European Parliament

CAN NATURE GET IT RIGHT?[1]

A Study on Rights of Nature in the European Context

ABSTRACT

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, explores the concept of "Rights of Nature" (RoN) and its different aspects in legal philosophy and international agreements, as well as in legislation and case-law on different levels. The study delves on the ideas of rights of nature in comparison with rights to nature, legal personhood and standing in court for natural entities, and analyses ECtHR and CJEU case-law on access to justice in environmental decision-making. It emphasises, in particular, the need to strengthen the requirements for independent scientific evaluations in certain permit regimes under EU law. The study also highlights the crucial importance of promoting the role of civil society as watchdog over the implementation of EU environmental law by way of a wider access to justice via both the national courts and the CJEU, which is also in line with the political priorities for delivering the European Green Deal.

The Rights of Nature (RoN) school of thought is wide, containing a variety of different concepts. First of all, there is a *legal-philosophical* aspect, where it is highlighted that RoN means a paradigmatic shift in attitudes towards nature, from today's anthropocentric approach to an ecocentric one. Closely linked to this discourse is *environmental constitutionalism*, whose proponents argue that RoN should be included in an overarching piece of legislation in order to give a long-lasting constitutional and ethical value to the protection and conservation of nature. Other scholars focus on the *representation issue*, arguing that if natural entities were granted legal personhood, this would not only give nature standing in court, but also give courts a wider scope to take nature science evidence into consideration in deciding on precaution and remediation. Finally, RoN is described as a means for *indigenous peoples to uphold their rights to traditional use of natural resources*, while still preserving biodiversity.

The aim of the study is to analyse RoN from a legal-scientific viewpoint in order to see whether this new concept might bring added value to the field of EU environmental law. Each of the aspects of RoN is analysed with a view to determining its key elements. In Chapter 2, some of the different schools of thought within the RoN

[1] Full study in English: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/689328/IPOL_STU(2021)689328_EN.pdf

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discourse are introduced. After this comes a description of different legislation on RoN, from the constitution in Ecuador, and the laws of Te Urewara and Whanganui in New Zealand, to local bylaws in the USA and elsewhere. Different cases granting legal personhood to natural entities are presented, most importantly the *Vilcabamba River* case in Ecuador, the *Atrato River* case in Colombia, and the *Ganges/ Yamuni River and Glaciers* cases in India.

The study also covers an investigation about a human right to a healthy environment (Chapter 3). Where such a right can be established for a wider circle of people without a link to direct damage to individuals, this idea relates closely to RoN. However, contrasting with several other international instruments, the European Convention on Human Rights (ECHR) does not include any such protection. Even though its provisions have been expanded in a "greening" direction in the case-law of the European Court of Human Rights (ECtHR), the Convention is still firmly rooted in the idea about a "direct victim", whose right to life and respect for private and family life is protected. This concept may be challenged by the many climate cases throughout Europe, but only time can show if the Strasbourg Court is willing to alter its position without support from the Parties to the Council of Europe.

In contrast, the UNECE Aarhus Convention covers all kinds of legislation with an impact on the environment. It established three "pillars" of procedural rights in environmental matters, namely the rights to information, public participation and access to justice. The EU and all its Member States are Parties to the Convention. When Aarhus Convention is combined with fundamental principles of EU law developed in the case-law of the European Union Court of Justice (CJEU) – such as the principles of direct effect and of judicial protection – the effect has been forceful. In the EU today, it is established that members of the public – including recognised Environmental Non-Governmental Organisations (ENGOs) – shall have the possibility to challenge administrative decisions and omissions in environmental matters by going to court. This is the subject of Chapter 4 of the study, where environmental protection in substantive EU law is also dealt with, both on the constitutional level (TEU and TFEU) and in secondary legislation in regulations and directives. It is contended that the "intrinsic value of nature" – although not found in an express provision on the constitutional level in the EU – is contained in the nature conservation directives and the case-law of the CJEU.

Chapter 5 is finally the operative part of the study where the RoN concept is evaluated from the perspective of EU law on the environment. On a general level, the RoN concept is criticised for being mostly symbolic and built on anecdotal evidence. What is more important, though, is that the proponents of RoN do not succeed in showing that this is a paradigmatic shift in environmental regulation. Instead, the history of RoN shows that it faces the same reality and problems as the ordinary laws on the environment, most importantly weak enforcement. Further, the idea of giving natural entities "legal personhood" is compared with the EU model for protecting environmental interests through ENGO representation and found not to entail any systematic advantages from a European perspective. Having reached this conclusion, however, the study also emphasises the crucial importance of strengthening the role of civil society as watchdogs over the implementation of EU law in environmental matters by way of a wider access to justice via both the national courts and the CJEU.

But even so, the RoN concept offers new ideas that can be adapted to the present institutional or legal scope of the EU system. One example of an idea borrowed from the RoN school of thought is to introduce a provision on the constitutional level in the EU about the intrinsic value of biodiversity and some basic principles of ecological integrity. As for secondary legislation, it is proposed that stronger adaptivity requirements be introduced in relevant directives, as well as stricter environmental and ecological standards. The idea of "ecological impact tracing" also seems interesting. A comprehensive overview of the nature conservation directives ought to be performed, and the requirements for independent scientific evaluations should be

strengthened in certain permit regimes under EU law. The creation of national funds for the remedying of damage to biological biodiversity is further mentioned. As for enforcement, it is suggested that the Commission tighten up the demands on the Member States' courts to fulfil their obligations under Article 267 TFEU to ask for preliminary rulings from the CJEU. Stricter criteria for the enforcement of environmental provisions and the creation of independent enforcement authorities would also be worth investigating further. Another idea that is discussed is the establishment of an Environmental Ombudsman on both the EU and national levels. One could also contemplate different measures both to strengthen the position of science in the administration and courts and to improve the education and competence of the courts. It is finally of vital importance to introduce strict sanctions for administrative inertia in relation to obligations under EU environment law.

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