

CAN NATURE GET IT RIGHT?

A Study on Rights of Nature
in the European Context



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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.

This document was requested by the European Parliament's Committee on Legal Affairs.

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LIST OF ABBREVIATIONS

BAT	Best Available Technology
CBD	Convention on Biological Diversity
CELDF	Community Environmental Legal Defense Fund
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
DBD	Damage to Biological Diversity
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
ENGO	Environmental Non-Governmental Organisations
EU	European Union
GARN	Global Alliance for the Rights of Nature
IUCN	International Union for Conservation of Nature
PPP	Polluter Pays Principle
RoN	Rights of Nature
UN	United Nations
UNDRME	Universal Declaration of the Rights of Mother Earth
UNECE	United Nations Economic Commission for Europe
UNESCO	United Nations Educational, Scientific and Cultural Organization
SLAPP	Strategic Lawsuit Against Public Participation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

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 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 NGO 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.

1. INTRODUCTION

1.1. About the study

I must admit that I was a bit puzzled when asked to do this study. Why appoint a traditional legal scholar to analyse a concept which is totally new, even ground-breaking? But on second thought, perhaps a traditional legal scholar is the right person for this kind of task, since paradigmatic new concepts also have to be understood by those who are affected and by the lawyers who are supposed to apply the new norms. This is what I have tried to do in this study, that is, to give an honest description of the concept “Rights of Nature” (RoN) in order to analyse what added value it might bring to the legal order of the European Union (EU).

It should be noted from the outset that RoN is a very wide subject and that this discourse of legal philosophy comprises a number of different aspects. Along with the most obvious ones – that is, the rights of nature in comparison with rights to nature, legal personhood and standing in court for natural entities – one can find discussions about principles of environmental law and constitutionalism, the human right to a healthy environment, nature science and law, climate cases, ecocide, the competence of the courts, and many more subtopics. There is also a distinction between substantive and procedural aspects of RoN. In this study, I have focused on those issues which I think are instrumental for the RoN concept and its encounter with the EU system of environmental law. Other issues are touched upon in this context, whereas some topics have been excluded. Climate cases are only mentioned and I have not delved into animal rights, as that discourse is slightly different to RoN.¹ The legal concept of “ecocide” is another interesting issue that I leave aside. These delimitations can as always be criticised, but this is a choice that lies in legal scholarship, namely, to cover what one considers most important for a certain area of law.

The study is structured as follows. In the first part (Chapter 2), I describe the concept of “rights of nature” (RoN) and the surrounding legal discourse. Next, in Chapter 3, the European Convention on Human Rights and Fundamental Freedoms (ECHR) is pictured together with the case-law of the European Court of Human Rights (ECtHR). The question here is whether the Convention contains a “human right to a healthy environment”. In the last two sections of this chapter, the so-called Aarhus Convention is touched upon with its three “pillars for environmental democracy”, that is, the rights to information, public participation and access to justice. EU law on the environment is the subject of Chapter 4, focusing on environmental rights and obligations and their implementation in the Member States. Chapter 5 is at the centre of the study as it is here that the critical analysis of the RoN concept is performed, together with a discussion about what added value it may bring to the legal order of the Union. In this context, some interesting ideas from the RoN discourse are extracted and analysed in order to use them within the framework of EU environmental law. The suggestions from that chapter are thereafter summarised and listed in Chapter 6, after which the study is concluded with some final remarks (Chapter 7).

¹ This topic is, however, thoroughly dealt with in a coming issue of *Scandinavian Studies in Law* (Sc.St.L.).

1.2. Words of thanks

I am deeply grateful to a group of “first readers”, namely *Merideth Wright*, former judge of the Vermont Environmental Court and distinguished judicial scholar at the Environmental Law Institute (Washington DC, USA), *Carol Day*, solicitor in environmental law (London, UK), *Malin Brännström*, juris doctor of law and director of the Silver Museum in Arjeplog (Sweden), *Ludwig Krämer*, honorary professor of German and European environmental law at the Universität Bremen, *Kari Kuusienemi*, president at the Finnish Supreme Administrative Court (Korkein hallinto-oikeus), and *Julien Bétaille*, associate professor at Université Toulouse 1 – Capitole in France. Thank you all for your valuable comments, proposals for clarification and alternative perspectives!

Since the summer of 2020, I have attended a number of seminars on issues related to the study, organised by Université Toulouse 1 – Capitole, the Stockholm Environmental Law and Policy Centre, Vermont Law School, World Commission on Environmental Law under the International Union for Conservation of Nature (IUCN), the European Court of Human Rights (ECtHR) and Marie Toussaint at the European Parliament. Apart from the literature on the subject, I have also read a number of research papers and project descriptions provided to me by my colleagues in the academic community, to whom I direct my sincere gratitude. I am also grateful to Alexander Moore for excellent editorial assistance.

2. WHAT DOES “RIGHTS OF NATURE” MEAN?

KEY FINDINGS

- The Rights of Nature (RoN) school of thought is wide, containing a variety of different concepts.
- To begin with, 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 international law or national constitutions in order to give a long-lasting value to the protection and conservation of nature. Examples used to illustrate this are the 2010 *Universal Declaration of the Rights of Mother Earth* (UDRME) and Article 71 in the 2009 Ecuadorian Constitution proclaiming the right of Pacha Mama.
- Another key component of the RoN discourse is to award natural entities “legal personhood” in order to provide for standing in court and a wider possibility to take nature science evidence into consideration in deciding on environmental matters. Such examples exist legislation and jurisprudence in Latin America, in Aotearoa New Zealand, India and other countries. Most of these cases have, however, been given under specific cultural and anticolonial circumstances, and the outcomes are a mix of failures and successes.
- Finally, RoN is described as a means for *indigenous peoples to uphold their rights to traditional use of natural resources*, while still preserving biodiversity.

2.1. Introduction

The concept Rights of Nature (RoN) follows two basic lines of reasoning. First, since the recognition of human rights is in part based on the philosophical belief that those rights emanate from humanity's own existence, then logically, so do inherent rights of the natural world. A second and more pragmatic argument asserts that humanity's own survival depends on healthy ecosystems, and so, protection of nature's rights in turn advances human rights and well-being.

In the origin story of the RoN discourse, this school of thought originates from Christopher Stone's article “Should trees have standing?”, published in *Southern California Law Review* in 1972.² He wrote the article to make an impact in the ongoing case *Sierra Club v Morton* in a US federal court in order to award the plaintiff standing to challenge a decision about the development of a ski resort in the Mineral King valley in the Sierra Nevada mountains of California.³ Although the majority of the court rejected the lawsuit, Justice William O. Douglas wrote a famous dissenting opinion in which he referred to Stone's idea, proposing that environmental objects should be granted legal personhood and thus be able to defend themselves in court through representation by the public. This idea was picked up and developed during the following 30 years by academic scholars such as Roderick Nash, Thomas Berry and Cormac Cullinan. However, the concept did not win general traction, which is

² Time line according to the Global Alliance for the Rights of Nature (GARN); <https://therightsofnature.org/timeline/>

³ *Sierra Club v. Morton*, 405 U.S. 727 (1972).

usually explained by the fact that it came in an era when modern environmental legislation was introduced in the Western world. With these laws also came the founding of environmental protection agencies, and environmental non-governmental organisations (ENGOS) were awarded standing in court to challenge decision-making under those laws – at least to a certain extent.

The resurrection of RoN ideas came at the beginning of the 2000s, when the Community Environmental Legal Defense Fund (CELDF) – from the beginning, a traditional public interest law firm – launched a campaign for the adoption of a “bill of rights” for nature at a local level in the USA. First in this respect was the small community of Tamaqua Borough in Pennsylvania, drafting a Rights of Nature Law in order to prevent the dumping of toxic waste into the community in 2006. Having developed into an organisation for bringing together public interest litigators with different actors such as communities, civil society and governments, the CELDF together with the Pachamama Alliance in San Francisco – an organisation for the empowering of indigenous tribes in the Amazonas – joined forces with radical and anti-colonial oriented politicians in Ecuador for the introduction of rights for nature in the Constitution in 2008. To date, this is the only Constitution in the world establishing RoN.

The year after, Bolivia adopted a new Constitution granting each citizen the right to “protect and defend an adequate environment for the development of living beings”. The 2009 Constitution did not establish RoN, but it paved the way for the Law on the Rights of Mother Earth (Madre Tierra) the following year. Also in 2009, the organisation Global Alliance for the Rights of Nature (GARN) was founded.

In 2010, in this prevailing sentiment, the first World People’s Conference on Climate Change and the Rights of Mother Earth was held in Cochabamba, Bolivia, adopting the Universal Declaration of the Rights of Mother Earth (UDRME). Also this year, the General Assembly of the United Nations (UN) proclaimed 22 April as International Mother Earth Day. In so doing, the State Parties acknowledged that the Earth and its ecosystems are our common home and expressed their conviction that it is necessary to promote “Harmony with Nature” in order to achieve a just balance among the economic, social and environmental needs of present and future generations. The first report of the Secretary-General on Harmony with Nature was published already in 2010 and the first resolution on the subject was adopted by the General Assembly the same year.⁴

The year after, the first court case under the Ecuadorian Constitution was decided concerning the protection of the Vilcabamba River. In 2012, Bolivia adopted another RoN law: the Framework Law of Mother Earth and Integral Development to Live Well (“buen vivir”). This was also the year when the national government and the Maori people of New Zealand reached their first RoN agreement, awarding the Whanganui River legal personhood and guardianship by a joint council. Further, the International Union for the Conservation of Nature (IUCN) adopted a policy to incorporate the RoN into its decision-making processes. Two years later, in 2014, a second RoN act was passed in New Zealand after a settlement between the government and the Tuhoe people. The object this time was Te Urewara, a former national park, which was given “legal recognition in its own rights”. And again in 2014, the first RoN tribunal organised by GARN was held in Quito, Ecuador.⁵

⁴ The “Harmony with Nature” reports have been issued annually since 2010, out of which the 12th report was adopted by the UN General Assembly in late 2020; <http://www.harmonywithnatureun.org/chronology/>

⁵ In the RoN school of thought, it is also often mentioned that in 2015, Pope Francis issued the encyclical (circular letter) *Laudato Si* (“praise be to You”), subtitled “on care for our common home”, in which he criticises consumerism and irresponsible developments, and called for swift and unified global action against environmental degradation and global warming.

Since then, many local bylaws on the RoN have been passed, mostly in the USA but also in Latin America (Mexico City, Colima), New South Wales in Australia (Blue Mountain Council), Spain (Los Alcazares) and the Netherlands (Dongeradeel). Most well-known of these is perhaps the Lake Erie Bill of Rights which was passed by the city of Toledo (Ohio) in 2019, recognising the lake's right "to exist, prosper and evolve naturally". Also, numerous tribes of indigenous peoples in the Americas have awarded legal rights to nature or natural objects, such as wild rice. For example, in 2016 the Grizzly Treaty recognising the bear species' right to exist in a healthy ecosystem was signed by more than 200 US and Canadian tribal nations. Further, high profile cases on RoN have been brought in many countries, out of which *Colorado River v. State of Colorado* (2017)⁶ perhaps is the most well-known. As a result, rights of natural systems – mostly rivers and forests – have been recognised by courts on different levels in Colombia, Mexico, Chile and Bangladesh. In 2017, the High Court of Uttarakhand in India recognised that the Ganga and Yamuna rivers, glaciers, and other ecosystems are legal persons with certain rights. Finally, it is worth mentioning that in 2019 Uganda enacted the National Environmental Act, recognising that nature has "the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution".

From this short history, one may conclude that RoN is a broad concept, containing a variety of different aspects. 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 attitude 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 a wider possibility 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. In the following, I give a general presentation of each of these aspects of RoN, after which some preliminary conclusions are made as an introduction to the discussion in Chapter 5.

2.2. Rights of Nature in legal philosophy

A starting point for the legal philosophy on RoN is that the traditional notion of the Rule of Law in our societies must include and recognise the reality of planetary boundaries. This in turn means that the environment should take precedence, with humans second and the economy third. The background to this is evidently the dire state of the environment in the world. Climate change has become the key issue of our time, and biodiversity is threatened all over the planet through mass extinction of species and natural habitats. According to estimates, approximately 60% (15 out of 24) of ecosystem services are degraded or used unsustainably, including fresh water, air and the utilisation of natural resources.⁷ This means Earth's capacity to sustain human life and many other living organisms is significantly compromised, and the situation continues to worsen due to human activities.

According to the RoN proponents, these emergencies have the same root cause: old paradigms of thinking, structures and systems that separate human beings from the rest of the interconnected web

⁶ *Colorado River Ecosystem v. State of Colorado*; no. 17-cv-02316-NYW (D.Colo. Dec. 4, 2017).

⁷ *Our life insurance, our natural capital: an EU biodiversity strategy to 2020*. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Region. European Commission, Brussels, 3.5.2011 COM(2011) 244 final, page 1.

of life.⁸ Therefore, we need to perform a quantum leap in governance in order to move towards living in harmony with nature. This must necessarily include the legal system as a whole and the notion of "rights". Learning from history, old systems of oppression – be it that of slaves, indigenous and colonised peoples, women or sexual minorities – were abolished through shifts in paradigms, creating rights for those discriminated against. In view of this, there is a need to establish a governance regime for the enhancement of the health of ecological systems, that is, a Rule of Law for Nature. This notion of the "eco-constitutional state" is in its very nature opposite to the dominating paradigm of today with the Western liberal concept of the rule of law focusing only on the well-being of humans. Instead, the Rule of Law for Nature focuses on the well-being of both humans and nature in a symbiotic relationship.⁹ Thus, if we abandon the erroneous beliefs that we are separate from the natural Earth and superior to all beings, and instead embrace our participation within the community of life, exciting new legal possibilities will soon emerge.¹⁰

Another main point for RoN supporters is that modern environmental law has not made much difference in preventing the destruction of the planet. Some go even further, claiming that modern environmental law is part of the problem as it is a piece of a structure of law which – rather than focusing on protecting people, workers, communities, and the environment – focuses on endless growth, extraction, and development. Regarded this way, environmental law makes sustainability illegal. Proponents of RoN further argue that as long as we have an anthropocentric view of nature and natural resources, regarding them as "property" or "objects", we will fail to tackle the most important environmental problems of our time. Further, weak enforcement is not the main obstacle, since legislation only aims at upholding the system by way of mitigating the negative impacts of economic growth. With its cultural and socio-economic context, modern Western law is merely part of the enclosure of nature and environmental law has never intended to turn this process around. Nature as a whole has never been on the radar of legal systems which instead fragment it into different natural resources or one particular medium at a time, such as soil, water, air, or plants. Even more crucially, environmental objectives are set into competition with economic and social objectives. This means that irrespective of the number of new environmental regulations, those reforms will never be enough to override legislation supporting economic growth, private property and state sovereignty. The basis of current environmental legislation can therefore be summarised as environmental reductionism, manifested by compartmentalisation, fragmentation and anthropocentrism.¹¹

In the RoN discourse, a number of ideas have been introduced in order to change our paradigmatic views on the relationship between humans and nature. One of the founders of this philosophy was Thomas Berry, who introduced the concept of "Earth Law". He advocated a new jurisprudence to uphold the rights of nature, arguing that any component of the Earth community has three rights: the right to be, the right to habitat, and the right to fulfil its role in the ever-renewing processes of the Earth community.¹² In his view, the universe is the primary law giver and rights originate where existence originates. The only laws that humans should create and observe are therefore those derived from the natural laws that govern life on Earth. His successors have developed these ideas into "Earth System Law" or "Earth Jurisprudence", broadening the universe of entities capable of

⁸ Carducci et al (2020), at. p. 59.

⁹ Bosselmann (2013) at p. 83.

¹⁰ Cullinan (2013) at p. 102.

¹¹ Bosselmann (2013) at p. 84.

¹² See literature list; Berry, T: *Rights of the earth: We need a new legal framework which recognises the rights of all living beings* (2011).

qualifying as legal subjects in their own right to include both natural and artefactual non-humans.¹³ They talk about the “subjectification” of nature in contrast to “objectification”, thus not only concerned with defining nature’s rights, but also redefining the duties of humankind. Theories closely attached to these are “Wild Law” and the discussion about deep or shallow ecology. Irrespective of these different perspectives, the proponents suggest a new hierarchy of rights where RoN sit at the apex and thus is of a higher order than all other rights, such as human rights or the rights of States.

In this vein, it was stated in the 2020 study of the European Economic and Social Committee (EESC) entitled *Towards an EU Charter of the Fundamental Rights of Nature* that the recognition of RoN is crucial in making legal systems proactive in tackling our emergency challenges, which would entail a radical change in the entire legal system, by guaranteeing Nature’s primacy over economic and political interests.¹⁴ Another advantage that was emphasised is that people would also be empowered to bring cases on behalf of nature to courts where the actual merits of the case would be heard.¹⁵ This in turn requires close cooperation between the nature sciences and law, thus recognising that legal rules are part of a natural system:¹⁶

The self-ordering of the universe can be understood as a “Great Jurisprudence”, which can be discovered by inductive reasoning based on close observation and experience of Nature. This Great Jurisprudence can be used to inform and guide the development of human jurisprudence (“Earth jurisprudences”) that may in turn inform the development of laws that give effect to them (“wild laws”). For example, the stupendous biological diversity that surrounds us is an indication that the universe has an inherent tendency to diversify. This suggests that we should be wary about enacting laws that seek to impose unnecessary homogeneity because we may well be working against the fundamental principles of the system of which we are part.

All this presupposes interdisciplinary collaboration between lawyers, scientists and indigenous and local communities that have a deep understanding of ecosystems. It is also stated that for law to be truly aligned with truth and justice, we must address the way law is held in our society, in that we move towards a justice system that fosters greater collaboration, problem solving and healthy relationships with all of life.¹⁷ In summary:¹⁸

The rights of nature movement represents the practical instantiation of ideas contained in Earth system law. First, its focus on obtaining legal recognition for non-human natural entities, both individually and on a holistic basis, works to reshape law’s anthropocentric orientation to become more inclusive of the range of subjects worthy of protection. Second, it respects the diversity of relationships in the world through its acknowledgment that entities exist not in isolation but in thick webs of interdependency. Finally, the movement pays tribute to complexity in the sense that it seeks to respond to the exigencies of the Anthropocene through legal interventions that more accurately capture the dynamic character of human-environment interactions. By embodying these tenets of Earth system law and rejecting “problematic” human-nature binaries, the rights of nature movement actively combats inter and intra-generational and inter-species injustices.

¹³ Gellers (2020) at p. 2.

¹⁴ Carducci et al (2020) at p. 14.

¹⁵ Carducci et al (2020) at p. 62.

¹⁶ Carducci et al (2020) at p. 103.

¹⁷ Carducci et al (2020) at p. 63.

¹⁸ Gellers (2013) at p. 4.

2.3. Rights of Nature at an international level

As was already mentioned at the beginning, there currently exist several “soft law” instruments recognising the intrinsic value of nature, such as the preamble to the 1992 *Rio Declaration*: “Recognizing the integral and interdependent nature of the Earth, our home”.¹⁹ Another is the *Earth Charter*, an international declaration adopted in 2000 in Rome.²⁰ The Charter’s ethical vision proposes that environmental protection, human rights, equitable human development, and peace are interdependent and indivisible. It contains 16 principles under four headings:

- I. Respect and Care for the Community of Life
- II. Ecological Integrity
- III. Social and Economic Justice
- IV. Democracy, Non-Violence and Peace

Under the first heading, principle 1 is “Respect Earth and life in all its diversity”. Principles 5–8, under Ecological Integrity, aim to protect and restore the integrity of Earth’s ecological systems, with special concern for biological diversity and the natural processes that sustain life; prevent harm by applying a precautionary approach; adopt patterns of production, consumption and reproduction that safeguard Earth’s regenerative capacities, human rights and community well-being; advance the study of ecological sustainability; and promote the open exchange and wide application of the knowledge acquired. The Earth Charter has been formally endorsed by many international organisations, including UNESCO and the IUCN, and over 250 universities around the world.

As noted, the *Universal Declaration of the Rights of Mother Earth* (UDRME) was adopted in 2010 at the World People’s Conference on Climate Change and the Rights of Mother Earth in Cochabamba, Bolivia. It recognises that all peoples and nations are part of Mother Earth, an indivisible, living community of interrelated and interdependent beings with a common destiny. In the provisions of UDRME, it is stated that Mother Earth is a living being and the rights of each being are limited by the rights of other beings. Thus, any conflict between their rights must be resolved in a way that maintains the integrity, balance and health of Mother Earth. Mother Earth and all beings of which she is composed, have a number of rights, among them: the right to life and to exist; the right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions; the right to water as a source of life and clean air; the right to be free from contamination and pollution; and the right to full and prompt restoration for violation of the rights caused by human activities. The UDRME also stipulates a number of obligations human beings have towards Mother Earth, namely, that all States, and all public and private institutions must:

- recognise and promote the full implementation and enforcement of the rights and obligations recognised in the Declaration;
- establish and apply effective norms and laws for the defence, protection and conservation of the rights of Mother Earth;
- empower human beings and institutions to defend the rights of Mother Earth and of all beings; and
- establish precautionary and restrictive measures to prevent human activities from causing species’ extinction, the destruction of ecosystems or the disruption of ecological cycles.

¹⁹ *Rio Declaration on Environment and Development*. UN General Assembly 12 August 1992; <https://www.un.org/en/conferences/environment/rio1992>

²⁰ *Earth Charter 2000*; <https://earthcharter.org/courses/leadership-sustainability-ethics-lse-online-course/>

The Cochabamba meeting called on the UN General Assembly to adopt the Declaration as a common standard of achievement for all peoples and all nations of the world.²¹

2.4. Rights of Nature at a constitutional level and in national and sub-national legislation

The legal philosophy of the RoN is linked closely to *environmental constitutionalism*. The obvious arguments from its supporters is that if the RoN were awarded constitutional status, this would establish a long-lasting and superior legal value, as well as an ethical dimension to the protection and conservation of nature. Such a constitutional provision would have a direct effect on the understanding of black-letter law, and also play an educational role among the decision-makers and judges applying environmental law. It might finally redress the temporal misalignment between the environment and law, thereby adding an intergenerational aspect to the regulation. This way, RoN as part of environmental constitutionalism would function as a procedural guideline for conducting legislative and administrative processes:²²

In the environmental context it would entail: the need for government to be subjected to the general law and, more specifically, to environmental laws; the need for government to only act in accordance with the law; the ability of the courts to oversee government actions, including their administrative and legislative functions that are relevant to environmental issues; the need for government to be accountable and to exercise just administrative action and general good environmental governance practices; and the process to make good environmental laws.

Backed by a constitutional provision, courts may, for example, be able to set aside a decision authorising the construction of a new coal-fuelled power station on the basis that the decision-maker does not have the power to authorise activities that violate the functioning of vital natural systems by exacerbating climate change. In other words, it would make it unlawful for decision-makers to impose liabilities on others – including future generations – by allowing natural limits to be transgressed.²³ Also, as decisions on whether the rights of humans prevail over those of natural entities would be balanced for the benefit of the planet as a whole, fundamental changes in administrative and justice systems would be required. It would be necessary to establish publically funded institutions to represent the interests of nature and new courts or other institutions with the sufficient knowledge and understanding to adjudicate conflicts between economic development and nature in order to promote the greater good of the whole community.²⁴

However, a “real” RoN protection at constitutional level is, to date, only given in one country, that is in Ecuador. For obvious reasons, the Ecuadorian Constitution has gained much attention in the RoN movement. Article 71 proclaims the right of Pacha Mama:²⁵

Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and

²¹ As of 11 February 2021, there is actually also a *Declaration of the Rights of the Moon*; <https://www.earthlaws.org.au/aclc/moon-declaration/>

²² Kotzé (2013) at p. 135.

²³ Carducci et al (2020) at p. 104.

²⁴ Cullinan (2013) at p. 104f.

²⁵ Translation from Spanish of the Ecuadorian Constitution and the Bolivian Law on the Rights of Mother Earth is provided in Humphrey at p. 463f.

evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.

As already noted, the 2009 Bolivian Constitution stated the aim of protecting and defending an adequate environment for the development of living beings. Though the Constitution as such does not recognise RoN, the 2010 Law on the Rights of Mother Earth (Madre Tierra) does just that in Article 2:

The State and any individual or collective person must respect, protect and guarantee the rights of Mother Earth for the well-being of current and future generations.

In Article 7, seven rights of Mother Earth are recognised, the right:

- to life
- to the diversity of life
- to water
- to clean air
- to equilibrium
- to restoration
- to pollution-free living

The law also defines the duties necessary for upholding the rights of Mother Earth: The State has the duty to develop policies that will *"prevent human activities causing the extinction of living populations, the alterations of the cycles and processes that ensure life, or the destruction of livelihoods, including cultural systems that are part of Mother Earth"* (Article 8). Further, the people of Bolivia and public and private legal entities have the duty to *"uphold and respect the rights of Mother Earth"* (Article 9).

The legislation in Aotearoa New Zealand under the agreement between the Crown and the Maori tribes of Te Urewara and Whanganui has a background and unique design of its own.²⁶ First of all, the agreements and the subsequent legislation were part of a mediation and reconciliation process in order to atone for all wrongs that have been made to the indigenous peoples since the Treaty of Waitangi in 1840. Another important background factor is the common law idea of "ownership" to real property which only allows private subjects to obtain "fee simple" to the land. Against this backdrop, the Crown was not willing to transfer ownership of the areas to the tribes, which is why the Te Urewara National Park and Whanganui River became entities in their own rights. The Whanganui River Settlement Agreement (2012 and 2014) is based on the notion of *"Ko au te awa, ko te awa ko au"* ("I am the river and the river is me"), recognising the intrinsic value of the river (*Tupua te Kawa*). Any person responsible under a wide array of statutes is obliged to recognise and work with this aim in mind. An official guardian has been designated, namely a board (*Te Pou Tupua*) with representatives from the Crown and the tribes along the river. A strategy group has likewise been established that will work with the drawing up of a Whole of River Strategy, with a fund created for the management and restoration of the river. The chosen solution can therefore be characterised as having transferred the title to the river from the Crown to the "river itself" (*Te Awa Tupua*).

Te Urewara is an old forest reserve (National Park) traditionally inhabited by Maori tribes that were not parties to the 1840 Treaty of Waitangi. An agreement between the government of New Zealand and the tribes was signed in 2013, resulting in the recognition that the area "holds title to its own

²⁶ The description of the settlements and legislation concerning the Te Urewara National Park and the Whanganui River is mainly after Iorns Magallanes (2015) and Sanders (2017). It should be noted that a similar settlement was made in 2017 concerning Mount Taranaki and the surrounding area.

land". The settlement also included principles for the management of the forest and a board was established in order to recognise and reflect *Tūhoetanga* (Tūhoe identity and culture). The purpose of the Te Urewera Act 2014 is to preserve the area in perpetuity in its natural state, identifying its values regarding indigenous ecosystems, cultural heritage, recreation, landform, and freshwater quality. The *Te Urewera Board* – where the majority of the seats will eventually go to the Maori tribes – can issue bylaws and permits for judicious use of the natural resources in the area. This stands in contrast with the previous regime in the National Park's regulation, where all human activities were banned. However, such permits can only be granted under the condition that the preservation of the species concerned is not adversely affected. Thus, the Te Urewera settlement and legislation upholds the indigenous concept that nature can be protected in conjunction with proper managed human use, including that fauna may be sustainably harvested, while still being protected. Finally, it should be noted that in Aotearoa New Zealand legal personality is framed as recognising the prior, intrinsic identity of nature, which is made clear in Section 3 of Te Urewera Act:

Te Urewera

1. Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty.
2. Te Urewera is a place of spiritual value, with its own mana and mauri.
3. Te Urewera has an identity in and of itself, inspiring people to commit to its care.

2.5. Legal personhood and Rights of Nature in practice

In his 1972 article, Stone discussed the possibility of awarding legal personhood to natural objects under the heading "Should trees have standing?". In the same vein, Justice Douglas in his dissenting opinion in the case at hand proposed that it should be titled "*Mineral King Valley v. Morton*", as the valley – not the organisation Sierra Club – was the real victim of the exploitation in the area. Stone argued that an entity may enjoy legal rights when:

- 1) an authoritative body is willing to review actions that threaten it.
- 2) it can institute actions in court on its own accord (judicial standing or locus standi).
- 3) the court considers injury to the entity when ordering preventive or remedial actions to be taken by the responsible party.²⁷

Thus, legal personhood to Stone meant, first of all, that that subject has legal standing to challenge decisions and activities that impact its being. In order to do so, the natural being needs someone to act on its behalf – a guardian. In Stone's and his successors' view, anyone should be able to defend the environment in such a manner. This is what in procedural terms is labelled "*actio popularis*". Many municipal RoN bylaws in the USA build on this concept in order to provide for legal standing for residents to protect the local environment.²⁸

As has been shown above, such standing may be granted directly in law. This is, for example, the case with the 1991 Resource Management Act in New Zealand, something which impacted the legislation

²⁷ Stone (1972) at p. 458, see also Gellers (2020) at p. 3.

²⁸ Boyd (2018) at p. 13.

on Te Urewara and Whanganui.²⁹ But the core idea of RoN is that this is not necessary, as such rights – like human rights and freedoms – should always enjoy court protection irrespective of any regulation on standing.

A study of the most important cases highlighted in the RoN discourse show a mix of either express standing in law or standing directly awarded by the courts. The Ecuadorian Constitution lacks rules on standing, making the rights stated in Article 71–74 not self-executing. The first case under those provisions was initiated in 2011 by two private individuals who lived close to an area where the authorities planned to expand a road (*Wheeler v. Director de la Procuraduría General Del Estado de Loja, the "Vilcabamba River case"*). The Wheeler-Huddle couple argued that the exploitation would have a negative impact on the nearby river Vilcabamba, also pointing to the fact that there was no environmental impact assessment (EIA) provided for the project. In 2012, the Provincial Court of Loja agreed with the plaintiffs and ordered the government to establish a plan for rehabilitation and remediation of the river and its surroundings. In this case, the court gave precedence to environmental interests above those of development. For other cases in Ecuador, however, the outcome has been the opposite. In the case concerning the *El Condor Mirador Mining Project* (2013), to which a permit was granted by the national Government in 2012, the Provincial Court of Pichincha gave precedence to the mining project instead of the conservation of the environment. In fact, the court gave a very restricted view on the protection under Article 71, as it viewed the conservation interest as "private" and that only already-protected areas fell under the Constitutional RoN provision. As a whole, the picture of RoN cases in Ecuador is not very positive, as many cases have been lost on the merits.³⁰

The picture seems to be quite different in Colombia, a country which does not have a RoN provision in its Constitution or legislation at lower level. The leading example is the *The Atrato River case* (2016),³¹ initiated by the Parliamentary Ombudsman as an *acción de tutela*, which is an *actio popularis* for the protection of constitutional rights. The aim of the action was to stop illegal forestry in the area and the dumping of chemicals in the river. The Constitutional Court accepted the action and agreed with the Ombudsman in emphasising the close link between the environment and the cultural values of the indigenous tribes in the area, also referring to the Whanganui settlement and legislation in Aotearoa New Zealand. The Court ordered that a joint guardianship between the Government and the local tribes should be undertaken for the Atrato River basin. In a similar decision, the Colombian Supreme Court in 2018 declared that the Amazon River ecosystem is subject to rights of its own and may be a beneficiary of protection.³² These precedents have been followed by a range of court judgements at the regional level recognising rights of ecosystems and rivers, some of them resulting from tutelar actions launched by individuals.

In the USA, many RoN cases have concerned the legality of local and regional bylaws granting rights to natural objects. Some of the municipal regulations have to date not been challenged in court, like Tamaqua Borough (Pennsylvania) and Shapleigh (Maine) for example. Many others – such as Mora County (New Mexico), Grant Township (Pennsylvania) and Bill of Rights of Lake Erie (Toledo) – have been quashed as unconstitutional. I have found very few cases where a natural object, as such, has

²⁹ Daya-Winterbottom (2018) at page 131.

³⁰ See Humphrey (2017), also Boyd (2018) at p. 15.

³¹ *Tierra Digna y otros v Presidencia de la República y otros*. Colombian Constitutional Court, ruling T-622 of 10 November 2016, Expediente T-5.016.242. The decision was released to the public in May 2017. Full text in Spanish; <http://cr00.epimg.net/descargables/2017/05/02/14037e7b5712106cd88b687525dfef4b.pdf>

³² *Dejusticia y otros v Presidencia de la República y otros*. Colombian Supreme Court, ruling STC4360 of 4 May 2018. Full text in Spanish, available at <https://cdn.dejusticia.org/wp-content/uploads/2018/01/Fallo-Corte-Suprema-de-Justicia-Litigio-Cambio-Clim%C3%A1tico.pdf?x54537>

sued an administrative body or an operator in court. The case in the USA which became famous for being the first “real” RoN case in this sense – *Colorado River Ecosystem v. State of Colorado* (2017) – was withdrawn after a few months, following threats of financial sanctions sought by the Attorney General’s office against the plaintiff for abuse of process, claiming that the action taken was improper or frivolous. However, this picture must be nuanced in light of the many cases that have been brought by ENGOs such as different “river keepers”. They have brought a number of cases in order to challenge administrative decision-making on permits or to request remedial actions by polluters, beginning with *Scenic Hudson Preservation Conference v. Federal Power Commission* in 1965.³³ In this case, standing was granted to the ENGO as the court decided that “those who by their activities and conduct have exhibited a special interest in such areas must be included in the class of aggrieved parties”. In other and subsequent cases, the ENGOs have either merged into existing cases already begun, or with the support of express rules on standing in federal law, allowing for “citizen suits”.³⁴ Such provisions are included in, for example: the Clean Air Act (1970), the Clean Water Act (1972), the Endangered Species Act (1973), and the Resource Conservation and Recovery Act (1976).

In India, the Supreme Court beginning in the 1990s, has emphasised the importance of shifting from an anthropocentric to a ecocentric world view and that non-human species also have rights that need to be recognised and respected.³⁵ This seems to be in line with a long history of Hindu sacred deities, regarded as juristic persons in Indian case law.³⁶ In 2017, this perspective was expanded to environmental cases, when the High Court of Uttarakhand ruled in two cases concerning the Ganges/Yamuna Rivers and the Gangotri/Yamunotri Glaciers that natural objects enjoy rights similar to legal minors, stating:³⁷

Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system. The rivers are not just water bodies. These are scientifically and biologically living.

In both cases, the High Court criticised the authorities for not having protected the environment, emphasising that the rivers Ganges and Yamuni are holy according to Hinduism. The Court therefore conferred guardianship responsibilities on several individuals within the State government of Uttarakhand, as well as individuals living in the neighbouring areas and representatives of the scientific community. According to the rulings, these guardians shall uphold the status of natural objects in order to promote the environment’s health and well-being. However, just a few months later, the Uttarakhand decisions were quashed by the Indian Supreme Court, which found the granting of legal personhood in these cases unclear and outside the competence of the High court.³⁸ Another landmark RoN judgement in the region was issued in Bangladesh in 2019, when the High Court granted all rivers with legal personhood and therefore the right to have legal protection.³⁹

³³ *Scenic Hudson Preservation Conference v. Federal Power Commission*. US Court of Appeals, 29 December 1965 (354 F.2d 608 (2d Cir. 1965)).

³⁴ Citizen suits can be directed against a polluter (“citizen enforcement suit”) or a competent authority for lax enforcement (“nondiscretionary suits”), see Coplan (2014) at p. 67.

³⁵ Boyd (2018) at p. 17.

³⁶ O’Donnell (2018) at p. 144.

³⁷ Citation after O’Donnell (2018) at page 138.

³⁸ <https://www.bbc.com/news/world-asia-india-40537701>

³⁹ <https://www.law.ox.ac.uk/events/rights-rivers-rights-nature-turning-intentions-action-launch-event-bangladesh-high-court>

2.6. Interim conclusions on Rights of Nature

The RoN school of thought includes a wide and intermingling array of aspects which are not always easy to distinguish from each other. Clearly, a discourse that focuses principally on natural entities is very different to one that deals with ecosystems, which in turn is more limited compared with one of a planetary focus. Whereas Christopher Stone drew attention to the protection of species, many US local ordinances aim to protect “natural communities and ecosystems”. The latter was also the protection awarded by the courts in cases reported from Bangladesh and India, even though there is an additional traditional Hindu aspect in India that may prove politically controversial.⁴⁰ Ecuador and Bolivia use the concept “*Pachamama*” and “*Madre Tierra*” respectively, which include the idea of *buen vivir*, “a spiritual component and a notion of community to which harmony among people and between people and nature is integral”.⁴¹ This idea is rather vague and leaves open for the courts to find the exact meaning in each case at hand. Moreover, these RoN must be balanced with other rights protected under legislation and the outcome has not always been environmentally friendly.⁴² In this context, it is noteworthy that the governments of Ecuador and Bolivia are using the concept of *Pachamama* and *Madre Tierra* in order to pursue an “extractivist” economic development model, with assertions of national sovereignty over natural resources.⁴³ The legislation in Aotearoa New Zealand is more distinct and environmentally friendly in this respect, even though it allows for judicious use of natural resources. But similar to the legislation in Latin-American countries it is founded in a specific political context, here in a reconciliation process between the national government and indigenous peoples. The major difference between the two regions is that the Te Urewara and Whanganui legislation are both aimed at the protection of those ecosystems and leave it to the Maori tribes to decide about the RoN, as they have the majority in the guardianship boards managing those areas. In contrast, the Constitution in Ecuador does not provide standing for the public as a whole, not even for indigenous communities.

Similarly, existing Earth jurisprudence includes everything from species protection to climate actions. In this text, I have intentionally refrained from mentioning the latter ones, as they lie outside the core meaning of giving legal personhood to natural objects or ecosystems. But even with a more narrow approach, it is not clear why some cases qualify as RoN cases in that discourse and others lie outside. Why, for example, is *Colorado River Ecosystem v. State of Colorado* considered a case concerning nature's rights, while civil suit cases under the US Clean Water Act are not? As a matter of legal philosophy, it may seem as a critical difference if the river itself has a legal personhood and standing of itself, compared with when ENGOs or individuals are allowed to take action in court because they have an interest in the protection of the river. But from a practical viewpoint, the two situations are very similar, as both concepts require that someone appear in court, claiming that s/he represents the river. Be that as it may, the success rate all over the world for RoN cases seems to be quite low, especially if one considers the constitutional challenges to the local and regional RoN bylaws in the USA. As noted however, this is contrasted with the judgements in the Colombian cases and the ones in India and Bangladesh. In those instances of success, it becomes interesting to discuss whether the actual outcomes of the cases have introduced something radically new to environmental law. And, finally, success must be examined in relation to the enforcement of court decisions; the Wheeler-Huddle couple never succeeded in stopping the construction of the road after their victory in the

⁴⁰ See O'Donnell (2018) at p. 141.

⁴¹ Humphrey (2017) at pp. 471 ff.

⁴² Rühls (2016) at p. 10.

⁴³ Villavicencio Calzadilla, P & Kotzé (2018) at p. 3.

Vilcabamba River case, as they could not afford to sue the developer once again.⁴⁴ Whether this is an issue purely for RoN cases or a general trend in environmental law is one of the issues discussed in Chapter 5 of this study.

⁴⁴ <https://www.npr.org/2019/08/03/740604142/should-rivers-have-same-legal-rights-as-humans-a-growing-number-of-voices-say-ye?t=1611578191150>

3. A HUMAN RIGHT TO A HEALTHY ENVIRONMENT

KEY FINDINGS

- Environmental protection under the European Convention of Human Rights and Fundamental Freedoms (ECHR) is indirect, since the beneficiaries of the duty of the States to regulate and control sources of environmental harm are only those individuals whose rights will be affected. Thus, the duty is not about protecting the environment, but of protecting humans from significantly harmful environmental effects. The ECHR also gives the States a wide margin of appreciation when rights of individuals are affected by interventions by the State on behalf of the environment, as well as in the administration's choice of measures to abate or avoid environmental harm.
- Therefore, despite its evolutionary character, the ECHR still falls short of guaranteeing the right to a healthy environment if that concept is understood in broader terms unrelated to impacts on humans. Also, going to the Strasbourg court is only a last resort, a principle that equally applies in environmental cases: the procedures are often prolonged, and do not intervene in the actual situation for those whose rights have been infringed.
- The 1998 Aarhus Convention establishes the three pillars of "environmental democracy", namely *access to information* about environmental issues, *public participation* in decision-making and *access to justice* in court.
- The Aarhus Convention covers all kinds of decisions relating to the environment as such, even those belonging to other fields of law as long as they have an impact on the environment.
- However, Aarhus exclusively relates to procedural aspects of environmental decision-making. Therefore, it has little importance for what results from the end of that procedure, even if all the rules in the book are followed.
- The Aarhus Convention has an independent Compliance Committee to which the public can submit complaints about flaws in the implementation of the Convention requirements. Although its statements are not binding, they play an important part in the understanding of the Convention and – when endorsed by the Meeting of Parties – work as "interpretive factors" in the building of international norms in the field of environmental democracy.

3.1. Introduction

The first human rights instruments on an international level came directly after the Second World War, focusing on the reconstruction of economies and the establishment of a lasting peace. Being instruments of their time, they did not include a right to a healthy environment. Neither the 1948 Universal Declaration on Human Rights nor the 1966 Covenants (the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Political and Civil Rights) contain any such provision on the environment, although some of their articles can be interpreted in that direction. Environmental issues came into focus 25 years later and in the 1972 Stockholm

Declaration⁴⁵ it was stated as a right for humanity to enjoy “an environment of a quality that permits a life of dignity and well-being”. This was further developed in the 1987 Brundtland Report on Legal Principles for Environmental Protection and Sustainable Development.⁴⁶ The 1992 Rio Declaration was rather timid on the rights issue, focusing more on the procedural questions. Instead, the substantive aspects of a right to a healthy environment were developed under the UN Commission on Human Rights, beginning with the report of the Special Rapporteur in 1994, “Draft Principles of Human Rights and the Environment”.⁴⁷ Later, the right to a healthy environment was included in the UN Declaration on the Rights of Indigenous Peoples 2007,⁴⁸ the outcome document “The Future We Want” from the Rio+10 Conference in 2012 and the Sustainable Development Goals established in 2015. The Special rapporteurs under the UN Commissioner on Human Rights have followed suit, as well as many international organisations and courts.⁴⁹

As for the meaning of a human right to a healthy environment, a definition is given in the document “Global Pact for the Environment”, currently in negotiations under the auspices of the UN:

Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment.

This idea may be expanded to encompass aspects “that take into account the suitability of a given environment to an individual or a people according to its social and cultural needs and thus acknowledge the interdependence of elements of the human environment”.⁵⁰ It can therefore be argued that the human right to a healthy environment includes all kinds of environmental protection, nature conservation and heritage law. These factors are also covered in the reports from the UN Special Rapporteur on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, namely:

- Clean air
- A safe climate
- Healthy and sustainable produced food
- Access to safe water and adequate sanitation
- Non-toxic environments in which to live, work and play
- Healthy ecosystems and biodiversity

Even though the concept thus includes healthy ecosystems and biodiversity, the link between human rights law and the RoN is not evident. One may even argue that the two ideas are opposites as the perspective of the former is that nature is an “object”, whereas the latter presupposes that nature is a “subject”. Even so, the human right to a healthy environment is often mentioned as part of the RoN discourse. Further, as it is commonly accepted that human rights and the environment are

⁴⁵ Declaration of the United Nations Conference on the Human Environment, Stockholm 5-6 June 1972; <https://www.un.org/en/conferences/environment/stockholm1972>

⁴⁶ Our Common Future. Report of the World Commission on the Environment and development. Oslo 20 March 1987; <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>

⁴⁷ Human Rights and the Environment. Final report prepared by Fatma Zohra Ksentini, Special Rapporteur, Geneva 6 July 1994; <https://digitallibrary.un.org/record/226681>

⁴⁸ Declaration on the Rights of Indigenous Peoples. UN General Assembly 13 September 2007; <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

⁴⁹ History and timeline according to Manual on human rights and the environment (2012) p. 11ff and Boer (2019) section VI.4.4.

⁵⁰ Boer (2019) at p. 55 citing Cullet, P: *Definition of an environmental right in a human rights perspective*. 13 Netherlands Quarterly of human rights, 1995 pp. 25–40.

interrelated, there is a need to explore to what extent human rights law takes nature's intrinsic value into account. Against this backdrop, the following section will deal with the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the case-law of the European Court of Human Rights (ECtHR). As the ECHR carries procedural requirements for access to information, good governance and "fair trial", I will also cover another regional treaty of great importance to the EU and its Member States in this respect, namely the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).

3.2. The European Convention on Human Rights and Fundamental Freedoms

The European Convention on Human Rights and Fundamental Freedoms⁵¹ (ECHR) is the oldest human rights convention, with the largest number of signatories. The ECHR became operational in 1953 and all 47 members of the Council of Europe – among them Turkey and Russia – are Parties to the Convention. The European Court of Human Rights (ECtHR) in Strasbourg was established in 1959. In contrast with other human rights treaties – such as the African (Banjul) Charter on Human and Peoples' Rights 1981 (Article 24) and the San Salvador Protocol to the American Charter on Human and Peoples' Rights (Article 11)⁵² – the ECHR does not contain any article on environmental rights. This issue has been raised throughout the years in different cases, but the ECtHR has consistently held that the Convention cannot be read to include an environmental right in itself.⁵³ In the Council of Europe's *Manual on human rights and the environment*, we can read:⁵⁴

Neither the Convention nor the Charter are designed to provide a general protection of the environment as such and do not expressly guarantee a right to a sound, quiet and healthy environment. However, the Convention and the Charter indirectly offer a certain degree of protection with regard to environmental matters, as demonstrated by the evolving case-law of the Court and decisions of the Committee on Social Rights in this area.

This statement also reflects that the Convention is a "living instrument" which must be interpreted in the light of present-day conditions.⁵⁵ The ECtHR has adopted an evolutionary approach, showing a growing awareness of the link between human rights and the environment.⁵⁶ As for environmental

⁵¹ *The Convention for the Protection of Human Rights and Fundamental Freedoms*. Council of Europe 1953; <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>

⁵² The right to live in a healthy environment is recognised in Article 11 of the Protocol of San Salvador. Still, that article was not enforceable through individual petitions until the 2018 Advisory Opinion 23/17, in which the Inter-American Court found that the right to a healthy environment is encompassed by Article 26 of the American Convention on Human Rights (1969). This was later confirmed in the case *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina* (IACtHR 6 Feb 2020).

⁵³ *Kyrtatos v. Greece* (2003; 41666/98), *Fadeyeva v. Russia* (2005; 55723/00) and *Karin Andersson ao v. Sweden* (2014; 29878/09).

⁵⁴ CoE: *Manual on human rights and the environment* (2012) at p. 7. The manual was issued for the first time in 2006 and is a non-binding guideline for the understanding of the case-law of the ECtHR and decisions by the European Committee of Social Rights about the European Social Charter (ESC). In addition to just recapturing judgements and decisions, it sets out some principles under the Convention. The current edition of the manual was issued in 2012, but the Steering Committee for Human Rights (CDDH) decided in late 2020 to undertake an update.

⁵⁵ Boyle (2007) at p. 485 with reference to *Soering v. UK* (1989; 14038/88).

⁵⁶ CoEs Manual (2012) at p. 30.

matters, this can be described as a substantial “greening” of the Convention over the years.⁵⁷ So far, the Court has ruled on some 300 environment-related cases, mainly under the provisions on the right to life (Article 2), respect for private and family life (Article 8), peaceful enjoyment of property (Article 1 of Protocol no. 1), and a fair hearing (Article 6).⁵⁸ Broadly speaking, the Convention deals with environment matters in two ways, albeit in distinctly different situations. On the one hand, when the State undertakes measures for environmental protection or nature conservation, the Convention sets restrictions for the infringement on the property rights of individuals and private entities, as well as the right for individuals to enjoy a private life. On the other hand, the State also has an obligation to regulate and control environmental degradation when it impairs or may impair the exercise of rights under the ECHR. In addition, there is an obligation for the State to uphold basic requirements of good governance in these situations (information to the public, participation in decision-making procedures, access to justice, and so on). In the following sections, I will discuss the ECtHR’s case-law on these matters.

3.3. When the State undertakes measures on behalf of the environment

Article 1 of Protocol no. 1 protects property rights, reading, “every natural or legal person is entitled to the peaceful enjoyment of their possessions”. When the State undertakes different measures in order to protect certain environments, natural objects, habitats or species, this may of course collide with the landowners’ or tenants’ right according to this Article. Such measures may, for example, include the designating of nature reserves, shore protection zones, water protection areas, or the protection of wild species of fauna and flora. When these conflicts arise, the ECtHR has consistently awarded the State a wide margin of discretion as to the choice of protective measures to be undertaken, albeit under strict conditions; the decision in question must meet a legitimate objective, be authorised by law and proportionate in reaching the aim.

For many years, the ECtHR has recognised that environmental protection and nature conservation is increasingly important in society. For this purpose, the Court has been consistent in accepting this aim as legitimate. Case-law concerning such restrictions has instead focused on balancing of interests, necessity of the intervention or protection (proportionality), legitimate expectations and compensation. Measures to uphold environmental standards have been widely accepted by the Court.⁵⁹ Property rights under the Convention are – like many other rights – never absolute or unqualified.⁶⁰ Leading cases here are *Fredin v. Sweden* (1991) and *Pine Valley Developments ao v. Ireland* (1991).⁶¹ The first case concerned the revocation of a licence to operate a gravel pit situated on the applicant’s land. The authority’s decision was based on the Nature Conservation Act and was accepted by the ECtHR. The Court stated that while it was true that the applicant had suffered substantial losses due to investments in the operation, he had known about the revocation of the permit for years and could not, therefore, have any legitimate expectations of continuing to exploit the land for a long period of time. In these circumstances the ECtHR found that the revocation decision had neither been inappropriate nor disproportionate.

⁵⁷ Boyle (2007) at p. 486, Kobylarz (2018) at p. 101.

⁵⁸ <https://www.coe.int/en/web/portal/human-rights-environment>

⁵⁹ CoE’s Manual (2012) at p. 21.

⁶⁰ Boyle (2007) at p. 493.

⁶¹ *Fredin v. Sweden* (1991; 12033/86) and *Pine Valley Developments ao v. Ireland* (1991; 12742/87), see also *Kapsalis and Nima-Kapsali v. Greece* (2004; 29037/03).

Measures undertaken on behalf of the environment can also infringe upon the respect for private and family life and the home, according to Article 8 of the Convention. This has also been accepted by the Strasbourg court if the restrictions are proportionate to the legitimate aim and there is a fair balance between the opposing interests. The Grand Chamber decision in the two cases *Depalle v. France* (2010) and *Brosset-Triboulet ao v. France* (2010)⁶² – concerning the demolition of buildings on a seashore – show that very intrusive infringements on property rights can also be justified for the sake of environmental protection. The case *Hamer v. Belgium* (2007)⁶³ concerned the demolition of a holiday home, built in 1967 by the applicant's parents without a building permit. After some efforts from the authorities to impose criminal sanctions for the illegal development, the house owner was ordered to restore the site to its original state. She brought the case all the way to Strasbourg, arguing that her property rights had been violated. The ECtHR did not agree, finding that she had not suffered disproportionate interference. The Court also emphasised the importance of environmental protection and nature conservation, why the public authorities must assume responsibility to ensure that the laws on this are implemented effectively. Not even fundamental rights should be afforded priority in situations such as the one at stake in the case.

Against the background of these cases, one may conclude that when the ECtHR balances environmental concerns against convention rights, it has recognised that national authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects. In reaching its judgments, the Court therefore affords the national authorities a wide discretion. Under this discretion, however, the authorities must respect the fundamentals of good governance in administration.

3.4. Protection against environmental harm

Another and contrasting situation for when the Convention may come into play is when disturbances through air pollution, water contamination, noise, odour, smoke and other nuisances have a serious impact on peoples' homes and "living space".⁶⁴ If the competent authorities have failed to protect the inhabitants in these situations, breaches in the protection of their human rights have been found. Most notably, these environmental cases concern the protection of private and family life according to Article 8 and Article 2 on the right to life. Also, Article 1 of Protocol no. 1 on property rights and Article 6 on fair trial have been applied.

First, the protection afforded in the ECHR covers only serious environmental impacts and disasters. Complaints over minor issues or general environmental concerns are dismissed by the Court.⁶⁵ It is also important to note that in these cases, the State is given a wide margin of discretion on environmental policies and appropriate ways to tackle the situation in order to protect the public concerned from disturbances. This was made clear in *Hatton v. United Kingdom* (2003)⁶⁶ concerning noise from Heathrow airport in London. Here, the 3rd Chamber of the ECtHR found a breach of Article 8, where the United Kingdom had not demonstrated the benefits of night flights, nor had it adequately assessed the noise impact or mitigated its effects sufficiently for the complainants. The

⁶² *Depalle v. France* (2010; 34044/02) and *Brosset-Triboulet ao v. France* (2010; 34078/02).

⁶³ *Hamer v. Belgium* (2007; 21861/03).

⁶⁴ CoE's Manual (2012) at p. 19.

⁶⁵ See CoE's Manual (2012) at p. 50 with reference to *Luginbühl v. Switzerland* (2006; 4143/02) on general concerns about nuclear plants. There are also cases concerning radiation from radio masts.

⁶⁶ *Hatton ao v. UK* (2003; 36022/97).

Grand Chamber however took an opposite view, finding that the effects on the properties and their inhabitants were not altogether that serious and that the Conventional duty on the State is confined to protect individuals from disproportionate interferences in the right to life, health, enjoyment of property and family. Concerning the margin of discretion in environmental cases, the Grand Chamber noted:⁶⁷

The Court must consider whether the State can be said to have struck a fair balance between those interests and the conflicting interests of the persons affected by noise disturbances, including the applicants. Environmental protection should be taken into consideration by States in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights. In this context the Court must revert to the question of the scope of the margin of appreciation available to the State when taking policy decisions of the kind at issue.

However, when serious environmental degradation or disasters occur, there may be breaches of Articles 2 and 8 to the Convention. When such circumstances or events directly and seriously affect the individuals' privacy and living space, the competent authorities are obliged to investigate, inform and intervene.⁶⁸ Cases illustrating these requirements have dealt with natural disasters, city dumps, incineration plants, industrial installations and similar activities with severe environmental pollution, for example: *Lopez Ostra v. Spain* (1994), *Guerra v. Italy* (1998), *Fadeyeva v. Russia* (2005), *Ladyayeva v. Russia* (2006), *Budayeva v. Russia* (2008), *Tâtar v. Romania* (2009), *Öneryildiz v. Turkey* (2004) and *Budayeva v. Russia* (2008).⁶⁹ Another well-known case is *Di Sarno v. Italy* (2012),⁷⁰ where a number of inhabitants of a community sued the Italian government for not having solved the "waste crisis" problems that prevailed in the Campania region between 1994 and 2009, thus forcing them to live in an environment polluted by refuse left in the streets. During part of that time, the Court considered that the situation had led to a deterioration of the applicants' quality of life, which was in breach of Article 8 of the ECHR.

In these case types, the ECtHR's focus has been on the context and individual circumstances of the situation, such as the causal link between the environmental degradation and the effects on the inhabitants, intensity and duration of the impact, and soon. The ECtHR has made clear that if such a risk can be foreseen by the relevant competent authorities, they must undertake an independent and impartial investigation of the events. In addition, the authorities must – applying the precautionary principle – undertake any measure necessary to protect the public concerned and to remedy the situation.⁷¹ Here, the margin of appreciation is not very wide, especially if there have been breaches of domestic environmental standards.⁷²

⁶⁷ *Hatton ao v. UK* (2003; 36022/97), para. 122.

⁶⁸ CoE's Manual (2012) at p. 19.

⁶⁹ *Lopez Ostra v. Spain* (1994; 16768/90), *Guerra v. Italy* (GC 1998; 14967/89), *Öneryildiz v. Turkey* (2004; 48939/99), *Fadeyeva v. Russia* (2005; 55723/00), *Ladyayeva v. Russia* (2006; 53157/99), *Budayeva v. Russia* (2008; 15339/02), *Budayeva v. Russia* (2008; 15339/02) and *Tâtar v. Romania* (2009; 67021/01). In the *Öneryildiz* case an explosion occurred on a rubbish tip close to the houses where the complainant lived, killing several members of the family. It can be noted that the ECtHR found that a breach of their right to "living space" despite the fact that the development of houses at the site was illegal, a situation that the authorities had known about for years. Other prominent cases concerning environmental issues are: *Moreno Gómez v. Spain* (2004; 4143/02), *Öçkan ao v. Turkey* (2006; 46117/99), *Deés v. Hungary* (2011; 2345/06), *Dzemyuk v. Ukraine* (2014; 42488/02), *Jugheli ao v. Georgia* (2017; 38342/05) and *Cordella ao v. Italy* (2019; 54414/13 and 54264/15).

⁷⁰ *Di Sarno v. Italy* (2012; 30765/08).

⁷¹ CoE's Manual (2012) at p. 18.

⁷² Boyle (2007) at p. 488.

3.5. Good Governance under the Convention

Another important feature developed in the case-law is that the Court has established rules on good governance for administration under Article 8 ECHR. In situations where there is a risk of serious environmental degradation affecting inhabitants' private and family life, the authorities are not only required to undertake investigations, but also to inform those concerned. In the two cases *Giacomelli v. Italy* (2006) and *Lemke v. Turkey* (2007), the ECtHR thus stated:⁷³

... a governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies ... The importance of public access to the conclusions of such studies and to information enabling members of the public to assess the danger to which they are exposed is beyond question.

In addition, the decision-making procedure must be transparent and fair with due respect to all interests involved. Possibilities for public participation shall be provided for, as well as access to justice.⁷⁴ In the two cases *Tâtar v Romania* (2009) and *Taşkin ao v Turkey* (2005), the ECtHR stressed that although Article 8 does not contain an express provision on due process, these requirements must still be upheld in relation to those "specifically affected".⁷⁵ In the first mentioned case, the ECtHR referred to the Aarhus Convention and pointed to the national legislation on public debates that had not been complied with and that the public concerned had no access to the conclusions of the studies conducted on the environmental impacts. In the literature, this has been described as a "profound extension of the procedural rights" under the Convention.⁷⁶

Article 6 and the requirement for a fair trial has also been triggered in environmental cases in the ECtHR. The case *Bor v. Hungary* (2013)⁷⁷ concerned serious noise emissions from a railroad station, disturbances that the ECtHR found had affected the quality of life of a person who lived nearby and therefore in breach of Article 8. As the authorities had been passive over the years and had not intervened to protect the inhabitant's interests, there was also a breach of Article 6. This last finding was in accordance with previous case-law, clarifying that the legal systems of the Parties must include the legal means for the public concerned to challenge administrative actions and omissions concerning people's living conditions.⁷⁸ Article 6 is further supplemented by the provision on effective remedies in Article 13. This was emphasised in the *Di Sarno* case, where there were no remedies available according to Italian law for the waste situation. The requirement for a fair trial in Article 6 is even wider than the substantive protection in Article 8 and other provisions of the Convention, as it applies in "the determination" of someone's civil rights and obligations according to the Convention. Thus, when someone has an arguable case, they may claim unlawful interference with, for example, Article 8 – as was the case in *Karin Andersson ao v. Sweden* (2014)⁷⁹ – and then invoke the requirement for a fair trial. Finally, one must not forget the basic demand for "equality of

⁷³ *Giacomelli v. Italy* (2006; 59909/00), para. 83 and *Lemke v. Turkey* (2007; 17381/02), para. 41 (translation after CoE's Manual (2012) at p. 85).

⁷⁴ Boyle (2007) at p. 497, Kobylarz (2018) at p. 116. It may also be noted that environmental information issues have been raised under Article 10 ECHR, such as *Verein gegen Tierfabriken v. Switzerland* (2001; 32772/02) concerning a ban on advertisements from an animal welfare group.

⁷⁵ CoE's Manual (2012) at p. 23 with reference to *Taşkin ao v. Turkey* (2004; 46117/99), *Tâtar v Romania* (2009; 67021/01), see also *Grimkovskaya v. Ukraine* (2011; 38182/03).

⁷⁶ Boyle (2007) at p. 498.

⁷⁷ *Bor v. Hungary* (2013; 50474/08).

⁷⁸ *Grimkovskaya v. Ukraine* (2011; 38182/03), *Hardy and Maile v. UK* (2012; 31965/07).

⁷⁹ *Karin Andersson ao v. Sweden* (2014; 29878/09).

arms” contained within Article 6, as illustrated by the famous *McLibel* case (2005).⁸⁰ Finally, high costs and lack of legal counsel cannot be allowed to create barriers for those who choose to take legal action to protect their rights and freedoms, a consideration which is also valid in environmental cases. The recent ECtHR judgement in *Ecoglasnost v. Bulgaria* (2020) is a showcase in that respect.⁸¹

3.6. Victims and standing

The European Convention has a strong public trigger; any “victim” – after having exhausted national remedies – can sue the government of the Party involved. However, there is a limitation which excludes those who want to use the Convention for general purposes of environmental protection or nature conservation, the so-called “direct victim requirement”.⁸² This means that a condition for having ECtHR review the merits of the case is that the environmental disturbance or degradation affects the applicant’s rights under the Convention. Thus, if a person’s civil rights are not sufficiently affected by the environmental event, standing in the Court will not be afforded. Or as the Court usually puts it, there is no explicit right in the Convention to a clean and quiet environment, but when an individual is directly and seriously affected by noise or other pollution, an issue may arise under Articles 2 or 8.⁸³

Those persons who go to Strasbourg, but from the outset are not regarded by the Court as victims under the Convention, will be dismissed and their complaint not reviewed on the merits. Therefore, in order to undertake an analysis of the “direct victims” concept, one must study both judgements and decisions. This is not the place for such an exercise, which is why I will confine the report to some landmark cases. In *Kyrtatos v. Greece* (2003) a couple of landowners complained about an urban development project that had impacted their living space with noise, night-light and other disturbances. They also claimed that the project had destroyed nature values in a swamp on their property.⁸⁴ The ECtHR found, however, that even though the environment could have been impaired by the developments in the area, the applicants had not shown that the damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their rights under Article 8. As for the noise and other disturbances arising from the project, those emissions were not so serious as to amount to a breach of their convention rights. In the so-called *Tigris Dam case* (*Ahunbay ao v. Turkey*, decision 2019), five individuals involved in the excavation of a historic site complained that a hydropower project in the river would destroy cultural heritage values in the area, something that amounted to a breach of their Article 8 rights. They also claimed that the project was in breach of Article 2 of Protocol no. 2 to the Convention, as it would violate humanity’s right to education, now and for future generations. Hearing those arguments, the ECtHR recognised that there exists a shared European and international perception of the need to protect cultural heritages, but that this generally focused on situations pertaining to the right of minorities to enjoy their own culture freely and to preserve their cultural heritage. In contrast, the Court did not perceive there to be any consensus among the Parties to the Council of Europe that would make it possible to infer from the Convention’s provisions that there exists a universal, individual right to the protection of the cultural heritage. Under this reasoning, the application was dismissed.

⁸⁰ *Steel and Morris v. UK* (2005; 68416/01).

⁸¹ *National movement Ecoglasnost v. Bulgaria* (2020; 31678/17).

⁸² Kobylarz (2018) at p. 106, CoE’s Manual (2012) at p. 100.

⁸³ *Leon and Agnieszka v. Poland* (2009; 12605/03), para. 98.

⁸⁴ *Kyrtatos v. Greece* (2003; 41666/98).

From this case-law, one can safely conclude that a certain amount of environmental protection can be extracted from the ECHR – at least a healthy environment and some basic procedural requirements – but only to those directly affected.⁸⁵ Consequently, the ECtHR has consistently rejected any ideas of *actio popularis*.⁸⁶ However, the Court has also showed an increasing awareness of the role that ENGOs play in a democratic society. *Gorraiz Lizarraga ao v. Spain* (2004) is illustrative in this respect. Here, a number of inhabitants had set up an association with the sole purpose of protecting their interests when a hydropower dam was built. The Court accepted to review the complaint, stating that the victim criteria must be understood in the light of the conditions in contemporary society. When citizens are confronted with particularly complex administrative decisions, recourse to collective bodies is an important means for them to protect their interests effectively. This is the reason most countries in Europe today recognise standing in court for organisations for these purposes. As the dam project in this case would concern the individuals' rights under the Convention, standing was awarded to the association.⁸⁷ Also, in quite a few other cases on environmental matters before the ECtHR, associations and groups have played an important role.⁸⁸ Case-law on this matter can be summarised so that they are allowed to act on behalf of their members, if the individuals have an arguable claim that their rights under the Convention have been infringed upon. This way, individuals can work via ENGOs “by proxy” so to speak, but only when their individual rights under the Convention are affected.⁸⁹

3.7. The Aarhus Convention

As noted, the European Convention of Human Rights contains basic rules on good governance in administration, but only in relation to those who are directly affected in the enjoyment of their rights. Instead, the most advanced instrument for environmental democracy is currently the regional 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention)⁹⁰. This Convention establishes three pillars in order to improve the democratic legitimacy of decision-making in environmental matters, namely *access to information* about environmental issues, *public participation* in decision-making and *access to justice* in court. The preamble to the Convention emphasises the importance of a close relationship between environmental rights and human rights, and further stresses that all three pillars are of decisive importance for sustainable development. The ideas forming the pillars are intertwined to form a whole, something that is advanced in the Implementation Guide of the Convention:⁹¹

Public participation cannot be effective without access to information, as provided under the first pillar, nor without the possibility of enforcement, through access to justice under the third pillar.

The Aarhus Convention is relatively short, containing only 22 Articles. Like many international instruments, it starts with a general part, including a provision laying down its objectives (Article 1),

⁸⁵ Boyle (2007) at p. 505.

⁸⁶ *Klass ao v. Germany* (1978; 5029/71), *İlhan v. Turkey* (2005; 22494/93), CoE's Manual (2012) at p. 23

⁸⁷ *Gorraiz Lizarraga ao v. Spain* (2004; 62543/00), paras. 38–39.

⁸⁸ See for example the already mentioned cases *Taşkin ao v. Turkey* (2004), *Di Sarno v. Italy* (2012), *Öçkan ao v. Turkey* (2006).

⁸⁹ See also *Collectif Stop Melox et Mox" v. France* (2007; 75218/01) and *L'Erablière asbl v. Belgium* (2009; 49230/07).

⁹⁰ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters adopted in Aarhus, Denmark, on 25 June 1998 by United Nations Economic Commission for Europe (2161 UNTS 447). Available at: <https://unece.org/DAM/env/pp/documents/cep43e.pdf>.

⁹¹ *The Aarhus Convention – An Implementation Guide*, p. 119.

largely reflecting what was earlier stated in the preamble. In this part, there are also some definitions (Article 2) and general provisions (Article 3). The definition of environmental information is very broad, including information from decision-making procedures. Of particular interest for this article are the definitions of the “public” and the “public concerned” (Articles 2.4 and 2.5). The broader concept “public” is defined as *“one or more natural or legal persons, and, in accordance with national legislation and practice, their associations, organizations or groups”*. The “public concerned” means *“the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”*. Further, the general provisions make clear that the provisions of the Convention constitute a floor (“minimum provisions”) that does not prevent the Parties from maintaining or introducing enhanced information, wider participation and more effective access to justice than that required by the Convention (Article 3.5). Article 3.9 essentially prohibits discrimination on the basis of citizenship, nationality, domicile or registered seat.

Provisions on access to environmental information are found in Articles 4–5 of the Convention, whereas Articles 6–8 deal with public participation in decisions on specific activities and concerning plans, programmes, policies and generally applicable legal norms. The “third pillar” of the Convention is contained in its Article 9. According to Article 9.1, any person whose request for environmental information has been refused shall have access to a review procedure in a court or tribunal.⁹² Article 9.2 stipulates that the public concerned shall have access to a similar procedure to challenge the substantive and procedural legality of any decision, act or omission subject to permit decisions on activities that may have a significant impact on the environment. In addition, Article 9.3 requires 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 provisions of its national law relating to the environment. There is also a general requirement for the environmental review procedure to be effective, fair, equitable, timely and not prohibitively expensive (Article 9.4).

3.8. The compliance mechanism of the Aarhus Convention

Most international environmental conventions have some kind of surveillance committee in charge of controlling the implementation and application of the conventional requirement in the signing Parties. Most of these committees are populated by governmental representatives and can only deal with complaints from the signing States. However, some modern environmental instruments have independent and impartial commissions, which are able to receive submissions directly from the public concerned, including from ENGOs (“public trigger”).⁹³ Examples of such compliance mechanisms can be found in the 1979 Bern Convention,⁹⁴ the 1991 Alpine Convention,⁹⁵ the 1999 Protocol on Water and Health,⁹⁶ and the 2010 Nagoya Protocol.⁹⁷

⁹² See, *The Aarhus Convention – An Implementation* (2014) at pp. 187ff., also Darpö (2021).

⁹³ See Koester (2016), at pp. 713ff.

⁹⁴ Convention on the Conservation of European Wildlife and Natural Habitats, CETS 104 (19 Sept. 1979).

⁹⁵ Convention Concerning the Protection of the Alps (1991); <https://www.ecolex.org/details/treaty/convention-concerning-the-protection-of-the-alps-tre-001126/>

⁹⁶ Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Water Courses and International Lakes (1999); https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-5-a&chapter=27&clang=en

The Aarhus Convention has such an independent commission equipped with a public trigger. The Convention's Compliance Committee consists of nine members, nominated by the Parties and ENGOs and elected at the Meeting of the Parties. The Committee is independent, because its members are judges and legal scholars sitting in their personal capacities for six years. All communications and meetings among the Committee are open to the public.⁹⁸ From 2004 to date, the Committee has received 184 communications from the public, out of which 83 have been concluded with recommendations. One must not underestimate the importance of committee decisions. Though its statements are not binding, they play an important part in the understanding of the Convention and – when endorsed by the Meeting of Parties – work as “interpretive factors” in the building of international norms in the field of environmental democracy. It can be noted that all Member States of the EU are Parties to the Convention, as well as the EU itself. The latter has particular importance for the public's possibilities to go directly to the Court of Justice, on which I will expand upon in the next chapter.

3.9. Interim conclusions on ECHR and Aarhus

From a RoN perspective, the following conclusions concerning the European Convention of Human Rights are relevant. To begin with, environmental protection under the Convention is indirect, since the beneficiaries of the duty of the States to regulate and control sources of environmental harm are only those individuals whose rights will be affected. Thus, the duty is not about protecting the environment, but of protecting humans from significantly harmful environmental effects. Against this background, environmental protection becomes primarily a task for the national governments and courts, applying other substantive norms in this field of law. Moreover, the Convention gives the States a wide margin of appreciation when rights of individuals are affected by interventions by the State on behalf of the environment, as well as in the administration's choice of measures to abate or avoid environmental harm. Therefore, despite its evolutionary character, the ECHR still falls short of guaranteeing the right to a healthy environment if that concept is understood in broader terms unrelated to impacts on humans.

This position may be challenged by all climate cases which are brought in Europe today. As the readers are well aware, the Supreme Court in the Netherlands in 2019 found that the Dutch government's failure to meet the requirements under the Paris agreement amounted to a breach of the inhabitants' rights under Article 2 and 8 of the ECHR.⁹⁹ However, in 2020 the Norwegian Supreme Court drew the opposite conclusion concerning the opening of the Barents Sea for oil exploitation,

⁹⁷ Protocol on Access to genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention of Biological Diversity (2010); https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XXVII-8-b&chapter=27&clang=en

⁹⁸ All documents are published on the Aarhus Convention's web site: <http://www.unece.org/env/pp/>.

⁹⁹ Hoge Raad, 8 December 2019 in case no. 19/00135. It is noteworthy that the Hoge Raad did not ask for an advisory opinion of the ECtHR, something which would have been possible as the Netherlands has signed Protocol no. 16 to ECHR. This Protocol allows the highest courts and tribunals of the Parties to request the ECtHR for an advisory opinion on questions of principle relating to the interpretation of the rights under the Convention. However, only a few Member States of the EU have signed and ratified this Protocol.

taking a more traditional stance.¹⁰⁰ The Austrian Constitutional Court concurred in that position, when it dismissed an action based on Article 2 and 8 ECHR from Greenpeace to invalidate a tax regulation that gave credits to air travel and not railways.¹⁰¹ The same fate met a group of women (“Verein KlimaSeniorinnen Schweiz”) when they took legal action against the Swiss government for not having ambitious enough policies to fight climate change.¹⁰² Similar cases have been brought in Belgium (“Klimaatzaak”), United Kingdom (Heathrow), France, Germany and other countries, as well as directly in the EU Courts.¹⁰³ Some of these will eventually find their way to the Strasbourg court, although the first have already arrived. In addition to the Swiss Klimaseniorinnen, a group of six Portuguese youngsters – “Youth for Climate Justice” – has sued all Member States of the EU and six other Parties to the ECHR for breaches of Articles 2 and 8 due to their failure in undertaking necessary measures to stop climate change.¹⁰⁴ Even if the various outcomes in these cases are not directly relevant for the discussion on RoN, it touches upon the basis of the human rights system in Europe, something which may have wider implications for all Parties to the European Convention on Human Rights.

Having said this, it is also important to recognise another of the basic features in the Conventional system. Going to the Strasbourg court shall only be regarded as a last resort, a principle that equally applies in environmental cases. In addition, human rights procedures are often (very) prolonged, and do not intervene in the actual situation for those whose rights have been infringed. Nadezhda Fadeyeva received compensation, but the Severstal steel plant in Cherepovets still operates, and the railroad close to Karin Andersson’s house has already been built. These situations will not be remedied by the judgements of the ECtHR. Even if those decisions are closely scrutinised by the national courts in Europe, the system is still mainly reparative.

By comparison, the Aarhus Convention covers all kinds of decisions relating to the environment as such, even those belonging to other fields of law. Thus, Aarhus is relevant for decision-making procedures on, for example, taxes, domestic and international investments, State subsidies, or issues relating to energy or land-use, so long as they have an impact on the environment. However, the drawback is obvious; Aarhus exclusively relates to procedural aspects of the decision-making and therefore has little importance for what results from the end of that procedure, even if all the rules in the book are followed. To be able to delve into the substance of environmental law and its relation to the RoN concept, we need to move on to the legal system of the EU.

¹⁰⁰ Norges Høgsterett, 2020-12-22 in case no. 20-051052SIV-HRET.

¹⁰¹ Verfassungsgerichtshof, 30 September 2020 in case no. G 144-145/2020-13, V 332/2020-13.

¹⁰² Schweizerisches Bundesgericht, 5 May 2020 in case no. 1C_37/2019.

¹⁰³ The case *Carvalho ao v. the EU* (T-330/18) was instigated by 37 individuals from six Member States of the EU plus Fiji and Kenya. The action was not based on the ECHR, but partly on a similar protection of life, family life and health under Articles 2, 3 and 7 of the EU Charter on Fundamental Rights (CFR). The action was however dismissed by the General Court, a decision which is now under appeal at the CJEU (C-535/19 P). For more information about the different climate cases, see <http://climatecasechart.com/>.

¹⁰⁴ *Duarte Agostinho v. Austria ao Parties to ECHR* (393/71/20). The case rests with the 4th Chamber of the ECtHR, and as of today, the admissibility of the action has yet to be decided.

4. EU LAW ON THE ENVIRONMENT

KEY FINDINGS

- The preservation and protection of the environment and the notion of sustainable development has a strong constitutional position in the primary law of the European Union, that is the Treaties of the European Union and the CFR. Also the most important environmental principles are found on this hierarchic level of the legal system.
- In secondary EU law, all kinds of environmental issues are currently covered by a wide array of Regulations and Directives.
- Whereas the regulations are directly applicable in the Member States, in the case-law of the CJEU a similar effect has been awarded to those provisions in Directives that are sufficiently precise and unconditional. The national courts are called upon to disregard any national law in breach with such provisions containing clear, precise and unconditional obligations concerning nature conservation or environmental protection.
- In the wake of Aarhus and under the development of the principle of judicial protection of EU law, there has been a substantial widening of the access to justice possibilities for the public concerned to challenge administrative action and inaction in recent years. According to the CJEU, the public concerned – including recognised ENGOs – must be able to bring administrative decision-making under EU law on the environment to the national courts for review.
- However, this widening of access to justice to the national courts has not as of yet included the possibilities to challenge acts by EU institutions by direct action to the CJEU. This situation has been raised to the Aarhus Convention's Compliance Committee, which already in 2011 voiced criticism against the EU in the so-called C32 decision. To meet these concerns, the EU Commission in late 2020 proposed a reform of the Aarhus Regulation (1367/2006). Whether the proposal suffices to meet the criticism from the Aarhus Compliance Committee remains to be seen on the next Meeting of the Parties to Aarhus in September 2021.

4.1. Introduction

The development of EU law on the environment has followed a similar trajectory to corresponding international law, albeit with its own characteristics. Since 2009, the constitutional pillar of the Union has had its basis in the *Treaty on European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU). Also, the *Charter of Fundamental Rights of the European Union* (CFR) has become legally binding with the same status as the Treaties in primary law.

In Article 3(3) TEU, it is established that the Union shall work for the sustainable development of Europe based on, among other things, balanced economic growth, full employment and social progress, and a high level of protection and improvement of the quality of the environment. This programmatic declaration is supplemented by the general provision in Article 11 TEU, requiring that environmental protection must be integrated into the definition and implementation of Union policies, “*in particular with a view to promoting sustainable development*”. However, the most important provision on a constitutional level is Article 191 TFEU, formulating the environmental objectives:

1. Union policy on the environment shall contribute to pursuit of the following objectives:
 - preserving, protecting and improving the quality of the environment,
 - protecting human health,
 - prudent and rational utilisation of natural resources,
 - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

Finally, the importance of environmental protection is also highlighted in Article 37 CFR, where it states: *“that a high level of environmental protection and the improvement of the quality of the environment shall be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”*.

As noted, some environmental principles are expressed in these provisions, most importantly the precautionary principle and the polluter pays principle. Other such principles instead are defined in the secondary legislation of EU law, such as Best Available Technology (BAT) in the Industrial Emissions Directive (IED)¹⁰⁵. The substitution principle can also be found in that Directive, although that is first and foremost one of the bases for the laws on chemicals – mainly in the Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)¹⁰⁶. Principles have a key function in the EU legal system, both for the deciding of competences, and as tools for the interpretation of the legislation. The CJEU’s case-law in environmental matters shows many examples of deliberations about the purpose and aim of a certain piece of legislation. In this way, environmental principles complement the general principles within EU law, such as the rule of law, the principle of useful effect (*effet utile*), and the principle on judicial protection.¹⁰⁷

4.2. EU regulations and directives

As in all other areas of social regulation, environmental law in the EU consists of both regulations and directives, although the latter dominate. Regulations are often used to implement international agreements into the Union and its Member States and on areas where trade harmonisation is of key importance, such as in the legislation on chemicals and waste, and on the protection of endangered species. REACH has already been mentioned, the EU Wildlife Trade Regulations implementing the

¹⁰⁵ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ L 334, 17.12.2010, p. 17), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010L0075>.

¹⁰⁶ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396, 30.12.2006, p. 1), available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32006R1907>

¹⁰⁷ Further reading on environment principles in EU law can be found in Langlet & Mahmoudi (2016), section 2.3 and Krämer (2016), Chapter 1.

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention)¹⁰⁸ being another example.¹⁰⁹

Today, EU directives cover most of the environment, from the soil and water to the air, atmosphere and climate. From a RoN perspective, the most prominent are the two “nature directives”, that is, the Birds Directive¹¹⁰ and Habitats Directive¹¹¹. These directives require the Member States to designate areas for the conservation of natural habitat types of European interest and for the protection of rare and threatened species, thus establishing the so-called Natura 2000 network. The directives aim to implement the 1979 Bern Convention under the ambit of the Council of Europe,¹¹² while also being part of the EU’s implementation of the 1992 Convention on Biological Diversity (CBD).¹¹³ The CBD recognises the “intrinsic value of biodiversity” and has three main objectives:

1. the conservation of biological diversity,
2. the sustainable use of the components of biological diversity, and
3. the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.

Other important pieces of sectorial legislation are the Water Framework Directive (WFD)¹¹⁴ and the above-mentioned Industrial Emissions Directive (IED). There are also horizontal directives – applicable to all kinds of activities – such as those about Environmental Impact Assessments concerning plans and programs (SEA Directive)¹¹⁵ and projects (EIA Directive)¹¹⁶. The EIA Directive is also applicable to transboundary pollution, thus incorporating the 1991 Espoo Convention into EU law.¹¹⁷

According to Article 288 TFEU, a directive is “*binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*”. On the face of it, one may believe that this leaves the Member State a wide discretion for the means of implementation. However, this openness has been narrowed considerably by the CJEU, clarifying that directives must be transposed in the national legislation so that the general legal context is reflected, but still ensuring the full application of their provisions in a sufficiently clear and precise manner.¹¹⁸ Concerning strict obligations, mere internal practices within the administration do not

¹⁰⁸ Signed in Washington D.C., US, on 3 March 1973 (993 UNTS 243). For further information, see <https://cites.org/eng>.

¹⁰⁹ EU Wildlife Trade Regulations include, in particular: Council Regulation (EC) No 338/97, Commission Regulation (EC) No 865/2006, and Commission Implementing Regulation (EU) No 792/2012, all available at: <https://eur-lex.europa.eu/homepage.html?locale=en>

¹¹⁰ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010, p. 7), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0147>.

¹¹¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0043>.

¹¹² Convention on the Conservation of European Wildlife and Natural Habitats, CETS 104 (19 Sept. 1979).

¹¹³ Convention on Biological Diversity (1992); 1769 UNTS 79. The 2010 Nagoya protocol (see footnote 97) is issued under the third limb of CBD.

¹¹⁴ 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 (OJ L 327, 22.12.2000, p. 1), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32000L0060>

¹¹⁵ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ L 197, 21.7.2001, p. 3), available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0042>

¹¹⁶ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ L 26, 28.1.2012), consolidated version available at: <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A02011L0092-20140515>.

¹¹⁷ 1991 Convention on Environmental Impact Assessment in a Transboundary Context, 1989 UNTS 309.

¹¹⁸ See for example, C-6/04 *Com v. UK* (2005), para. 26, C-507/04 *Com v. Austria* (2007), para. 89.

meet these requirements, as they are not published and can be altered at the will of the authorities.¹¹⁹ To meet the principle of legal certainty, such provisions in EU law must be implemented into national legislation “*with unquestionable binding force*” in order to clarify the rights and obligations of all those who are concerned.¹²⁰

4.3. The doctrine of direct effect

According to Article 4(3) TEU, the Government and all administrative bodies and courts in a Member State that are charged to apply EU law are bound to the principle of loyal cooperation. Accordingly, they must respect the doctrine of *treaty conform interpretation* of EU legislation and also award certain provisions *direct effect*. Treaty conform interpretation is what lawyers do in their everyday tasks, namely, to understand black letter law systematically and in line with the aim and purpose of any given legislation. Direct effect is something that, according to the CJEU, shall be awarded to provisions in directives that are sufficiently precise and unconditional. Such provisions take precedence over national legislation incompatible with EU law.

For many years, there has been debate over whether direct effect can be afforded only to provisions that carry *individual rights* in a more traditional understanding, or if it may also be applied to provisions in directives carrying obligations for the national administration. Today, a broad understanding dominates the legal scholarship of environmental law. To most legal scholars, direct effect is about the possibilities open to the public concerned to challenge decisions by authorities, in relation to demands for a certain environmental quality in accordance with clear indications under EU law.¹²¹ The direct effect of EU law has also been described as the duty of the Member States’ court or other authority to apply the relevant provision *ex officio* as a norm governing the case, superior to and irrespective of what the national regulation says on the matter. In this way, provisions with direct effect could be used by all concerned parties in order to challenge decision-making under EU law.¹²²

This is also the general position from which this study takes its view. As will be shown below, the CJEU emphasises *both rights and duties* expressed in directive provisions with direct effect. In this way, case-law expresses two aims of direct effect – a dual approach.¹²³ These aims are, first, the protection of rights, and second, to verify that EU legislation in the environmental sphere is complied with at Member State level. The point of departure for the analysis here is that all provisions of EU law with sufficient clarity and precision have direct effect – meaning the substitutional effect on incompatible rules of national law – and that those who are qualified as bearers of the interests expressed in these provisions should be able to challenge the national decision-making in court in line with the principle of judicial protection. Another starting point is that the Union legal system cannot discriminate between different areas of law concerning the enforcement of common obligations, although the doctrine of direct effect must be adapted to the legal context in which it functions. Traditional individual subjective rights belong to areas where there are distinct bearers of the rights expressed in EU law, such as free movement of goods and services, labour law, social security, or migration. As those interests thus always can appear in court, the legal system would be biased if the public

¹¹⁹ C-507/04 *Com v. Austria* (2007), para. 162 with references to case-law.

¹²⁰ C-415/01 *Com v. Belgium* (2003), para. 21.

¹²¹ Jans, & Vedder (2011), Chapter 5, Fisher & Lange & Scotford (2013), Chapter 1–2.

¹²² Prechal (2005), p. 241, Langlet & Mahmoudi (2016), p. 21, see also Eliantonio (2016), p. 175–201.

¹²³ Commission Notice (2017) section C (paras. 31–57).

interests – clean air, sound water resources and a rich biodiversity, etc. – were to be prevented from coming to court in order to achieve a balance against the interests of developers and enterprises. Such an attitude would not be in line with the high ambitions of environmental protection within the Union, expressed in Article 3(3) TEU, Articles 11 and 191 TFEU and Article 37 CFR.

4.4. The Aarhus Convention and EU law

The basic provision on access to justice within the EU lies in Article 47 CFR, stating that everyone whose rights or freedoms are violated is entitled to an effective remedy, meaning a fair and public hearing within a reasonable time by an independent and impartial tribunal. This provision is complemented by Article 19 TEU, requiring Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Read together, these provisions express the two underlying reasons for access to justice on a general level; first, to protect rights and freedoms, and second, to enforce the *rule of law*.

The European Union and its Member States are parties to the Aarhus Convention. Nearly all the provisions in the Convention are implemented in the Union by various directives, most importantly the Environmental Information Directive (2003/4, EID)¹²⁴ and amendments made to the EIA Directive and the IED through the Directive on public participation (PPD).¹²⁵ Other pieces of legislation also contain implementation measures, such as the Environmental Liability Directive (ELD).¹²⁶ For decision-making by the institutions of the Union, the Aarhus Convention is implemented by Regulation No 1367/2006 (Aarhus Regulation).¹²⁷ With respect to Article 9(3), the picture is more complex. On the approval of the Convention, the EU made a declaration on competence, stating that Member States are responsible for the performance of the obligations in accordance with Article 9(3) and will remain so unless and until the Union adopts provisions covering implementation. A proposal for a directive on access to justice was launched by the European Commission in 2003 and deliberated upon for more than a decade before finally being withdrawn in 2014 due to resistance at Member State level.¹²⁸ In reality, however, this resistance has had little importance since the CJEU has driven the development of a wider access to justice for the public under the principle of legal protection under EU law.

Even before the ratification of the Aarhus Convention in 2005, important positions were taken by the Court on issues such as the “direct effect” of EU directives and the principles of effectiveness and

¹²⁴ 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, available at : <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003L0004&qid=1615481237607>

¹²⁵ 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 (OJ L 156, 25.6.2003, p. 17), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0035>.

¹²⁶ 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 (OJ L 143, 30.4.2004, p. 5), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0035>.

¹²⁷ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p. 13), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R1367>.

¹²⁸ Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters (COM/2003/0624 final), withdrawal announced in OJ (2014) C153/3.

judicial protection under EU law. Examples of landmark cases in this respect are C-431/92 *Grosskrotzenburg* (1995), C-72/95 *Kraaijeveld* (1996), C-435/97 *WWF* (1999) and C-201/02 *Delena Wells* (2004). Since 2005 and the EU's accession to Aarhus, the development of case-law on access to justice has been expansive.¹²⁹ About 50 cases have been delivered by the CJEU, covering all aspects of access to justice in environmental matters. Concerning standing for individuals and NGOs the following can be mentioned: C-237/07 *Janecek* (2008), C-75/08 *Mellor* (2009), C-263/09 *Djurgården* (2010), C-240/09 *LZ or Slovak Brown Bear* (2011), C-115/09 *Trianel* (2011), C-128/09 *Boxus*, C-182/10 *Solvay* (2012), C-72/12 *Altrip* (2014), C-404/13 *ClientEarth* (2014), and C-243/15 *Slovak Brown Bear II* (2016). A number of cases have dealt with the cost issue in environmental proceedings: C-427/07 *Irish costs* (2009), C-260/11 *Edwards* (2013), and C-530/11 *Com v. UK* (2014). As has been mentioned, Article 9(4) of the Aarhus Convention requires that the national procedures be fair, equitable and timely, an issue which was dealt with in C-416/10 *Križan* (2013).¹³⁰

Two cases stand out as especially important for the understanding of the position in EU law concerning access to justice in environmental matters. First, when the CJEU was faced with the problem of Article 9(3) not being implemented in EU law, it established what we may call the "to enable" formula in *Slovak Brown Bear* (2011). Here, the Grand Chamber of the CJEU made clear that even though Article 9(3) of the Aarhus Convention is not directly applicable in EU law, it is still a *Union law obligation for the Member States' courts to interpret, to the fullest extent possible, the national procedure in order to enable NGO standing in environmental cases*.¹³¹ That statement opened the gates to national courts all over Europe, since most domestic procedural systems use "open criteria" for standing in administrative cases. These provisions were now to be understood as including standing for NGOs in environmental cases. The next question that immediately arose concerned the situation where national procedures do not leave any such room for interpretation. The reply to this came only two months later in *Trianel* (2011), where the court stated (*italics added*):¹³²

It follows more generally that the last sentence of the third paragraph of Article 10a of Directive 85/337 must be read as meaning that the '*rights capable of being impaired*' which the environmental protection organisations are supposed to enjoy must necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having direct effect.

Thus it follows from this case that NGOs represent the environmental interest, not only where EU law provisions have been implemented in national legislation, but also where they have direct effect by way of being sufficiently precise and unconditional. As a consequence, national courts are obliged to set aside any domestic rule contrary to the reading of that provision in EU law. Another reasonable conclusion to be drawn from this judgement in combination with *Slovak Brown Bear* and the principle of judicial protection in Article 19 TEU is that this role of the NGOs is generally applicable in all areas of EU environmental law. This was made even clearer in subsequent case-law, for example in *Slovak Brown Bear II* (2016), where CJEU – the Grand Chamber once again – stated that Article 47 of the Charter was applicable to a situation where an NGO had appealed a decision to construct an enclosure for deer within a Natura 2000 site.¹³³ Yet another important step was taken in C-664/15

¹²⁹ See Brakeland (2014): Access to justice in environmental matters – development at EU level.

¹³⁰ A summary of the CJEU cases from *Djurgården* and onwards is published on the website of the Task Force on Access to Justice under the Aarhus Convention, see <http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention/envpptfwg/envppatoj/jurisprudenceplatform.html>.

¹³¹ Free citation from para. 51 of the judgement in C-240/09.

¹³² C-115/09 *Trianel* (2011) para. 48.

¹³³ C-243/15 *Slovak Brown Bear* (2016), para 73.

Protect (2017).¹³⁴ In this case, the CJEU first made the often repeated statement from the *Slovak Brown Bear* case about Article 9(3) of the Aarhus Convention not having direct effect in EU law. But then it added that, used in conjunction with Article 47 of the Charter, that provision shall be interpreted as meaning that an ENGO must be able to contest before a court a decision granting a permit for a project that may be contrary to the obligation to prevent the deterioration of the status of bodies of water as set out in Article 4 of the WFD.¹³⁵ If the procedural rules in the Member State do not allow for this under the doctrine of treaty conform interpretation, it would then be for the national court to set aside (disapply) those provisions.¹³⁶

In conclusion, direct effect of EU environmental law relates to *clear obligations*, meaning that the public concerned shall have *standing* in order to challenge decisions by national authorities on subjects that are covered by provisions that are sufficiently precise and unconditional. In addition to this, the requirement *taking it into consideration* expressed in the case-law of the CJEU implies that the Member State court must make its own evaluation of the case to see whether the administration has decided in accordance with those provisions. Thus, the direct effect has *two legal consequences*: first standing in the case and, second, that of being invocable in court. Evidently, the underlying reason for the jurisprudence of the CJEU is that the Member States shall not have the advantage of being able to escape from obligations according to EU law on the environment by simply avoiding implementing them. Clearly, this argument relates to the rule of law, but also to the fact that the public plays a crucial role as guardian of the correct application of EU law, something already stressed in the case *Van Gend en Loos* in the early 1960s.¹³⁷ To strengthen access to justice for the public concerned – both on the national level and by way of direct action to the CJEU – is also stated by the Commission as a political priority for delivering the European Green Deal.¹³⁸

4.5. Direct action to the CJEU

The CJEU body of case-law relates directly to the provisions of the Aarhus Convention. In this way, the various positions of the CJEU have become an important source for understanding the Convention,

¹³⁴ Case C-664/15, *Protect* (2017), paras. 55–58.

¹³⁵ Among others, the CJEU referred to C-73/16 *Puškár* (2017), para 57 and the case-law cited therein.

¹³⁶ Other recent cases with implications for the enforcement of EU environmental and access to justice are C-470/16 *North East Pylon* (2018) on costs in environmental proceedings, C-752/18 *Deutsche Umwelthilfe* (2019) about the possibilities of a national court to impose imprisonment in order to sanction administrative passivity concerning implementation of obligations under EU law, C-723/17 *Craeynest* (2019) on the possibilities open for the public concerned to challenge how the authorities are monitoring and assessing air quality under Directive 2008/50, C-280/18 *Flausch* (2019) on the requirements in the EIA Directive for how the public shall be notified about ongoing decision-making procedures, C-197/18 *Wasserleitungsverband Nördliches Burgenland* (2019) about the possibilities for individuals, private entities and ENGOs to challenge the authorities omission to set up Nitrate Actions Programs under Directive 91/676 and C-826/18 *Varkens in Nood* (2021) about participation as a prerequisite for access to justice. On a general level, the CJEU's preliminary decisions in the *Białowieża* case (C-441/17 R, ECLI:EU:C:2017:622), where the Court for the first time granted interim relief combined with fines according to Article 279 TFEU and Article 260(7) and 260(3) in the Rules of Procedure of the Court of Justice also are highly relevant for the effectiveness of justice in environmental matters, as well as the judgements in late 2019 about the independence of the Polish judiciary (C-619/18, C-192/18 and joined cases C-585/18, C-624/18 and C-625/18).

¹³⁷ C-26/62 *Van Gend en Loos v Netherlands* [1963] ECR 1, the second last paragraphs (not numbered) above “The second question”, see Brakeland (2014), p. 6.

¹³⁸ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: *The European Green Deal*. Brussels 11.12.2019. COM/2019/640 final, p. 30, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1596443911913&uri=CELEX:52019DC0640#document2>

not only for its implementation in EU law, but also on a general level. At the same time, the Aarhus Convention's Compliance Committee has issued a number of important decisions about the third pillar of the Convention. Often, the standpoints of the CJEU and the Committee coincide, but not always. Most importantly, the Compliance Committee has been seriously concerned about CJEU case-law concerning the possibilities available for the public concerned to challenge decisions within the EU administration. In its two "C/32 decisions",¹³⁹ the Compliance Committee criticises the strict criteria in EU law which apply when someone wants to challenge decisions and omissions by the EU institution by instigating legal action direct to the CJEU. The background to this is the traditional *Plauman doctrine*, which does not seem to have been substantially changed by the introduction of the Aarhus Regulation in 2006.¹⁴⁰ Although the Regulation introduces an internal review mechanism and a possibility for certain ENGOs to appeal to the EU Courts, this possibility is open only for a limited number of EU acts.

The C/32 case was brought in 2008 by the ENGO ClientEarth with support from a number of entities and individuals. The communicant claimed that EU law concerning direct action to the EU Courts was incompatible with Article 9(3) of the Aarhus Convention. The Compliance Committee's decision was taken in two phases, the first of which came in April 2011 (C/32 Part 1).¹⁴¹ The Committee drew some general conclusions in this decision and stayed further proceedings, pending the final outcome of T-338/08 *Stichting Mileu* (2012) in the CJEU, concerning the interpretation of the Aarhus Regulation. The decision in C/32 Part 2 came in March 2017. That decision was, however, not endorsed by the Aarhus Meeting of the Parties later that year, due to resistance from the EU. Instead, the meeting took note of the Compliance Committee's findings and decided to discuss the matter at the next meeting in September 2021. And so, the EU was awarded another four years to deal with the criticism.

Considering the subsequent development of case-law after 2011, the Compliance Committee raises criticism against the EU on several points. To begin with, the Committee held with regard to the "special nature" of the EU legal system, that while a system of judicial review in the national courts of the EU Member States – including the possibility to request a preliminary ruling of the CJEU – is a significant element for ensuring proper implementation of EU law, it cannot be a basis for generally denying members of the public access to EU Courts to challenge decisions, acts and omissions by EU institutions and bodies. Without delving into the details of the case, the remarks concerned both criteria for standing and what types of internal decisions can be challenged by way of direct action to the CJEU. As for standing, only those for which the administrative act is of "direct concern" can ask for annulment, which rarely can be said about an ENGO challenging a particular measure by EU institutions. The Committee also criticised the limitation that restricted access to recognised ENGOs only, thus excluding private persons and other entities belonging to the public. The Committee further pointed to the combination of Article 263 TFEU and the Aarhus Regulation which offers a panoply of restrictions on what kind of administrative decisions and omissions can be subjected to an action for annulment, only allowing: "regulatory acts" not entailing "implementing measures", acts with "legally binding and external effects", measures of "individual scope under environmental law", and those not taken by the administrative authority in their "judicial and legislative capacity". Compared with Article 9(3), covering all kinds of acts and omissions by public authorities that

¹³⁹ The findings of the Compliance Committee on communication ACCC/C/2008/32 (part I) (ECE/MP.PP/C.1/2011/4/Add.1) and ACCC/C/2008/32 (part II) (ECE/MP.PP/C.1/2017/7) concerning the compliance by the European Union.

¹⁴⁰ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p. 13), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R1367>.

¹⁴¹ See the chart for the case ACCC/C/2008/32 *European Union* at <https://unece.org/acccc200832-european-union>.

contravene laws relating to the environment, the Compliance Committee found the criteria for direct access to the CJEU too strict.

After the Meeting of the Parties in 2017 and some debate among the EU institutions, the Council of the European Union requested the European Commission to undertake a study to explore ways to comply with the findings of the Compliance Committee. This study was published in 2019 together with an Environmental Implementation Review. Strict criteria for ENGO standing and costs were identified as the main barriers to access to justice in the EU.¹⁴² In late 2020, the European Commission published a proposal for revision of the Aarhus Regulation.¹⁴³ The stated reason is that access to justice in environmental matters – both via the CJEU and via the national courts – is an important measure for delivering the European Green Deal and to strengthen the role that civil society can play as watchdog for the implementation of EU law. The proposal aims to amend the Regulation in a way that is compatible with the fundamental principles of the Union legal order and its system for judicial review. Against this background, ENGOs should be awarded broader possibilities to challenge acts and omissions of EU bodies in accordance with the Aarhus Convention. In detail, it is suggested to expand the definition of appealable decisions to any non-legislative act that has legally binding and external effects and contains provisions that may contravene environmental law. At the request of the EU, the Aarhus Compliance Committee in February 2021 issued an “advice” concerning the proposed reform of the Aarhus Regulation.¹⁴⁴ The Committee welcomed the amendments as a significant positive development, but still had some remaining concerns. Most importantly, it criticised that only recognised ENGOs have the possibility to ask for internal review of acts by the EU institutions and advised that also other members of the public should have this possibility, albeit under certain criteria. The remaining concerns touched upon minor issues such as the understanding of “binding effect” and “implementing measures”. As noted, the outcome of this discussion will be decided on the seventh session of the Meeting of the Parties to the Aarhus Convention in September this year.

4.6. Interim conclusions about EU Law on the environment and access to justice

Although RoN is not recognised in the EU, the preservation and protection of the environment and the notion of sustainable development has a strong constitutional position in the Treaties of the European Union and the CFR. We can also find the most important environmental principles on this hierarchic level of the legal system. Moreover, in secondary EU law we find all kinds of environmental

¹⁴² European Commission study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters (2019) available at: https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implementation_environmental_matters_2019.pdf, and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Environmental Implementation Review 2019: A Europe that protects its citizens and enhances their quality of life (COM/2019/149 final), available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52019DC0149>.

¹⁴³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Improving access to justice in environmental matters in the EU and its Member States (COM(2020) 643 final), available at: https://ec.europa.eu/environment/aarhus/pdf/communication_improving_access_to_justice_environmental_matters.pdf

¹⁴⁴ Advice 2021-02-12 by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3, available at: https://unece.org/env/pp/cc/accc.m.2017.3_european-union

issues covered by directly applicable regulations and directives that leave room for the Member States to implement. This national discretion has, however, been restricted in two ways by the doctrine on direct effect that has been developed in the CJEU case-law. First, the Member States' courts are called upon to disregard any national legislation incompatible with clear, precise and unconditional obligations of EU law. Second, the public concerned – including recognised ENGOs – must be able to bring administrative decision-making under certain provisions to the national courts for review. In the wake of Aarhus and under the development of the principle of judicial protection of EU law, there has been a substantial widening of the access to justice possibilities for the public concerned to challenge administrative action and inaction in recent years. However, the situation is quite the opposite concerning the possibilities to challenge such acts by EU institutions by direct action to the CJEU. In comparing this stance with the generous attitude concerning the requirements for open access to national courts, it is no exaggeration to talk of the Janus face of the CJEU.

In the following sections, I will relate the basic features of the EU legal system to the RoN concept and ask what added value legal personhood for natural objects would entail. I will also discuss what improvements can be made in EU law to meet the issues that the RoN shines the light on.

5. A CRITICAL APPROACH TO RIGHTS OF NATURE IN A EUROPEAN CONTEXT

KEY FINDINGS

- RoN does not entail a shift of paradigm in law that has the capacity to save the environment from the challenges we face today. Many of the deficits that this movement criticises modern environmental law for having are general problems that have been discussed for years and which will not be remedied by introducing new labels in a system that still must be handled by humans. The dichotomy between RoN and modern European environmental law is therefore partly artificial, a symbolic construct.
- The idea of giving “legal personhood” to natural entities is basically to introduce “actio popularis” via the backdoor so to speak. In the legal order of the EU – with advanced environmental law and clear obligations for the administration – we have chosen a different avenue for enabling civil society to act as a watchdog of environmental decision-making, namely to award standing in court for the public concerned and for recognised NGOs. There is little reason to deviate from this system, although it needs to be strengthened in certain aspects.
- Even so, the RoN school of thought contains fresh insights in its critique of current environmental law and presents ideas that can be developed within our conventional legal notions.
- Such an idea may be to introduce the general principle of non-regression on the constitutional level in EU law, meaning a prohibition on the Member States to undertake measures entailing environmental degradation or the weakening of environmental laws. Other principles that are lacking at that level is those concerning environmental or ecological integrity, as well as the recognition of the “intrinsic value of biodiversity”.
- In addition, many ideas in the RoN concept can be used to improve secondary EU legislation on the environment. Most importantly, these ideas concern the improvement of the enforcement possibilities and the implementation of the Union obligations in the Member States. A number of such issues are touched upon in this section, which will be followed by recommendations in Chapter 6.

5.1. Introduction

In this section, I will give my own perspectives on RoN and discuss what may be the benefits of applying this concept in the jurisdiction of the EU. In doing this, an effort is made to define the main components in this school of thought – to “deconstruct” the RoN concept so to speak – in order to see what it consists of. The methodological point of departure is that only by doing so are we able to see beyond the labels and evaluate what added value RoN can bring about.

Some caveats must be made from the beginning. In the RoN discourse, one may say that there is a distinction between those who belong to the “deep ecology” movement and us, the others, “anthropocentric” – sometimes even named “shallow” – legal scholars. As already confessed at the beginning, I definitely belong to the latter group and my analysis is therefore in line with that

perspective. But as Elder said 35 years ago, “epithets cannot replace analysis”.¹⁴⁵ Another quotation worth remembering is one by the late Staffan Westerlund, professor in Uppsala, and one of the founders of environmental legal scholarship in Europe. When we were doctoral students in his seminar, he kept reminding us that “if you invent a new legal term, ask yourself if it is really needed”. Thus, my scholarly sceptical attitude towards RoN begins with the question: do we really need this new concept, what is the added value? However, it should also be noted from the beginning that I share much of the RoN movement’s view on the need for a systematic change in our society if we want to fight the climate challenges and loss of biodiversity.

Another starting point of mine is a strong belief in *trias politica* from a European understanding, namely that politics, executives and the courts have different roles to play in a democratic society. These roles are obviously developing in accordance with society and the environment, but the basis remains the same: parliaments establish rules by legislation, the governments and administrations manage the implementation, and the courts ensure that this is done according to the law (the *rule of law* principle). Within the RoN movement, there exist tendencies that I find worrying in this respect. To be concerned about having politicians decide on which species shall be included in the lists under the Habitats Directive is a valid critique that merits support. But to talk about a renewal of environmental law by way of “liberation of governments from electoral blackmail” is something radically different.¹⁴⁶ That attitude is in line with a darker side of “deep ecology” where “nature” is the ultimate norm giver through “rights” to which humankind is obliged to abide no matter what social interests are at stake. In such a system, there seems to be little room for political or democratic choices or prioritisations, because it is not defined who determines what ‘nature’ requires, that is, what person or institution is allowed or mandated to define the superior interest of the environment. The democratic deficit in this philosophy of “deep ecology” was already questioned in French philosophy 30 years ago, but that debate seems now to be dormant.¹⁴⁷ In the RoN discourse, the *trias politica* issue is not even mentioned, let alone discussed. In contrast to this, I am a strong believer of the distribution of powers and the rule of law, even though it may have its apparent drawbacks from an environmental viewpoint. But that is the price to pay for democracy and I am sure that it will – at the end of the day – show that the environment will also benefit from developing majority support in society. In consequence, I also concur with those who advocate a strong position for the environment at the constitutional level, an issue returned to in Section 5.3.

In this chapter, the key elements of the RoN school of thought are analysed and discussed from a critical point of view. Some ideas will be dismissed, whereas others will be developed into proposals for the improvement of European environmental law. The discussion here touches upon issues such as: the description of the world and the environment according to the RoN movement and the recipe for change, substantive and procedural aspects of RoN, legal personhood and standing for natural entities, representation and guardianship, the relationship between nature science and law, the burden of proof in environmental decision-making, the implementation and enforcement of environmental law, and the competence of the courts.

¹⁴⁵ Elder (1984) at p. 285.

¹⁴⁶ Citation from the reading, although I will not give the source.

¹⁴⁷ See, *inter alia*, Goyard Fabre, S: *Les embarras philosophiques du droit naturel*, Vrin, 2002, p. 345; Bourg, D: *Droits de l’homme et écologie*, *Esprit*, Octobre 1992, p. 80. Both authors underline the anti-humanism of deep ecology. This debate nevertheless tends to reappear through the concept of planetary limits proposed by advocates of deep ecology and rights of nature, see Bétaille, J: *La personnalité juridique de la nature démystifiée, éléments de contre-argumentation*, *Actu-environnement*, November 16th 2020 : www.actu-environnement.com/blogs/julien-betaille/180/personnalite-juridique-nature-demystifiee-elements-contre-argumentation-22-439.html

5.2. Arguments in the Rights of Nature discourse

Reading a substantial amount of RoN literature during a limited period of time is a trying task and actually quite confusing. As already noted in Chapter 2, this discourse is very wide and contains a number of different stories. What was initially a rather confined topic has become a whole philosophy with content that is not always very distinct. Christopher Stone was mainly concerned with awarding a constitutional value to nature with an absolute ban on certain environmental degradations, the undertaking of high quality EIAs, economic considerations and trust funds for nature, the burden of proof and representation in court. In his 1972 article, he favoured the idea that natural objects should have standing in court, as well as an obligation for the court to assess the damage to that object and issue relief to its benefit. Today, we do not find this position to be very radical, albeit we use different labels for these legal constructs. And what is more, the case Stone analysed was not different from an ordinary environmental case of today where an ENGO contests a decision to allow the destruction of nature. However, the current discourse on RoN has moved far beyond this position and has clear ingredients of politics and symbolism. And as with any such movement, it is not always very mindful of the accuracy of its storytelling.

With Bétaille, one may say that the modern idea of RoN rests upon three basic assumptions; first, that current environmental law is anthropocentric and therefore cannot recognise nature's intrinsic value; second, that introducing legal personhood to natural objects would be a paradigm shift in law; and third, that this concept is better suited than existing environmental law to solving the challenges of today, such as climate change and large scale biodiversity losses.¹⁴⁸ As noted in Chapter 2, there are even some RoN philosophers claiming that modern environmental law is not part of the solution to these problems, but is a contributor to a system which cements the status quo in regarding nature as an object free for exploitation, although with certain limits harmless for the rights of man.

In support of this world view, the RoN discourse is surprisingly consistent. The same cases are highlighted over and over while the low success rate of these is given less attention, both concerning their survival on appeal and their implementation on the ground. Something similar can be said about the fact that most of the local bylaws on RoN have been quashed on constitutional grounds when they have been appealed to court. Further, it is seldom discussed that the RoN legislation in, for example, Aotearoa New Zealand and Latin America and subsequent cases are given in very special cultural circumstances. In the first case, RoN are a means for conciliation between the government and the Maori tribes, in the latter, they are part of an anti-colonial strategy in a coordinated action from environmental activists, associations representing the indigenous peoples, and progressive politicians in these countries. In Ecuador and Bolivia these RoN laws have been used by the governments to strike hard against illegal activities in sensitive areas, but also to promote a traditional – albeit nationalist – extractivist agenda. According to some authors, RoN has thus become a superior principle to all others except for the “right” to exploit natural resources (sic).¹⁴⁹

Another characteristic of the RoN discourse along the same lines is the anecdotal evidence supporting the idea. Suggesting Sweden as a country where RoN may be established in the Constitution only shows an astonishing lack of understanding of political realities. This motion to the *Riksdag* was made by four members of the Green Party and will be discussed in an assembly

¹⁴⁸ Bétaille (2019) at p. 37.

¹⁴⁹ See Kauffmann & Martin (2017), also Humphrey (2017) who reminds us that the Inter-American Court of Human Rights in 2012 found that the government of Ecuador acted in breach with the right to life of the Kichwa indigenous people of Sarayaku when not protecting them from damages originating from oil exploration on land which the tribe held (*Kichwa Indigenous People of Sarayaku v. Ecuador*, IACtHR 2012-06-27, Series C No. 245).

composed of 349 delegates (out of which the Green Party has 17) where the predominating sentiment is strongly anti-Aarhus. The chances for success are thus negligible, diplomatically speaking. Another such example concerns access to justice in the EU. By pointing to a couple of Italian cases and the meagre possibilities for the public concerned to take direct action in the CJEU, RoN proponents largely fail to discuss the radical widening of the possibilities open for ENGOs to challenge decision-making in environmental matters in the Member States' courts, a development that is strongly driven by the CJEU.

Yet another point of criticism is that the RoN school of thought includes elements which lack clarity. Even if one may understand the words in a sentence like the following, the actual meaning is not evident:¹⁵⁰

The contents of the Charter must establish the concept of a natural nested hierarchy of rights that follows the order of hierarchies in natural systems that operate to sustain life leading to a reframing of the notion of 'rights' from adversarial to 'right relationship' i.e.: synergistic and complementary.

Also the reasoning that "all existence" shall constitute the basis for natural objects' status as rights-holders is not easy to comprehend from the perspective of legal scholarship. Does that include the rights of less-wanted creatures such as mosquitos and feral animals? From time to time, the reasoning in the RoN discourse also seems to be circular – "as nature lacks rights it is deemed incapable of having interests" – as well as self-declaratory statements such as "one cannot truly speak about the intrinsic value of nature without granting nature rights". The reader may wonder, why not?

However, these viewpoints on the RoN discourse may be of minor importance. The most serious criticism relates instead to the basic question of how to deal with environmental degradation as an urgent practical matter in the present day. From an analysis of climate change, loss of biodiversity and other serious environmental problems – which I think are basically well founded and which concerns I share – the RoN believers make a "leap" in order to find a solution. It is rarely seriously discussed why awarding natural objects legal personhood should solve all the problems described. The arguments against such a conclusion that have been put forward in literature in recent years are never met and RoN is presented as a "quick fix" to all issues, without getting into any further explanation. Often, it is merely stated that the dire state of the environment and rapid climate change require fundamental structural changes in the current legal system, something that can be effectively achieved only through recognition of the RoN. What is surprising is that such statements sometimes even occur in articles where the poor outcome of RoN cases is accounted for. To give an example, Gellers states, after having analysed the cases *Vilcabamba*, *Atrato River*, *Ganges/Yamanu Rivers* and *Gangotri /Yamunotri glaciers* – of which three out of four failed – that, "(a)s such, these cases hold the potential to expose anthropocentric systems of law that have facilitated environmental destruction through economic development". Needless to say, the reader remains puzzled how this conclusion was reached. Even if one accepts that RoN would be the solution in conflicts concerning the exploitation of natural resources or climate change, how does the concept cope with opposing interests "on equal level" which often occurs in environmental decision-making? And what about competing ecosystems on different scales? Wind farms are good sources of renewable energy but can be detrimental for slow flying birds and bats if poorly placed and not conditioned with measures for protection of the species. The same is true about hydropower and fresh water biodiversity. Extraction of rare earth elements such as lanthanum and yttrium, much needed for the development of a sustainable society, is not free from controversy or conflicts, nor is modern forestry as provider of biofuels without environmental challenges. On this, the RoN discourse is silent.

¹⁵⁰ Carducci et al (2020) at p. 69.

As a final remark on the critical side, the RoN school of thought is obsessed with “rights”.¹⁵¹ The proponents tend to forget that the notion of rights is entirely a manmade legal construct, not easy to fathom. Anyone who has been involved in the discussion about the dual approach to standing in environmental matters in Europe knows that the difference between “interest-based” and “rights-based” systems is anything but clear.¹⁵² As noted in Chapter 3, another example is the use of “rights” in case-law of the CJEU, where the concept has lost its traditional meaning and been watered down to mean all kinds of “obligations according to EU law”. Thus, the decisive importance that is lent to the notion of “rights” in some legal systems does not exist in the jurisdiction of the Union. In fact, this perspective on rights is an import from other legal systems and legal cultures. If this kind of legal move is performed without taking due account to the receiving system – in our case that of the EU – we stand before a classic situation of “legal transplant”. For such an adventure to be successful, the reform must be “demand-driven and fit into the institutional and cultural legal context” within the hosting system, sharing the same basic norms.¹⁵³ This can only be achieved if considerations have been given to the country-specific settings and institutional frames of the receiving legal system. No such discussion can be found in the RoN discourse.

In summary, the RoN school of thought contains quite a lot of symbolism and has not so far succeeded in showing that this concept would be a paradigmatic revolution for environmental law in Europe. But even so, this discourse tries to fulfil several needs in order to save the environment. Can we learn anything from its perspective? This will be discussed in the following sections.

5.3. Substantive or procedural aspects of Rights of Nature

In order to understand RoN, it may be helpful to begin with the distinction between the substantive and the procedural aspects of the concept. The latter will be dealt with in the following sections, whereas the discussion here concerns what changes in law would meet the demands for change.

To begin with, there is a constitutional issue, dealing with what importance is awarded to nature in EU primary law. The treaties of the European Union – TEU, TFEU and CFR – all contain provisions on sustainable development, the integration principle and a high level of protection and improvement of the quality of the environment. Article 191 TFEU builds on the triad of “preserve-protect-improve” with regards to the environment. In addition, the major environmental principles are included in EU primary law. What is lacking on a constitutional level in comparison with ideas of RoN is a general principle of non-regression, meaning a prohibition on the Member States to undertake measures entailing environmental degradation or the weakening of environmental laws. Other principles mentioned are those concerning environmental or ecological integrity. Finally, as noted in section 4.2, the CBD begins with recognition of the “intrinsic value of biodiversity”, a term that cannot be found on constitutional level in EU law. It can however be said to reside in the nature conservation directives, as well as the case-law on these directives by the CJEU.¹⁵⁴

The 2020 study of the European Economic and Social Committee (EESC), *Towards an EU Charter of the Fundamental Rights of Nature*, proposes a separate Charter in order to award nature a higher value in

¹⁵¹ For an interesting discussion about the notion of “deep ecology” and the failure in applying “rights of animals” through the doctrine of *habeas corpus* in the USA, see Staker (2017).

¹⁵² See Hellner (2019).

¹⁵³ Faure (2020), section 5.

¹⁵⁴ See for example C-461-17 *Holahan* (2018).

the legal hierarchy of the Union.¹⁵⁵ Since I share their view on the need for a systematic change in our society if we want to fight the climate challenges and loss of biodiversity, the arguments for such a reform are in my view legally sound. Such a Charter would have the same status as CFR and thus the Treaties of the EU. Consequently, all EU legislation would have to be consistent with this Charter and EU institutions would have a duty to act accordingly. The problem with the proposal is not the idea of raising certain values and principles to constitutional level, but the substantive content. Even if the above-mentioned principles were written in a Charter they remain rather unclear. The same can be said about the overarching principles expressed in the *Draft Directive on the Rights of Nature*, which was presented as a civil society initiative by the organisation *Nature's Rights* in 2017.¹⁵⁶ The proposal provides for the substantive and procedural rights of nature, and the rights of people in relation to nature, and establishes a duty of care, protection and enforcement and ecological governance. Even if the intrinsic value of biodiversity and ecological principles were introduced in EU primary laws, the balancing of different principles of law and different interests is decisive for the success of any such reform. It is worth remembering that both the ECtHR and the CJEU have clearly stated that environment protection is a general interest which may outweigh other vested rights or interests, formulated like this in the *Križan* case:¹⁵⁷

However, the right to property is not an absolute right and must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, disproportionate and intolerable interference, impairing the very substance of the right guaranteed...

Accordingly, since environmental protection already has a strong position vis-à-vis other rights and interests in the case-law of the CJEU, a further strengthening must be expressed on a constitutional level if the “interests of nature” are to prevail over others. One such idea is to set a limit for economic activities so as not to compromise “ecological integrity”. I leave it to others to assess the prospects for launching such a reform in the EU today. But it is worth emphasising that the history of the RoN movement shows us that it certainly does not suffice to make a difference in a legal system by simply introducing a nice-looking provision in the Constitution.

The RoN school of thought has strong roots within indigenous traditions in the Americas and Aotearoa New Zealand. In the storytelling of the movement, indigenous people live “in harmony with nature”. This presumption may be correct regarding the traditional culture of reindeer herding for the Sami people in the Nordic countries and Russia – being the only indigenous people on the European continent.¹⁵⁸ However, the situation in the arctic region is anything but free from conflicts. Forestry, mining and wind farming all are activities that put pressure on the Sami land-use rights. Modern reindeer herding is at the same time a rather intense land-use activity and has its own environmental challenges. On the one hand, reindeer herding is a condition for certain aspects of biodiversity in the arctic region.¹⁵⁹ On the other, its coexistence with large carnivores is filled with controversy. Wolves are not tolerated in these areas in any of the countries. Moreover, research undertaken by Swedish and Norwegian ecologists show that the risk of poaching of brown bear, wolverine and lynx was higher inside national parks under Sami management, compared with surrounding unprotected

¹⁵⁵ Carducci et al (2020).

¹⁵⁶ Boyd (2018) at p. 16, also <https://natures-rights.org/ECI-DraftDirective-Draft.pdf>

¹⁵⁷ C-416/10 *Križan* (2013), para. 113.

¹⁵⁸ Of course, indigenous peoples reside in places subject to some level of European governance, such as Greenland and the French “départements d'outre-mer”, for example, French Guiana in South America.

¹⁵⁹ Kaarlejärvi et al (2017).

areas.¹⁶⁰ Similar investigations by Swedish ornithologists suggest that the situation for the golden eagle in these areas is equally dire. The Sami people have also shown limited interest for the RoN even though the Sami parliament in Sweden endorsed the Universal Declaration of the Rights of Mother Earth (UDRME) as a symbolic gesture in 2018. The dominating discourse among lawyers and legal scholars dealing with Sami land rights in Nordic countries is instead that of property rights.¹⁶¹ This has also been the strategy in those cases when Sami villages have turned to the courts to have their rights respected.

As for secondary legislation in the EU, the RoN discourse contains manifold thoughts that may be fruitful to implement in different directives on the environment. This is not the place to be too detailed, but some of them are particularly interesting. The strengthening of the adaptivity requirements in the permit regimes under IED and WFD – as well as the introduction of such requirements in other directives – is one such example, meaning that given permits must be re-assessed on an ongoing basis as regards subsequent and cumulative effects on the environment. Another is a more frequent use of strict environmental standards in different directives which regulate activities that have an impact on biodiversity. Also some of the ideas from the *Draft Directive on the Rights of Nature* seem to be worth investigating further, such as “ecological impact tracing” – meaning the investigation, analysis and recording of the impact on nature and ecology of a system or method of production. There is also room for provisions that establish clear limits for the impact on certain environmental values, taking into account the cumulative effects of all impact factors. Although I have little sympathy for the criticism of the derogation possibilities under the nature conservation directives – this is, in my view, mostly a question of implementation at national level – both the Birds Directive and the Habitats Directive need reforming in order to be effective. First of all, they ought to be coordinated both concerning the protection required and the listing. Ecological considerations should be decisive for the listing of species in different categories, not national priorities or political compromises. Here, as in other pieces of legislation, the work of independent scientific committees may provide an exemplary model to follow. For example, today, such committees can be found under the Habitats Directive¹⁶² and the WFD,¹⁶³ although their mandate can be expanded and formalised. Finally, the ELD may be reformed in several ways. The strict definition of serious damage, the limitation on activities covered and the wide room for derogation has made this piece of legislation almost obsolete in most of the Member States. There is a clear tendency to overlook ELD, instead using the traditional national schemes for environmental damage.¹⁶⁴ Consequently, the EU lacks a general standard on liability for environmental contamination, something that ought to be discussed more. Although the public law basis for the legislation is legally sound from a European perspective, certain ideas may be introduced in order to improve the effectiveness. One such idea is to equip the directive with a compulsory “remediation fund” for the restoration of contaminated areas and destroyed habitats. The financial contributions to such a fund could be raised from taxation of certain categories of environmentally hazardous industry, as well as administrative sanction fees for breaches of environmental law. Some of these issues are raised in the recent report by Michael G Faure to the European Parliament's Committee on Legal Affairs:

¹⁶⁰ Rauset et al (2015).

¹⁶¹ See Åhrén (2016).

¹⁶² The Habitats Committee; see https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm

¹⁶³ The Common Implementation Strategies under the WFD are recommendations issued by “water directors” from the Member States; see https://ec.europa.eu/environment/water/water-framework/objectives/implementation_en.htm

¹⁶⁴ See the European Parliament resolution of 26 October 2017 on the application of Directive 2004/35/EC (the ‘ELD’) (2016/2251 (INI)), also the Member State reports on the application of ELD, all available at; <https://ec.europa.eu/environment/legal/liability/index.htm>

Environmental Liability of companies (2020).¹⁶⁵ One of his recommendations (no. 2) is to improve access to justice for ENGOs in order to solve collective action problems in cases of widespread pollution.

5.4. Legal personhood and standing

The question about *who shall have the right to represent the environment* in court is at the heart of the RoN discourse. The reason for this is that behind all statements about the environment having “legal personhood of its own” or “standing in court” lies the undeniable fact that some human being, organisation, or institution needs to represent the environmental interests. Without exception, the answer to this question in the literature on RoN is that all members of society should have this possibility. In other words, *actio popularis* is a key component of the discourse. The Aarhus Convention – to which 47 countries of the UNECE region are Parties including the EU – rests on a different tradition. Standing for the public concerned may be construed in different ways as long as it allows for a wide access to justice. There may be restrictions for individuals belonging to this category, but recognised ENGOs should always be awarded access to court. Both administrative and court proceedings are required to provide adequate and effective remedies, and be fair, equitable and timely. The costs connected to litigation should not be prohibitively expensive for the public.

Among the Member States of the EU, there are great variations between the legal systems concerning standing in environmental cases. Different kinds of *actio popularis* exist but are not common.¹⁶⁶ Portugal uses this legal construct for standing in administrative law, but the application is strict and allows only for a rather formal review of the contested decision. Something similar can be said about Spain, Slovenia and Romania. The system in Latvia allows for *actio popularis*, where litigants representing a general interest can challenge environmental decisions in court.¹⁶⁷ Regarding constitutional challenges, wider standing is offered at different levels in the legal systems in the Union. The prevailing system for standing, however, restricts the possibility for judicial review only to those members of the public who can show that their interests or individual rights have been affected. In addition, recognised ENGOs by definition have standing in environmental matters. An interesting feature can be found in some legal systems where the court is allowed to evaluate the general interest in the case at hand when deciding on standing. Most legal systems operating in the Member States, however, handle the standing issue separately from the merits of the case in a more formal way, which is why applications for judicial review can be dismissed due to lack of standing even in cases where the decision at stake seems to be in breach of the law.

As noted, this development on this area has been driven by the CJEU that has consistently stressed the importance of having wide possibilities open to the public concerned to challenge decision-making in environmental matters under EU law to the national courts. Traditional models for standing such as the “protective norm theory” (*Schutznormtheorie*) have thereby been dismissed. This development can actually be explained as mainly due to the need for an effective enforcement of EU law in the Member States according to the principle of legal protection, although Aarhus is used as a lever. The idea of having *actio popularis* in environmental cases has been debated, but has never won general traction in Europe.

¹⁶⁵ Faure (2020).

¹⁶⁶ See Darpö (2013), section 2.2.

¹⁶⁷ See Mikosa (2017).

On the face of it, *actio popularis* seems to be a more generous model for defending environmental interests or rights in court. However, the RoN discourse has a somewhat romantic attitude concerning the possibilities of going to court, never discussing pros and cons with this rule on general standing for all members of the public compared with the ENGO-oriented model of Aarhus and EU law. However, some lessons can be learned from just reading the history of RoN in the literature. This shows that barriers to access to justice other than strict standing rules can be equally effective in shutting out the public, such as high costs, and the need for legal or technical assistance. Litigation costs are one of the main reasons why the public concerned in Europe rarely take direct action in court against operators of activities hazardous to the environment. The normal route is instead to appeal administrative acts or omissions in environmental matters. Civil cases have other barriers as well. As already noted, the claimant in *Colorado River v. State of Colorado* dropped the case after threats of fines or disciplinary sanctions requested by the Attorney General claiming abuse of process. The existence of so-called Strategic Lawsuits Against Public Participation (SLAPP) are also more frequent in countries where civil action is the main avenue for coming to the court; meaning counter suits in order to threaten the litigants into silence.¹⁶⁸ Another version of this is to ask for financial security ("bonds") in case the plaintiff requests the court to stop the hazardous activity by way of injunction. As such bonds are calculated from the cost of the delay of the construction or operation in question, these can amount to considerable sums. The security will be gone if the case is lost, something which obviously has a chilling effect on the willingness to go to court. It is true that also the CJEU has accepted such bonds, but those costs are included in what is considered to be acceptable under the general cost rules according to EU law.

Against this backdrop – considering both the different traditions and the widespread resistance to a general introduction of *actio popularis* in Europe, and the lack of discussion as to why this would be a much better model – there is little reason to abandon the current ENGO-oriented solution for access to justice in EU law. Even as there remain important barriers to access to justice in environmental cases in the Member States – such as high costs and strict criteria for ENGO standing – these can preferably be dealt with through the ordinary instruments for enforcement, that is infringement proceedings (Article 258 TFEU) or request for preliminary rulings of the CJEU (Article 267 TFEU). As already mentioned, strengthening the role of civil society by way of wider access to justice is also one of the priorities of the Commission for the delivery of the European Green Deal and will be one of the key issues to be discussed during the Conference on the Future of Europe 2020-2022. To this backdrop, one may also consider to widen the notion of the "public concerned" in EU law in order to include groups of interest and professional associations representing the environment even though they do not meet the criteria for being recognised ENGOs.

In my view, much of this reasoning is also valid for a "human right to a healthy environment". One may of course argue that this idea entails nothing more than generous standing for representatives of the public in order to challenge administrative action or inaction under duties prescribed in law, which was the successful approach applied in the recent climate cases in Ireland and France.¹⁶⁹ In both cases, the government's inaction was deemed incompatible with their obligations according to the Paris agreement as implemented in national law. But a more radical idea is that each and every person should be able to go to court in order to defend his or her environment in a wider sense,

¹⁶⁸ The expression SLAPP was minted by professor George W "Rock" Pring at Sturm College of Law, University of Denver. His publication list on the subject is impressive, see: <http://www.law.du.edu/index.php/profile/george-pring>

¹⁶⁹ *Friends of the Irish Environment v. Ireland*, Supreme Court of Ireland 31 July 2020 (no. 205/19), *Commune de Grande-Synthe v. France*, Conseil d'Etat 19 November 2020 (no. 427301) and the *L'affaire de siècle* case, that is *Oxfam ao v. France*, Tribunal Administrative de Paris, 3 February 2021 (no. 1904967, 1904972 and 1904974/4-1).

irrespective of what the law says and even if the link between the environmental degradation and the victim is weak. As the case-law of the ECtHR stands today, this latter idea does not have much support. On the other hand, the tendencies in “greening” direction of human rights law are also noticeable in Europe and only time will show how far the Strasbourg court is willing to go. The upcoming climate cases will be the first test on this respect.

Having said this, it is also crucial to the EU legal system that those acts and omissions by EU institutions which cannot be challenged in national courts can effectively be brought directly to the EU courts. Without going into the details of the C/32 case, it suffices to say that all such decisions or failures to act under EU law with effects on the environment ought to be challengeable by way of ENGO action. As regards standing, the key point is how to define the other members of the public who are affected by acts of the EU institutions in such a way that they should be awarded standing directly to the CJEU without disturbing the general distribution of roles between that court and the Member States’ courts. Is there a middle way between natural and legal persons who are “directly concerned” and “recognised ENGOs”, so to speak? As this is an ongoing debate in the EU and the issue will be decided at the next Meeting of the Parties to Aarhus in September, I rest my case.

Lastly we must address Article 267 TFEU concerning requests from national courts to the CJEU for preliminary rulings. This is an obligation for the courts of last resort of the Member States when the correct understanding of EU law is not unequivocal. However, this avenue is rarely used in environmental cases and the application rate varies substantially between countries.¹⁷⁰ One reason for this is obviously that these cases often concern operations with important consequences for industry and society, which is why there may be a need to decide quickly on the matter. In other situations, it is more apparent that the court culture in the Member States plays a decisive role. A recent calculation on Article 267 requests from Member States’ courts in environmental cases during the period 2008–2020 gave the following figures: Germany 38, Italy 31, Belgium 22, France 17, the Netherlands 13, Austria 13, Sweden 10, Finland 8, Ireland 8, Spain 6, Greece 6, Hungary 5, Romania 5, Slovakia 4, Poland 3, Bulgaria 3, Estonia 3, Luxemburg 2, Croatia 2, Lithuania 1, Denmark 1, while Czechia, Malta, Cyprus, Portugal, Slovenia and Latvia all had zero requests.¹⁷¹ Even considering the countries’ sizes and populations, as well as the different dates of their accession to the Union, the variations are remarkable. Against this backdrop, the Portuguese youth in their action to the ECtHR claim that the possibility to challenge decision-making under EU law is not an effective national remedy according to Article 35(1) ECHR, which constitutes a reason for why they should be admitted to the Court. We will learn about the Strasbourg court’s position on this issue in due time, but even so, the scarce and uneven application of Article 267 obligation is evidently a problem for the EU legal system as a whole. The only practical measure today for remedying the situation is by way of an infringement action from the Commission against the failing Member States under Article 258 TFEU. In my experience, it is extremely rare that this happens.¹⁷² Against this backdrop, it is of utmost importance for the effectiveness of EU environmental law that such attempts will increase in order to remind the national courts about their Article 267 duties.

¹⁷⁰ Milieu (2019), section 2.5.

¹⁷¹ My warmest gratitude to Ludwig Krämer for the providing of these figures.

¹⁷² To my knowledge, C-417/17 *Com v. France* (2018) is one of the very few cases where the Commission has brought such an action. The CJEU has, however, touched upon the Article 267 obligations in a great variety of cases in different fields of law, see for example C-689/13 *PFE v. Airgest SpA* (2016) and the case-law indicated therein.

5.5. Enforcement

According to Krämer, weak and uneven enforcement is the main challenge for EU environmental law of today, a position which I share.¹⁷³ With a long history of environmental law and a reputation of being “best in class”, Europe ought to do better. On the other hand, the examples given in the RoN discourse do not point in any direction for improvement, except for the naked statement that “guardians” for “nature” is a way forward. This may be true in societies with less developed administrative infrastructure for the enforcement of environmental law, but does not seem to entail anything new if it is intended as a replacement for the system of EU law. Our system is built upon authorities that control and ensure that the laws are upheld. Proper funding, well-developed administrative infrastructure with specialised personnel as well as transparency are necessary conditions for this model to function. If the administration neglects to do its job, the public concerned must have the possibility to challenge this inaction in court. If the complaint is successful, the court generally has the power to order the administration to do the right thing. This system works fine in theory, and also – from time to time – in relation to clear obligations under EU law. Positive examples of this can be found under the Air Quality Directive¹⁷⁴ in respect to the requirements to set up action plans or undertake certain measures.¹⁷⁵ But what happens if the authority takes another decision in breach of those obligations or even refuses to adhere to the court order? That is another issue that needs to be addressed.¹⁷⁶

Even so, we have formally speaking a system of enforcement in place which in a way is comparable with that of a guardian, even if the roles of the public concerned and the administration are somewhat different. Guardians and boards of stakeholders are sometimes an important part in our system also as a means for transparency and participation. But the key elements are a functioning administration, and that the public concerned is able to challenge administrative action and inaction concerning obligations to the environment under EU law by going to court. This legal construct will surely be further developed in the case-law of CJEU under the principles of legal protection and useful effect (*effet utile*). Obviously, it can also be improved if proper consideration is taken when deciding new directives or updating old ones. But then again, when those obligations are implemented into the Member States it is all about money and administrative structures. If proper funding is not given to the authorities for keeping an eye on activities that may have an adverse impact on the environment, no new rules will have any actual effect.

This is also true of a guardian system, and here we have little to learn from the RoN stories. How would two guardians and a board be able to get an overview of the River Ganges, 2,500 km long – twice the length of the River Rhine – with 200 million people living on its shores? A similar point is valid for the lead Colombian case on the *Atrato River*. Obviously, a handful of guardians cannot protect an area over which the government does not have full control due to the presence of guerrillas and other armed groups in the midst of illegal extraction activities.¹⁷⁷ To claim that such a system provides an alternative for the enforcement of environmental law in Europe is plain symbol politics. For an effective enforcement of environmental law, there must be well financed authorities

¹⁷³ Krämer (2020).

¹⁷⁴ Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008, p. 1–44. Available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32008L0050>

¹⁷⁵ Most importantly, C-237/07 *Janecek* (2008), C-404/13 *ClientEarth* (2014), and C-723/17 *Craeynest* (2019).

¹⁷⁶ As was shown in C-752/18 *Deutsche Umwelthilfe* (2019).

¹⁷⁷ Billy Briggs & Simon Murphy: *Guns, gold and guns bring terror and death to 400-mile waterway in Colombia*. The Ferret 2019-10-16. Available at: <https://theferret.scot/colombia-drugs-river-atrato/>

with full competence to intervene, albeit under the critical eye of the public concerned and the control of the courts.

However, enforcement of environmental law in the EU faces major problems as well. And as above, the RoN discourse contains some ideas that may be worth looking further into. First, the proposal for an Environmental Ombudsman who is able to independently bring environmental cases to court is one such idea. Today, all Member States have a Parliamentary Ombudsman institution but its functions are mostly disciplinary. The Austrian *Landesumweltanwalt* may be an exception together with the Hungarian *Ombudsman for Future Generations* and the experience from these institutions will be interesting to follow.¹⁷⁸ It may also be fruitful to discuss a similar solution at an EU level, either as part of the existing European Ombudsman, or as a separate institution with administrative muscle.

There are also other ideas about how to improve enforcement in this field of law. One such proposal is the establishing of independent environmental regulatory authorities, along the lines of what the EU has done in the field of economic law to combat conflicts of interest. The idea is simply that the administrative authorities often have to deal with a conflict of interest due to the conflict between the promotion of short-term economic development and environmental protection. Therefore, entrusting the enforcement of environmental law to an independent administrative authority can be relevant to ensure that the long-term, sustainable interests are taken into account. In this context, the idea of having guardians has advantages, particularly in environmental cases where the “ping-pong phenomenon” occurs, meaning that the reviewing court quashes the administrative decisions and remits the case back to the same body, which then issues another bad decision, and so on. In some legal systems, this is solved by having a rule that enables the court to order the administration to perform according to instructions and report back to the same court for control. This is interesting, especially if such orders are combined with sanction possibilities. Such an example is the Conseil d’État’s decision from last year, ordering the French State to pay 10 million euro in fines per semester until satisfactory ambient air is reached in eight city zones.¹⁷⁹ In certain situations, another solution would be to allow some other body or individual person to be responsible for the performance of that order. This possibility exists and is commonly used in Italy, where the administrative court may name an individual person – at the competent authority or outside the administration – who will have to answer to the court for the fulfilment of the order, a so-called *commissario ad acta*.¹⁸⁰

Yet another innovative idea discussed in the literature of RoN has already garnered attention in a European context and that is the possibility for ENGOs and civil society groups to ask for damages on behalf of the environment. As Fasoli showed in a comprehensive study in 2015 covering four countries (Portugal, Italy, the Netherlands and France), this possibility can have different legal designs, from the mere possibility to request of the polluter or the authority reimbursement for the costs of remediation to moral damages that go into a fund to the benefit of the affected environment. The latter system may be combined with such a solution in ELD that was discussed in section 5.3.¹⁸¹

A final view on enforcement. We can discuss new and different ideas on this issue, although the key still lies in proper funding and staffing of the competent authorities, transparency, and involvement of the public, as well as the possibility to challenge administrative action and inaction. But as long as administrations in the Member States can effectively avoid meeting their obligations under EU

¹⁷⁸ For more information about the cases mentioned in this section and on the independent Ombudspersons of Austria and Hungary, see Krämer (2020).

¹⁷⁹ Conseil d’État decision 428409 (10 July 2020; ECLI:FR:CEASS:2020:428409.20200710), available at <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-07-10/428409>

¹⁸⁰ Articolo 114 Codice del processo amministrativo, Libro Quarto, Titolo I – Giudizio di ottemperanza.

¹⁸¹ See Fasoli (2015).

environmental law, none of these factors will be able to change this situation if there are no sanctions available for that kind of inertia. Accordingly, a reform in this direction would perhaps be the first step to take in order to improve the enforcement of EU law on the ground.

5.6. Nature science and evidence in court

Yet another aspect of the RoN school of thought is the criticism of how nature science and technical knowledge is translated to law. Closely related to this is the competence of the courts deciding in environment matters. The 2017 *Draft Directive on the Rights of Nature* states that, due to the complexity and interrelatedness of environmental issues it must be ensured that all civil servants, lawyers and decision-makers and judges have adequate training in order to be able to integrate the principles and provisions on RoN fully into administrations and court systems. It is further recommended that the Member States establish specialist environmental courts or tribunals to deal with cases specifically relating to the rights of nature. From a RoN perspective, this is consequential as the legal system ought to be built upon the possibility for the public to go to court and claim that the rights of nature have been breached. In order to succeed in this, the public will present scientific and technical information for the court to evaluate. Of course, this is a simplification since RoN proponents also are aware that there exists more than one version of truth in relation to species, sensitive areas and environmental processes. Actually, in most environmental cases the opinions among technical experts and nature scientists are strongly divergent on a range of issues, be that about the impact of air pollution and noise, the flowing of ground water, or the conservation status of species. On a larger scale, I think we can all agree that what constitutes a satisfactory, decent or ecologically sound environment is bound to suffer from uncertainty. And thus arises the question – paraphrasing Boyle – should we let judges determine whether to preserve the habitat of the white-backed woodpecker or the great crested newt instead of extending an airport or a shopping mall?¹⁸²

In the EU legal system, the answer is already affirmative. The reason for this is that EU legislation on the environment is often based on complex scientific assessments and legal-technical standards which the authorities must be able to apply in concrete situations. For example, in order to evaluate environmental impacts and risk assessments, the decision-makers must be able to assess standards such as “significant impact on the environment” (EIA Directive), “good ecological status” (WFD) or “likely to have a significant effect on the conservation objectives” (Habitats Directive). In addition, “soft” guidelines are used to operationalise the requirements in law. Such instruments with substantial effect on the understanding of EU law are guidelines from the Commission, of which the different guidance documents under the Habitats Directive can be used as illustrative examples. In addition, the application of “proxies” is widespread among the different areas of environmental law. Those are indicators of the status of key elements of the environment, such as IUCN’s Red List of threatened species or the use of “key habitats” and “indicator species” in nature conservation law.

In environmental cases, the assessments made by the authorities are often challenged in court by different actors contesting the legality of the decisions at stake. The ability for national courts to independently evaluate scientific and technical information is therefore of the utmost importance for the effectiveness of EU obligations in this field of law. This in turn requires a certain “intensity of the review” in court, for which the CJEU has set certain standards. First, EU environmental law requires that the legal systems of Member States manage to perform a legality control of administrative

¹⁸² The citation from Boyle (2007) at p. 508, although his examples are species from the Americas.

decisions and omissions on *both procedural and substantive requirements* of that law. In some pieces of legislation this is expressly prescribed, whereas in others it follows from the principle of useful effect (*effet utile*). Further, on a general level, the CJEU has expressed that judicial procedures must enable the national court *to effectively apply the relevant principles and rules of EU law* when reviewing the lawfulness of administrative decisions.¹⁸³ In environmental cases the Court has analysed different legal-technical expressions and explained the correct application, strongly *emphasising the precautionary principle*. This has been the case when assessing permits for projects that may have an impact on Natura 2000 sites¹⁸⁴ or how to undertake an evaluation of the non-deterioration criterion in the WFD¹⁸⁵ or a risk assessment for chemicals according to REACH.

This is all well and good as a model, the challenge being that there are substantial differences concerning the quality of judicial review of administrative decisions in the various Member States within the Union. On the one hand, we have reformatory systems where the court decides the case on its merits. Typically – but not always – this also means that the court substitutes the administrative decision with a new one of its own. This is the basic position of judicial review in environmental courts in Sweden and administrative courts in Finland, and it exists for certain categories of cases in other countries as well. On the other hand we have systems where legality control is very formal and the court mostly focuses on procedural aspects of the environmental decision, allowing the administration almost full discretion on the substance of law. This is how I perceive the judicial review under most regimes based on *actio popularis* or citizen suits in the Member States. Although most legal systems lie somewhere in between these two outer positions, judicial review is commonly cassatory, meaning that the court will either accept the administrative decision or quash it. National courts' ability to rightly understand environmental law in all its varieties also depends on a range of other factors such as: the kind of procedure (civil or administrative), who has the burden of proof (claimant, administration or operator), how scientific evidence is produced and controlled (passive benches or the *ex officio* principle), the availability to refer a technical or scientific question to in-house technicians or even technical judges, as well as the availability of advisory boards on such matters, the use of remits to expert authorities, the cost for investigation, and so on.

In this context, the experiences with boards of independent experts created for the sole purpose of helping the administration and courts on scientific issues are interesting. In some countries, the EIA procedure is managed by a specially assigned administrative body and concluded with a separate statement in order to guarantee the quality of the investigation.¹⁸⁶ Although not binding, these statements normally are decisive when the permit cases are brought to the environmental courts. In the Netherlands, there is the Foundation for advising the administrative judiciary (Stichting Advisering Bestuursrechtspraak, StAB), which is mostly used in environmental and planning law cases.¹⁸⁷ With some 40 independent and highly qualified "advisors", this body provides the Raad van State (Supreme Administrative Court) and the districts courts with answers on specified questions on certain technical aspects in environmental and planning cases.¹⁸⁸ In my view, these advisory boards may serve as models for how to handle technical and scientific evidence in environmental litigation.

¹⁸³ C-71/14 *East Sussex* (2015), p. 58.

¹⁸⁴ C-127/02 *Waddenzee* (2004).

¹⁸⁵ C-461/13 *Weser* (2015).

¹⁸⁶ See Darpö (2019) section 4.2.

¹⁸⁷ <http://www.stab.nl/Pages/start.aspx>

¹⁸⁸ See Backes (2018).

On a general level, the issue of the competence of the courts is already an ongoing discussion in the EU which will have to be followed elsewhere.¹⁸⁹ It suffices to say that I concur with the RoN discourse, that the competence of the courts is decisive for the advancement of environmental law in society. To make any proposals on this issue is not an easy task because we must deal with an encounter between the *procedural autonomy* of Member States and the EU law requirement for *effective justice*. Even so, it should be possible to set up certain requirements for the experience and qualification of the judges, as well as the availability of expertise in the national court systems. In my view, It is high time to realise that the field of environmental law is enormous and highly technical and thus requires both experience and qualification. The myth about the all-knowing generalist judge is particularly ill-suited in this context.

5.7. Rights of Nature is not a revolution, but...

By now, the reader of this study is aware that I concur with those legal scholars who do not share the view that RoN entails a shift of paradigm in law that has the capacity to save the environment from the challenges we face today. Many of the deficits that this movement criticises modern environmental law for having are general problems that have been discussed for years and which will not be remedied by introducing new labels in a system that still must be handled by humans. The dichotomy between RoN and modern European environmental law is therefore partly artificial, a symbolic construct. Environmental law remains an instrument handled by individuals and – as the history of RoN shows – any alternative discourse of thoughts faces the same challenges as the old schools, most importantly; lofty legislation not adapted to the nature and development of the environment, deferral to economic growth in decision-making, weak enforcement, and lack of funding for environmental interests. When deconstructing the RoN concept, no radical new instruments come to light compared with what we have today.

Even so, the RoN school of thought contains fresh insights in its critique of Western society and presents ideas that can be developed within our conventional legal notions. At the heart of the concept lies the notion that law must adapt to ecological and scientific reality in order to address the main challenges of today, such as climate change and large-scale losses of biodiversity. The limiting factor for achieving this is not, however, that nature does not have rights, or other basic flaws in our legal system, but the lack of public support for a radical change, and the necessary political will. I cannot think of any reform that lies beyond the present institutional or legal scope of the EU. Environmental and social reforms require decisions through political process, and until the necessary shifts in public attitudes or values occur, the fundamental direction of society will not change.

¹⁸⁹ See for example *Managing facts and feelings in environmental governance* (2019), also the recent *Science and Judicial Reasoning - The legitimacy of international environmental adjudication* by Katalin Sulyok, Cambridge University Press 2020 looks promising.

6. A SUMMARY OF PROPOSALS FOR THE FUTURE

In this Chapter, I summarize the proposals discussed previously in the study. Thus, nothing new is introduced except for a systematisation of the most important ideas touched upon. All recommendations are cautiously formulated as I am aware that the policy choices are not mine to make. What I try to do here, though, is to point to possible solutions of some of the main weaknesses of EU laws on the environment today and their implementation in the Member States. Some of these proposals may seem farfetched, but must be seen in the light of the remarkably poor performance of some of the fundamental obligations under EU law on the environment. Those proposals that seem easier to undertake can be dealt with either in new legislation or in connection with the updating of existing regulations or directives. Ten recommendations are presented, of which the majority focus on the problem of weak enforcement of EU environmental law. Most of the proposals are in line with the ambitions of the Conference on the Future of Europe 2020-2022 and the Green Deal and may therefore be taken into account in this ongoing work.

1. *The introduction of new environmental principles in EU primary law*

It may be fruitful to introduce some new principles of environmental law on the constitutional level in EU law. What is lacking is a general **principle of non-regression**, meaning a prohibition on Member States to undertake measures entailing environmental degradation, or the weakening of environmental laws. Other principles that may be introduced on this level of EU law concern **environmental or ecological integrity**, as well as a general recognition of the **intrinsic value of biodiversity**.

2. *Stronger adaptivity requirements and environmental standards in EU laws on the environment*

Introducing adaptivity requirements in different environmental laws will be crucial for the furtherance of ecological governance. Examples of such rules can currently be found in Industrial Emissions Directive and Water Framework Directive and include the compulsory updating of permits with an impact on the environment, or the imposition of conditions that are flexible as regards certain opposing interests. It can also be recommended to use **strict environmental standards** in different directives which regulate activities that have an impact on biodiversity. In this context, the idea of **ecological impact tracing** seems to be interesting to investigate further. Another feature to consider when adopting EU environmental law is a more frequent use of **clear limits for the impact on certain environmental values**, taking into account the cumulative effects of all impact factors.

3. *Wider use of legal-technical standards*

Moreover, when introducing new EU legislation on the environment it may be worth contemplating how scientific assessments and uncertainties can be formulated by way of **legal-technical standards** which the authorities must adhere to in concrete situations. The use of such standards is a key component in a legal system where the national courts on judicial review are able to control administrative decision-making. This way, the national courts may effectively apply the relevant principles and rules of EU law when reviewing the lawfulness of administrative decisions at the request of the public concerned or other stakeholders.

4. Reform of EU Nature Directives

Unpopular as it seems, both the **Birds Directive and the Habitats Directive need reforming** in order to be more effective. First of all, they ought to be coordinated with each other, both concerning the protection required and the listing of nature types and species. Only ecological considerations should be decisive for the listing in different categories. In order to perform this, it is necessary to strengthen the mandate of the Habitats Committee or to *set up an independent scientific committee* for decision-making when listing is requested.

5. Reform of Environmental Liability Directive

Another important step would be to reform the Environmental Liability Directive in several ways. The **strict definition of serious damage** needs to be reviewed, as well as the **limitation on activities covered** and the wide **room for derogation**. It may also be fruitful to equip the directive with a compulsory **remediation fund** for the restoration of contaminated areas and destroyed habitats. Financial contributions to such a fund could be raised from taxation of certain categories of environmentally hazardous industry, as well as from administrative monetary sanction for breaches of environmental law. The possibility for ENGOs and civil society groups to **ask for damages on behalf of the environment** is also worth considering. This legal construct would be possible to combine with the remediation fund mentioned above.

6. Regulate the competence and power of the national enforcement authorities

As noted, for effective enforcement of environmental law, there must be well financed authorities with full competence to intervene, albeit under the critical eye of the public concerned and the control of the courts. A way forward in this regard would be to introduce in EU law – either as a component in different regulations and directives on the environment or in a horizontal directive – a demand that the environmental regulatory authorities be independent from those who are subjected to supervision and enforcement. **Entrusting the enforcement of environmental law to independent administrative authorities** can be relevant to ensure that the long-term, sustainable interests are taken into account. In addition, in order to ensure that the authorities meet their obligations under EU environmental law, requirements concerning sanctions against administrative inertia should be introduced in EU laws on the environment.

7. Power of the national courts

Further, it would be possible to introduce rules in EU environmental law that establish **obligations for the competent authorities to report back to the national courts in cases on review**. This can be obtained by way of requirements in regulations and directives, enabling the national courts to order the administration to perform according to instructions and report back to the same court. Such a solution would be particularly interesting if combined with sanction possibilities. Also the Italian solution of a *commissario ad acta* – naming an individual or a board outside the administration who will have to answer to the court for the fulfilment of the court order – would be interesting to study further.

8. Competence of the national courts

Even given the notion of procedural autonomy, it may be possible to set up some basic requirements for the experience and qualification of judges who handle environmental cases, as well as the availability of expertise in the national court systems. The main avenue in this regard is obviously by the **setting up of schemes for education for and cooperation between administrative judges**, similar to those already in place through organisations such as ERA, EUFJE, AEAJ. But it should also be possible to complement this by requirements in environmental law for the Member States to **set up independent advisory bodies** like the ones established in the Netherlands, or **obligations concerning remits to expert authorities** on technical and scientific topics, and similar solutions.

9. The obligation for national courts to request preliminary rulings by the CJEU

One cannot really claim that the EU forms a legal system as a whole **if the Article 267 obligation fails to function at the national level**. Against this backdrop, **the Commission should be required to step up** its efforts to enforce this key requirement, including initiating infringement proceedings under Article 258. Even if this may be problematic in individual cases, it is still possible to review the national courts' activities in this respect and to take actions against a Member State that fails on a more systematic level. As shown above, examples of this certainly exist. Different ways may also be discussed to put more pressure on both the Member States and the Commission as regards the obligation to request the CJEU for preliminary rulings.

10. Environmental Ombudsman at EU level

One idea that could be discussed further is the **establishment of an Environmental Ombudsman on both the EU and national levels**. A well-functioning Ombudsman institution is already in place at the EU level. One may also consider to **award the European Ombudsman with more competence** to take action directly against Member States in cases where the Commission fails to do so. One such area may be concerning the Article 267 obligation discussed above. Also in other areas it may prove fruitful for the Ombudsman to have the possibility to initiate infringement proceedings against Member States on systematic issues related to weak enforcement of EU law on the environment.

7. CLOSING REMARKS

I close this study with a Swedish proverb. By now, after more than 60 pages of describing, discussing and analysing RoN and with not that many concrete suggestions, perhaps the reader feels the same as the old lady shearing the pig, namely “a lot of fuss for little wool”. But as I said at the beginning, that is the chance you take when assigning a legal scholar to do a study on such a novel discourse of law as RoN. Even so, allow me to give some advice for those who will keep doing legal research on this topic, be that in Toulouse, Rennes, Ghent, Copenhagen, Uppsala, Tromsø or elsewhere in Europe. There are two approaches connected to RoN that I find particularly interesting. The first is finding a way to facilitate the communication between science and law and how to apply this knowledge basis in court, while still upholding the procedural autonomy of each Member State as well as the effective implementation of EU law on the environment across the Union. The second is the legal philosophical discussion about the origin of “rights”, aligning with the French debate on “*trias politica*” and “*droits naturel*”.¹⁹⁰ Closely related to this is how a human right to a healthy environment can be defined in a democratic society in order to meet the social and environmental needs of present and future generations. Is this a question only about applying international agreements or other overarching instruments on the environment, or are we talking about the courts finding the needs of the environment and future generations from scientific and technical evidence presented before them by representatives for those interests?

¹⁹⁰ The literature mentioned in footnote 147 may be good starters for such studies. Also Nordic legal philosophers such as Aleksander Peczenik and Aulis Aarnio have written important contributions to such an analysis.

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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.