Succeed and Others Fail' (2017) 92 *World Development* 130.

⁵³ Stone, above n. 18, at 453.

on behalf of a chimpanzee kept in captivity, the New York Supreme Court held that 'legal personhood has consistently been defined in terms of both rights and duties'. The Court finally held that it was the chimpanzee's 'incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees ... legal rights'.⁵⁴ This train of thought is reminiscent of Rawls' contractarianism, which is famously highlighted in his magnum opus *A Theory of Justice*.⁵⁵ As animals are merely 'moral patients', Rawls posited that 'there are no requirements at all with regard to them'.⁵⁶

Although this skeptical stance appears persuasive, it is certainly not flawless either. For instance, human moral patients, such as incompetents, also lack the capacity to express their will.⁵⁷ Even if incompetents or, for instance, small children, have no direct duties towards us, this does not entail that they are rightless. Moreover, recent research⁵⁸ has given more credit to Lovelock's Gaia theory, which holds that the combined physical, chemical and biological components of the earth system regulate the planet so as to maintain it as a habitat for life.⁵⁹ In several studies, it has now been acknowledged that the weak version of the Gaia theory – which states that there are close links between the evolution of life and the environment, and that biology affects the physical and chemical environment – is credible. But on a more fundamental level, one should note that social contract arguments, which were put forward during the Enlightenment by political philosophers like Locke, Hobbes and Rousseau, typically posit that individuals consent, either explicitly or tacitly, to surrender some of their freedoms and to submit to the authority (of the ruler, or to the decision of a majority) in exchange for protection of their remaining individual rights or maintenance of the social order. In a manner similar to the social contract theorists, the French philosopher Michel Serres suggested that mankind should sign a 'natural contract' with the earth to bring balance and reciprocity to our relations with the planet that gives us life.⁶⁰ Thus, it remains perfectly possible to rethink the existing social contract theories of emerging ecological insights, which mitigate the anthropocentric underpinnings of our existing normative frameworks and lay more emphasis on the interdependence of humans and nature. Differently put, revisiting Serres' approach, would basically come down to swapping an exclusively human-centred fictitious social contract for a more ecocentric understanding of our interdependence with nature.

⁵⁴ *The Nonhuman Rights Project Inc., on behalf of Tommy v. Patrick C. Lavery*, N.Y. Supp. Ct., Appellate Division, Third Judicial Dept, 4 December 2014.

⁵⁵ J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge MA, 1971.

⁵⁶ *Ibid.* p. 512.

⁵⁷ Stone, above n. 18, pp. 451–452.

⁵⁸ See: I. Enting, 'Gaia theory: is it science yet?', <https://theconversation.com/gaia-theory-is-it-science-yet-4901>.

⁵⁹ J.E. Lovelock, 'Gaia as seen through the atmosphere' (1972) 6(8) *Atmospheric Environment* 579.

⁶⁰ M. Serres, *Le contrat naturel*, Champs Essais, Paris 1990 (2020).

6.2. WHY RIGHTS?

As regards the usage of the concept of 'rights', Rolston posited that 'the concept of rights that has worked so well to protect human dignity is a hallmark of recent cultural progress. The rights model, however, proves troublesome when used to protect the biological world'.⁶¹ While powerful at first sight, the criticism does not necessarily hold up under scrutiny. Irrespective of the fact that some human beings are 'mere' moral patients, which prevents them from expressing their own desires and beliefs, it is also vital to reiterate that there are two competing theories underlying the concept of subjecthood in law. On the one hand, supporters of the so-called will or choice theories assume that rights are the protection of the rights-holder's free will, freedom of choice or a range of possibilities to make decisions about the self.⁶² Yet champions of the so-called interest theories, such as Joseph Raz, approach rights as interests that the lawmakers regard as deserving of legal protection against third parties.⁶³ So, if we decide to grant legal rights to corporations and incompetents, why not do the same for rivers and animals?

Along similar lines, the notion of rights is closely related to the concept of moral responsibility. The Kantian principle 'ought implies can', presupposes that morality is based upon the premise that you are capable of choosing what to do. Enter the notion of free will. Yuval Noah Harari held that

[h]umans certainly have a will – but it isn't free. You cannot decide what desires you have. You don't decide to be introvert or extrovert, easy-going or anxious, gay or straight. Humans make choices – but they are never independent choices. Every choice depends on a lot of biological, social and personal conditions that you cannot determine for yourself.⁶⁴

If we accept that our morality is rooted more in our genes than in our rational thought, then we ought to question the human exceptionalism underpinning much of the existing legal schemes.⁶⁵ As Mark Rowlands puts it: 'Our (human) morality is rooted in our biology rather than our intellect'.⁶⁶ Against this backdrop, the idea of explicitly 'granting' certain rights to nature – instead of human duties towards nature – no longer appears off-chart.

⁶¹ H. Rolston, 'Rights and Responsibilities on the Home Planet' (1993) 18 *Yale Journal of International Law* 251.

⁶² P. Graham, 'The Will Theory of Rights: A Defence' (1996) 15(3) *Law and Philosophy* 257.

⁶³ J. Raz, *The Morality of Freedom*, Clarendon Press, Oxford 1986, pp. 178–182.

⁶⁴ Y.N. Harari, 'The myth of free will', *The Guardian* (14 September 2018), <https://www.theguardian.com/books/2018/sep/14/yuval-noah-harari-the-new-threat-to-liberal-democracy>.

⁶⁵ T. Pietrzykowski, *Personhood Beyond Humanism. Animals, Chimeras, Autonomous Agents and the Law*, Springer, 2018, p. 76.

⁶⁶ M. Rowlands, 'The kindness of beasts. Dogs rescue their friends and elephants care for injured kin – humans have no monopoly on moral behaviour', <https://aeon.co/essays/if-a-lion-did-a-good-deed-would-we-understand-it>.

6.3. WHAT IS PRECISELY IN NATURE'S INTEREST?

In line with the above objections, some authors, like Sagoff, mocked Stone's usage of rights by stating that it is simply impossible to know what nature's interest is. 'Why', Sagoff stated, 'wouldn't Mineral King (mountain) want to host a ski resort after doing nothing for a billion years?'.⁶⁷ This refutation, even if it appears plausible at first sight, also merits further consideration. For one, when focusing on animals, recent research has indeed underpinned the premise that animals do have certain beliefs and desires. Not only chimpanzees and other primates, but also elephants, killer whales and even octopuses display various signs of some intelligent behaviour.⁶⁸ Yet also with respect to ecosystems, our scientific understanding has significantly altered over the past years.⁶⁹ Even on a more global scale, such as ecosystems, the growing body of ecological research can be used to understand what nature's interest might exactly be.

6.4. THE ULTIMATE CONQUEST OF NATURE?

In line with John Livingston, one could point out a certain paradox when endowing nature with legal rights: 'To extend or bestow or recognize rights in nature would be, in effect, to domesticate all of nature – to subsume it into the human political apparatus'.⁷⁰ Along similar lines, one might contend that the delineation between nature and culture remains blurry and arbitrary at best. Yet this argument only goes so far, as was also highlighted by Peter Burdon.⁷¹ Ultimately, human beings are inevitably limited to using language to describe the reality they are inhabiting. It cannot be contested that 'granting' rights to nature is to be seen as a major step towards a less anthropocentric approach to environmental governance. And in a certain way, it is also a more consequential approach. When NGOs file lawsuits to save protected species, such as wolves or hamsters, what really is at stake is the viewpoint of these animals?⁷² In essence, such lawsuits focus on the ecological requirements of the endangered species, not on the statutory objectives or property interests of the NGO at issue.

⁶⁷ M. Sagoff, 'On Preserving the Natural Environment' (1974) 84 *Yale Law Journal* 221, 221–222.

⁶⁸ For an overview, see: F. De Waal, *Are We Smart Enough to Know How Smart Animals Are?*, W.W. Norton and Company, New York 2017.

⁶⁹ See: E. Dardenne, 'From Jeremy Bentham to Peter Singer' (2010) 7 *Revue d'études benthamiennes*, DOI: 10.4000/etudes-benthamiennes.204.

⁷⁰ J. Livingston, *Rogue Primate: Exploration of Human Domestication*, Key Porter Books, Toronto 1994, pp. 159–161.

⁷¹ P. Burdon, 'The Rights of Nature: Reconsidered' (2010) 49 *Australian Humanities Review* 69.

⁷² C.D. Stone, 'Response to commentators' (2012) 3(Special Issue) *Journal of Human Rights and the Environment* 100, 109.

7. DO WE REALLY NEED IT IN THE EU?

As alluded to in the introduction, nature has not been vested with explicit legal rights in the EU legal order. At least, that is the common believe of most scholars. As of today, for instance, no explicit reference to rights of nature can be found in primary EU law. Of course, this does not mean that the EU legal order does not lay down certain human protection duties towards nature. Equally, it might be conceivable to argue that certain implicit legal rights are recognised in the EU legal order. Often the distinction between duties-based protection and rights-based approaches is not clear-cut. For instance, Article 3 of the Treaty on the European Union (TEU) puts ‘sustainable development’ at the centre of the EU’s internal market, specifying that the ‘internal market ... shall work for the sustainable development of Europe based on balanced economic growth ... and a high level of protection and improvement of the quality of the environment’. And although the practical relevance of these norms in lawsuits remains fairly limited,⁷³ we should certainly not lose sight of the broader picture. This has prompted some scholars, such as Julien Bétaille, to argue that EU environmental law is less anthropocentric than it used to be.⁷⁴ In this section, I argue that while this hypothesis indeed has some merits, it should not lead us to dismiss the rights-based approach altogether.

7.1. THE EU AS ENVIRONMENTAL FRONTRUNNER

Not seldomly, the EU prides itself on its remarkable track record of environmental legislation. At first glance, this self-praise seems justified; from the implementation of the first EU environmental action programme to the adoption of several progressive environmental directives like the Wild Birds Directive.⁷⁵ Whereas the EU’s protected nature has not been explicitly vested with the right to exist, the environmental principles laid down in the TFEU as well as secondary legislation have certainly strengthened environmental protection over the past decades. It is evidently impossible to treat all relevant pieces of EU environmental legislation in the context of this chapter.⁷⁶ Reference has to be made to the 2000 EU’s Water Framework Directive,⁷⁷

⁷³ J. Verschuuren, ‘The growing significance of the principle of sustainable development as a legal norm’ in D. Fisher (ed.), *Fundamental Concepts of Environmental Law*, Edward Elgar, Cheltenham 2016, pp. 292–293.

⁷⁴ J. Bétaille, ‘Rights of Nature: why it might (not) save the world’ (2019) 16(1) *JEEPL (Journal for European Environmental and Planning Law)* 35, 43–44.

⁷⁵ Council Directive 79/409/EEC on the conservation of wild birds [1979] OJ L103/1 (further referred to as the ‘Birds Directive’).

⁷⁶ See for a more detailed analysis of the applicable rules in the field of water management: L. Krämer, ‘Rights of nature and their implementation’ (2020) 17(1) *JEEPL* 47.

⁷⁷ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L371/1.

which compelled the Member States to achieve good qualitative and quantitative status of all water bodies (including marine waters up to one nautical mile from shore) by 2015. No legal personhood is granted to rivers, yet the legislation contains several stringent principles, such as a standstill obligation to be observed when granting permits.⁷⁸ A recent attempt to apply the 'the polluter pays' principle is offered by the 2014 Environmental Liability Directive, which also requires preventive and remedial action in the context of 'pure' ecological damage,⁷⁹ and thus at least partly implements one of Stone's primary suggestions.

Lastly, and perhaps most importantly, the EU has adopted two pieces of legislation explicitly aimed at halting the biodiversity loss within its territory. The aforementioned Birds Directive, which was later complemented by the more cross-cutting Habitats Directive, not only explicitly protected hundreds of endangered species within the EU but also obliged the Member States to designate the most ecologically valuable parts of their territory as protected sites (better known as 'Natura 2000 sites'). Again, these directives do not explicitly grant substantive 'legal rights', such as the right to exist, to certain species or ecosystems; rather, they put forward a more traditional governmental approach, whereby the competent authorities at the national level are tasked to designate the most vulnerable sites on their territory and, subsequently, to implement stricter permitting policies and conservation schemes aimed at the recovery of these sites. A similar approach surfaces with respect to strictly protected species, such as the wolves and hamsters that were mentioned in the introduction to this contribution.

7.2. PROGRESSIVE CASE-LAW DEVELOPMENTS TOWARDS 'EARTH JURISPRUDENCE'?

In the jurisprudence of the CJEU some traces of eco-centrism are also noticeable. Three specific progressive trends can be identified. *First*, since 2008 the CJEU has consistently spawned very progressive jurisprudence when it comes to the standing of environmental NGOs before national courts. This led the CJEU, for instance, to grant standing to a Slovakian NGO that was challenging the legality of hunting regulations regarding protected Brown bears.⁸⁰ In doing so, the CJEU highlighted that when appraising the *locus standi* of NGOs, national judges are to also accept claims that are not based on economic or

⁷⁸ Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland e.V. v. Bundesrepublik Deutschland*, ECLI:EU:C:2015:433.

⁷⁹ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.

⁸⁰ Case C-240/09, *Lesoochrannárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky I*, ECLI:EU:C:2011:125, para. 50.

property-related arguments.⁸¹ Of course, these NGOs still need to demonstrate that the legal action squarely falls within the scope of their statutory provisions. Interestingly, NGOs can partly rely on the European Commission, which does not shy away from taking Member States to the EU courts whenever they implement management strategies that blatantly endanger the survival of certain habitats and species, as was recently demonstrated by the halting of the illegal logging in the Bialowieza Forest.⁸² As a result, one might submit that both the environmental NGOs and the EU Commission can partly act as guardian of endangered EU protected nature.

Second, the CJEU recently also underlined that the EU protected habitats and species are to be approached as the EU's common heritage, thereby at least implicitly underscoring their intrinsic value.⁸³ Most prominently, the CJEU rejected the acceptability of destructive forestry practices in the vulnerable Bialowieza Forest in Poland with reference to Article 6(3) of the Habitats Directive, which prevents national authorities from authorising plans and/or projects that put in jeopardy the integrity of the protected site.⁸⁴ Irreparable damage cannot be tolerated, unless the strict derogation clause is applied.⁸⁵ In recent jurisprudence, the CJEU consistently underlined the prevalence of the precautionary principle in this respect, prompting national authorities to apply the '*in dubio pro natura*' rationale in the context of restorative actions.⁸⁶ Regarding protected species, the CJEU has persistently broadened the substantive scope of the protection duties included in Article 12(1) of the Habitats Directive.⁸⁷ Bypassing these rules is only possible by way of derogation. And these exceptions are to be interpreted narrowly.⁸⁸ Even when applying the derogation clauses, for instance in the specific context of wolf culling, the CJEU has underlined the importance of science-based decision-making.⁸⁹ These jurisprudential evolutions all contribute to a more encompassing protection of EU protected species, while also leaving room for taking into consideration the intrinsic value of unique ecosystems or even individual specimens of threatened species, such as Gray wolves.

⁸¹ Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen (intervening)* [2011] ECR I-03673, ECLI:EU:C:2011:289, para. 46.

⁸² Case C-441/17R, *Commission v. Poland*, ECLI:EU:C:2017:877.

⁸³ Case C-441/17, *Commission v. Poland*, ECLI:EU:C:2018:255, para. 208.

⁸⁴ Case C-258/11, *Peter Sweetman and Others v An Bord Pleanála*, ECLI:EU:C:2013:220, para. 46.

⁸⁵ *Ibid.*

⁸⁶ Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* ECLI:EU:C:2004:482, para. 56–59.

⁸⁷ Case C-183/05 *Commission v. Ireland* [2007] ECR I-137, paras. 15–15.

⁸⁸ Case C-6/04 *Commission v. United Kingdom* ECLI:EU:C:2005:626, para. 111.

⁸⁹ Case C-674/17 *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo – Kainuu ry* ECLI:EU:C:2019:851, para. 67.

Third, recent case-law developments have also highlighted the restoration imperative contained in several EU environmental directives, such as the EU Habitats Directive, which also hints towards a more ecocentric understanding of the existing environmental protection statutes. In its recent case-law, for instance, the CJEU seems to prioritise restoration of strictly protected species, such as wild hamsters, whose populations have dwindled over the past decades.⁹⁰ Likewise, the CJEU clarified that Member States are equally obliged to designate sites which at present harbour relatively little actual biodiversity but which possess important restoration features.⁹¹ More importantly, the continuation of ongoing and authorised activities in such areas can be challenged through Article 6(2) of the Habitats Directive when it conflicts with the restoration imperative.⁹²

7.3. MAJOR SUBSTANTIVE SHORTCOMINGS?

In spite of all the above-mentioned praise and progressive jurisprudence, the EU legal order still falls short of many of the self-evident substantive underpinnings that ought to prevail in a jurisdiction where rights of nature are to be approached as constitutional bedrock. For one, it is a well-known fact that the prevailing case-law of the CJEU with respect to the admissibility requirements for direct actions against EU acts precludes public interest litigation at the EU level.⁹³ This is not a merely theoretical issue, since many of the EU decisions regarding pesticides, GMOs and fisheries have an important bearing on European ecosystems.⁹⁴ One of the more fundamental shortcomings in terms of substantive protection is the apparent lack of an imperative to preserve ecological integrity in the EU treaties, alongside the notable absence of an overarching no-net-loss instrument with binding effects in secondary EU law. It is true that the EU Nature Directives have helped in protecting large swaths of vulnerable habitats and species across the European continent. Even so, the existing protection regime prioritises the most endangered sites and species, leaving several less 'charismatic' species unprotected'. Recent research has revealed that Brown bears, wolves, bitterns and Eurasian lynxes receive

⁹⁰ Case C-383/09, *Commission v. Finland* [2011] ECR I-4713.

⁹¹ Case C-281/16, *Vereniging Hoekschewaards Landschap v. Staatssecretaris van Economische Zaken* ECLI:EU:C:2017:774.

⁹² Case C-399/14, *Grüne Liga Sachsen e.V. and Others v Freistaat Sachsen* ECLI:EU:C:2016:10 paras. 40–46.

⁹³ See more extensively: H. Schoukens, 'Articles 9(3) and 9(4) of the Aarhus Convention and Access to Justice before EU Courts in Environmental Cases: Balancing On or Over the Edge of Non-Compliance?' (2016) *European Energy and Environmental Law Review* 178.

⁹⁴ Communication ACCC/C/2008/32 (Part II) (European Union), adopted on 17 March 2017.

almost the same amount as all invertebrates put together.⁹⁵ Moreover, the derogation clauses that are present in the majority of the above-mentioned EU environmental directives leave ample room for anthropocentrism to prevail ‘via the backdoor’. In addition, endowing all nature in the EU with legal personhood would evidently also require a systemic recalibration of nature protection in terms of territorial scope. Whereas the recognition of the legal rights of certain ecosystems that already have been accorded a legal status under the 1992 EU Habitats Directive, still appears to be in line with a more progressive understanding of EU law, this would imply a genuine paradigm shift in property law when also applied in urban zones and agricultural sites. This conclusion is exacerbated by the lack of an effective integration of ecological integrity as a seminal yardstick in the other sectoral policies of the EU, such as fisheries and agriculture.⁹⁶ If the existing environmental protection duties are already poorly applied within the context of, for instance, agricultural policies, what then to expect from a more systemic shift to legal personhood for nature in this context?

8. HOW TO OPERATIONALISE RIGHTS OF NATURE IN THE EU?

As of today, it remains delusional to think that the mere introduction of rights of nature in the EU legal order will fundamentally bring about an ‘ecological revolution’. This scepticism is backed up by a recent analysis of the application of rights of nature in Ecuador, which seems to attest that explicitly recognising rights of nature cannot lead to a transformative shift towards more sustainable practices in an economic growth-based society.⁹⁷ However, if we are really serious about a shift towards better environmental performance, more systemic changes appear inevitable. Even the European Environment Agency had to recognise that a ‘recalibration of the existing policy approaches’ is necessary in order to allow a genuinely green economy.⁹⁸ And therefore, as the final part of this analysis, I will briefly assess the options left to operationalise a more rights-based approach within the context of the European Union.

⁹⁵ S. Mammola et al. ‘Towards a taxonomically unbiased European Union biodiversity strategy for 2030’ (2020) *Proc. R. Soc. B.* 2166.

⁹⁶ See: P. Barkham, ‘Europe faces “biodiversity oblivion” after collapse in French birds, experts warn’, *The Guardian*, 21 March 2018 (<https://www.theguardian.com/environment/2018/mar/21/europe-faces-biodiversity-oblivion-after-collapse-in-french-bird-populations>).

⁹⁷ Kaufmann and Martin, above n. 52.

⁹⁸ European Environment Agency, *The European Environment: State and Outlook 2015: Synthesis Report*, 2015, p. 155.

8.1. THE TEMPTING YET UNCONVINCING SOLUTION?

At first glance, one of the most obvious pathways to do away with the lack of explicit recognition of nature's rights in the EU is to pass an EU Directive which explicitly recognises the legal rights of all ecosystems within the EU. It is therefore no surprise to see the charitable organisation called 'Nature's Rights' advocating a new directive in this regard.⁹⁹ The draft proposal explicitly grants nature substantive and procedural rights. Yet, a more thorough analysis seems to curb the initial enthusiasm. Not only is it very unlikely that this directive will be adopted any time soon by the European Parliament and Council, it also gives rise to some more fundamental legal obstacles that are to be addressed. For one, secondary legislation aimed at revising the dualism between nature and Mankind that is certainly implicitly present in the EU treaties will sooner or later come into conflict with the EU constitutional order. One cannot ponder the recognition of intrinsic rights of nature without revising seminal concepts like the (human) right to property, to give but one example. Likewise, recognising rights of ecosystems would also necessitate the revision of many other EU directives.

8.2. THE LONG YET UNREALISTIC ROAD?

An alternative route, which almost automatically flows from the analysis above, assumes that the operationalisation of rights of nature requires their inclusion in the EU's constitutional order. This taps into the emerging field of environmental constitutionalism, which aims to effectively cure the current problem of fragmentation of environmental law. This approach seems more logical, since it would highlight the interdependency between the internal market, the human values upon which the EU legal order is based and the environment. As of today, however, the cumbersome prospect of initiating a lengthy and complex treaty review to introduce rights of nature within the EU's constitutional order seems to severely diminish the likely success of this 'constitutional' scenario. Even when encompassed in the context of a more general treaty revision, the question remains whether enough political support will be found for the substantive shift towards the recognition of rights of nature. Of course, this leaves the option of an implicit recognition of the legal rights of certain ecosystems by the EU constitutional order unaddressed.

8.3. MORE PRAGMATIC PATHWAYS?

As the two options dealt with above do not present themselves as a realistic pathway, the question remains whether there may be more pragmatic solutions

⁹⁹ See <https://www.citizensforeurope.eu/organisation/rights-of-nature-europe>.

for operationalizing a more rights-based approach to EU environmental law in the short run. And to a certain extent, there are. Especially when taking into account a more Hohfeldian understanding of the concept of 'rights', which focuses more on legal relationships, additional room for recalibration becomes available.¹⁰⁰ In Hohfeldian terms, a nature protection framework may include a duty to refrain from harming a species. Another way to understand this limitation would be to say species have a right to their habitat and a right not to be harmed. As hinted at above, a clear case can be made for the EU Nature Directives to already grant certain habitats and species a 'right', or, as Stone puts it, 'an interest than can be infringed'.¹⁰¹ Zooming in on the above-mentioned strictly protected species, such as Gray wolves or European hamsters, Article 12(1) of the Habitats Directive basically lays down a list of negative and positive duties towards protected species. This raises the question whether one could not try to reframe these duties as 'rights' owned by species. For instance, the duty not to kill wolves, as put forward in Article 12(1)(a) of the Habitats Directive, might be reframed as a 'right to life' endowed to the species. Similarly, the protection of certain parts of the habitat of protected species, such as the burrows of wild hamsters, grants these species a certain property right.¹⁰² At face value, this reinterpretation of the existing rights appears farfetched. Yet when one puts forward a prohibition on killing certain species, one basically creates a positive duty for the government to protect endangered species from harmful actions by third parties.¹⁰³ Likewise, every time authorities decide to protect the burrows or dens of a species, one basically grants it a proto-property right.¹⁰⁴ And even if, as stated above, the rights granted to the said species are not absolute, they still remain very potent precursors of environmental protection. Recognising that certain endangered species possess some kind of property rights would evidently oblige us humans to refrain from deliberate interference with their habitats. But is that not exactly what we are already obliged to do, at least when applying the strict protection schemes included in EU law?¹⁰⁵

One possible pathway to further the rights-based approach to nature would consist in bringing more cases forward in the interest and on behalf of endangered species under EU law. This is not as novel as it seems: several lawsuits have already been initiated in the United States with endangered

¹⁰⁰ W.N. Hohfeld, 'Some Fundamental Concepts as Applied in Legal Reasoning' (1913) *Yale Law Journal* 16.

¹⁰¹ C.D. Stone, *Should Trees Have Standing? Law, Morality and the Environment*, Oxford University Press, New York 2010, p. 53.

¹⁰² See more broadly on the topic of animal property rights: K. Bradshaw, 'Animal Property Rights' (2018) 89 *University of Colorado Law Review* 810.

¹⁰³ Stone, above n. 99, p. 169.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

species as plaintiffs, alleging failures to protect their habitat as required under the Endangered Species Act (ESA). In the renowned *Palila* case, the Ninth Circuit Court ruled that the Palila bird 'has legal status and wings its way into the federal court as a plaintiff in its own right'.¹⁰⁶ Similar symbolic victories were scored in subsequent cases, including legal proceedings regarding the Northern Spotted Owl.¹⁰⁷ In all these cases standing was granted for the endangered species. However, it should be pointed out that in none of these cases was the species the sole plaintiff. And although this case law was subsequently revisited in other jurisprudence,¹⁰⁸ it has certainly hit a nerve amongst US courts.

The afore-mentioned litigation strategy has remained largely unexplored in the EU. As of today, however, the EU treaties do not include an outright prohibition on the vesting of legal personhood in non-human objects. One might thus claim that EU law as such does not necessarily bar lawsuits on behalf of endangered species. In any event, environmental protection is treated as a shared competence within the EU legal framework. In this respect, one might therefore argue that national courts and/or national legislation are still allowed to grant legal rights to nature. Or, at the very least, they might refer the matter to the CJEU through a preliminary reference, which grants the EU judges the opportunity to shed their light on this very topical issue.

9. CONCLUSION

On a concluding note, it needs to be reiterated that, if not accompanied by a comprehensive revision of the existing institutional, political and economic structures, rights of nature will not bring about any short-term fix for the degraded environment. Certainly, this more eco-centric approach is not to be treated as a panacea or a substitute for the enforcement of existing protection statutes. This would be a logical fallacy: there simply is no easy fix for our current environmental predicament if no systemic shift towards a less consumption-based society is implemented in the short run. Even so, the rights of nature narrative puts forward a new language and framework which might be more suitable for dealing with environmental issues in the Anthropocene. This case-study of recent case-law developments of the EU underscored the potential for a more gradual move towards the implicit recognition of certain legal rights for EU protected species, habitats and ecosystems, even when this is not explicitly acknowledged in the existing legal frameworks. In doing so, rights of nature

¹⁰⁶ *Palila v. Hawaii Dept. of Land & Natural Resources*, 852 F.2d 1106, 1107 (9th Cir. 1991).

¹⁰⁷ *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988).

¹⁰⁸ *Cetacean Community v. Bush*, 386 F. 3d 1169, 1137 (9th Cir. 2004).

would no longer be put forward as a short-term fix, but rather as the result of a incremental ecological understanding and re-interpretation of the existing protection duties towards nature and the wider environment. In this respect, I also want to refer to Thomas Berry, one of the most outspoken modern advocates for the rights of nature. When faced with the multitude of objections, Berry ultimately underlined the pragmatic approach underpinning the rights of nature movement: ‘the language of rights answers the legal establishment in its own terms.’¹⁰⁹ As Chapron et al. noted, ‘[w]hen people and corporations have rights, nature frequently loses Rights of nature may help prevent this one-sided outcome.’¹¹⁰ And this is exactly what also appears to be possible in the EU legal order.

¹⁰⁹ Thomas Berry as quoted in Burdon, above n. 71.

¹¹⁰ G. Chapron, Y. Epstein and J.V. Lopez-Bao, ‘A rights revolution for nature’ (2019) 263(6434) *Science* 1392.