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Incorporating a Rights of Nature Approach into the EU Legal Framework

Exploring Legal Mechanisms for Enhanced Wadden Sea Habitat Protection

Author: Madelon van den Hoek Ostende
Supervisor: Veerle Platvoet and Jan Klabbers

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ABSTRACT

This thesis explores the incorporation of a Rights of Nature approach into the legal framework of the European Union on habitat protection. The study assesses the existing EU environmental framework and the barriers to Rights of Nature in the EU. It further analyzes international case studies where Rights of Nature have been implemented. Drawing from this analysis, the study explores the feasibility and effectiveness of three legal instruments regarding the objective of enhancing habitat protection in the Wadden Sea. Through a comparison of these legal mechanisms, the thesis identifies practical implications of incorporating a Rights of Nature approach into the EU legal framework, in particular concerning the criteria for legal standing. The findings suggest that each legal mechanism faces significant challenges to incorporating a Rights of Nature approach, especially if not accompanied by a broader ecocentric shift across the EU legal framework. The implications of this study therefore have significance beyond the case of the Wadden Sea, providing insights into the broader integration of Rights of Nature into EU environmental law.

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1. INTRODUCTION

One of the most prominent environmental problems of the present day is the rapid deterioration of coastal ecosystems around the globe. Many coastal ecosystems around the world are experiencing a significant loss of populations and species, thereby threatening to permanently damage crucial ecosystem functions and their ability to recover.[1] The reasons for these are multifold, including pollution, human exploitation, climate change, and commercial activities.[2] The Wadden Sea, comprising Denmark, Germany, and the Netherlands is such a coastal system under threat.[3] The Wadden Sea is a unique tidal ecosystem that is home to a diverse array of animal and plant species.[4] Due to its important function as a habitat for an estimated 10,000 different species[5], it is important that its critical ecological functions can flourish without disturbance. However, the condition of the Wadden Sea has declined significantly by extensive human intervention.[6] A multiplicity of human activities have caused such deterioration. For example, Lambooy, van Soest, and Breemer outline several factors and activities contributing to the declining state of the Dutch part of the Wadden Sea. Not only does the global problem of climate change also apply to the Wadden Sea, which threatens to 'drown' the tidal flats, but there are also numerous activities in the local context that disturb the Wadden Sea's natural ecosystem. Various industrial and commercial activities in and along the coastal areas of the Wadden Sea have negative impacts on the natural environment. Pollution occurs through agricultural activities that deposit nitrogen into the environment and the operations of several industries, such as shipyards and refineries. Commercial activities like gas exploration, salt drilling, electric cable installations, and fishing pose additional threats to the natural ecosystem functioning of the Wadden Sea. Considering the multiplicity of activities and factors negatively impacting the Wadden Sea, Lambooy, van Soest, and Breemer speak of a 'cumulation effect'.[7] This makes the protection of the Wadden Sea a highly complex and challenging task.

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[1] Britas Klemens Eriksson and others, *Major Changes in the Ecology of the Wadden Sea: Human Impacts, Ecosystem Engineering and Sediment Dynamics* (2010) 13 Ecosystems 752
[2] Tineke Lambooy, Tessa van Soest and Ignace Breemer, *Granting Rights of Nature to the Wadden Sea? An exploratory study* (Wadden Academy 2022) 11
[3] Heike K. Lotze, 'Radical changes in the Wadden Sea fauna and flora over the last 2,000 years' (2005) 59 Helgol Mar Res 71
[4] Lambooy, van Soest and Breemer (n2) 10
[5] Quality Status Report 2017
[6] Lotze (n3)
[7] Lambooy, van Soest and Breemer (n2) 11

Due to the recognized importance of the Wadden Sea as a natural habitat and ecosystem, there are many environmental laws and governance structures that seek to safeguard the Wadden Sea on multiple levels. The protection of the Wadden Sea has been the subject of national, multinational, and international agreements, thereby emphasizing the need for coordinated efforts to ensure its preservation. In 1971, the Wadden Sea was designated as Ramsar Convention site, which ensures the protection of important wetland areas.[8] In 1982, Denmark, Germany and the Netherlands engaged in trilateral collaboration, leading to the development of the Trilateral Wadden Sea Plan (TWSP). Through the TWSP, the countries bordering the Wadden Sea agreed to assess the issues impacting the Wadden Sea, identify key species and habitats that make up the natural ecosystem, and define targets to enhance the conservation status of the Wadden Sea.[9] Moreover, in 2009 the Wadden Sea was designated as a UNESCO World Heritage site, being recognized for its 'outstanding universal value' and meeting multiple criteria for selection.[10] In addition, a multiplicity of EU legislation applies to the Wadden Sea. In the next section, I will discuss the various sources of EU law that determine the scope of protection granted to the Wadden Sea.

1.1 The EU and the protection of the Wadden Sea

The European Union's framework on environmental law is generally regarded as one of the most well-developed legal environmental protection frameworks. Environmental protection and sustainable development have been incorporated into the legal framework of the European Union through primary and secondary legislation. For example, Article 3 of the Treaty on the European Union (TEU) asserts that 'a high level of protection and improvement of the quality of the environment' is at the heart of the European Union's internal market.[11] Moreover, Article 37 of the EU Charter of Fundamental Rights 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'.[12] In terms of nature conservation, the European Union has

[8] Joe Weston, 'Implementing International Environmental Agreements: The Case of the Wadden Sea' (2007) 15(1) European Planning Studies 133, 150
[9] Ibid 138
[10] Lambooy, van Soest and Breemer (n2) 10
[11] Hendrik Schoukens, 'Granting Legal Personhood to Nature in the European Union: Contemplating a Legal (R)evolution to Avoid an Ecological Collapse? (Part 1)' (2018) 15(3-4) Journal for European Environmental & Planning Law 309, 315
[12] Charter of Fundamental Rights of the European Union [2012] OJ C326/391

adopted the 1979 Birds Directive[13], the 1992 Habitats Directive[14], the 2000 Water Framework Directive[15], and the 2008 Marine Strategy Framework Directive[16]. For example, through the Birds and Habitats Directives, the Wadden Sea has been incorporated into the Natura 2000 network. In accordance with Article 3 of the Habitats Directive, habitats and species listed under the Natura 2000 network shall be maintained, or otherwise 'restored at a favorable conservation status'. Moreover, it requires Member States to periodically report on the measures they have implemented to enhance the conservation status of the habitats and species listed in the Annexes.[17]

Despite this seemingly wide-ranging body of environmental protection, the decline of environmental quality across Europe is still ongoing.[18] The common explanation for this is that the European framework of environmental law faces various enforcement and implementation challenges.[19] Concerning the Wadden Sea, there appear to be discrepancies in the way that the relevant EU legislation is interpreted among the three Wadden Sea countries, including divergent complementary national guidelines. This has resulted in different monitoring strategies and ultimately the fragmentation of environmental protection approaches. However, for the overall understanding of the state and functioning of the Wadden Sea ecosystem, it would be beneficial to combine the countries' best practices in monitoring strategies.[20] This can subsequently support the defining and measuring of targets more easily. The enforcement of existing environmental instruments is important for their effectiveness in ensuring environmental protection by meeting the targets outlined therein.

However, there are also more structural factors that can be identified that impede the realization of the EU's environmental objectives. For instance, a study by the European Economic and Social Committee (EESC) found that the failure of EU environmental law lies in its conception and design.[21] The question of effectiveness should be reconsidered in terms of its meaning and objectives. According

[13] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1979] OJ L103/1
[14] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7
[15] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1
[16] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) [2008] OJ L164/19
[17] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7, art 17.
[18] Michele Carducci and others, *Towards an EU Charter of the Fundamental Rights of Nature* (European Economic and Social Committee 2019) 19
[19] Ibid 20
[20] K. Ricklefs and others, *Wadden Sea Quality Status Report: Subtidal habitats* (Common Wadden Sea Secretariat 2022) 27
[21] Carducci and others (n18) 23

to the EESC study, effectiveness can have three meanings, namely legal, behavioral, and problem-solving effectiveness. It criticizes EU environmental law for focusing on mere legal effectiveness, implying that a certain measure or instrument is effective if it can enforce legal compliance.[22] Behavioral effectiveness, meaning the ability of a legal instrument to change the behavior of the addressees, and particularly problem-solving effectiveness, meaning the ability of certain measures to effectively address the problem, have mostly been neglected in terms of measuring effectiveness. Similarly, the EESC study argues that the effectiveness of EU environmental law has typically focused on curbing the negative effects of economic activities on the environment, rather than taking on a comprehensive approach aligned with the scientifically established thresholds of the Earth system.[23] These reasons can be taken as evidence that EU environmental law has generally not been effective in achieving effective protection for the environment, despite the frequently observed formal compliance with its provisions.[24] These critiques are rooted in a wider narrative that criticizes the current legal framework's conceptualization of nature within the law and the public discourse of the European Union. Scholars increasingly refer to the anthropocentric nature of the current EU environmental legal framework as the main reason for its failure to meet its environmental objectives.[25] The instrumental definition of nature and the environment in the legal framework of the European Union negatively affects the achievement of the desired objectives of environmental protection, because there is an inherent discrepancy between the top-down, instrumentalist legal framework and the holistic and dynamic system of nature.[26] This gap has created the structural problem of prioritizing short-term economic gains over environmental objectives. Recognizing that environmental laws perceive nature as something to be used for the benefit of humans, it becomes clear that compliance with environmental laws may not invariably signify success. Rather, the suitability of the legal norms to achieve their objectives, in this case habitat protection, must be considered.[27] Some authors therefore argue to move beyond anthropocentric worldviews and seek to establish a worldview that recognizes the deep interconnectedness of human life and nature.[28] This is why scholars increasingly draw attention to the

[22] Ibid
[23] Ibid
[24] Mumta Ito, Massimiliano Montini and Silvia Bagni, 'Towards an EU fundamental charter for the Rights of Nature. Integrating nature, people, economy' in Jenny García Ruales and others (eds), *Rights of Nature in Europe. Encounters and Visions* (Routledge 2024) 285
[25] Ibid 309
[26] Carducci and others (n18) 20
[27] Ibid 21
[28] Ibid 50

so-called Rights of Nature approach as a potential pathway to deal with the environmental issues we face today by fundamentally reconceptualizing the way humans value and interact with nature.

1.2 Focus and objectives of the thesis

Through the expressed need for other ways of framing EU environmental law to achieve its objectives of environmental protection, this study seeks to contribute to the ongoing discourse concerning the reevaluation of and potential restructuring of EU environmental law to more effectively reach its objectives, particularly in the realm of habitat protection. In order to do this, this study focuses on the incorporation of a Rights of Nature approach into the EU legal framework on habitat protection, using the Wadden Sea as a case study. Recognizing the wide body of law and governance structures that currently deal with the conservation of habitats in the Wadden Sea, the study finds that these measures have been inadequate to protect habitats in the Wadden Sea effectively. The main reason given for this is the anthropocentric nature of the current EU environmental legislation. The fragmentation of current environmental legislation only contributes to this by tackling separate issues, inevitably leading to a mechanistic approach to environmental protection rather than taking on a whole system perspective.[29] Therefore, this study focuses on the incorporation of a Rights of Nature approach as a holistic, nature-based view on protecting habitats and the environment, into the legal framework of the European Union. The thesis thus assumes that a Rights of Nature approach proves promising in addressing the environmental problems facing the Wadden Sea. This will be elaborated on in chapter 2. The focus here is placed on the EU legal framework on habitat protection, rather than, for example, on the national level, due to its far-reaching influence into the jurisdiction of the EU Member States, thereby allowing for a more unified and harmonized strategy to habitat protection across the three EU Member States that encompass the Wadden Sea. It also follows from the argumentation in this study that a more whole systems approach is needed to address the transboundary problems facing the Wadden Sea, which I argue can better be achieved at the EU level. In addition, taking a broader focus on the EU level provides the opportunity to explore how habitat protection can be enhanced in other European ecosystems through a unified EU regulatory framework, using lessons from this case study. The focus on the EU level makes this study fundamentally different from other initiatives that aim to employ a Rights of Nature approach to combat habitat loss and other environmental threats to the Wadden Sea. For example, different initiatives in the Netherlands have proposed or studied the possibility of

[29] Ito, Montini and Bagni (n24) 289

granting rights to the Dutch part of the Wadden Sea.[30] Furthermore, the Wadden Sea was chosen as a case study since it provides a prominent example of a transboundary natural ecosystem under pressure that requires a comprehensive framework and coordinated response to address its conservation across multiple jurisdictions.

The goal of this study is to analyze how a Rights of Nature approach can be incorporated into the broader legal framework of the European Union by analyzing three different legal mechanisms and what these entail in terms of protection provided to habitats in the Wadden Sea as a case study. To study this, the research question has been formulated as follows:

'What is the most feasible and effective legal mechanism to incorporate a Rights of Nature approach into the EU legal framework to enhance habitat protection in the Wadden Sea?'

There are limitations in the scope of this study. For example, since this study focuses on the EU legal framework, it does not engage with the possibility of incorporating a Rights of Nature approach at the national level in the European Union. For the protection of the Wadden Sea, it could be beneficial to study this potential at the national level. However, this has been done elsewhere.[31]

1.3 Structure of the thesis

Following a theoretical analysis of the concept of Rights of Nature, the study identifies three incorporation methods for the Rights of Nature concept into law. The identified strategies are 1) constitutional amendment, 2) new legislation, and 3) development through courts. After identifying these incorporation methods, the study will proceed to analyze these methods for their feasibility and effectiveness regarding the protection they offer to habitats in the Wadden Sea. Feasibility is defined here in line with Pedreschi and Scott's conception of legal feasibility.[32] This definition comprises two dimensions, namely the compatibility of a proposed method within the existing EU legal framework, and the enforceability of the proposed method, considering the practical challenges in implementation.[33] Regarding effectiveness, the study adopts the broader view of effectiveness to comprise also the behavioral and problem-solving effectiveness, as have been identified in the EESC study. It asserts that effectiveness is not merely limited to legal compliance, but that it should also

[30] See Lambooy, van Soest and Breemer (n2) 7
[31] Ibid
[32] Luigi Pedreschi and Joanne Scott, 'External Differentiated Integration: Legal Feasibility and Constitutional Acceptability' (2020) EUI Working Paper RSCAS 2020/54, European University Institute, 2
[33] Ibid

encompass the social context in which the law operates. In this way, effectiveness is ultimately about 'obtaining results that are as close as possible to realizing the ideal expressed by the political actors, considering the context of operation'.[34] This conception of effectiveness includes the measure of legal compliance and enforcement.[35] In relation to the case study, this means that the effectiveness of a particular legal instrument to incorporate a Rights of Nature approach can be found in its ability to reach the objective of 'conservation and sustainable use' of habitats in the Wadden Sea.[36]

[34] Mauro Zamboni, 'Legislative Policy and Effectiveness: A (Small) Contribution from Legal Theory' (2018) 9(3) European Journal of Risk Regulation 416, 420

[35] Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56(1) The Modern Law Review 19

[36] Ramsar Convention Secretariat, *The Fourth Ramsar Strategic Plan 2016-2024* (5th edn, Ramsar Handbooks 2016) 12 https://www.ramsar.org/sites/default/files/hb2_5ed_strategic_plan_2016_24_e.pdf accessed 7 July 2024

2. THEORETICAL CHAPTER

In this chapter, I will elaborate on the principles of the Rights of Nature approach. The framework of Rights of Nature encompasses a broad range of concepts and ideas. I will clarify the Rights of Nature approach using Kauffman and Martin's distinction between understanding Rights of Nature as a legal philosophical approach and as legal provisions. In this way, I will explain the development of the concept of Rights of Nature as a legal and philosophical approach, navigating the border between the moral and legal underpinnings of the Rights of Nature concept. Then, I will discuss some examples of how Rights of Nature has been incorporated into various legal orders and jurisdictions, in which I will identify three distinct legal instruments through which to incorporate Rights of Nature into the legal system.

2.1 What is Rights of Nature

The concept of Rights of Nature embodies several moral and legal foundations. Essentially, advocates of Rights of Nature argue in favor of a fundamental shift in our approach to nature. In this way, they argue that nature, or certain parts of nature such as natural entities or ecosystems, can be better protected by adopting the view that nature has intrinsic value and therefore should be endowed with rights.[37] In practice, the term Rights of Nature can refer to two related yet distinct concepts. According to Kauffman and Martin, Rights of Nature can be distinguished between Rights of Nature as a legal philosophy and the legal provisions that are associated with it.[38] This reflects the debates regarding the moral and legal status of nature. Therefore, in this section, I will clarify the distinction between Rights of Nature as a legal philosophy and legal practice by demonstrating their theoretical underpinnings. I will first briefly define the concepts of nature and rights within the Rights of Nature framework.

2.1.1 The concept of nature

When considering the concept of nature with Rights of Nature, there seem to be many ways in which this nature is defined. There are two prevailing ideas on nature within the Rights of Nature framework. The first conception of nature, which has been followed mostly by Earth Jurisprudence[39] scholars,

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[37] Jérémie Gilbert and others, 'Understanding the Rights of Nature: Working Together Across and Beyond Disciplines' (2023) 51 Human Ecology 363

[38] Craig M. Kauffman and Pamela L. Martin, *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future* (The MIT Press 2021) https://doi.org/10.7551/mitpress/13855.001.0001 accessed 4 March 2024, 4

[39] The term 'Earth Jurisprudence' was created by Thomas Berry, an influential advocate for incorporating a more 'Earth-centered' approach to law and jurisprudence. This approach entails a fundamental change in how humans interact with

refers to Nature (with a capital "N") as the entirety of the natural world.[40] In other words, Nature is defined in the broadest sense, namely as 'totality'. It includes all things belonging to the natural world, including human activity. This implies that humanity is an inherent part of this broader natural world. Earth Jurisprudence scholars who adopt this view of nature thereby challenge the modern view that nature is to be perceived as the background for human activity. However, this view of Nature as totality has been criticized for being 'hopelessly large' and too abstract.[41] Therefore, it is also worth exploring other ways of defining nature. For example, some scholars have defined nature as the immediate environment. This definition of nature has also been referred to as 'nature as place' in which nature is perceived as rather specific, contextual, and local. In this way, it emphasizes the understanding of nature as providing the conditions for life in a particular environment, focusing on the locality and unique conditions in a specific place. Viewing nature in this way draws the concept of nature into the realm of politics, as it involves the interactions and power dynamics at play between the natural world and humanity.[42] Moreover, it also allows for the conceptualization of nature in a more narrow sense since it can also entail nature as specific natural entities, such as rivers and forests, or as an ecosystem.

According to Tănăsescu, the understanding of nature as comprising the entirety of existence has prevailed within the theoretical framework on the Rights of Nature. However, different conceptions of nature have also been used to shape Rights of Nature in practice. As stated by Tănăsescu, and as I will later demonstrate in this chapter, this is best explained through practical examples.[43]

2.1.2 The concept of rights

It is important to demonstrate how the concept of rights has generally been defined to understand what is meant by granting rights to nature. Even though rights have been subject to many different definitions under legal theory, within the Rights of Nature movement rights can best be explained through the Hohfeldian conception of rights.[44] According to legal theorist Wesley Newcomb Hohfeld, legal rights can be perceived as correlatives of legal obligations. In this way, rights are equated with duties in which a right-holding entity has a valid claim to have its rights respected by others, thereby

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the natural world. See, for example, Thomas Berry, *The Great Work: Our Way into the Future* (Broadway Books 1999) cited in Hiroshi Fukurai and Richard Krooth, *Original Nation Approaches to International Law* (Palgrave Macmillan 2021) 218

[40] Mihnea Tănăsescu, *Understanding the Rights of Nature, A Critical Introduction* (New Ecology 2022) 33

[41] Ibid

[42] Ibid 35

[43] Ibid

[44] Ibid 36

imposing a duty on others.[45] This view correlates with Hohfeld's conception of claim-rights.[46] It should further be questioned who is deemed capable of holding such rights. Ultimately, whether an entity is capable of holding rights is a different question from whether an entity holds rights. The former is a moral question, whereas the latter is a question of legal proclamation. From a legal perspective, a legal person is defined as anyone who is deemed 'a placeholder for the capacity to enforce rights' by the prevailing legal system.[47] When it comes to the question of eligibility for rights, there are two prevailing theories in legal philosophy that seek to answer this question. Firstly, the so-called 'will theory' proclaims that to be a rights-holder means to have power over another person's obligation. In this way, will theories demand that one has full autonomy over the exercise of their rights. In other words, the legal person must be capable of choosing whether to enforce a right or not, and thereby enforce someone else's duty.[48] In this way, the will theory fundamentally excludes non-human entities from being capable of holding rights because it necessitates an element of choice.[49] On the other hand, there exists the interest theory. According to the interest theory, as developed by Joseph Raz, entities can be assigned legal personality if they have interests. Thus, an entity's interest is sufficient in granting it legal rights, because it is part of the entity's well-being which has ultimate value.[50] Raz differentiates between intrinsic and ultimate value, contending that intrinsic value remains derivative because it is valuable to someone or something. In contrast, ultimate value is about an entity's value for its own sake.[51] This distinction is useful for defining what entities can be considered eligible for rights according to the interest theory. For example, Kurki holds that sentience is necessary for having interests since sentient beings have a stake in how they are treated.[52] Kurki argues that this does not apply to non-sentient organisms, such as plants, since they are indifferent to how they are treated.[53] However, I contend that like Taylor, not sentience but rather an organism's 'good of their own' is sufficient for having interests.[54] Taylor asserts that all organisms are part of a goal-oriented system

[45] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) The Yale Law Journal 710 cited in Tănăsescu (n40) 36
[46] Yaffa Epstein and Eva Bernet Kempers, 'Animals and Nature as Rights Holders in the European Union' (2023) 86(6) Modern Law Review 1336, 1340
[47] Tănăsescu (n40) 36
[48] Epstein and Kempers (n46) 1341
[49] Tănăsescu (n40) 37
[50] Epstein and Kempers (n46) 1342
[51] Visa A.J. Kurki, 'Can Nature Hold Rights? It's Not as Easy as You Think' (2022) 11(3) Transnational Environmental Law 525, 531
[52] Ibid 547
[53] Ibid 549
[54] Paul W. Taylor, *Respect for Nature A Theory of Environmental Ethics* (Princeton University Press 2011) 222

striving to preserve their existence.[55] Similarly, Kramer adopts an expansive view of interests, arguing that an entity is only without interests if 'its condition is insusceptible to any enhancement or deterioration'.[56] Employing Taylor's and Kramer's view of interests allows for the contention that nature can have interests and therefore is eligible for rights. Acknowledging that there are also shortcomings to such a broad approach,[57] I would argue that nature can have rights under the interest theory because it can be argued that nature has an interest in maintaining its existence regardless of its value to other beings.

This debate over eligibility for rights and legal personhood is important since it reflects the moral and legal arguments in favor and against granting rights to nature. As will be shown in this thesis, because of the various conceptions of rights and legal personality, it appears that advocates for Rights of Nature draw from this multiplicity of definitions.

2.2 Rights of Nature as a legal philosophy

Rights of Nature as a legal philosophical approach encompasses various, though often interconnected, conceptualizations of nature's value emerging from diverse ideological underpinnings. In this section, I will focus on two ideologies that have greatly shaped the trajectory of the Rights of Nature movement, namely the philosophy of Earth Jurisprudence and Indigenous ontologies.

Rights of Nature as a legal philosophy often refers to the philosophy of Earth Jurisprudence.[58] The idea of Earth Jurisprudence is to incorporate a more 'Earth-centered' approach to law and jurisprudence.[59] This requires a reconceptualization of current political, economic, and social structures to align them more closely with the natural world, rather than attempting to impose human will upon nature.[60] Thus far, these systems have been founded on an instrumental view of nature, in which nature is merely perceived as a means to satisfy human needs.[61] However, through the increased awareness that the natural world and humanity are inherently interconnected, it is misguided to think that

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[55] Ibid 219
[56] M.H. Kramer, *Liberalism with Excellence* (Oxford University Press, 2017) 137
[57] See for example Kurki (n51) 549
[58] Kauffman and Martin (n38)
[59] Thomas Berry, *The Great Work: Our Way into the Future* (Broadway Books 1999) cited in Hiroshi Fukurai and Richard Krooth, *Original Nation Approaches to International Law* (Palgrave Macmillan 2021) 218
[60] Cormac Cullinan, 'A History of Wild Law' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield 2011) 12
[61] Ian Mason, 'One in All: Principles and Characteristics of Earth Jurisprudence' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield 2011) 36

extracting resources on such a large scale will not have any repercussions on life on our planet.[62] The field of law has not been an exception to the instrumentalist view. According to Boyd, there is a disconnect between Western law that assumes a mechanistic view of nature and the 'laws governing the natural world'.[63] Boyd identifies three explanations for the ongoing misuse of nature.[64] The first explanation for the dissociation between humanity and nature is anthropocentric thought. Anthropocentrism entails human-centeredness.[65] It constitutes the belief that only humans have intrinsic value and deserve 'direct moral consideration'.[66] As a result, the widespread conviction exists that humans can be seen separately from the natural world.[67] Consequently, anthropocentrism has established the notion of human superiority. The second explanation is the perception that nature can be owned as property, ultimately fostering the view that humans are entitled to exploit natural resources without restraint. The third explanation for this disconnect is the pursuit of limitless economic growth.[68] Through these convictions, Western legal systems have created the conditions to maximize the use of the natural world. The perceived superiority of humanity has therefore produced outcomes that contradict reality.[69] Earth Jurisprudence scholars point towards these convictions as the primary reasons for the decline in biodiversity and the destruction of ecosystems that are essential to sustain life.[70] Therefore, they aim to reconstruct these destructive ideas and fundamentally transform humanity's relationship with nature.[71] The reconceptualization that Earth Jurisprudence scholars advocate for is to shift focus on the intrinsic value of nature itself. The idea of valuing nature for its own sake reframes the way humans interact with it. For example, Earth Jurisprudence emphasizes the duties humans have towards other ecosystem entities of which they are a part. In this way, they recognize humanity's integration into a larger 'web of life' where the well-being of humans is intricately connected with the well-being of ecosystems that 'provide the conditions for life'.[72] However, viewing humanity as an integrated part of a broader natural world is not a new idea.

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[62] Kauffman and Martin (n38) 5
[63] David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press 2017) xxiii
[64] Ibid
[65] Lissy Goralnik and Michael Paul Nelson, 'Anthropocentrism' in Ruth Chadwick (ed), *Encyclopedia of Applied Ethics* (2nd edn, Academic Press 2012) 145
[66] Chelsea Batavia and Michael Paul Nelson, 'For goodness sake! What is intrinsic value and why should we care?' 209 Biological Conservation 366, 369
[67] Boyd (n63)
[68] Ibid
[69] Ibid
[70] Kauffman and Martin (n38) 6
[71] Ibid
[72] Ibid

Many of the ideas that Rights of Nature scholars advocate for can be found in various Indigenous ontologies and traditions. The relation between Rights of Nature and Indigeneity is complex. It can be stated that the underlying principles of Rights of Nature are closely related to many Indigenous worldviews that have historically perceived the interconnectedness of humans and nature.[73] For example, Petel presents various arguments examining whether incorporating Indigenous worldviews into the Rights of Nature movement signifies translation, hybridization, or subordination to the inherently Western notion of law.[74] Some authors argue that Rights of Nature codifies Indigenous worldviews about nature into law since the concept of rights as such is foreign to most Indigenous ontologies.[75] Others argue that Rights of Nature serves as a 'cultural bridge' between Indigenous worldviews and Western legal terminology.[76] Tănăsescu is more critical regarding the relation between Indigenous ontologies and the concept of Rights of Nature, arguing that the adoption of Indigenous beliefs does not always align with or fully capture the nature of Indigenous ontologies.[77] Some authors question whether the adoption of Indigenous beliefs through Rights of Nature is simply a perpetuation of the historical marginalization and exclusion of Indigenous knowledge.[78] Nevertheless, the role of Indigenous communities has been indispensable to the development of Rights of Nature as a legal philosophy and as legal provisions.[79] Essentially, as I will show in this chapter, many of the legal provisions based on Rights of Nature that have currently been adopted have been the result of Indigenous activism.

To conclude this section, Rights of Nature as a legal philosophy can be viewed as the adoption of the principles of Earth Jurisprudence and Indigenous ontologies. The Rights of Nature movement thus encompasses more than specific legal provisions that seek to establish legal personality and standing for nature. In other words, a clear delineation can be made between the Rights of Nature

[73] Harriet Harden-Davies and others, 'Rights of Nature: Perspectives for Global Ocean Stewardship' (2020) 122 Marine Policy 104059
[74] Matthias Petel, 'The Illusion of Harmony: Power, Politics, and Distributive Implications of Rights of Nature' (2024) 13(1) Transnational Environmental Law 12, 29
[75] Craig M. Kauffman and Pamela L. Martin, 'Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail' (2017) 92 World Development 130
[76] Petel (n74)
[77] For more critical engagement, see Minhea Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies' (2020) 9 Transnational Environmental Law 429
[78] Lieselotte Viaene, 'Can Rights of Nature Save Us from the Anthropocene Catastrophe? Some Critical Reflections from the Field' (2022) 9(2) Asian Journal of Law and Society 187, 201
[79] Erin O'Donnell and others, 'Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature' (2020) 9(3) Transnational Environmental Law 403, 405

movement and 'legal models that are associated with this movement'.[80] The Rights of Nature movement is fundamentally about enabling a paradigm shift in the way humans and nature interact.

2.3 Rights of Nature as legal provisions

There are several examples of how a Rights of Nature approach has been incorporated into legal provisions. Rights of Nature as legal provisions stand apart from the legal philosophy, as well as from traditional environmental law. First of all, as I have argued, the underlying idea of the Rights of Nature approach in legal philosophy is to create a paradigm shift in how humans and nature interact. The Rights of Nature as legal provisions are seen as a way to attain this objective. It thus focuses more concretely on the role that legal practice can play in this transformation. Secondly, the legal practice of Rights of Nature is essentially different from existing environmental law. This is because, through its practice, environmental law fundamentally perceives nature and natural entities as legal objects.[81] In this way, environmental law operates within the instrumentalist approach to nature. Therefore, environmental law has been criticized due to its inefficiency in making a real impact to curb the effects of environmental destruction.[82] Due to environmental law's instrumental focus, human interests remain central in cases that are essentially about nature or ecosystems. The Rights of Nature approach to legal practice is distinct from this by advocating for the creation of nature or specific natural entities as legal subjects, thereby also redefining the responsibilities of humans towards it.[83]

The notion of granting legal rights and legal personhood to nature before courts of law was first expressed by Christopher Stone, a United States lawyer, in 1972.[84] In his influential article on 'Should trees have standing', Stone argued in favor of endowing nature with rights. Stone wrote this article in reaction to the ongoing case of *Sierra Club v Morton* in the United States federal court. In this case, the dispute was about the development of a ski resort by Walt Disney Enterprises in the Mineral King Valley within California's Sequoia National Forest. The Sierra Club, an environmental organization, sued Rogers Morton, the then Secretary of Interior of the United States, arguing that the development of the ski resort would have negative consequences on the environment of the Mineral King Valley.

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[80] Jérémie Gilbert and others, 'The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda' in Daniëlla Dam-de Jong and Fabian Amtenbrink (eds), *Netherlands Yearbook of International Law 2021* (Springer 2021) 64

[81] Kauffman and Martin (n38) 7

[82] Jan Därpo, *Can Nature get it right? A Study on Rights of Nature in the European Context* (European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs 2021) 19

[83] Ibid 14-15

[84] Tănăsescu (n40) 20

Ultimately, the case was dismissed because the Sierra Club failed to demonstrate a direct impact of the defendant's actions, and therefore they did not meet the conditions for legal standing under the Administrative Procedure Act.[85] Stone's article did however influence Justice William O. Douglas' dissenting opinion in which he argued for the granting of legal personhood to the environment and to allow for standing of environmental organizations to sue on their behalf.[86]

To support his argument, Stone referred to earlier rights movements. In legal history, the extension of rights to a new category of beings has always seemed unthinkable and has been met with resistance. However, in accepting that rights are fundamentally 'legal conventions acting in support of the sonic status quo', rather than based on a supposed natural order, it becomes conceivable to extend rights to entities that were traditionally believed not to be capable of holding rights.[87] In this way, throughout legal history, rights have been extended to a wide variety of groups, such as children, women, formerly enslaved persons, and companies.[88] The basis for granting entities certain rights is because of their intrinsic value rather than their instrumental value.[89] To have intrinsic value is to hold a certain significance that cannot be reduced to human interests.[90] In other words, intrinsic value is about whether an entity possesses characteristics or qualities that make it worthy of recognition, regardless of external factors or outcomes.[91] For example, the idea of intrinsic value in animal ethics is mostly occupied with whether animals hold value 'for their own sake'.[92] Stone also uses the notion of moral consideration in his argumentation for granting legal rights to nature, arguing that nature should have legal standing because it is morally deserving of such recognition.[93] Furthermore, for an entity to become, as Stone describes it, a 'holder of legal rights', three criteria must be satisfied.[94] The first

[85] *Sierra Club v Morton* [1972] USSC 56, 405 US 727
[86] Därpo (n82) 11
[87] Christopher D. Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (Oxford University Press 2010) 2
[88] Kauffman and Martin (n38) 8
[89] Hendrik Schoukens, 'Rights of Nature as an Unlikely Saviour for the EU's Threatened Species and Habitats, A Critical Introduction to a Revolutionary Idea' in M. Boeve, S. Akerboom, C. Backes and M. van Rijswick (eds), *Environmental Law for Transitions to Sustainability* (Intersentia 2021) 189
[90] This contention of intrinsic value is different from Joseph Raz's explanation of intrinsic value under the interest theory. As I have argued under section 2.1.2, Raz contends that intrinsic value is derivative, whereas ultimate value would describe an entity's value for its own sake. Therefore, the understanding of intrinsic value described here follows Raz's description of ultimate value better, but it is labeled as intrinsic value following Taylor's and Kramer's definition of interests and value. For more explanation, see section 2.1.2.
[91] Katie McShane, 'Why Environmental Ethics Shouldn't Give Up on Intrinsic Value' (2007) 29(1) Environmental Ethics 43
[92] Visa A.J. Kurki, 'The Main Legal Theories and Approaches to Animal Protection' (2021) Nordic Animal Law. Advance online publication.
[93] Tănăsescu (n40) 22
[94] Stone (n87) 4

criterion is that legal proceedings can be initiated at the behest of an entity, either through the rights holder himself or through an appointed guardian. Secondly, courts must consider the injury to the entity when granting legal relief, and thirdly, the relief must therefore essentially benefit the entity itself. Through the satisfaction of the three criteria, the foundational view of valuing entities intrinsically is upheld within legal practice.[95] In this way, Stone argues, legal personhood ultimately paves the way for legal standing for nature or natural entities. Through legal standing, natural subjects can subsequently sue for their own preservation. In order to do this, nature needs someone to act on its behalf. Stone therefore argues in favor of a guardianship approach, through which nature or specific natural entities are appointed a guardian who can sue on their behalf.[96]

Initially, Stone's idea of granting legal standing to nature did not gain much traction. The idea was further developed by other academic scholars, such as Thomas Berry, Cormac Cullinan, and Roderick Nash, but it did not extend beyond legal theory.[97] The emergence of Rights of Nature legal provisions did not occur until 2006. The sudden traction of Rights of Nature in recent years through legal provisions can be explained as a reaction to various issues concerning restorative justice and social inequity and the perceived underperformance of current governance structures in safeguarding the environment.[98] As stated by Kauffman and Martin, due to the perceived common environmental threats, 'communities in distinct parts of the world began experimenting with new environmental laws that are functionally similar in that they share a common norm regarding humans' relationship to nature and their responsibility toward it'.[99] In other words, the Rights of Nature were gradually considered and adopted in various legal orders simultaneously. According to Kauffman and Martin, this was not necessarily a process of norm diffusion, but this was rather the result of 'independent processes of norm contestation shaped by distinct political, institutional, and cultural contexts'.[100] This consequently explains why Rights of Nature legal provisions vary in their approach in different legal orders.[101] In the next section, I will demonstrate how Rights of Nature have been adopted in a variety of ways in distinct legal contexts.

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[95] Ibid
[96] Därpo (n82) 19
[97] Ibid 11
[98] Gilbert and others (n37) 363
[99] Kauffman and Martin (n38) 20
[100] Ibid
[101] Schoukens (n89) 192

2.4 How Rights of Nature have been incorporated into various legal orders

In recent years, the concept of Rights of Nature has been codified into positive law in different legal orders. In this section, I will present some of the most prominent examples of how Rights of Nature provisions have been implemented into distinct legal systems. I will do this by identifying 1) the definition of nature and Rights of Nature in each example, 2) the specific legal instrument employed to establish the Rights of Nature, and 3) the mechanisms and responsible parties for enforcing these rights.

2.4.1 Pacha Mama: The Constitutional Case of Ecuador

Ecuador was the first country to recognize the Rights of Nature in its constitution in 2008.[102] The incorporation of Rights of Nature into the Ecuadorian constitution was the result of a national referendum, which was drafted through the collaborative efforts of the government of Ecuador and representatives of the Indigenous nations in Ecuador.[103] At the core of the new constitution was the Indigenous notion of *Sumak Kawsay*, or *buen vivir* in Spanish. This phrase can be translated as 'good living' and it entails the harmonious existence of nature and people.[104] These ideas were incorporated through the concept of *Pacha Mama*, which translates to 'Mother Earth' and which is the embodiment of Nature.[105] The Ecuadorian constitution embraces a broad understanding of nature. It does not define nor delineate 'nature', thereby reaffirming it as an all-encompassing entity.[106] It reiterates this view in the Preamble, establishing that 'We women and men, the sovereign people of Ecuador . . . celebrating nature, the Pacha Mama (Mother Earth), of which we are a part and which is vital to our existence . . . hereby decide to build a new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living, the Sumak Kawsay'.[107] Chapter 7 of the Ecuadorian constitution enshrines the rights of nature. For example, Article 71 states that 'Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions, and evolutionary processes'.[108] It further establishes

[102] Kauffman and Martin (n38) 79
[103] Hiroshi Fukurai and Richard Krooth, *Original Nation Approaches to International Law* (Palgrave Macmillan 2021) 220
[104] Boyd (n63) 171
[105] Kauffman and Martin (n38) 130
[106] Schoukens (n89) 192
[107] Constitution of the Republic of Ecuador (2008) cited in Boyd (n63) 171
[108] Constitution of the Republic of Ecuador (2008) cited in María Valeria Berros, 'Challenges for the Implementation of the Rights of Nature Ecuador and Bolivia as the First Instances of an Expanding Movement' (2021) 48 Latin American Perspectives 192, 195

the obligations of the State to install effective mechanisms to restore natural restoration and to take measures against harmful practices to the environment in Articles 72 and 73. In addition, Article 88 asserts that anyone can call upon the public authorities in case of a breach of constitutional rights. This entails that to ensure the enforcement of the rights of nature, every person or organization can initiate legal proceedings before the court when the constitutional rights of nature are threatened.[109] In this way, the incorporation of Rights of Nature ultimately lays the foundation for the development of Rights of Nature jurisprudence. Initially, the application of Rights of Nature in Ecuador in courts faced several obstacles. These challenges mainly revolved around the politicization of legal proceedings in which Rights of Nature were invoked, thereby drawing attention away from the 'implementation of the specifics of the law', as well as the lack of knowledge on how to interpret the Rights of Nature provisions by judges and other legal professionals.[110] The first successful application of Rights of Nature was the Vilcabamba River Case. The case was about the disposal of excavated material from roadside construction into the Vilcabamba River in Loja Province, causing the river to flood. This case was filed by two Americans living in the affected area on behalf of the river, claiming the right of the river to its natural course.[111] The Loja provincial court ultimately ruled in favor of the river, referring to the constitutional Rights of Nature.[112] Ever since, judges have played an important role in strengthening the development of Rights of Nature through courts by applying the legal principles to various cases. This has laid the groundwork for jurisprudence on which judges have based later decisions.[113]

2.4.2 Bolivia: The Law of Mother Earth

Following the 2009 amendment of its constitution, Bolivia adopted the Law of the Rights of Mother Earth in 2010, which was changed into the Framework Law of Mother Earth and Integral Development for Living Well in 2012.[114] The Bolivian Indigenous community played a significant role in creating this new legislative act to enshrine the Rights of Nature into the domestic legal framework.[115] In this

[109] María Valeria Berros, 'Challenges for the Implementation of the Rights of Nature Ecuador and Bolivia as the First Instances of an Expanding Movement' (2021) 48(3) Latin American Perspectives 192, 195
[110] Kauffman and Martin (n38) 81
[111] María Valeria Berros, 'Defending Rivers: Vilcabamba in the South of Ecuador' in Anna Leah Tabios Hillebrecht and María Valeria Berros (eds) 'Can Nature Have Rights? Legal and Political Insights' (2017) 6 RCC Perspectives: Transformations in Environment and Society 37, 38
[112] Criminal Division of the Provincial Court of Loja, Judgement no. 11121-2011-0010, 31 March 2011
[113] Kauffman and Martin (n38) 81
[114] Bolivia, Law No. 300, Framework Law of Mother Earth and Integral Development to Live Well, Official Gazette of the Plurinational State of Bolivia (2012)
[115] Fukurai and Krooth (n103)

way, many of the concepts surrounding the Rights of Nature embodied in the Bolivian Law of Mother Earth resemble those found in Ecuador. The concept of Mother Earth, which resembles that of *Pacha Mama*, has been defined in Article 3 of the 2010 Law of the Rights of Mother Earth as 'a dynamic living system made up of an indivisible community of all living systems and living organisms that are interrelated, interdependent, and complementary, sharing a common destiny. Mother Earth is considered sacred in the worldviews of communities and peasant indigenous peoples.' Furthermore, Bolivia has adopted a similar enforcement mechanism, in which citizens are empowered to bring lawsuits in case of perceived violations of the subjects covered by the Framework Law.[116] However, to this day, there have been no significant cases brought to court on the basis of the 2010 Law of the Rights of Mother Earth. Scholars have given different reasons for this, from a different civil society structure than in Ecuador, to a lack of training for legal professionals on how to interpret Rights of Nature provisions, to weaknesses in the enforcement mechanisms. However, this has been explained better elsewhere.[117]

2.4.3 Rights to ecosystems: New Zealand's guardianship approach

The conceptualization of Rights of Nature observed in New Zealand differs from those in Ecuador and Bolivia in terms of scope, enforcement mechanisms, and the legal instruments employed. The definition of nature that permeates within the Rights of Nature discourse in New Zealand has also been shaped by its Indigenous populations. The development of the Rights of Nature discourse in New Zealand is inextricably linked with the struggle of Indigenous populations to restore their relationship with the environment.[118] Through decades of negotiations, the government of New Zealand has increasingly recognized the worldviews of its Indigenous populations. Most recently, this has led to New Zealand's recognition of the legal rights of certain ecosystems, such as the Whanganui River and subsequently the national park of Te Urewera.[119] For example, the granting of rights to the Whanganui River is the combined result of the dispute to end the polluting discharge of sewage wastewater in the Whanganui River and the Indigenous Māori population's efforts to have their spiritual connection with the river officially acknowledged.[120] The Māori hold that the people living in a particular place are

[116] Kauffman and Martin (n38) 118
[117] See for example Kauffman and Martin (n38) 120-139; and Lorna Muñoz, 'Bolivia's Mother Earth Laws. Is the Econcentric Legislation Misleading? (ReVista 6 February 2023) https://revista.drclas.harvard.edu/bolivias-mother-earth-laws-is-the-ecocentric-legislation-misleading/ accessed 27 March 2024
[118] Ibid 144-145
[119] Ibid 131
[120] Boyd (n63) 134

'intimately connected to its geographic features—rivers, forests, lakes, and other species—and have responsibilities toward them all'.[121] The Māori's struggle for the recognition of their worldviews ultimately led to the signing of the Whanganui Agreement, which includes provisions that seek to safeguard and implement the Māori's physical and spiritual attachment to the river. The most notable result of the Whanganui Agreement was the recognition of the Whanganui River as a legal entity with rights upon which ownership was transferred to a legal body that represents the river itself. This legal body is made up of two individuals who act as official guardians of the Whanganui River. One is appointed by the Whanganui River tribe and the other is appointed by the government. These guardians are tasked with speaking and acting on behalf of the river, ensuring the consistent application of the identified needs and interests of the river.[122]

In 2014, a similar struggle for self-determination and recognition resulted in the granting of rights to Te Urewera, which had been a national park since 1954.[123] The Tūhoe Indigenous population has historically relied on the Te Urewera land for their needs. Following the arrival of the British settlers, the Tūhoe experienced displacement and ultimately the loss of their connection to the land and traditional customs.[124] The Tūhoe's continuous efforts to reclaim Te Urewera have eventually resulted in the transformation of Te Urewera from a national park to a self-owning entity through the Te Urewera Act.[125] The Te Urewera Act also adopted the approach of appointing legal guardians to speak on behalf of the ecosystem. According to Kauffman and Martin, the Tūhoe conceptualize guardianship differently from the conventional Western legal perspective. This is because the Tūhoe emphasize the safeguarding of the relationship between people and their immediate environment, which is to be achieved by 'listening' to the ecosystem.[126]

Thus, through the Whanganui Agreement and the Te Urewera Act, legal personhood has been established for specific ecosystems. Therefore, some scholars refer to New Zealand's approach as the legal personhood model.[127] To enforce the rights of these ecosystems, guardians have been designated to advocate on their behalf. This approach ensures that the ecosystems' rights are upheld through

[121] Ibid 133
[122] Ibid 134
[123] Kauffman and Martin (n38) 144
[124] Ibid
[125] Tănăsescu (n40) 73
[126] Kauffman and Martin (n38) 153
[127] Ibid 141

governance systems where appointed guardians serve as their representatives.[128] There are also objections to this guardianship approach. For example, similar to the debates I have discussed regarding the interest theory, some authors would object that natural entities have interests and needs that can be represented.[129] Moreover, assuming that natural entities do have interests, it can be questioned whether a guardian can adequately represent the needs or interests of the natural entity, as it proves difficult to assess precisely what those needs or interests entail.[130] In addition, some argue that a guardianship approach will not be fundamentally different from the existing environmental protection legislation, arguing that existing legislation already has mechanisms to effectively advocate for the protection of natural entities.[131] Stone has addressed and countered these objections. Firstly, presupposing that nature has interests, he argues that natural entities can communicate their needs and interests in a far less ambiguous way than already established legal persons, such as corporations.[132] Therefore, it is possible for guardians to adequately assess the interests of natural systems and represent them accordingly. Secondly, Stone argues that current environmental protection arrangements suffer from several limitations, such as in the jurisdictional scope or their ability to provide independent representation. Therefore, a guardianship approach can be an 'additional safeguard' to ensure the effective, independent protection of natural entities.[133]

2.4.4 The development of Rights of Nature through courts: the case of the Atrato River in Colombia

In 2016, the Constitutional Court of Colombia ruled that the Atrato River in Colombia is a subject of rights. This judgment stemmed from the necessity to take measures against harmful human activities in the Atrato River and its tributaries, most notably illegal mining. These activities have severely polluted the river and thereby endangered the livelihoods of local communities.[134] Due to the government's failure to take action, the Center of Studies for Social Justice 'Tierra Digna' initiated legal proceedings against the government. In the proceedings that followed, the court found a 'serious violation of the fundamental rights to life, health, water, food security, the healthy environment, the culture and the territory of the ethnic communities that inhabit the Atrato River basin and its tributaries, attributable to

[128] Ibid 159
[129] Kurki (n51) 548
[130] Stone (n87) 11
[131] Kurki (n51) 529
[132] Stone (n87) 11
[133] Ibid
[134] Iván Vargas-Chaves and others, 'Recognizing the Rights of Nature in Colombia: the Atrato River case' (2020) 17 Revista Jurídicas 13

the Colombian State entities'.[135] According to Article 8 of the Constitution, the Court observed that the government is obligated to protect the environment by preventing pollution and deterioration and promoting conservation, restoration, and sustainable development.[136] It further asserted that the protection of the environment is intrinsically related to the fundamental rights to life, health, territory, and culture. The court demonstrated the interconnectedness of nature and human existence, emphasizing the importance of the conservation of nature for the preservation of the 'ways of life and cultures that interact with it'.[137] The court referred to the ecocentric conception of nature, thereby conceptualizing nature as a 'real subject of rights that must be recognized by the States and exercised under the protection of its legal representatives, such as, for example, [namely] by the communities that inhabit nature or that have a special relationship with it'.[138] Thus, the court ordered the protection of the Atrato River by granting it legal personhood and by assigning it representation. This way, this court decision has initiated discussions regarding the notion of subjects of law within the Colombian context, and also concerning the role of judges and courts in these matters.[139] Yet, it remains unclear whether the Atrato River can assert its rights in any instance of harm inflicted upon it.[140]

2.5 Identifying the legal instruments used to incorporate the Rights of Nature

Recognizing that there are more examples of the incorporation of Rights of Nature into diverse legal systems and on various levels, the above examples demonstrate how Rights of Nature has been incorporated into different legal systems, reflecting the environmental, cultural, and social contexts that have contributed to its development. Considering these examples, I have identified three fundamental ways in which Rights of Nature have been incorporated into different legal contexts, namely through 1) constitutional amendments, 2) new legislation, and 3) development through courts. In the case of Ecuador, Rights of Nature has been incorporated into its Constitution, thereby establishing the constitutional status of nature as a legal person with standing. In Bolivia and New Zealand, new legislation has been adopted to incorporate the Rights of Nature into their respective legal systems. The approaches of Bolivia and New Zealand are different in two ways, namely 1) the scope of rights, and 2) how the rights in question are enforced. In Bolivia, Rights of Nature has become part of the legal order

[135] Lidia Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' (2018) 7(1) Resources 1, 8
[136] Vargas-Chaves and others (n134) 25
[137] Ibid
[138] Judgment T-622/16 (The Atrato River Case), Constitutional Court of Colombia (2016) https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2016/20161125_T-62216_judgment.pdf accessed 15 March 2024
[139] Vargas-Chaves and others (n134) 38
[140] Pecharroman (n135)

through the 2010 Law of the Rights of Mother Earth, which asserts a holistic Rights of Nature approach, emphasizing the interdependence of all living systems and organisms. In New Zealand, various national instruments, such as the Whanganui Agreement and the Te Urewera Act, were adopted to endow specific natural entities with rights. In addition, for the protection of the Rights of Nature, the Bolivian Law of the Rights of Mother Earth empowers citizens to initiate legal proceedings in cases of perceived violations of the Rights of Nature, whereas New Zealand establishes guardians through governance systems to speak on behalf of the natural entity in question.[141] These examples demonstrate how Rights of Nature can be incorporated through national legislation in distinct ways. Finally, as in the example of Colombia, Rights of Nature can also be gradually integrated into the legal system through court decisions. More specifically, I assert that by employing a teleological interpretation method, courts can draw from existing legislation to progressively recognize and protect the intrinsic rights of nature, thereby creating precedents that can be used to guide future judicial decisions and shape the development of Rights of Nature. The teleological interpretation method is based on the notion that legal provisions pursue a particular objective and that these provisions should be interpreted to promote this objective.[142] Despite the different legal instruments used, the goal remains to assert the Rights of Nature in various legal settings. The purpose here is not to argue in favor of any legal instrument, but it is rather to demonstrate the multiplicity of instruments that can be used to facilitate the goal of incorporating Rights of Nature. With this goal in mind, I will now explore the possibility of incorporating a Rights of Nature approach into the legal framework of the European Union.

[141] Kauffman and Martin (n38) 142
[142] Žaklina Harašić, 'More About Teleological Argumentation in Law' (2015) 31 Pravni Vjesnik 23, 27

3. RIGHTS OF NATURE IN THE EUROPEAN UNION

In the previous chapter, I explored the theoretical underpinnings of the Rights of Nature approach. In addition, I demonstrated several practical examples of how Rights of Nature has been incorporated into different jurisdictions across the globe. Since the purpose of this study is to explore the incorporation of a Rights of Nature approach into the EU legal framework on habitat protection, using the Wadden Sea as a case study, this chapter will discuss the arguments in favor of incorporating a Rights of Nature approach into current EU environmental law, including the substantive and procedural challenges EU environmental law currently faces that are not specific to a particular instrument.

3.1 EU environmental law and substantive rights to nature

As I have demonstrated in section 1.1, the European Union has a comprehensive legal framework regarding environmental protection, established in both primary and secondary law sources. For instance, the Treaties put sustainable development at the core of the internal market of the EU, asserting in Article 3 TEU that the 'internal market (…) shall work for the sustainable development of Europe based on balanced economic growth (…) and a high level of protection and improvement of the quality of the environment'.[143] What is more, Article 11 TFEU lays down the 'integration principle' which establishes that requirements for environmental protection must be integrated into the policies and actions of the EU.[144] The EU has further established the precautionary principle to be part of environmental protection in Article 191 TFEU, which seeks to ensure a higher level of protection for the environment through 'preventative decision-taking' in cases of uncertainty.[145] Following these Articles and principles, the EU has adopted several secondary law sources that serve more particular environmental protection goals, such as the Birds Directive, Habitats Directive, and the Water Framework Directive, which set out binding targets for Member States to ensure a high degree of environmental protection. Nevertheless, despite the seemingly comprehensive protection of the environment throughout the EU legal framework, some scholars criticize the substantive rights that the environment currently has in the EU, asserting that they are not based on the intrinsic value of nature, but rather on the notion that the environment needs protection because its importance can be found in its use by humans.[146] In other words, the current rights that nature has in the EU are derived from its

[143] Schoukens (n11) 315
[144] Ibid
[145] EUR-lex, 'The precautionary principle' (European Union) https://eur-lex.europa.eu/EN/legal-content/summary/the-precautionary-principle.html accessed 27 June 2024
[146] Carducci and others (n18) 20

value to humans, thereby reaffirming a hierarchical relationship between nature and mankind.[147] Subsequently, this has resulted in a structural prioritization of short-term economic goals over environmental protection. Thus, the lack of substantive rights to nature based on its intrinsic value can be taken as one of the reasons why EU environmental law has failed to effectively protect the environment across Europe.[148]

3.2 Procedural rights in the EU as a barrier to standing for nature

Nature itself currently does not have legal standing within the European Union.[149] However, there are other pathways through which different actors can bring environmental cases to the CJEU. The EU legal order offers three primary pathways for accessing justice in environmental cases. According to Hadjiyianni, these are the annulment procedure (Article 263 TFEU), the preliminary reference procedure (Article 267 TFEU), and the administrative review procedure under the Aarhus Regulation.[150]

Firstly, EU acts can be challenged through the annulment procedure in Article 263 TFEU. Through the annulment procedure, the CJEU can review the legality of acts of EU institutions.[151] It establishes that 'any natural or legal person may (…) institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.' Article 263 TFEU distinguishes between privileged and non-privileged applicants.[152] Privileged applicants are the EU institutions, i.e. the Commission, the Council and the European Parliament, and the EU Member States. Non-privileged applicants are legal persons, such as companies or individuals, since they must meet more stringent criteria, such as 'direct and individual concern', to gain standing in an annulment procedure. Yet, when it comes to a Rights of Nature approach, it has become clear from the case studies in the previous chapter that it was often NGOs, civil society actors, and individuals who advanced the Rights of Nature approach through courts. Therefore, the additional barrier to these actors specifically to gain standing in

[147] Schoukens (n11) 320
[148] Ibid
[149] Schoukens (n11) 325
[150] Ionna Hadjiyianni, 'Judicial protection and the environment in the EU legal order: missing pieces for a complete puzzle of legal remedies' (2021) 58(3) Common Market Law Review 777, 778
[151] European Union, Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, art 263
[152] EUR-lex, 'Annulment of legal acts by the Court of Justice' (European Union) https://eur-lex.europa.eu/EN/legal-content/summary/annulment-of-legal-acts-by-the-court-of-justice.html accessed 11 June 2024

front of the CJEU in environmental cases under Article 263 TFEU has led to the failure of some environmental cases since the Court did not consider the legislative act in question to be of direct or individual concern to those initiating the proceedings.[153] This also relates to the nature of environmental cases since environmental harms often affect many people in comparable ways, thereby complicating the demonstration of individual concern.[154]

Yet another pathway to the CJEU is through a preliminary reference procedure as established in Article 267 TFEU. Under this procedure, the CJEU may give an interpretation of the Treaties and comment on the validity and interpretation of acts of EU institutions.[155] Article 267 TFEU provides a pathway through which individuals can sue their Member State's government for failing to comply with European law before national courts. The preliminary reference procedure can therefore pressure Member States into complying with EU law. At the same time, it offers a way for individuals to challenge the content and application of specific EU legislative acts. Therefore it can be a powerful mechanism through which EU norms can be internalized domestically and strengthened across the EU by ensuring a uniform application.[156] A preliminary reference procedure can be initiated by national courts. In courts of first instance, national judges may refer a case to the CJEU for a preliminary reference, but they are not obliged to do so. Therefore, the preliminary reference procedure is ultimately dependent on the cooperation of national courts which can either initiate a preliminary reference procedure or apply prior CJEU preliminary rulings. Courts of the highest instance are, however, obliged to refer questions regarding European law to the CJEU. [157] The effective cooperation of national courts to refer cases to the CJEU for preliminary rulings can be seen as a potential barrier for actors seeking to bring their concerns to the CJEU since the decision to refer a question is at the discretion of the national court, which may choose not to make a referral. Therefore, Därpo argues that the preliminary reference procedure has scarcely been used in environmental cases.[158] The application of a preliminary reference procedure in environmental cases has been found to differ substantively

[153] Armando Carvalho and Others v European Parliament and Council of the European Union Case C-565/19 (CJEU, 25. March 2021), para 73
[154] Federica Passarini, 'Legal Standing of Individuals and NGOs in Environmental Matters under Article 9(3) of the Aarhus Convention' (2023) 3(2) The Italian Review of International and Comparative Law 283, 284
[155] European Union, Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, art 267
[156] Tanja, A. Börzel, 'Guarding the Treaty: The Compliance Strategies of the European Commission', in Tanja A. Börzel and Rachel A. Cichowski (eds), *The State of the European Union 6: Law, Politics, and Society* (Oxford University Press 2003) 204
[157] Ibid 209
[158] Därpo (n82) 55

between Member States. Domestic politics and the 'court culture' in a Member State play an important role in this.[159]

Considering these barriers to standing in environmental cases due to the difficulty of showing direct and individual concern, the CJEU has strongly contributed to the development of greater access to justice in environmental matters for environmental NGOs to align with the objectives of the Aarhus Convention, by adopting the so-called Aarhus Regulation.[160] This Regulation aims to strengthen access to justice in environmental cases by easing standing requirements for NGOs. For example, the 2021 Amendment to the Aarhus Regulation made it possible for NGOs to challenge administrative acts by EU institutions that may violate EU environmental law without demonstrating an individual or direct concern.[161] Pursuant to Article 10 of the Aarhus Regulation, environmental NGOs may request an internal review of administrative acts by all EU institutions and bodies under environmental law. To request an internal review, environmental NGOs must meet certain criteria.[162] After following the internal review process, NGOs can choose to bring the matter to the CJEU under Article 12 of the Regulation. However, this must be done 'in accordance with the relevant provisions of the Treaty'.[163] Following the case law of the CJEU, it established that Article 12 of the Aarhus Regulation cannot be interpreted to automatically assert standing of an NGO that made a request based on Article 10 since Article 12 does not exempt NGOs from meeting the conditions for admissibility in the Treaties.[164] This means that despite the broadened scope for environmental NGOs to challenge EU acts under environmental law, their access to the CJEU remains difficult due to the limitations of Article 263(4) TFEU in which direct and individual concern must be shown. This is because, pursuant to the hierarchy of EU law, secondary legislation such as the Aarhus Regulation cannot change the provisions established in primary law.[165] Similarly, the CJEU has adopted a restrictive interpretation of Article 12,

[159] Ibid
[160] 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 [2006] OJ L264/13
[161] Niels Hoek and others, 'Implementing Rights of Nature: An EU Natureship to Address Anthropocentrism in Environmental Law' (2023) 19(1) Utrecht Law Review 72, 78
[162] 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 to Community institutions and bodies [2006] OJ L264/13, art 11
[163] 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 to Community institutions and bodies [2006] OJ L264/13, art 12
[164] Géradine Garçon, 'The Rights to Access to Justice in Environmental Matters in the EU – The Third Pillar of the Aarhus Convention: Validity and Scope of the Review Procedures under Regulation (EC) No 1367/2006' (2013) 8(2) European Food and Feed Law Review 78, 89
[165] Ibid

asserting that a judicial review does not extend to the substance of the initial administrative act.[166] This way, Article 12 of the Aarhus Regulation does not provide an effective pathway for NGOs to challenge the legality of administrative acts since this would also have to be done through an annulment procedure.[167] Therefore, the Aarhus Convention and the Aarhus Regulation have not significantly changed NGOs' access to court in environmental cases.[168]

The procedural barriers thus pose a significant problem to those advocating for environmental protection. In the current situation, the burden of advocating on behalf of nature falls mainly on NGOs and the general public.[169] This is despite the fact that EU institutions face less stringent criteria for standing. Within the EU's political economy, the European Commission appears increasingly reluctant to initiate infringement proceedings based on Article 258 TFEU to challenge government inaction on politically sensitive issues.[170][171] This is because the Commission, as a supranational actor, seeks to constantly navigate its prosecutorial and policy-making role.[172] Since the Commission is ultimately also a political actor, the vigorous enforcement of laws by the Commission may negatively influence their political support, for example from Member States. An example of this can be found in the context of environmental policy. Considering the generally low level of support within Member States for environmental policy, strict enforcement by the Commission of environmental policies may result in resistance to additional environmental measures in the EU.[173] Therefore, adopting a new approach to standing through the Rights of Nature approach should be explored.

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[166] TestBioTech eV and Others v European Commission (Case C-82/17 P) EU:C:2019:719 (2019) cited in Ioanna Hadjiyianni, 'Access to Justice in Environmental Matters in the EU Legal Order – Too little too late?' (European Law Blog, 4 November 2020) Access to Justice in Environmental Matters in the EU Legal Order – Too little too late? – European Law Blog accessed 6 June 2024

[167] Hadjiyianni (n150)

[168] Hendrik Schoukens, 'Granting Legal Personhood to Nature in the European Union: Contemplating a Legal (R)evolution to Avoid an Ecological Eclipse? (Part II)' (2019) 16(1) Journal for European Environmental and Planning Law 66, 89

[169] Hoek and others (n161) 79

[170] Ibid

[171] Juliane Kokott and Christoph Sobotta, 'The Contribution of the Case Law of the CJEU to the Judicial Enforcement of EU Environmental Law in the UK' (2019) 16 Journal for European Environmental and Planning Law 109, 113

[172] R. Daniel Kelemen and Tommaso Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (2023) 75(4) World Politics 779, 783

[173] Christoph Knill, Yves Steinebach, and Xavier Fernández-i-Marín, 'Hypocrisy as a crisis response? Assessing changes in talk, decisions and actions of the European Commission in EU environmental policy' (2018) 98(2) Public Administration 363, 367

3.3 Introducing Rights of Nature into the EU legal framework

Against the backdrop of deteriorating environmental quality across Europe, the question arises of whether the current EU environmental law framework can tackle the systematic challenges of environmental protection. In this thesis, I argue that the Rights of Nature approach, with its fundamentally different understanding of substantive and procedural rights for nature, can address these challenges.[174] As I have argued in Chapter 2, a Rights of Nature approach requires the reframing of nature within the law to reflect the deep interconnectedness of human life and nature. This approach allows nature to be valued intrinsically, thereby paving the way for nature to be considered a legal subject with legal personality and rights under the framework of the European Union. In this way, nature becomes a stakeholder in the relevant decision-making processes that necessitates recognition and consideration in all actions pertaining to it. What is more, Rights of Nature can inspire new governance and decision-making models that prioritize environmental protection.[175] However, what legal mechanism is used to incorporate a Rights of Nature approach matters to how the objective of environmental protection can be achieved. Therefore, in the next chapters, I will analyze the legal instruments that I have identified under section 2.4.5 at the EU level as a strategy to incorporate a Rights of Nature approach to enhance habitat protection in the Wadden Sea.

[174] Schoukens (n11) 320

[175] Fátima Alves and others, 'The rights of nature and the human right to nature: an overview of the European legal system and challenges for the ecological transition' (2023) Frontiers in Environmental Science, 3

4 CONSTITUTIONAL AMENDMENT

In chapter 2, I discussed the moral and ideological underpinnings of the Rights of Nature concept. In addition, I demonstrated how Rights of Nature has been incorporated in different ways in various jurisdictions. Based on this, I have identified and explained three ways in which Rights of Nature has been incorporated into different legal contexts. I have identified these incorporation strategies through 1) constitutional amendments, 2) new legislation, and 3) court decisions. In this and the following chapters, I will focus on each of these incorporation methods and apply them to the legal framework of the European Union. I aim to analyze the process of incorporating Rights of Nature into the EU legal framework using the practical example of the Wadden Sea. To analyze this, the chapters are structured according to the three identified incorporation methods. This means that for each incorporation method, I will discuss the feasibility and effectiveness of using this particular incorporation strategy in the context of the Wadden Sea. This way, I aim to establish a comprehensive analysis of how Rights of Nature can be integrated into the legal framework of the European Union, specifically to enhance the protection of habitats in the Wadden Sea. In this chapter, I will focus on the strategy of constitutional amendment.

In chapter 2, I discussed Ecuador's inclusion of Rights of Nature into its constitution. This entails that these rights enjoy a constitutional status, arguably the highest level of law, affording them a special legal and political significance.[176] The constitutional approach to environmental protection thereby enshrines environmental protection as a fundamental right that cannot easily be compromised.[177] What sets the constitutional approach apart from other legal instruments is the level at which the Rights of Nature would be incorporated, with Rights of Nature being enshrined at the highest and most fundamental level of law. In the next section, I will elaborate on what this entails in the framework of the European Union.

4.1 The 'constitution' of the European Union

A notable feature of the European Union is that it has a distinct legal order.[178] The European Union legal order has established a hierarchy of sources of law, namely primary legislation, general principles of law, and secondary legislative acts. EU primary law consists of the Treaty on European Union

[176] Tănăsescu (n40)
[177] Louis J. Kotzé and Paola Villavicencio Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6(3) Transnational Environmental Law 401, 402
[178] Paul Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7(2) European Law Journal 1 25, 129

(TEU), the Treaty on the Functioning of the European Union (TFEU), the European Charter of Fundamental Rights (CFR), the protocols to these Treaties, and the general principles of EU law.[179] The Treaties set out the legal foundations of the European Union, thereby establishing the fundamental principles that govern the European Union. Moreover, they define the competences between the European Union and its Member States and they delimit the power of the EU institutions.[180] Due to the significance and use of these primary sources, some authors have argued that EU primary law can be viewed as akin to a constitution of the European Union.[181] In both the Court of Justice of the European Union (CJEU) and within EU legal scholarship, the constitutional character of EU primary law has increasingly been affirmed.[182] Passchier and Stremler refer to this as a process of 'constitutionalization'.[183] This process is characterized by the consolidation of a legal framework, whose proliferation of norms ultimately establishes legal principles that become fundamental to the legal framework. This naturally creates a hierarchy of norms which is further reinforced through the reference to these norms by adjudicative authorities. In this way, the sources of EU primary law are similar to national constitutional law since they enshrine the fundamental values on which the legal order is founded and they regulate the relationship between public authorities and between the public authorities and EU citizens. In addition to the perceived similarities of EU primary law with national constitutions, the CJEU has repeatedly emphasized the 'constitutional character' of EU primary law.[184] Because of this, Rosas and Armati argue that it is 'both appropriate and useful to speak of an EU constitutional order'.[185]

4.2 Feasibility

In this section, I will assess the feasibility of integrating a Rights of Nature approach into the current EU primary legislation. This entails considering the compatibility of the chosen method within the

[179] Venelin Terziev, Marin Petkov, and Dragomir Krastev, 'Sources of European Union Law' (2021) 19 International E-Journal of Advances in Social Sciences 346, 347
[180] Ibid
[181] Reijer Passchier and Maarten Stremler, 'Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision' (2016) 5(2) Cambridge Journal of Comparative Law 337, 340. In addition, this argument is not without contestation, since some prefer to view the European Union as an intergovernmental entity governed by international public law that does not have a constitution in the 'proper sense of the word'. See Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (2nd edn, Hart Publishing 2012) 1
[182] Ibid
[183] Ibid
[184] See Kadi and Al Barakaat International Foundation v Council and Commission (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 285; Case C-101/08 Audiolux and Others EU:C:2009:626, para 63; Opinion 2/13 (Draft Agreement on the Accession of the EU to the European Convention on Human Rights) EU:C:2014:2454, para 158.
[185] Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (2nd edn, Hart Publishing 2012) 35

broader EU structure and analyzing the legal and political challenges of opting for such an approach. The first question that arises is how a Rights of Nature approach can be added to the EU constitutional order. This can be done through the addition of a specific Rights of Nature provision into the Treaties or CFR, thereby following the Ecuadorian example, which has a chapter dedicated to the Rights of Nature in its Constitution. Other authors argue in favor of a new Fundamental Charter for the Rights of Nature that would have the same status as the Treaties and CFR.[186] For both of these instruments, an amendment procedure would have to be followed.

The EU establishes rigid mechanisms to amend EU primary legislation, codified in the Treaties. Article 48 TEU allows for treaty revisions. The revision of the Treaties is a complex process. According to Article 48 TEU, the Treaties may be amended according to an ordinary revision procedure or a simplified revision procedure. Article 48(2) to (5) TEU set out the ordinary revision procedure, which allows for amendments to any section of the Treaties.[187] The simplified revision procedure, which can be found in Article 48(6) and (7) TEU, can only be applied to modify specific areas of EU policies, namely Title III TFEU. Depending on the scope and specific content of the proposed Rights of Nature provision, I argue that it is more likely to follow an ordinary revision procedure. This is because the principles of Rights of Nature argue for a broader, more fundamental appreciation of nature, which will probably require amendments to sections of the Treaties outside of Title III TFEU since this primarily deals with the internal policies of the EU. Both the ordinary and simplified revision procedures require ratification by all Member States before entering into force following the requirements outlined in their respective constitutions. [188] In some cases, these requirements include holding a referendum.[189] Thus, within the current political economy of the EU, a considerable barrier to treaty amendment seems to be the number of Member States and the collective of national procedures to be followed.[190] As a way to introduce new legislation into the EU legal

[186] Carducci and others (n18)
[187] Silvia Kotanidis, 'How the EU Treaties are modified' (2022) European Parliamentary Research Service (European Parliament Briefing No. PE 733.615) https://www.europarl.europa.eu/cmsdata/281671/How%20the%20EU%20Treaties%20are%20modified%20EPRS_BRI(2022)733615_EN.pdf accessed 29 April 2024
[188] European Union, Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 48(4).
[189] Ros Taylor, 'The EU is extraordinarily complex. But do we want to simplify it?' (LSE EUROPP 20 October 2017) https://blogs.lse.ac.uk/brexit/2017/10/20/the-eu-is-extraordinarily-complex-but-do-we-want-to-simplify-it/ accessed 1 May 2024
[190] Robert Böttner, 'The Treaty Amendment Procedures and the Relationship between Article 31(3) TEU and the General Bridging Clause of Article 48(7) TEU' (2016) 12(3) European Constitutional Law Review 499, 501

framework, EU treaty amendment is therefore the most complex process since it touches upon the very foundations of the EU legal framework.

If a treaty amendment aims to succeed, it is essential to consider the level of support for the specific amendment. As with other instruments, the level of support ultimately depends on the content, formulation, and legal form of the amendment. As I have argued, the treaty amendments regarding the incorporation of a Rights of Nature approach have focused on a single provision or a new Fundamental Charter on the Rights of Nature. Firstly, the content of a Rights of Nature provision is very important to the level of support it would garner based on the importance that environmental protection holds in the European Union. This support for a Rights of Nature provision could, for example, be found in the Member States' legal systems and to what extent these recognize nature's rights.[191] At the same time, the formulation, in terms of what obligations it imposes on Member States, is an important factor in measuring the support for such a provision. In this way, whether the Rights of Nature provision is formulated in a narrow sense with specific obligations for the Member States could expect a different level of support than a Rights of Nature provision that enshrines the rights of nature in a broad sense with more room for interpretation as to the obligations of the Member States. I argue that a broad formulation would benefit the acceptance and level of support of the treaty amendment since it allows for greater flexibility and adaptability in interpreting the obligations of Member States, potentially garnering broader consensus and cooperation in its implementation. This holds especially true for constitutional amendments since they have a profound influence in determining Member States' obligations. Furthermore, I contend that the incorporation of a single provision could count on more support from Member States since this approach seems to be less disruptive. On the other hand, the introduction of a Fundamental Charter of the Rights of Nature seems to have more far-reaching effects regarding the structure of the EU legal framework but it would necessitate more structural changes within the EU law system and this has many implications for the level of support it could expect. The EESC study contends that Member States could potentially interpret the Charter as limiting their sovereignty.[192] This is because some of the principles put forward in the Fundamental Charter fundamentally require a redistribution of power and responsibility. This can affect Member States' freedom to shape their own agendas in relation to environmental policies. In other words, Member States might perceive such principles as infringements upon their ability to prioritize and address

[191] Alves and others (n175) 2
[192] Carducci and others (n18) 102

environmental issues according to their national contexts. These critiques are mostly specific to the proposed Fundamental Charter of the Rights of Nature as put forward by the EESC study. However, these critiques remain important for the consideration of the level of support that such a legal form would generate. Another critique from the literature regarding the future of treaty amendments that can be used against the proposal for a Fundamental Charter is that EU primary law in its current form is already quite extensive, consisting of several constituent documents. Therefore, some scholars would rather see a simplification of EU primary law in the future and, in particular, to reduce the number of primary law texts.[193] Evidently, the Fundamental Charter of the Rights of Nature does not fit this perceived simplified future of EU primary law.

Thus, for the feasibility of incorporating a Rights of Nature approach into the constitutional framework of the EU, there appear to be various practical challenges. Most notably, the treaty amendment requires a unanimous decision of all Member States, making it a highly complex process through which to incorporate a Rights of Nature approach into EU primary law.

4.3 Effectiveness

In this section, I will assess the effectiveness of a Rights of Nature approach as a result of its incorporation into the EU constitutional order. This entails the consideration of various aspects of effectiveness that are directly related to the legal instrument of the EU Constitution. This thesis adopts a broad understanding of effectiveness, thereby comprising not only legal compliance but also the level of enforcement that such a legal instrument allows for. Finally, the measure of effectiveness can be found in its ability to bring about the desired results expressed by the Rights of Nature approach.

4.3.1 Compliance

In the context of EU primary law, legal compliance is fundamental to the functioning of the EU. In other words, non-compliance or violations of the constitutional values and principles established in the Treaties would undermine the functioning of the European Union. The functioning of the European Union's legal framework is dependent on the compliance of Member States with the values and principles established in the Treaties to which they have committed themselves.[194] The legal compliance and enforcement of the Rights of Nature constitutional approach thus ultimately relies on Member States' willingness to abide by and enact the constitutional provision of Rights of Nature. The

[193] Steve Peers, 'The Future of EU Treaty Amendments' (2012) 31(1) Yearbook of European Law 17, 100
[194] Börzel (n156) 197

Treaties establish several mechanisms to ensure Member States' compliance with the Treaties and other sources of EU law. Article 4 TEU establishes that Member States are required to take all appropriate measures to 'ensure the fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.' This also requires Member States to refrain from acts that might threaten the achievement of the objectives enshrined therein.[195] The European Commission has been tasked to oversee compliance with EU law.[196] The most prominent example of a compliance mechanism that the European Commission can employ in cases of non-compliance is Article 258 TFEU. This Article empowers the European Commission to initiate an infringement procedure in case it considers that a particular Member State has failed to fulfill its obligations under EU law. Through this mechanism, the costs of non-compliance increase due to the threat of sanctions, which provides the Commission with a mechanism to ensure compliance and thus uphold the constitutional principles of the European Union.[197][198] Yet, as I have contended in Chapter 1, the existence of a compliance mechanism does not automatically mean the effective enforcement of particular legislation since the Commission appears increasingly reluctant to initiate such proceedings in environmental cases.[199]

4.3.2 Enforcement

Despite the incorporation of the Rights of Nature into the Ecuadorian Constitution, the case of Ecuador demonstrated that a major issue in enforcing the constitutional Rights of Nature was the lack of 'sincere ability and intention to implement them'.[200] This is specific to the legal and political environment. For example, in Ecuador, the constitutional amendments to incorporate the Rights of Nature were introduced as part of President Correa's presidential campaign.[201] At the same time, Ecuador's economy is highly dependent on extractive industries that are polluting the environment. Therefore, Ecuador's actions have not always been consistent with the constitutional Rights of Nature. This has

[195] European Union, Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 4
[196] European Union, Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 17
[197] Börzel (n156) 204
[198] At the same time, it must be noted that infringement proceedings reflect only those cases detected by the Commission and on which it decides to take action. Therefore, some authors are critical of using infringement proceedings as a measure of non-compliance. See, for example, Asya Zhelyazkova, 'Complying with EU directives' requirements: the link between EU decision-making and the correct transposition of EU provisions' (2013) 20(5) Journal of European Public Policy 702, 703
[199] Knill, Steinebach and Fernández-i-Marín (n173)
[200] Mary Elizabeth Whittemore, 'The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite' (2011) 20(3) Pacific Rim Law and Policy Journal 659, 662
[201] Ibid

led some to question whether the amendments can withstand these economic realities.[202] The fundamental conflict between the economy and the protection of nature therefore raises doubts about the enforcement of the Rights of Nature in a country whose economy is heavily dependent on the exploitation of nature. This argument can be extended to the European Union. As I have contended, even if the Rights of Nature are to be incorporated into EU primary law, they will still be subject to a balancing exercise between other fundamental rights and values. A prominent critique against the European Union in its implementation of its environmental laws is that it has structurally prioritized short-term economic gains over environmental objectives, despite its far-reaching commitment to environmental protection.[203] This can be explained by the underlying anthropocentric assumption that nature is something to be used for the benefit of humans. This is what the incorporation of a Rights of Nature approach fundamentally challenges by giving more weight to nature and its intrinsic value. However, even if nature's intrinsic value were to be incorporated into EU primary law, it still can be questioned whether this balancing exercise with other fundamental values will change.[204] Therefore, the success of the constitutional amendment will depend on the balancing of different principles of law and interests in favor of protecting nature. What this point emphasizes is that the success of the amendment ultimately depends on the political and institutional context. The example of Ecuador has shown that simply introducing a provision into the constitutional framework does not invariably signify the success of such a reform, despite it being expressed as a fundamental value within the jurisdiction.[205]

4.4 Preliminary conclusion

In this section, I have explored the feasibility and effectiveness of incorporating a Rights of Nature approach into the constitutional framework of the European Union. The sources of EU primary law reflect a strong commitment from the European Union to environmental protection. Yet, the possibility of integrating a Rights of Nature approach into EU primary law has not received much attention. Drawing on the example of Ecuador, where Rights of Nature have been incorporated into the Constitution, I have demonstrated the potential significance of such incorporation to elevate the legal

[202] Ibid
[203] For example, the CJEU has stated that environmental protection is a general interest that can outweigh other interests, such as formulated in C-416/10 Križan and Others v Slovenská inšpekcia životného prostredia (2013), para. 113. See Därpo (n82) 51
[204] Ibid
[205] Ibid

and political importance of environmental protection within the EU. However, there are several obstacles concerning the integration of Rights of Nature within EU primary law. In terms of feasibility, the incorporation of a Rights of Nature approach through treaty amendment seems highly unlikely due to the complexity and political sensitivity of the process. In addition, the effectiveness of the constitutionally enshrined Rights of Nature is ultimately determined by the institutional context in which it will operate. From this analysis, it becomes clear that the constitutional Rights of Nature will inevitably be subject to a balancing act with other constitutional principles. In the current political economy of the European Union that prioritizes short-term economic gains, it can thus be questioned whether this balancing act would be in favor of the rights of nature. Therefore, to be effective, a broader shift in perspective toward environmental protection within the EU would be required. Thus, the incorporation of Rights of Nature into the constitutional framework of the European Union will not achieve the desired objectives of environmental protection if not accompanied by the 'comprehensive revision of the existing institutional, political, and economic structures.'[206]

[206] Schoukens (n89) 189

5. NEW LEGISLATION

The second method of incorporating a Rights of Nature approach that I have identified is through new legislation, exemplified by the cases of Bolivia and New Zealand. As I have demonstrated, Bolivia and New Zealand have incorporated Rights of Nature into their national legislation in distinct ways, differing in 1) the scope of rights, and 2) how the rights in question are enforced. In other words, the main differences between the two jurisdictions can be found in the substantive and procedural rights of nature. Whereas Bolivia has opted for a more holistic Rights of Nature approach that applies to all of nature in Bolivia, New Zealand grants rights to specific natural entities based on national instruments. At the same time, the Bolivian Law of the Rights of Mother Earth empowers citizens to initiate legal proceedings in the case of a perceived violation. In contrast, New Zealand has established a guardian approach that allows appointed guardians to speak on behalf of the rights of the natural entity they protect. This chapter analyzes the method of integrating Rights of Nature into the EU legal framework through new legislation. To do this, I will first look at what new legislation in the EU context entails. Following this explanation, I will look at the cases of Bolivia and New Zealand, with their respective Rights of Nature arrangements, to assess their feasibility and effectiveness regarding the integration of Rights of Nature into EU secondary law. Based on this analysis, I argue that granting rights to specific natural entities and a guardianship approach, exemplified by the case of New Zealand, seems more feasible in the European context because it fits more neatly within the established EU legal framework on environmental protection. Regarding effectiveness, however, I contend that the institutional barriers to standing pose significant problems to either arrangement in the European context.

5.1 New legislation in the EU context

In accordance with Article 288 TFEU, the types of legislative acts that the European Union can adopt to exercise its competences are regulations, directives, decisions, recommendations, and opinions. The legal effects that each type of act entails ultimately depend on its specific nature.[207] For example, a regulation has general applicability and is binding and directly applicable in the Member States, whereas a directive is binding upon all Member States insofar as the results achieved, leaving the choice of methods and form up to the Member States.[208] Following these definitions, van den Brink

[207] Terziev and others (n179) 348
[208] European Union, Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, art 288

argues that regulations seem to be a more 'intrusive' instrument as opposed to directives.[209] Compared to regulations, directives provide a more flexible mechanism since Member States are allowed to choose the implementing form and method that is most suitable to them. At the same time, however, since a regulation is binding upon all Member States and directly applicable, it is usually the preferred mechanism to achieve coherence and uniformity across the EU.[210] Directives need to be transposed into national law for their implementation which complicates the process of effecting uniform environmental protection. However, as Hoek and others argue, the integration of a Rights of Nature approach into the EU legal framework potentially touches upon sensitive administrative and constitutional matters, which is why a directive seems more feasible by allowing Member States some discretion to cooperate with this novel approach to environmental protection.[211] This is also why, I argue, proposals for secondary legislation incorporating Rights of Nature into the EU have focused on the legislative act of a directive. This can be exemplified by Nature's Rights proposal on a new Directive on the Rights of Nature and Hoek and others' proposal for an EU Natureship Framework Directive.[212] These proposals reflect the strategic choice for a directive to incorporate the Rights of Nature in the EU legal framework. Therefore, drawing from these proposals, this chapter will focus on the legislative act of a directive. That is not to say that it is not worth exploring a regulation to implement the Rights of Nature through secondary EU legislation, but I contend that a directive provides for a more pragmatic approach considering the current EU legal framework.

5.2 Extending the Bolivian case to the European Union?

In 2017, the organization Nature's Rights came up with a proposal for a Draft Directive on the Rights of Nature.[213] In its content, the Draft Directive looks very similar to the Bolivian arrangement to grant rights to nature. This entails a holistic view of nature, recognizing the interconnectedness of the natural world, and broad procedural rights to empower anyone to litigate the rights of nature in front of courts. Following Article 1, the Draft Directive seeks to provide for the 'substantive and procedural rights of nature, the rights of people in relation to nature, establishing a duty of care, protection and

[209] Ton van den Brink, 'The Impact of EU Legislation on National Legal Systems: Towards a New Approach to EU-Member State Relations' (2017) 19 Cambridge Yearbook of European Legal Studies 211, 215
[210] Hoek and others (n161) 79
[211] Ibid
[212] Mumta Ito, 'Draft Directive ECI for Rights of Nature' (2017) Nature's Rights https://ecojurisprudence.org/wp-content/uploads/2022/02/International_Draft-Directive-ECI-for-Rights-of-Nature_264.pdf accessed 28 June 2024; Hoek and others (n161) 79
[213] Därpo (n82) 51

enforcement, and ecological governance.' In terms of substantive rights, the Draft Directive advocates for legal personality for nature, which is understood holistically as a 'dynamic living system comprising an indivisible community of all living systems and living organisms, interrelated, interdependent, and complementary, which share a common destiny.'[214] These substantive rights are to be protected and enforced by 'any physical person, individually or collectively, government, or non-governmental organization of the European Union.' This understanding of procedural rights goes beyond what currently exists in EU environmental law, including the Aarhus Convention,[215] by allowing essentially anyone to act on behalf of nature in exercising its right to legal standing.[216] Considering the substantive and procedural rights this Draft Directive puts forward, I will now look at the implications regarding the feasibility and enforcement of such a proposal.

5.2.1 Feasibility

The proposal of a directive is compatible with the EU legal framework, drawing upon the EU's legislative authority as outlined in Article 288 TFEU. Consequently, the content of such a proposal must align with the values expressed by the European Union. Pedreschi and Scott refer to this as the 'constitutional acceptability' of EU measures, in which the proposed measure must align with the objectives and values established in EU primary legislation.[217] The 2017 Draft Directive on the Rights of Nature ensures this alignment by having regard for the Union's commitment to sustainable development and environmental protection, as expressed in Article 191 TFEU and the 7th Environment Action Programme to 2020.[218] The Draft Directive on the Rights of Nature was however abandoned due to the high costs and the perceived challenges related to the process of the European Citizens' Initiative through which the Draft Directive was to be advanced.[219]

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[214] Ito (n212)

[215] As I have argued under section 3.2, the Aarhus Convention allows for broader standing for environmental NGOs. However, these NGOs have to meet certain criteria to gain standing.

[216] Schoukens (n168) 85

[217] Pedreschi and Scott (n32)

[218] Ito (n212)

[219] The Initiative requires the acquisition of a minimum of one million signatures from EU citizens from at least seven different Member States. Achieving this threshold requires a large transnational campaigning process, carrying high costs. What is more, authors have pointed to the non-binding nature of the ECI and the power of the European Commission to dominate the proceedings as key weaknesses of the ECI. From previous initiatives, it has become clear that the high costs attached to the ECI process and the strict interpretation by the Commission have led to few successes within the ECI. This has further resulted in the widespread conclusion that the ECI 'does not work', leading to a decline in initiatives. These perceived barriers accompanying the ECI process are also the reason why the Draft Directive on the Rights of Nature has been deserted. See, for example, Nikos Vogiatzis, 'Between discretion and control: Reflections on the institutional position of the Commission within the European citizen's initiative process' (2017) 23(3-4) European Law Journal 250, and

Yet, the interest from EU institutions in these legal developments has become increasingly evident.[220] Another way through which a new Directive on the Rights of Nature can be advanced is through the Commission. As I have argued, the Commission is the sole EU institution with the right of initiative in accordance with Article 17 TEU. This entails that the Commission can propose new legislation, including directives. It can use its right of initiative following a successful ECI, but it can also come up with its own proposal following broad stakeholder consultations and impact assessments.[221] It further involves close collaboration with interest groups, experts, and national administrations. During the proposal process, the draft directive is coordinated across various hierarchical levels of the Directorate-General (DG) responsible for the policy area that is being legislated. Since the work of other DG's might be affected by the new directive, they will be consulted accordingly.[222] This can already present a conflict of interests at the agenda-setting stage due to different DG's having different priorities, potentially resulting in a 'watering down' of the 'original concept'.[223] Typically, the adoption of new legislation follows a so-called ordinary legislative procedure. Through this procedure, the Commission submits a proposal to the European Parliament and the Council, who will have to agree on and approve the text of the proposal. This can be a lengthy procedure with the proposal going back and forth between the European Parliament and the Council. In the European Parliament, the relevant committees review the proposal and suggest amendments, upon which it is presented to the Council. In the Council, the adoption of a new directive becomes subject to negotiation between national representatives. These national representatives negotiate their nations' interests regarding the proposal. This means that in order to reach an agreement in the Council, a balancing of national interests is to be conducted. These negotiations often take a considerable amount of time and can result in the weakening of the proposal drawn up by the Commission. This weakening

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Anastasia Karatzia, 'The European Citizens' Initiative and the EU Institutional Balance: On Realism and the Possibilities of Affecting EU Law-Making' (2017) 54(1) Common Market Law Review 177, 180

[220] The European Economic and Social Committee and the European Parliament commissioning studies on the topic can exemplify this. This has led to the development of two comprehensive reports, entitled 'Towards an EU Charter of the Fundamental Rights of Nature' (2020) and 'Can Nature Get It Right? A Study on Rights of Nature in the European Union' (2021).

[221] The requirement of consultations with 'parties concerned' has been established in Article 11(3) TEU. The requirement for impact assessments follows from the 2016 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.123.01.0001.01.ENG accessed 21 May 2024

[222] Christoph Knill and Duncan Liefferink, *Environmental Politics in the European Union: Policy-Making, Implementation, and Patterns of Multi-Level Governance* (Manchester University Press 2007) 83

[223] Ibid 84

usually involves revising the proposal to include 'norms with a low degree of obligation, vague legal terminology, long transition and adjustment periods, and extensive exceptions to the rule.'[224]

Within the ordinary legislative procedure, directives seem to gather more support from Member States, since they are generally perceived as less intrusive than, for example, a regulation. This is because, as I have argued, directives generally provide more flexibility for Member States to choose appropriate methods to implement them, considering their national legal context.[225] Ultimately, however, the level of support of Member States for a new directive is highly dependent on its formulation and content. Even though the Draft Directive on the Rights of Nature did not make it through the ECI, it provides a comprehensive framework for what a new directive integrating the Rights of Nature might look like. This makes it an interesting framework to analyze the potential points of contention during the ordinary legislative procedure. As I have argued, the Draft Directive on the Rights of Nature seeks to establish a holistic view of nature accompanied by broad procedural rights for anyone to act on behalf of nature. Therefore, in its application, it requires Member States to 'review national laws in light of the rights of nature.'[226] By proposing to grant nature such rights, this inevitably means that the Draft Directive will require Member States to reassess and potentially modify their existing national legislations to ensure compliance with the new directive. For example, the Draft Directive requires Member States to develop mechanisms to ensure that perceived breaches become punishable by fine, or imprisonment.[227] I contend that the above aspects can lead to significant opposition and pushback from Member States in the legislative process. Firstly, I argue that the comprehensive scope of the proposed Directive on the Rights of Nature might be perceived as intrusive by the Member States. For instance, the Draft Directive does not specify specific parts of nature, such as specific endangered ecosystems, that should have legal rights. Instead, it employs a holistic notion of nature, thereby opting for a 'transversal approach'.[228] This broad scope of environmental protection based on a holistic notion of nature may raise questions regarding its implementation on the part of the Member States.[229] At the same time, the Draft Directive's requirement of Member States to review

[224] Ibid 95
[225] Van den Brink (n209) 216
[226] Ito (n212)
[227] Ibid, see article 7
[228] Schoukens (n168)
[229] This way, it fundamentally differs from other EU Directives that ensure environmental protection. For example, the Birds Directive and the Habitats Directive specify what ecosystems or species are protected under it. Within the framework of the Natura 2000 network, as put forward in Article 3 of the Habitats Directive, Member States have a high

their national laws in light of the rights of nature, accompanied by the legislative steps that must follow such review, such as the development of mechanisms to punish perceived breaches may be perceived as infringing upon Member States' sovereignty. Member States then deliberately oppose such a proposal due to its demand to fundamentally change pre-existing national legislation.[230] The broad scope and the extensive national reviews that necessitate the adoption of the Draft Directive can thus implicate Member States' support for it. From a political perspective, the adoption of the Draft Directive in this form therefore seems unlikely.[231]

5.2.2 Effectiveness

The definition of effectiveness that this thesis adopts comprises the measures of legal compliance and the level of enforcement that a particular instrument allows for, thereby indicating its ability to reach the desired objectives enshrined in the legal instrument. This means that, within the context of this thesis, the effectiveness of a new Directive on the Rights of Nature entails its capacity to achieve the goal of improved habitat protection in the Wadden Sea. To achieve this, the Directive must ensure Member State compliance and powerful enforcement mechanisms.

5.2.2.1 Compliance

In the context of the EU, compliance refers to the extent to which national actors adhere to EU requirements by integrating and implementing EU legislation into their national context.[232] A characteristic of a directive is that it first needs to be transposed into national legislation for its implementation.[233] This is important for the directive to become 'law in action' through national authorities. Therefore, the correct transposition of a directive into national law is essential for its effective implementation. [234] Once a directive has been adopted, this means that, following its binding nature, it must be transposed into national law 'correctly' and in 'due time'.[235] Member States'

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level of discretion in determining what ecosystems and species should be part of this. The Draft Directive's holistic notion of nature can therefore lead to questions regarding Member States' implementation.

[230] Gerda Falkner and others, 'Non-Compliance with EU Directives in the Member States: Opposition Through the Backdoor?' (2004) 27(3) West European Politics 452, 453
[231] Schoukens (n168) p. 86
[232] Asya Zhelyazkova, 'Complying with EU directives' requirements: the link between EU decision-making and the correct transposition of EU provisions' (2013) 20(5) Journal of European Public Policy 702
[233] Bernard Steunenberg and Mark Rhinard, 'The transposition of European law in EU member states: between process and politics' (2010) 2(3) European Political Science Review 495
[234] Ibid
[235] Thomas König and Brooke Luetgert, 'Troubles with Transposition? Explaining Trends in Member-State Notification and the Delayed Transposition of EU Directives' (2009) 39(1) British Journal of Political Science 163, 164

compliance with these criteria depends on a number of factors, including Member States' willingness and national preferences on the one hand, and the legal complexity of the proposed directive on the other.[236] Regarding the first explanation, it is important to look at Member States' positions during the legislative process. From this, it can be expected that Member States who expressed opposition to the directive at the meetings of the Council will be more likely to not comply with the new directive or certain parts thereof.[237] This can be explained by national governments' failure to successfully incorporate their preferences during the legislative process, leading them to resist the directive in the implementation phase. In other words, Member States' unwillingness to correctly and timely transpose an EU directive can be considered a form of protest against being outvoted in the legislative process.[238] Member States' opposition to transposing a directive can also be expected when it demands an extensive review of the existing national laws.[239] This relates to the content and formulation of the new directive. In some cases, it is more the unclarity of the content and formulation that can lead to incorrect or delayed transposition. Some authors argue that a failure to implement a directive stems from 'administrative shortcomings'.[240] The generally long process of adopting a directive, including many different actors and opinions, can result in texts that may be more ambiguous and leave room for different interpretations.[241] This can then complicate the process of transposition and thereby result in non-compliance. Yet, to enforce the provisions in the adopted directive, it is essential that Member States correctly transpose the provisions into their national contexts without delay.

5.2.2.2 Enforcement

In my argument under section 4.3.1, I have explained that the Commission can employ enforcement mechanisms to ensure Member State compliance with EU laws, such as infringement proceedings based on Article 258 TFEU. Infringement proceedings regarding EU directives can be initiated when a Member State does not transpose the provisions of a directive in a correct and timely manner into their national legislation or for acting contrary to the provisions in the directive.[242] Due to the increased costs of non-compliance, infringement proceedings can urge Member States to comply with their obligations

[236] Ibid 165
[237] Zhelyazkova (n232) 703
[238] Falkner and others (n230)
[239] Ibid
[240] Ibid
[241] Ibid 454
[242] European Commission, 'Implementing EU law' (European Commission, 14 July 2023) https://commission.europa.eu/law/application-eu-law/implementing-eu-law_en#transposing-directives accessed 27 May 2024

concerning EU directives.[243] Nevertheless, the existence of compliance mechanisms does not automatically imply enforcement, for example, because it is not used due to political considerations.[244]

Enforcement also includes the effective use of a directive in the national context. This entails that directives must not only be transposed correctly and within due time by Member States but they must also be effectively applied within each national context to achieve the intended results. This reflects the need for actors to apply and refer to the provisions of the directive. Taking the example of Bolivia to reflect this necessity, it became clear that the 2010 Law of the Rights of Mother Earth faced several challenges in its application in the domestic context. One major reason for this was essentially that the civil society actors that had helped create the new legislation had abandoned support for the law. This was because the 2012 Framework Law that was supposed to support the enforcement of the 2010 Law of the Rights of Mother Earth was perceived as diverging too much from the original draft that aligned more closely with Indigenous worldviews. Consequently, the 2012 Framework Law was criticized for no longer adequately representing the views of the Indigenous groups and NGOs supporting the original draft, leading to a loss of support for the law.[245] This significantly weakened the power of the Rights of Nature laws in Bolivia, since the civil society actors that could invoke these laws did not do so as they did not perceive them as useful to support their cause.[246] This is problematic since newly introduced laws and provisions need time to develop through courts to establish themselves within the legal framework and set precedents. However, they must first be invoked before they can do so. Bolivia empowers citizens to bring cases on behalf of nature, which allows for a broad participation of the public to enforce the rights of nature. Yet, Kauffman and Martin argue that the current arrangement of empowering anyone to represent the rights of nature has one major limitation, being that 'while anyone can represent Nature to protect its rights, no one is obligated to do so.'[247] This means that without the institutional framework in place to support the enforcement of the rights of nature, it is ultimately up to individuals to take such initiatives. This means that the enforcement of the rights of nature would also face challenges regarding collective action, such as concentrated costs and

[243] Again, it must be noted that infringement proceedings are only those cases that the Commission detects and decides to act upon.
[244] I have explained this in more detail in Chapter 1.
[245] Kauffman and Martin (n38) 128
[246] This is because the 2012 Framework Law argues that the Rights of Nature must be considered in light of socioeconomic rights to economic development. In practice, this resulted in many cases in which government officials invoked other socioeconomic rights to prioritize natural resource extraction against environmental protection, thereby weakening the Rights of Nature. For more explanation, see Kauffman and Martin (n38) 127-128
[247] Kauffman and Maritn (n38) 139

diffused benefits.[248] This is especially relevant in the context of the Draft Directive's Article 5, which establishes the procedural right of nature in which the provisions of the Directive can be enforced by 'any physical person acting individually or collectively, government, or non-governmental organization of the European Union.' If this procedural right were correctly transposed into the domestic laws of each Member State, it would further empower individuals or interest groups to utilize these provisions in domestic courts to safeguard the rights of nature. However, as I have argued, the application of these provisions in front of EU courts would be more difficult since it signifies a significant deviation from the rules of standing set out by the Treaties.[249] In Chapter 3, I demonstrated that the EU's institutional context poses significant barriers to standing for nature or those advocating on behalf of nature, thereby increasing the stakes for individual actors to bring cases based on the Rights of Nature. Therefore, it can be questioned whether such an approach can be most effective in ensuring the enforcement of the rights of nature.

5.3 Extending the case of New Zealand to the European Union?

In their article entitled 'Implementing Rights of Nature: An EU Natureship to Address Anthropocentrism in Environmental Law', Hoek and others explore the possibility of a Natureship Framework Directive to implement a Rights of Nature approach into the framework of EU environmental law.[250] The concept of a 'natureship' has been developed by Lambooy and others.[251] A natureship will function as both a public institution and a legal person that can be defined geographically and functionally. Consequently, the statutory purpose of a natureship would be to safeguard the ecological integrity of a geographically defined area.[252] The natureship arrangement by Hoek and others reflects the arrangements present in New Zealand where specific natural entities enjoy legal personhood through a guardianship arrangement to preserve their interests. In this regard, the EU Natureship Framework Directive would appoint formal representatives with the authority to speak on behalf of and make decisions regarding the governance of a particular natural entity or area, which is called an EU Natureship.[253] These representatives would have to be elected, thereby complying with the principles of public participation as established in the Aarhus Convention. This way, the proposal

[248] Ibid
[249] Schoukens (n168) 86
[250] Hoek and others (n161)
[251] Lambooy, van Soest and Breemer (n2)
[252] Hoek and others (n161) 79
[253] Ibid

for an EU Natureship draws from the case of Lake Mar Menor in Spain, which has been appointed guardians to oversee the compliance with the rights of the lake.[254]

5.3.1 Feasibility

Hoek and others propose a Framework Directive to advance their natureship approach to implementing the Rights of Nature into the EU legal framework. In line with my argument in section 5.2.1, it appears that a directive is compatible with the EU legal framework if it aligns with the principles and values of EU primary law. The legal basis for the proposed Natureship Framework Directive is rooted in the EU's environmental policy set out in Article 191 TFEU.[255] Consequently, taking into account the environmental objectives in Article 191 TFEU, and the natureships' relevance for land use, Hoek and others argue that a Framework Directive can be established on the basis of Article 192(2) TFEU under a special legislative procedure.[256] Per Article 192(2) TFEU, the Council can adopt legislative measures by acting unanimously, after consultation with the European Parliament, the Committee of the Regions, and the Economic and Social Committee. A special legislative procedure implies similar practical implications for the negotiations regarding a Natureship Framework Directive. For instance, Member State support for the Natureship Framework Directive is crucial for the directive to be adopted. In section 5.2.2.1, I contended that Member State support is ultimately dependent on the form and content of new legislation. For example, I have argued that a directive can count on more support since it allows Member States a degree of discretion in its implementation. In addition, the Natureship Framework Directive as put forward by Hoek and others establishes a clear link with other fields of EU environmental law, such as the Nature Directives and the Natura 2000 network. This way, the Framework Directive can build on these legislative acts by automatically considering Natura 2000 areas to be eligible for legal personhood under a natureship arrangement.[257] This strategy can be effectively employed for the Wadden Sea since it enjoys the status of a Natura 2000 area. Consequently, this can enhance consistency in EU environmental law. Since the Natureship Framework Directive utilizes existing environmental legislation, I argue that it could be more readily accepted by

[254] Jérémie Gilbert and others, ''Caring for Nature' Exploring the concepts of stewardship in European philosophies, spiritual traditions, and laws' in Jenny García Ruales and others, *Rights of Nature in Europe: Encounters and Visions* (Routledge 2024) 55
[255] Hoek and others (n161) 79
[256] Ibid
[257] Ibid 80

Member States because it allows them a degree of discretion to decide what areas they want to consider as natureships.

5.3.2 Effectiveness

5.3.2.1 Compliance

Regarding compliance, the same applies here as in section 5.2.2.1.

5.3.2.2 Enforcement

The guardianship approach in New Zealand has resulted in two guardianship arrangements, namely that of the Whanganui River and the Te Urewera. Implementing a similar guardianship arrangement to the EU could be achieved through the proposed concept of natureships. A major strength that the authors identify in favor of a natureship approach is that it establishes a transparent body to maintain the 'ecological integrity' of the natural entity or area while lifting the burden from the EU Commission, the Member States, or NGOs to enforce and implement the rights of nature.[258] This way, a natureship can provide an 'additional safeguard' for nature.[259] However, Gilbert and others critically note that a guardianship arrangement for nature has not been very developed in the EU environmental law framework.[260] Therefore, Gilbert and others argue that it lacks clarity as to its use and the legal obligations it establishes.[261] What a guardianship arrangement will look like in the European legal system should thus be further explored.

5.4 Preliminary conclusion

In this chapter, I have analyzed the possibility of integrating a Rights of Nature approach through new legislation. Employing the substantially and procedurally different approaches of Bolivia and New Zealand, I have focused on several proposals for the adoption of a new directive based on the Rights of Nature. Based on this analysis, I have argued that granting rights to specific natural entities and a guardianship approach, exemplified by the case of New Zealand, appears to be more feasible in the European context. This is because a guardianship arrangement can build on and co-exist with current EU environmental legislation, such as the Nature Directives and the established Natura 2000 network.

[258] Ibid 81
[259] Stone (n87) 11
[260] Gilbert and others (n254) 59
[261] However, lessons could be drawn from the guardianship arrangements established in New Zealand to address the lack of clarity and the legal obligations of a guardianship arrangement.

Nevertheless, the introduction of a new directive, in either form, can be questioned regarding its effectiveness. Even though a directive introducing a Rights of Nature approach is highly ambitious, for the effective application of its provisions it must be embedded in an institutional context that allows for such ambition, which it currently does not. For this reason, Schoukens questions whether a directive, as part of EU secondary law, would be at the right level through which to pursue the Rights of Nature in the European Union.[262] This is because a Rights of Nature approach aims to bring about a paradigm shift that promotes a less instrumentalist approach to nature. Therefore, it can be questioned whether a directive is the best way to implement such a fundamental shift while leaving untouched the constitutional principles that are arguably inherently anthropocentric.[263]

[262] Ibid
[263] Ibid

6. DEVELOPMENT THROUGH COURTS

This chapter will focus on the strategy of gradually incorporating a Rights of Nature approach into the legal framework of the European Union through court decisions, such as through the case law of the Court of Justice of the European Union. In the theoretical chapter, I have identified this method through the example of Colombia in which the Constitutional Court of Colombia recognized nature as a subject of rights in several instances, such as in the case of the Atrato River. Therefore, by employing a teleological interpretation method, meaning the interpretation of legal provisions in such a way to best support their objectives, courts can utilize existing legislation to progressively recognize the intrinsic rights of nature. Such rulings can establish precedents that guide future judicial decisions, thereby shaping the development of a Rights of Nature approach through the judiciary. In this chapter, I will analyze the feasibility and effectiveness of this legal instrument. I will argue that the approach of developing a Rights of Nature approach through the CJEU has several substantial benefits to the strategies of constitutional amendment and the adoption of a new directive. Firstly, I will contend that teleological interpretation by courts is the most feasible in the current political and legal context of the European Union.[264] Secondly, I will remain critical of using a teleological interpretation method to incorporate a Rights of Nature due to its limited effectiveness in driving the shift necessary to ensure enforcement of the principles of Rights of Nature.

6.1 Feasibility

6.1.1 The CJEU and teleological interpretation

The Court of Justice of the European Union (CJEU) is tasked with ensuring that the law is observed in the interpretation and application of the Treaties.[265] It must interpret the law with the aim of filling any gaps in either primary or secondary EU legislation.[266] Under Article 19(3) TEU, the CJEU can ‘rule on actions brought by a Member State, an institution or a natural or legal person’ or give preliminary rulings ‘on the interpretation of Union law or the validity of acts adopted by the institutions'. In the exercise of its jurisdiction, the CJEU must adhere to the principles laid down in Article 13(2) TEU regarding the inter-institutional balance and mutual sincere cooperation. The CJEU must not infringe

[264] As I have argued in Chapter 2, the teleological interpretation method focuses on the underlying goals that the drafters of a particular legislative act were trying to achieve.
[265] European Union, Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 19(1)
[266] Koen Lenaerts and Jose A. Gutiérrez-Fons, ‘To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice’ (EUI Working Paper AEL 2013/9, EUI 2013) 4

upon the authority of the EU legislator as established by the Treaties.[267] Yet, the CJEU plays an important role in the interpretation of the Treaties. The Treaties lay down the framework of the European Union and are therefore drafted in broad terms, containing 'many general notions and few concrete rules'.[268] Therefore, the CJEU must fill normative gaps by providing concrete interpretations of these general provisions in practical cases. In this process, the CJEU is free to choose the interpretation method that best serves the legal order of the EU. In its decisions, the CJEU has favored a teleological interpretation method when interpreting EU primary legislation.[269] This is because the Treaties are 'imbued with a purpose-driven functionalism' which is best served by an interpretation strategy considering its underlying objectives.[270] Thus, the CJEU has considerable discretion in interpreting the provisions of EU law but it must ensure that it does not encroach upon the limits conferred to it by the Treaties. Otherwise, this would constitute a type of judicial activism that exceeds its mandate. Therefore, the teleological interpretation method has been criticized for allowing excessive judicial discretion for the CJEU as it 'removes all constraints resulting from the wording of the EU law provision in question.'[271] It would subsequently give such interpretations as to increase its judicial power, potentially infringing upon the competences of other EU institutions and threatening the competences left to the Member States. Lenaerts and Gutiérrez-Fons argue that such criticisms would be well-founded if the authors of the Treaties had solely intended the CJEU to be the 'mouthpiece of the law'. Yet, such a limited role for the CJEU contradicts the competences given to the CJEU to ensure the observation of the law in the interpretation and application of the Treaties.[272] Therefore, a teleological interpretation method is compatible with the EU legal framework to achieve the objectives outlined therein. This can then be a useful tool to progressively interpret the Rights of Nature in already established EU legislation. This would follow the trend of judicial activism of judges and courts all over the world who increasingly perceive the pressing need to regulate environmental protection.[273] Some authors contend that there is also room for such activism in the European Union.[274] Moreover,

[267] Ibid
[268] Ibid 31
[269] Gunnar Beck, 'Judicial Activism in the Court of Justice of the EU' (2017) 36(2) University of Queensland Law Journal 333
[270] Lenaerts and Gutiérrez-Fons (n266) 31
[271] Ibid 34
[272] Ibid 35
[273] Vargas-Chaves and others (n134) 20
[274] See, for example, Schoukens (n168)

Schoukens argues that a gradual approach to incorporate a Rights of Nature approach through court development is currently a more realistic scenario than, for example, a Treaty amendment.[275]

6.1.2 Can the rights of nature be interpreted from EU law?

In this section, I will set out some of the arguments from the literature that show how Rights of Nature can either be implied or derived from existing EU legislation. This is relevant for the subsequent analysis of the effectiveness of the teleological interpretation method because it demonstrates the possible pathways through which Rights of Nature can be accessed from the current legislation.

In the case of Colombia and the Atrato River, the Court asserted that safeguarding the environment is intrinsically linked to the human rights to life, health, land, and culture. It highlighted the deep connection between nature and human life, stressing the necessity of conserving nature to maintain the cultures and ways of life that depend on it. This exemplifies how Rights of Nature can be derived from human rights. This might seem counter-intuitive since human rights are inherently anthropocentric. This way, it would merely reinforce the instrumentalist view that the environment and nature exist to benefit humans and that the protection of the environment only goes as far as is necessary to ensure human well-being.[276] Yet, this line of reasoning can be used to establish the obligations of humans toward nature by recognizing their interconnectedness. Therefore, this anthropocentrism does not prevent the integration of Rights of Nature into the EU legal order.[277] In fact, some level of anthropocentrism might be necessary for environmental protection since only humans are capable of understanding and respecting 'the morality of rights'. [278] However, by applying an ecological approach to human rights, it becomes clear that the duties and interests of humanity cannot be seen separately from environmental protection. Adopting an ecological approach would involve the development and interpretation of human rights in a way that reflects humanity as an integral part of the environment, recognizing that nature has an intrinsic value and thus that humans have obligations towards nature.[279] In this way, human rights can be used as a vehicle to drive the

[275] Ibid 89
[276] Susana Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) Transnational Environmental Law 113, 128
[277] Elena Ewering, Andreas Gutmann, and Tore Vetter, 'Finding a path to Europe for the rights of nature' in Jenny García Ruales and others (eds) *Rights of Nature in Europe: Encounters and Visions* (Routledge 2024) 182
[278] Borràs (n276)
[279] Ibid 129

development towards the intrinsic valuation of nature. This can be especially helpful in the EU legal order where there are limited other ways to bring nature's interests to court.[280]

What is more, in contrast to the human rights approach, some authors argue that elements of an ecocentric approach can already be identified in the practices and laws of the EU.[281] For example, Schoukens identifies similarities between EU environmental law and the Rights of Nature rationale in different jurisdictions worldwide.[282] The Rights of Nature rationale is about recognizing the intrinsic value of nature and maintaining its ecological integrity. Schoukens perceives these objectives to be protected under some rules and decisions in EU law. This is because EU environmental laws contain many positive and negative obligations to protect and refrain from damaging the environment.[283] To support his argument, Schoukens provides a study of the case law of the CJEU in which he identifies a noticeable trend toward stricter enforcement and interpretation of laws regarding the protection of the environment. This trend reflects a stronger commitment of the EU to ensure that environmental regulations are complied with and enforced to protect nature. Schoukens demonstrates that the CJEU has increasingly applied a strict implementation of the principles of prevention and precaution in environmental cases.[284] These principles are used to uphold the integrity of the environment. In light of the prevention principle, the Habitats Directive asserts in Article 6(3) that projects related to the sites protected under the Directive must first undergo a thorough assessment of the implications the project might have on the conservation efforts in these areas and thus the 'integrity of the site'. By employing these conservation objectives as benchmarks in decision-making processes regarding potentially harmful projects, the CJEU indirectly strengthens the substantive rights of EU-protected nature.[285] Similarly, the CJEU has also applied a strict interpretation of the precautionary principle on the basis of Article 6(3) of the Habitats Directive. Drawing from the *Waddenzee* case, it follows that if there is reasonable scientific doubt about the absence of harmful effects of site management projects, permits cannot be granted. In this case, the CJEU favored the conservation of the Wadden Sea.[286] At the same time, this shifts the burden of proof to the proponents of such activities, rather than on those seeking to

[280] Ewering, Gutmann and Vetter (n277) 183
[281] See, for example, Schoukens (n168); Yaffa Epstein and Hendrik Schoukens, 'A positivist approach to rights of nature in the European Union' (2021) 12(2) Journal of Human Rights and the Environment 205
[282] Schoukens (n168)
[283] Yaffa Epstein and Hendrik Schoukens, 'A positivist approach to rights of nature in the European Union' (2021) 12(2) Journal of Human Rights and the Environment 205, 207
[284] Schoukens (n168) 68
[285] Ibid
[286] Case C-127/02, Waddenzee (2004) ecli:eu:C:2004:482, para. 59

ensure the environmental integrity of a site. What is more, the CJEU has increasingly used the precautionary principle in favor of the protection of public health, safety, and the environment over economic interests in its case law.[287] It thereby indirectly recognizes the integrity of the environment, from which the substantive rights of nature can be derived.

According to Epstein and Schoukens, all these obligations regarding the protection of nature following the strict interpretations of the CJEU can be taken as legal rights of nature.[288] This follows the Hohfeldian conception of rights that has been adopted by the Rights of Nature approach. As I have explained, this conception of rights regards legal rights as correlatives of legal obligations. Thus, it asserts that 'non-humans already have rights where their interests are protected by law'.[289] The legal obligations imposed by EU environmental law are taken to protect the interests of nature, thereby granting nature rights that can be claimed and enforced. EU environmental law accounts for this by allowing environmental NGOs to litigate for nature's protection. Following the broadened scope of procedural rights granted to environmental NGOs under the Aarhus Convention, the CJEU has asserted that environmental NGOs can derive rights from EU biodiversity legislation, such as the Habitats Directive, before national courts, exemplified in its ruling on the *Slovak Brown Bear* case.[290] In enforcing these laws aimed at protecting nature, these NGOs can play the role of legal guardians of the nature they seek to protect.[291]

These are some arguments supporting the implicit recognition of nature's substantive and procedural rights in the European Union. This section did not exhaustively explore all possible ways in which the Rights of Nature can be derived from EU law as this has been done more comprehensively elsewhere.[292] Nevertheless, it demonstrates that it is possible within the existing EU legal framework to derive rights for nature. By referring to the previous case law of the CJEU, lawyers can try to bolster the implementation of nature's rights within the anthropocentric environmental legislation of the EU by leveraging the identified trend of more robust environmental protection in the EU. To what extent such

[287] See, for example, Case T-429/13 & T-541/13, Bayer CropScience ag (2018) ECLI:EU:T:2018:280, paras. 109–111.
[288] Epstein and Schoukens (n283)
[289] Epstein and Schoukens (n283) 213
[290] Case C-240/09 Lesoochranárske zoskupenie VLK I (2011) ECLI:EU:C:2011:125, paras 46–7 cited in Epstein and Schoukens (n283) 221
[291] Epstein and Schoukens (n283) 219
[292] For example, Schoukens (n168)

an approach is effective in improving habitat protection in the Wadden Sea will be discussed in the next section.

6.2 Effectiveness

For the purpose of this thesis, effectiveness implies the two related yet distinct criteria of compliance and enforcement. Therefore, this section will look at how the pathway through the courts of the CJEU can ensure compliance with and enforcement of the rights of nature as derived from existing EU law.

6.2.1 Compliance

The CJEU is the principal court with jurisdiction over EU law.[293] All judgments from the CJEU are binding and final.[294] If Member States fail to comply with the judgment of the CJEU, an infringement proceeding can be initiated by the Commission or another Member State through Article 258 TFEU and Article 259 TFEU respectively. Compliance with CJEU judgments is important to uphold the rule of law in the European Union.

6.2.2 Enforcement

When the CJEU issues a judgment, it does not merely apply the law to the specific case at hand but it also contributes to legal development by setting precedents.[295] The development of precedents can be a useful tool to gradually insert and enforce a Rights of Nature approach into the EU legal framework. The case law of the CJEU has been developed by actors bringing cases to court.

In Chapter 3, I have discussed various ways in which different actors can bring cases to the CJEU. Concerning the initiation of proceedings, I have demonstrated that access to the CJEU varies for different actors. I have argued that the Commission can bring cases to the CJEU based on Article 258 TFEU, but that there appears to be a reluctance to do so in politically sensitive issues, including environmental policy. Other ways of bringing cases to the CJEU are through an annulment procedure (Article 263 TFEU) and a preliminary reference procedure (Article 267 TFEU). These mechanisms can be effective ways to bring proceedings to the CJEU but they are contingent on the conditions for judicial review, such as the criteria for standing. These institutional barriers mainly pose problems for individuals and environmental NGOs to gain standing in front of the CJEU. Therefore, the CJEU has

[293] Ewering, Gutmann and Vetter (n277) 193
[294] Beck (n269) 335
[295] Mattias Derlén and Johan Lindholm, 'Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions' (2015) 16(5) German Law Journal 1073, 1078

contributed to the increased access of environmental NGOs to standing in environmental cases through the adoption of the Aarhus Convention and the Aarhus Regulation. Nevertheless, I have shown that the adoption of the Aarhus Regulation has not significantly changed the access of environmental NGOs to the CJEU. The barriers to standing thus remain an obstacle to bringing cases to the CJEU that can foster the development of a Rights of Nature-consistent interpretation across the EU legal framework. Nevertheless, the CJEU can only rule on cases that have been brought before it. Therefore, it remains important that actors continue bringing cases. This should either be done by the EU institutions or Member States who, as privileged applicants, can increasingly challenge EU environmental regulations. Alternatively, since environmental protection is a shared competence within the EU, individuals or environmental NGOs can continue to initiate cases at the national level that can be referred to the CJEU through a preliminary reference procedure.[296] If national courts increasingly refer environmental cases to the CJEU, it can further shed light on the need for enhanced environmental protection.

At the same time, this method is more reliant on the role of judges to progressively interpret a Rights of Nature approach into the EU legal framework. In light of the perceived failures of EU environmental law, judges can play an important 'gap-filling role'.[297] Especially in cases related to the environment, since they have significant impacts on the lives of humans, Magoja argues that judges should take on a more active role in interpreting the law in accordance with environmental goals.[298] At the same time, a more active role for the judiciary could become problematic regarding the division of powers. Therefore, the CJEU must ensure that the environmental regulatory powers between the different EU actors are respected. However, the CJEU can play an active role by activating other actors, such as the EU institutions and Member States, to more effectively enforce environmental protection regulations.[299] It can do this by giving interpretations of EU provisions with a strong focus on environmental protections based on the principles of Rights of Nature. To effectively ensure a Rights of

[296] Schoukens (n89) 205
[297] Sanja Bogojević, 'EU Climate Change Litigation, the Role of European Courts, and the Importance of Legal Culture' (2013) 35(3) Law and Policy 184, 187
[298] Eduardo Esteban Magoja, 'Judicial activism in the environmental rule of law' (2023) 12(1) Ius Humani, Revista de Derecho 67, 74
[299] Bogojević (n297)

Nature-consistent interpretation, it would be beneficial to educate lawyers and judges on its principles.[300]

Even though the CJEU has increasingly taken a more proactive stance when it comes to environmental regulation, exemplified among other things through its broadening of standing for environmental NGOs, it can still be questioned whether the Court will always rule in favor of the environment, especially considering the inherently anthropocentric system within which it corporates. Therefore, since a Rights of Nature approach necessitates a significant shift away from this anthropocentric thinking, it can be questioned whether the level of the judiciary is where this radical shift can be achieved.

6.3 Preliminary conclusion

This chapter has focused on the feasibility and effectiveness of integrating a Rights of Nature approach into the EU legal framework through courts. Using the example of the recognition of the Atrato River as a subject of rights by the Constitutional Court of Colombia, I have shown that a teleological interpretation method can be utilized to gradually recognize the intrinsic rights of nature. The teleological interpretation method does not require new provisions or legislation to be introduced into the EU legal framework. Rather, existing legislation can be interpreted in such a way to best meet the objectives of, in this case, habitat protection. Because a teleological interpretation method is based on existing legislation, I have argued that it appears to be the most feasible legal mechanism in the current EU legal framework to gradually incorporate a Rights of Nature approach. At the same time, however, I have questioned whether such a gradual approach can drive the shift necessary away from the anthropocentrism within the EU legal system toward a more ecocentric perspective.

[300] Natalie Rühs and Aled Jones, 'The Implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature' (2016) 8(2) Sustainability 1, 13

7. CONCLUSION

This thesis has explored three legal mechanisms to incorporate a Rights of Nature approach into the EU legal framework. Advocates of Rights of Nature seek to bring about a fundamental shift in our approach to nature, arguing that nature can better be protected by endowing it with rights to reflect its intrinsic value. Thus, this study has looked at what legal instrument seems to be most feasible and effective in the EU legal framework to integrate a Rights of Nature approach that can be employed to improve habitat protection in the Wadden Sea. Endowing the Wadden Sea with substantive and procedural rights creates new pathways for its protection. Yet, as this thesis has shown, the feasibility and effectiveness of different legal instruments vary.

For the mechanism of a constitutional amendment, I have argued that it has the potential to elevate the legal and political significance of nature in the EU legal framework due to it being enshrined in the highest level of EU law, upon which all other legislation must be based and aligned. Nevertheless, the constitutional amendment process is highly complex and politically sensitive, thereby complicating the likelihood of successfully integrating a Rights of Nature approach into EU primary law. If successful, it remains to be seen whether the constitutionally enshrined Rights of Nature will lead to its prioritization considering that it will remain subject to balancing acts with other constitutional principles. For the instrument of new legislation, I have demonstrated that a directive incorporating a guardianship arrangement for specific natural entities seems more feasible in the European context since it can build on existing EU environmental law. However, it is not yet clear what a guardianship arrangement would look like in the context of the European Union since it has been underdeveloped in this context. Therefore, it would be beneficial to further explore the possibilities for a guardianship arrangement in the European Union context. Additionally, a directive also faces institutional challenges, in particular concerning the possibility of certain actors, such as individuals or environmental NGOs, to enforce the rights of nature in front of the CJEU. Finally, for the integration of Rights of Nature through the judiciary, I have argued that this appears to be the most feasible mechanism within the EU legal framework, as the CJEU has already effectively employed this strategy in environmental cases. Through teleological interpretation, the CJEU can gradually develop a trend towards greater environmental protection. Simultaneously, however, this gradual approach can be questioned regarding its effectiveness. Not only do individuals and environmental NGOs face the same institutional barriers to standing, but since the development of precedents takes time, it can be

questioned whether this approach can foster the fundamental shift needed across the EU legal framework to integrate a Rights of Nature approach.

This thesis has also identified common challenges inherent to the EU legal framework that can complicate the integration of a Rights of Nature approach. The biggest barrier that I have identified is related to the criterion of enforcement of the Rights of Nature. Throughout the EU legal framework there are significant barriers to those advocating on behalf of nature. This holds especially true for actors such as individuals or environmental NGOs who in other jurisdictions have played a pivotal role in pushing for the integration of a Rights of Nature approach. The criteria for standing stem from the anthropocentrism that is fundamental to the EU legal framework. To incorporate a Rights of Nature approach thus requires a fundamental shift towards a more ecocentric approach. The integration of a Rights of Nature approach, notwithstanding the legal mechanism that is used, must thus be accompanied by an extensive revision of the current institutional and political structures that inform the EU legal framework.

Recommendations

To achieve the fundamental shift necessary to integrate the Rights of Nature principles into the EU legal framework, it is necessary to look at what instrument can most feasibly and effectively do this. Nevertheless, this thesis has found that a broader shift is needed from the anthropocentrism that dominates the EU legal framework on habitat protection to a more ecocentric approach which would allow for more coherent solutions to environmental problems. How this transition from an anthropocentric to an ecocentric approach can be facilitated across the EU should therefore be explored more. This requires a shift in perspective within the EU toward recognizing nature's intrinsic value. Based on my findings regarding the institutional barriers to prioritizing environmental protection and legal standing to those advocating for nature, it should be further explored how to ensure the institutional support necessary to empower enforcement bodies to prioritize the intrinsic value of nature.

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