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## ***Rights of Nature: why it might not save the entire world***

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### **Abstract**

The advent of Rights of Nature (RoN) marks a new paradigm shift in the philosophical approach to nature. As such, the concept has generated enthusiasm amongst environmentalists and legal scholars. This is not surprising since granting legal personhood to nature seems to present itself as a relative easy fix for the multitude of deficiencies of “modern” environmental law. However, when critically assessed, many of the underlying assumptions justifying a shift towards rights-based approaches to nature are open to challenge. In this paper, which takes a more critical stance on the topic of RoN, it is submitted that also the much-criticized modern environmental law is moving towards a recognition of the intrinsic value of nature, puts breaks on property rights, offers remediation actions for pure ecological damage and also increasingly grants environmental NGOs wide access to courts. Moreover, on a second level, it is argued that RoN are not a legal revolution and that many of the problems Rights of Nature tries to cure – such as a lack of enforcement – will simply re-emerge if not adequately assessed within this novel paradigm.

Rights of Nature – Anthropocentrism – Ecological harm – Access to justice – Effectiveness

### **1. Introduction**

Thirty-six years after Christopher Stone’s proposal to grant Nature a legal personality was published<sup>2</sup>, the Ecuadorian Constitution was the first to make Rights of Nature (RoN) a reality

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<sup>1</sup> I would like to thank my colleagues and friends who could consider themselves as RoN advocates, such as Valéria Berros, Olivier Clerc and Jean-Pierre Marguénaud. Their argumentation helped to improve mine. I would also like to thank Hendrik Schoukens, Sacha Sydoryk and Lilia Meunier-Mili for the proofreading.

<sup>2</sup> Christopher D. Stone, « Should trees have standing? Towards legal rights for natural objects », 45 *South California Law Review* 450 (1972).

in positive law<sup>3</sup>, followed by further developments around the globe<sup>4</sup>. Against the backdrop of the first concrete manifestations of RoN on the ground, the discussion about the added value of RoN has moved to the forefront of the legal literature. At the center of RoN is the assumption that nature is not merely to be treated as an object but also – to some extent – as a subject of rights which can be represented in court by so-called “guardians”. In doing so, RoN abandons the long-standing instrumentalist approach to nature by the law, which principally reduces nature to an object, which is to be purchased and appropriated at one’s own discretion. In addition to the historical theoretical and philosophical debate surrounding the representation of non-human entities, such as rivers or chimpanzees, before court a legal debate has ensued on the practical repercussions of a shift towards granting specific rights to nature. The thought-provoking title of the book “*The Rights of Nature: A Legal Revolution That Could Save the World*”, written by David Boyd, seems to suggest that RoN has the unique potential of curing many of the deficiencies of “modern” environmental law<sup>5</sup>.

Even if the content of the book is more balanced, one might wonder whether the title on itself does not create a mirage<sup>6</sup>: for, is it not too simple to assume that granting rights to nature constitutes the much-needed revolution that will end the ecological destruction on this planet? Would it really be that straightforward: by granting explicit rights to nature, a more ecological governance could emerge, which would no longer be exclusively predicated on an instrumentalist, anthropocentric understanding of nature? Even where Christopher Stone’s article remains arguably one of the most groundbreaking pieces of legal literature, I submit that Stone’s underlying thesis is no longer as powerful as before, especially taking into account the recent progressive developments in the field of what can be dubbed modern environmental law. Therefore, this paper proposes to approach the subtitle of David Boyd’s book as a question rather than a clear-cut assertion.

The RoN’s theory, as spelled out in the existing literature, rests upon on three main assumptions: first, current (or modern) environmental law is supposed to be excessively anthropocentrically framed in order to be able to reassert Nature’s intrinsic value<sup>7</sup>; second, implementing RoN constitutes a legal revolution, i.e. it is to be treated as a legal paradigm shift<sup>8</sup>; third, implementing RoN would be more effective than environmental law to ‘save the

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<sup>3</sup> See Louis J. Kotzé and Paola Villavicencio Calzadilla, ‘somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador’, *Transnational Environmental Law*, 6:3 (2017), pp. 401-433; Craig M. Kauffman and Pamela L. Martin, “Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian lawsuits Succeed and Others Fail”, *World Development*, Vol. 92, 2016, pp. 130-142.

<sup>4</sup> Inter alia in Bolivia (see Paola Villavicencio Calzadilla and Louis J. Kotzé, “Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia”, *Transnational Environmental Law*, 2018, online, pp. 1-28), New Zealand, India (see Victor David, « La nouvelle vague des droits de la nature. La personnalité juridique reconnue aux fleuves Whanganui, Gange et Yamuna », *Revue juridique de l’environnement*, 2017, pp. 409-424), Colombia, in some parts of the United-States and France (Nouvelle Calédonie), etc.

<sup>5</sup> David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World*, ECW Press, Canada, 2017.

<sup>6</sup> Other authors are much more cautious, such as Louis J. Kotzé and Paola Villavicencio Calzadilla. For example, according to them, “the constitutionalization of the rights of nature in Ecuador does not necessarily mean that more ecocentric laws, policies and governance practices will immediately come about” (Louis J. Kotzé and Paola Villavicencio Calzadilla, ‘somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador’, *Transnational Environmental Law*, 6:3 (2017), p. 432).

<sup>7</sup> For example, see David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World*, *op. cit.*, p. xix; xxiii; xxv.

<sup>8</sup> For example, see David R. Boyd, *ibidem*, p. xxxv; 182.

world”<sup>9</sup>. The purpose of this article is to demonstrate that the three assumptions underpinning RoN might be at least partially wrong.

The methodological posture adopted in this article is distanced, critical and reflexive, keeping in mind the mantra that ‘*scientific observation is always a polemical observation*’<sup>10</sup>. In other words, the goal is not to present definitive conclusions when it comes to the topic RoN, rather I aim to spur the scientific debate on the validity of the substantive underpinnings of RoN. With the argumentation expressed below I do not want to choose sides in the heated debate between proponents and opponents of RoN. Rather I want to improve the quality debate on the added value of RoN. As a result, this article is to be approached as an invitation for a further debate, both directed at supporters and opponents of RoN. This article seeks to further finetune the arguments at play when discussing the benefits and disadvantages of RoN. In doing so, this article opts for an inclusive approach, i.e. an approach which allows both views to coexist. Accordingly, this critique is not to be read as a definite rejection of RoN altogether. Quite the contrary. One of the cornerstones of this article is the firm belief that science needs to be subjected to scrutiny in order to thrive<sup>11</sup>. And thus also the principles upon which RoN are based merit a critical review.

To be sure, RoN can be studied from different perspectives: *inter alia* ethical, philosophical, religious, political and/or legal. The goal of this article is not to study the philosophical premises of RoN, even if a philosophy of law analysis might lead to interesting findings, especially in view of the possible linkages between RoN and the concept of “natural law”. However, for the time being, it is not necessary to repeat the positivist criticisms of the natural law tradition<sup>12</sup>. It is important to keep a proper legal perspective and put the focus on RoN’s ontology. Again, it is imperative to make a clear-cut distinction between the two conflicting “stances” or “points of view” that might be in order here. On the one hand, as a “citizen”, it is possible to be attracted by the philosophy which underpins RoN, such as the very powerful idea that the intrinsic value of nature ought to be fully protected. However, on the other hand, it is obvious that the role of legal scholars is to subject RoN to scrutiny and to remain critical when it comes to the high-reaching promises that accompany RoN. For, legal scholars adopt a similar critical role when analyzing the suitability of modern environmental law. Both modern environmental law as well as RoN is to be assessed and criticized by scholars, including by legal scholars. Given the philosophical, ethical and religious foundations of RoN, I understand that the positivist approach which is put forward in this paper could be framed as “reductionist”. However, the pragmatic approach which is used below, might merit a deeper understanding of the fundamental premises upon which RoN is based. During the past decade,

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<sup>9</sup> For example, see David R. Boyd, *ibidem*, p. xxxv; 143; 232.

<sup>10</sup> Gaston Bachelard, *Le nouvel esprit scientifique*, 1934, Quadrige, PUF, rééd. 1984, p. 16.

<sup>11</sup> In that respect, it remains important to use objective arguments when discussing the pros and cons of RoN. For instance, comparing RoN proponents with Copernicus and his followers, which “were ostracized, excommunicated, even burned at the stake” does not help to guarantee a reasonable debate whatsoever (David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World*, ECW Press, Canada, 2017, p. xxxiv).

<sup>12</sup> A good summary is provided in Alexandre Viala, *Philosophie du droit*, Ellipses, 2010, p. 140 s. et p. 157 s. ; Eric Millard, *Théorie générale du droit*, Connaissance du droit, Dalloz, 2006, pp. 37-42 ; Michel Troper, *La philosophie du droit*, 3<sup>e</sup> éd., Que sais-je ?, PUF, 2011, p. 16 s. ; Henri Lévy-Bruhl, « La Science du Droit ou "Juristique" », *Cahiers Internationaux de Sociologie*, Vol. 8, 1950, p. 125.

nature's rights have been implemented into positive law in several jurisdictions around the globe. In the other papers that are included in this special issue, several cases of concrete manifestation of RoN are briefly discussed. Seeing that RoN are currently being applied on the ground, a comprehensive debate on the juridical-technical questions linked to RoN would be outdated. Another possible angle to approach RoN is to focus on the precise articulation of RoN in jurisdictions such as Ecuador and New Zealand, which are at the forefront of the RoN movement. However, such assessment has already been carried out by other legal scholars, which renders it superfluous from an EU perspective<sup>13</sup>. Rather, it is more relevant to focus on RoN as a legal instrument in itself and the many promises it puts forward. The main thesis of this article is thus that RoN are not to be presented as a miracle solution to the many flaws of existing environmental norms. Whereas this article is not to be read as a pamphlet against RoN or an outright rejection of the concept in itself, it still aims to critically investigate the main underpinnings of RoN, when compared to the recent evolutions of modern environmental law.

Before delving into the substantive arguments at play here, two additional disclaimers are in order. First, the scope of this paper is inherently limited to the framework of the European legal culture. Accordingly, the views presented below are those of a western scholar, accustomed to EU environmental law, in particular as applied in France. Therefore, it is obvious that those views might be biased, especially when used in a non-EU context. It is important to underline the relatively "progressive" character of EU environmental law, which could render it difficult to replicate the conclusions of this paper in the context of other jurisdictions, which might be characterized by a less progressive body of environmental legislation. Second, the views presented below are not necessarily "original". Indeed, RoN has been subject to severe criticism since it has been pitched by Stone as novel template or blueprint to nature conservation back in the 1970s<sup>14</sup>. However, its recent comeback in many jurisdictions might present yet another welcome opportunity to update the well-established criticism from before. Seeing that also in the European Union, which has passed many progressive pieces of environmental legislation during the past decades, a plea is launched to implement RoN (see the papers of Hovden and Schoukens in this special issue), a critical analysis of RoN surely comes in timely. Since RoN is increasingly being implemented into concrete regulatory frameworks, it becomes all the more interesting to shift the debate towards the legal underpinnings of RoN rather than exclusively focusing on the philosophical groundwork of RoN.

The main thesis of this paper is RoN will not do away with the main shortcomings of modern environmental law, being the lack of proper enforcement. It is opined that merely acknowledging nature's rights into legislation will in itself not lead to a better protection of the EU's endangered nature if not complemented with a clear commitment for more strict enforcement. The added value of RoN needs to be measured against the three main

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<sup>13</sup> See *inter alia* Louis J. Kotzé and Paola Villavicencio Calzadilla, 'somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador', *op. cit.*, pp. 401-433; Paola Villavicencio Calzadilla and Louis J. Kotzé, 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia', *op. cit.*, pp. 1-28.

<sup>14</sup> See *inter alia* P.S. Elder, « Legal Rights for Nature: the Wrong Answer to the Right(s) Question », *Osgoode Hall Law Journal*, vol. 22, n° 2, 1984, pp. 285-295.

assumptions upon which it is based. In this respect, it is important to underline that a revision of modern environmental law could, in itself, come forward to many of the prevailing criticism upon which RoN are based. In this article, it is substantiated that that modern environmental law is able to recognize the intrinsic value of Nature **(1)**, second, that acknowledging RoN is not necessarily to be equated to a “legal revolution” **(2)** and, third, that RoN might not live to its promise regarding saving the world **(3)**.

## **2. Environmental Law revisited: reinforcing the intrinsic value of nature?**

The first assumption underlying the RoN’s theory is that environmental law is too anthropocentric to take into account the intrinsic value of nature, whereas RoN would be more suitable to carry out the task of reasserting this intrinsic value. In other words, RoN is founded upon the assumption that even modern environmental law is not equipped to fully protect the intrinsic value of nature. This is a poignant point of departure. Often, RoN advocates submit that modern environmental law is the result of Cartesian philosophy, reproducing the renowned Nature/Culture dualism. Accordingly, environmental law would explicitly acknowledge that mankind is to be framed as the “master” of nature. For instance, pursuant to current property law nature is to be treated an object. In contrast, however, RoN is often linked to ecocentric philosophy and therefore is more inclined to approach nature as a subject of rights. However, this dichotomy, while attractive from a philosophical point of view, renders an objective legal critique of RoN challenging at best.

In my view, RoN supporters attach too much weight the above-depicted distinction. Indeed, it is possible to argue that modern environmental law is less anthropocentric than it used to be **(2.1)**, that property rights can be limited in light of environmental interests **(2.2)** and that modern environmental law protects the intrinsic value of Nature **(2.3)**, which recently has led to the recognition of “pure” ecological harm in several legal instruments **(2.4)**. Moreover, on the procedural ground, access to justice has been broadened in environmental cases **(2.5)** and the burden of proof is no longer an insurmountable hurdle in legal cases **(2.6)**.

### **2.1. Environmental law is less anthropocentric than it used to be**

For starters, it is undisputed that “prehistoric” environmental law was anthropocentric. This is poignantly illustrated by the Convention for the Protection of Birds Useful to Agriculture of 1902 and the Convention between the United States and Other Powers Providing for the Preservation and Protection of Fur Seals of 1911. Pursuant to the wording of both treaties, the species covered by the protection schemes, were protected only because there were useful to humans.

However, environmental law has changed substantially since then. To be more precise, it developed from a set of norms merely applicable to the environment to a set of norms to be

promulgated in *favor* of the environment. The latter approach is now explicitly present EU environmental legislation<sup>15</sup>. Whereas many propagators of RoN still posit that environmental law is predominantly anthropocentric, this view no longer holds completely true. In other words, when RoN supporters claim modern environmental law to be anthropocentric, they deliberately choose to promote an outdated version of environmental law. Of course, a significant part of the current environmental statutes still reflects anthropocentrism to some extent. Yet, in truth, modern environmental law is to be approached as a mixture of anthropocentric and ecocentric viewpoints.

In recent times, the interdependence between humans and nature has moved to the forefront of the legal debate. Several soft law instruments, such Rio Declaration of 1992, which recognize “the integral and interdependent nature of the Earth, our home”. However, increasingly, this interdependence is also explicitly reasserted in constitutional norms. For example, the Preamble of the French Constitutional Charter of the environment of 2005 emphasizes the following:

“Natural resources and equilibriums have conditioned the emergence of mankind;

The future and very existence of mankind are inextricably linked with its natural environment;

The environment is the common heritage of all mankind;

Mankind exerts ever-increasing influence over the conditions for life and its own evolution”.

This excerpt is remarkably akin to Chief Seattle’s famous quote “The earth does not belong to us, Man belongs to the earth”. The very fact that there exist explicit constitutional norms in Descartes’ homeland which dare to question the dualism between man and nature and, subsequently, underline their mutual interdependence, is to be cited as a remarkable illustration of the gradual shift towards ecocentrism in modern environmental law, even without there being an explicit recognition of RoN<sup>16</sup>.

## **2.2. Property rights can be limited in light of environmental protection**

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<sup>15</sup> See for example article 2, paragraph 1, of the regulation n° 1367/2006 of the European Parliament and 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. Environmental Law is defined as legislation which “contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources”.

<sup>16</sup> Article 1 of the charter of the environment recognizes the human right to a healthy environment and the following articles provides duties towards the environment (duty to protect it, to prevent damages, to repair damages and to adopt precautionary measures if necessary). Rights to information and participation are also in that Charter. The full text of the Charter can be found here in English: [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/anglais/charter\\_environment.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/charter_environment.pdf)

Property law is at the forefront of many of the critiques of modern environmental law. For, indeed, the RoN supporters often see property rights as a typical product of “Western Civilization”, which underlines the hierarchical relationship between mankind and nature. While the “classic” approach towards property – which defines it as an “absolute” right has many defects, it would be one-sided to pitch it as a definitive recognition of the dominion of mankind over Nature.

In truth, however, it is a well-established practice that property rights can be limited in the interest of environmental protection. And thus – at least in theory – it is perfectly possible to revise vested rights – for instance related to the economic exploitation of natural resources – when this would compromise the survival of the ecosystems present on such lands. Of course, many authorities would still feel reluctant to do so, especially given the financial compensation which might be in order in such instances. Yet, in itself, property law does not constitute a definitive barrier to a more progressive environmental protection of ecosystems, even not when these ecosystems are primarily located on private lands.

This is but common sense. The increasing importance of planning law is to be approached as a recent manifestation of this trend. By enacting specific restrictions for building on certain plots of land, the environment is further preserved. Many jurisdictions have seen as steady rise in land-use schemes, which at least partly also reserve certain areas as “no take-zones” given their importance from an ecological point of view. Such environmental objectives can be used in order to further limit property rights. In many jurisdictions, public easements are daily used in the interest of environmental protection. In other words, property rights are no longer to be treated as an absolute barrier to enhanced environmental protection. Yet, limiting property rights might require the governments to provide for additional financial compensation schemes in order to further balance the encroachment of property with the objective of enhanced environmental protection. This might render it a less attractive policy option on the ground. However, in practice, such compensation is not systematically required<sup>17</sup>.

That said, a lot of discretion remains. In the European Union, for instance, the right to property recognized under article 17 of the charter of fundamental rights of the European Union is “not an absolute right” according to the Court of Justice of the European Union (CJEU). In its recent case-law, the CJEU held that the right to property “must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, disproportionate and intolerable interference, impairing the very substance of the right guaranteed”. The CJEU held that: “protection of the environment is one of those

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<sup>17</sup> For instance, French planning law does not require the financial compensation of public easements (article L. 105-1 of the Planning Code).

objectives (of general interest) and is therefore capable of justifying a restriction on the use of the right to property”<sup>18</sup>.

This case-law is not to be treated as an exception. Also the European Court of Human Rights adopted a similar, nuanced approach. For instance, in 2007 it explicitly underlined that “(f)inancial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations”<sup>19</sup>.

Recently, the French Constitutional Court has expressed its view on the interplay between the prohibition of plastic use and the freedom to conduct a business, which is also reasserted as a fundamental right at the constitutional level. In this regard, the French Constitutional Court stated that limitation on the latter freedom can be justified whenever they are grounded upon considerations related to the public interest and those limitations are proportionate. Concerning the plastic prohibition, the Court ruled that it was not a disproportionate measure in order to comply with the public interest relating to environmental protection<sup>20</sup>. This represents but one example of a wider trend. In addition, it is to be recalled that the “abuse of right” theory can be used to limit the undue use of property rights at the expense of environmental protection<sup>21</sup>.

Lastly, against the backdrop of the global climate change, at least some legislators are now pondering quite far. Take for instance the new legislation that has been promulgated regarding the exploitation of natural resources in France, such as the act prohibiting the exploration and exploitation of liquid or gaseous hydrocarbon mines by hydraulic fracturing of 2011<sup>22</sup> and the act terminating research and exploitation of hydrocarbons of 2017<sup>23</sup>. Several decades ago, the enactment of such prohibitive pieces of legislation were unthinkable, especially in the context of environmental protection. Of course, that is not to say that such acts do not contain certain flaws or shortcomings. For example, in October 2018, the company “Total” was granted an extension of its exploration permits in French Guyana. Since the new law lacked retroactive effect, the granting of the permits could not be blocked with reference to the new legislation. Be that as it may, the latter example clearly illustrates that it is perfect to limit property rights for the benefit of nature conservation without endowing specific rights upon nature. Even more so, the fact that Ecuador has granted a license to exploit oil in the Yasuni national park, can be treated as a clear indication of the limited potential of RoN. Even

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<sup>18</sup> CJEU, 15<sup>th</sup> January 2013, *Jozef Krizan*, C-416/10, §§ 113-114; *Revue juridique de l'environnement*, 2013, pp. 374-376, comment Julien Bétaille.

<sup>19</sup> ECHR, 27<sup>th</sup> November. 2007, *Hamer v. Belgium*, n° 21861/03, § 79; see Jean-Pierre Marguénaud, “La petite maison dans la forêt”, *Recueil Dalloz*, 2008, pp. 884-887.

<sup>20</sup> CC, 25<sup>th</sup> October 2018, n° 2018-771 DC, *Loi pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine, durable et accessible à tous*, §§ 13-19.

<sup>21</sup> Gonzalo Sozzo, “El giro ecológico del abuso de derecho”, *RDAMB* 51, 15/09/2017, 1, AP/DOC/628/2017; Michael Byers, “Abuse of Rights: An Old Principle, A New Age”, 47 *McGill L.J.* (2001-2002), pp. 389-431.

<sup>22</sup> Loi n° 2011-835 du 13 juillet 2011 visant à interdire l'exploration et l'exploitation des mines d'hydrocarbures liquides ou gazeux par fracturation hydraulique et à abroger les permis exclusifs de recherches comportant des projets ayant recours à cette technique. See Christel Cournil. « Adoption of legislation on shale gas in France: Hesitation and/or progress », *European Energy and Environmental Law Review*, Kluwer Law International, 2013, 22 (4), pp.141-151.

<sup>23</sup> Loi n° 2017-1839 du 30 décembre 2017 mettant fin à la recherche ainsi qu'à l'exploitation des hydrocarbures et portant diverses dispositions relatives à l'énergie et à l'environnement.

when RoN are explicitly recognized at the level of the constitution, public authorities still enjoy a certain discretion, enabling them to balance economic rights with the conservation of nature. In other words, the principle of “permanent sovereignty over natural resources”, especially within the context of national economic policies, is to be treated as a major cornerstone of the legislative framework in many jurisdictions. Granting legal personhood to nature can of course help in recalibrating the equilibrium between economic exploitation and environmental protection. Yet, as demonstrated above, it is perhaps not to be framed as a prerequisite for that seeing that environmental progress is also possible in jurisdictions which lack such explicit recognition of RoN. And, as aptly demonstrated, even the more recent interpretations to be given to the right of property, leave ample room for more progress in this regard. It is much more a matter of political will and judges’ interpretation than a debate Nature being a subject or an object of law.

### **2.3. Environmental law protects the intrinsic value of nature**

As posited above, the advocates of RoN put forward that the latter is more capable of protecting the intrinsic quality of nature. But before tackling this question, it is important to underline the fault line between RoN and environmental protection. For, one can perfectly preserve the inherent quality of nature without having to resort to the implementation of RoN in the existing statutory framework. In this respect, reference is to be made to the following assertion of Mary Warnock: “the question of whether it would make sense to allow claims for standing on behalf of animals or trees should not be confused with another question, namely, whether such individual animals or species of animal (or trees or insects, or species of these kinds) have intrinsic value. It is possible to acknowledge such value by protective legislation, without the provision to them of standing as plaintiffs in their own right”<sup>24</sup>.

Even if we accept that modern environmental law can be perceived as being excessively anthropocentric, this does not imply that it is negating the intrinsic quality of nature<sup>25</sup>. The recent emergence of concepts like “ecological services”, which are progressively transposed into positive law<sup>26</sup> and which can be seen as tool of the anthropocentric approach, must not obfuscates the fact that the goal of classic nature conservation laws is not utilitarian.

For instance, the protection schemes enacted for many protected species are not grounded upon economic premises. The majority of the species that are protected under EU nature conservation law have no immediate and direct interest for mankind. Many of the protection schemes have been the result of yearlong campaigning by NGOs aimed at preventing the imminent extinction of certain species. The lack of human self-interest is present when we take into account the definition given to certain protection schemes in French nature

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<sup>24</sup> Mary Warnock, *Should trees have standing?*, *Journal of Human Rights and the Environment*, Vol. 3 Special Issue, 2012, p. 59.

<sup>25</sup> See Gilles Martin, « L’arbre peut-il être une victime ? », in Clément, M., Martin, G., Timmermans, Ch., (2018), *Le livre blanc « Le droit prend-il vraiment en compte l’environnement ? »*, Recueil de conférences du Collège Supérieur Lyon dans le cadre du cycle « Droit et environnement », Le Collège Supérieur Lyon ([www.collegesuperieur.com](http://www.collegesuperieur.com)), novembre 2018.

<sup>26</sup> However, even if the transposition of this concept into positive law gives questionable results, it is undeniable that the progresses made by scientific ecology have been crucial to convince of the interest to protect Nature.

conservation law. Accordingly, a national park is to be created when ecosystems are of “special interest” and if it is important to protect them from degradation<sup>27</sup>. A natural reserve is to be created to ensure the conservation of elements of the natural environment “of national interest”<sup>28</sup>. A species, a natural habitat or a geological site is protected when such protection is justified by “a particular scientific interest” or by its “essential role in the ecosystem” or when the “conservation of the natural heritage” requires such protection<sup>29</sup>. When we take into account French nature conservation law, it is thus obvious that nature or ecosystems are not merely protected because of anthropocentric reasons. Several parts of nature are protected because scientific research deems it to be important in light of the further protection of the ecosystems present within France. Even more so, the protection duties included in modern nature conservation law are also not confined to symbolic species such as lions, elephants, primates, bears and wolfs. Also “ugly” and “useless” species, without any cultural or economic value for humans, are protected. Moreover, in the European Union, it is the “ecological integrity” of Natura 2000 sites which is protected by the Habitats directive<sup>30</sup>, without considering its immediate usefulness for humans.

It is also key essential to understand that, as stated by Marianne Moliner-Dubost, “the intrinsic value cannot be extrinsic to human consciousness; it is necessarily the product of human assessment even if it leads to non-instrumental valuation”<sup>31</sup>. In other words, the intrinsic value is necessarily assessed by humans. This is inevitable. And such human assessment is exactly what is happening in France when a scientific official body decides to put a new species on the list of protected species.

Environmental law also uses other means or tools which indirectly protect the intrinsic value of nature. For instance, criminal environmental law punishes environmental offenses irrespective of the direct consequences of such offenses on humans<sup>32</sup>. Again, here the environment itself is protected. However, the most interesting example to demonstrate that modern environmental law is adequate to protect the intrinsic value of Nature without recognizing RoN is the recognition of the “pure ecological harm” in French tort law, which is addressed further below.

#### **2.4. Pure ecological harm is compensated under modern environmental law**

Providing redress for pure ecological harm – i.e. harm to nature which cannot be equated with harm to property or moral damages– has been one of the main drivers for granting rights to nature. However, contrary to what some authors assume, granting legal personhood to nature

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<sup>27</sup> Article L. 331-1 of the environmental code.

<sup>28</sup> Article L. 332-2 of the environmental code.

<sup>29</sup> Article L. 411-1 of the environmental code.

<sup>30</sup> For example, about the Bialowieza forest, see CJEU, 18 April 2018, *European Commission v. Poland*, C-441/17 ; Julien Bétaille, « L’efficacité du référé européen et le principe de précaution au secours de la forêt de Bialowieza – Commentaire sur CJUE, ord. référé, 27 juillet 2017 et ord. référé, grande chambre, 20 novembre 2017, *Commission européenne c. République de Pologne*, C-441/17 R », *Droit de l’environnement*, n° 263, 2018, pp. 14-22

<sup>31</sup> Marianne Moliner-Dubost, *Droit de l’environnement*, Cours, Dalloz, 2015, p. 52. The quote in French is the following: “la valeur intrinsèque ne peut pas être extrinsèque à la conscience humaine ; elle est nécessairement le produit d’une évaluation humaine même si elle aboutit à une valorisation non instrumentale”.

<sup>32</sup> See for instance article L. 415-3 of the environmental code.

is not the only pathway to seek for better redress of pure ecological harm. To be more precise, it was EU Directive 2004/35 on environmental liability which represented the first, cautious step towards a more comprehensive scheme of redress in the context of ecological harm<sup>33</sup>. In France, some important additional steps were taken in this regard. With its landmarking ruling in the *Erika* case of 2010, the French *Cour de cassation* formally accepted that redress was possible for pure ecological damage<sup>34</sup>. Most importantly, though, the 2016 Act on biodiversity modified the French civil code and provided an explicit legal regime on the compensation of ecological damages<sup>35</sup>. In this context, “ecological harm” is defined as a damage to “ecosystems elements or functions”<sup>36</sup> and is distinguished from economic and moral damages. It is a damage to nature itself, to its intrinsic value, which closely resembles the idea Christopher Stone pitched in 1972 in his landmark article. Again, it needs to be recalled that these new redress options have been implemented into French legislation without there being an explicit need to explicitly grant legal personhood to nature. And whereas their application on the ground still leaves a lot to be desired, the explicit reassertion of “pure” ecological harm in tort law is to be singled out as a major achievement of modern environmental law, at least within the French context.

## 2.5. Broad access to justice becomes the norm, not the exception

The increasingly broader access to justice in environmental cases is equally to be cited as an additional example of how RoN is not a necessary precondition to take further important steps in the protection of the environment. In this regard, it is to be recalled that the lack of access to justice in environmental cases was the main argument for Christopher Stone in his plea to grant legal personhood to nature.

At the time, Christopher Stone's stance appeared reasonable. Judicial actions to defend the environment were quite rare and legal systems were not yet adapted to this. As a consequence, advocating to grant rights to nature was to be approached as the next logical step in this sequence.

The point is that, in retrospect, Stone's proposal was not followed. The shift to RoN in the legislative framework is only of recent date. Yet, this does not entail that the issue of standing has remained unaddressed since the 1970s. Instead of contemplating the bold move to grant legal personhood to nature, many jurisdictions opted for a more hands-down approach, which consisted in liberalizing the standing requirements in environmental cases. For example, in France, the act on Nature conservation of 1976 created an accreditation system for environmental NGOs, which granted them the right to challenge administrative decisions, such as environmental permits for industrial activities, and to initiate civil and criminal actions

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<sup>33</sup> The International Court of Justice recently recognized the ecological damage (ICJ, 2<sup>nd</sup> February 2018, *Costa Rica v. Nicaragua*, n° 150; see Yann Kerbrat et Sandrine Maljean-Dubois, « La reconnaissance du préjudice écologique par la Cour internationale de justice », *Droit de l'environnement*, n° 266, 2018, pp. 90-91.

<sup>34</sup> See Cass., crim., 25 septembre 2012, n° 10-82.938; *Environnement*, 2012, n° 12, pp. 13-21, note Marie-Pierre Camproux-Duffrène.

<sup>35</sup> Simon Taylor, *Extending the Frontiers of Tort Law: Liability for Ecological Harm in the French Civil Code*, JETL 2018; 9(1): 81–103.

<sup>36</sup> Article 1246 of the civil code.

against polluters<sup>37</sup>. In turn, the 1990s saw the emergence of Principle 10 of the Rio Declaration, which provided that “effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”. The famous French legal philosopher François Ost welcomed the focus on granting broader standing in environmental cases in 1995, holding that:

“(r)ather, (...), than endowing explicit rights to nature, which allow it to play a more prominent role before courts (...), is it not appropriate to finally grant a more robust and encompassing right of access to justice to NGOs that defend Nature?”<sup>38</sup>.

Principle 10 was further implemented through the Aarhus convention, which was signed in 1998 and provided a very broad access to justice, particularly under article 9, paragraph 3:

“Each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment”.

Whereas also the other provisions of Article 9 are imperative in the quest for more accountability in environmental cases, Article 9, paragraph 3 has garnered much attention lately. To be more precise, this article is broadly interpreted by international bodies and courts, such as the Aarhus convention compliance committee<sup>39</sup> as well as the CJEU. For example, even if Member States are free to apply additional criteria to delineate standing in environmental cases, it must lead, in practice, to a broader access to justice in environmental cases. In other words, in spite of the discretion granted to the State Parties, it is now clear that new standing rules that go against the Aarhus Convention’s objective of broad access in environmental cases will probably not survive judicial scrutiny. This rationale helps to explain why Germany’s rather restrictive standing rules in environmental cases were finally not upheld by the CJEU<sup>40</sup>. In several cases concerning the United Kingdom, the CJEU also underlined that the costs linked to legal procedures in environmental cases cannot be too prohibitive<sup>41</sup>.

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<sup>37</sup> About the accreditation system, see Michel Prieur, Julien Bétaille, Marie-Anne Cohendet, Hubert Delzangles, Jessica Makowiak & Pascale Steichen, *Droit de l’environnement*, 7<sup>e</sup> éd., Précis, Dalloz, 2016, n° 146 et seq.

<sup>38</sup> François Ost, *La nature hors la loi – L’écologie à l’épreuve du droit*, 1995, rééd., *La Découverte*, 2003, p. 204. In French: “Plutôt, (...), que d’affubler la nature des oripeaux du sujet de droit et de lui confier un rôle d’emprunt sur la scène judiciaire (...), ne convient-il pas plutôt d’accorder enfin un réel droit d’action en justice aux associations qui la défendent ?”. See as well François Ost, « Personnaliser la nature, pour elle-même, vraiment ? », in Philippe Descola (dir.), *Les Natures en question*, Collège de France, Odile Jacob, 2018, pp. 205-226.

<sup>39</sup> See for example the decisions of the Committee concerning access to the action for annulment before the European Union Court of Justice (14<sup>th</sup> April 2011 and 17<sup>th</sup> March 2017, case n° ACCC/C/2008/32 ; Julien Bétaille, « Accès à la justice de l’Union européenne, le Comité d’examen du respect des dispositions de la Convention d’Aarhus s’immisce dans le dialogue des juges européens », *Revue juridique de l’environnement*, 2011, pp. 547-562)

<sup>40</sup> CJEU, 12<sup>th</sup> May 2012, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, C-115/09, *Revue juridique de l’environnement*, 2011, p. 653, chron. Julien Bétaille.

<sup>41</sup> CJEU, 11<sup>th</sup> April 2013, *David Edwards & Lilian Pallikaropoulos*, C-260/11, *Journal européen des droits de l’homme*, n° 4, 2013, p. 696, chron. Julien Bétaille ; CJEU, 13<sup>th</sup> February 2014, *European Commission v. United Kingdom*, C-530/11, *Journal européen des droits de l’homme*, n° 4, 2014, p. 558, chron. Julien Bétaille.

One might portend that the underlying rationale of the Aarhus Convention assumes that the increased environmental awareness will prompt more NGOs and citizens to defend the environment before court. In doing so, both NGOs and individual citizens increasingly act as guardians of nature. Thus, there would not exist urgency to grant explicit standing to nature itself. The growing body of case-law, especially within the EU, showcases that national judges are found increasingly prepared to halt unsustainable projects capable of jeopardizing nature at the request of environmental NGOs<sup>42</sup>.

The latter findings might explain why the Aarhus rationale has been exported to Latin America and the Caribbean. Indeed, just last year the so-called “Escazu agreement” was signed, which is mirroring the Aarhus Convention at many points. This regional treaty on Access to Information, Public Participation and Justice in Environmental Matters was adopted on the 4<sup>th</sup> of March 2018 in Escazu, Costa Rica. It applies the principle 10 of the Rio Declaration at the regional level. Article 8 of the agreement notably provides that “each Party shall guarantee the right of access to justice in environmental matters in accordance with the guarantees of due process”.

In spite of the remaining – and often very important – implementation issues in the EU regarding access to justice in environmental cases, the French experiences are instructive once again. They indirectly attest that liberalizing standing in environmental cases is a suitable alternative for granting explicit standing to nature itself. Since environmental NGOs were given legal standing, nature can now be – at least indirectly – represented before courts. When environmental NGOs go to court in order to defend their statutory objectives - which is to protect the environment – they implicitly also represent nature. In other words, they are to be approached as the equivalent of the Stone’s guardians<sup>43</sup>. Nature now has a voice before judges through the myriad of environmental NGOs that have been created in many countries<sup>44</sup>.

Whereas also individuals might take up the role of “guardian” against the backdrop of the Aarhus rationale, arguably environmental NGOs can be more effective in this regard. In order to do so, French NGOs can get an “accreditation” when several criteria are fulfilled<sup>45</sup>. The main one is to have been in business for at least three years. Indeed, article L. 142-1 al. 2 of the French Environmental code even includes a presumption of standing in favour of the NGOs that have fulfilled the requirements mentioned above. Such NGO is presumed to have

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<sup>42</sup> An author would prefer to replace such rationale by RoN (see Tamlyn Jayatilaka, *Rights of Nature: The Right Approach to Environmental Standing in the EU?*, LLM Paper, Ghent University, 2017). Such proposal is focused on the issue of access to justice before the CJEU, which indeed remains a problem. However, the progresses that have been made for 10 years in this area surely has to be taken into account, mainly thanks to the actions driven by the NGO ClientEarth.

<sup>43</sup> RoN supporters sometimes pretend that the way Nature is currently represented before the courts is not good because its representation is made through humans’ interests (on this issue, see Lucille Boisseau-Sowinski, « La représentation des individus d’une espèce animale devant le juge français », *VertigO*, Hors-série 22, septembre 2015). However, it is exactly the same problem with the Christopher Stone’s “guardians”: it remains humans (natural or legal person) representing Nature.

<sup>44</sup> See Gérard Monédiaire, « Sur la nature du droit de la nature », *Caesura, Canoas*, n° 4, 1994, p. 65.

<sup>45</sup> See L. 141-1 et seq. of the environmental code.

standing to challenge administrative decisions entailing a direct violation of its statutory objectives and producing harmful effects on the environment<sup>46</sup>.

The repercussions of such liberalized standing for the environment can be far-reaching. For example, it is possible to imagine an unsustainable project development capable of producing adverse effects on the natural environment, on a location where no individual can claim *locus standi* (because nobody lives close enough to this area to be affected by the adverse effects linked to the project). In such a scenario, an accredited NGO whose territorial scope covers the contested site can still claim standing. For, since the effects of this decision might be prone to affect the statutory object of the NGO at issue, which is aimed at the protection of the natural environment in the said geographical area, the NGO is permitted to claim standing in such cases. This limited French case-study underscores that the underrepresentation of nature in court can be cured without necessarily having to take recourse to a fundamental paradigm shift, such as RoN<sup>47</sup>.

Whereas the above-presented examples all relate to administrative decisions, the relevance of Article 9, paragraph 3, of the Aarhus Convention is not confined to such instances. Access to civil and criminal courts can also be liberalized with reference to Article 9, paragraph 3, of the Aarhus Convention. Again the French example might be instructive. Concerning access to the civil judge in France, the plaintiff is required to demonstrate a “legitimate interest” and a “direct damage”<sup>48</sup>. However, when the plaintiff is an environmental NGO this does not represent an insurmountable hurdle since an NGO merely needs to substantiate that the alleged acts compromise its statutory objectives. This is rather obvious in the case of unlawful pollution or habitat destruction. Concerning access to criminal proceedings in France, there are not any specific standing conditions to be observed when submitting complaints. Finally, if during a criminal trial, an NGO wants to claim financial compensations, it will benefit from the standing presumption provided by article L. 142-2 of the environmental code.

Therefore, in France, at least for accredited environmental NGOs, access to justice in environmental matters is quite broad<sup>49</sup>. Against this backdrop, one might again submit that there is no reason to grant explicit rights to nature in France since nature can already be represented in court. Of course, this does not imply that access to justice in environmental cases has now become a “walk in the park” in countries, such as France. However, the

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<sup>46</sup> CE, 8 février 1999, *Fédération des associations de protection de l’environnement et de la nature des côtes d’Armor*, rec., p. 20.

<sup>47</sup> It is also important to notice that RoN does not represent an absolute guarantee to claim standing in environmental cases. (see Mary Elizabeth Whittemore, « The Problem of Enforcing Nature’s Rights under Ecuador’s Constitution: Why the 2008 Environmental Amendments Have No Bite », *Pacific Rim Law & Policy Journal*, Vol. 20, n° 3, 2011, p. 667). Moreover, access to justice is apparently broader in Costa Rica than in Ecuador, whereas the latter has not explicitly recognized RoN in its internal legislation (Edgar Fernandez Fernandez, « Les controverses autour de l’intérêt à agir pour l’accès au juge constitutionnel : de la défense du droit à l’environnement (Costa Rica) à la défense des droits de la nature (Équateur) », *VertigO*, Hors-série 22, septembre 2015).

<sup>48</sup> Article L. 1240 of the civil code and article 31 of the Civil procedure code.

<sup>49</sup> See Julien Bétaille (Ed.), *Le droit d’accès à la justice en matière d’environnement*, Presses de l’IFR de l’Université Toulouse 1 Capitole, LGDJ, 2016 ; Jessica Makowiak, ‘study on factual aspects of access to justice in relation to EU environmental law’, in Jan Darpö, *Effective Justice? Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union*, 2013-10-11/Final (available at: [http://ec.europa.eu/environment/aarhus/access\\_studies.htm](http://ec.europa.eu/environment/aarhus/access_studies.htm)).

prevailing issues no longer primarily relate to restrictive standing requirements. In contrast, precisely the lack of adequate funding hinders a more comprehensive enforcement of the existing environmental rules. In addition, often legal certainty still prevails in environmental procedures at the expense of compliance<sup>50</sup>. While there is still much improvement to be made in this domain, standing in environmental cases has significantly improved, which renders the explicit recognition of RoN not necessary<sup>51</sup>. Even more so, the French lawyers which use the above-presented tools have already voiced scepticism as to the added value of RoN for nature protection on the ground. The myth that RoN will lead to an ecological utopia does not appear to have many supporters amongst lawyers that are dealing with the practical side of environmental law. For instance, Raymond Leost, the head of the *France Nature Environnement* law group, i.e. the main environmental NGO in France<sup>52</sup>, expressed reserves as to the relevance of RoN during a conference in December 2018<sup>53</sup>.

## 2.6. The burden of proof is no longer an insurmountable hurdle

Another of Christopher Stone's key-arguments is that the implementation of RoN could lead to a more flexible approach toward the burden of proof in environmental cases. According to Christopher Stone, judges would be inclined to interpret rules such as those of burden of proof far more liberally from the point of the environment in a system where RoN are explicitly recognised<sup>54</sup>.

It would be interesting to investigate whether this assumption has been reaffirmed in countries where RoN have already been explicitly recognised. For now, such proof is lacking. However, at the same time it is important to take into account the recent shift in the application of the burden of proof in environmental cases. While, admittedly, the burden of proof remains a substantial hurdle in many environmental cases, which are often characterized by evidence-related challenges linked to establishing a causal nexus, recent case-law developments again reveal a more favorable approach to the burden of proof in recent years. For example, based on the polluter pays principle, the CJEU held that Member-States have the possibility to ease up the burden of proof in case of pollution<sup>55</sup>. Granting rights to nature will, in my view, not substantially alter this debate. In essence, applying the burden

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<sup>50</sup> See Julien Bétaille, « Les limites européennes à la subjectivisation du contentieux de l'urbanisme », *Bulletin juridique des collectivités locales*, 2018, pp. 728-733.

<sup>51</sup> See for example Julien Bétaille & Antoine Gatet, *Legal Analysis of the Main Sources of Interpretation of the Access to Justice Rights in France*, Research project "Access to Justice for a Greener Europe" (ATOJ EARL) driven by ClientEarth, July 2018. It must be noticed that some academics are in favour of RoN, such as Marie-Angèle Hermitte. For her, the key argument in favour of RoN arises from the equality of arms principle (Marie-Angèle Hermitte, « La nature, sujet de droit ? », *Annales HSS*, 2011, n° 1, p. 212). Thus, it would be necessary to grant Nature legal personality, for Nature to be able to defend itself in courts against polluters. However, as mentioned above, I have a different view, since nature is already indirectly represented in court.

<sup>52</sup> Every year, *France Nature Environnement* brings hundreds of cases before the courts.

<sup>53</sup> This conference was held at the University of Limoges (France). The papers of the conference will be published in the *Revue juridique de l'environnement*, the main academic journal dedicated to Environmental Law in France.

<sup>54</sup> Christopher D. Stone, « Should trees have standing? Towards legal rights for natural objects », *45 South California Law Review* 450 (1972), p. 488.

<sup>55</sup> CJEU, 9<sup>th</sup> March 2010, *Raffinerie Mediterranée (ERG) SpA*, C-378/08; *Revue juridique de l'environnement*, 2010, p. 503, comment Pascale Steichen.

of proof remains a prerogative of national judges and, additionally, can also be reversed through reliance on the precautionary principle.

As a preliminary conclusion, it can be upheld that, when taking into account the recent progressive evolution of environmental law, many of the failings that were at the root of the RoN have already been addressed. Many environmental law already protect the intrinsic value of nature, while it is even possible to claim damages for “pure” environmental damage. In a similar vein, a steady evolution towards broader access to justice in environmental cases is noticeable. In other words, the dichotomy between RoN and modern environmental law is partly artificial. Or, differently put, one cannot simply stifle the debate by stating that modern environmental is inherently incapable of attaining environmental enhancement<sup>56</sup>.

### **3. Rights of Nature is not a legal revolution**

Another main assumption of the RoN’s theory that it is to be approached as a paradigm shift, placing nature of the first time in the center of the legislative framework. In my view, qualifying RoNs as a “legal revolution” is to be approached as the figment of the growing enthusiasm that is aroused by the novelty of the RoN’s recognition in several countries. However, at this stage, it is important to realize that, even if RoN may constitute a philosophical paradigm shift, it cannot necessarily be equated to a revolution on the legal ground.

Indeed, even if RoN actively promotes a more ecocentric approach to nature, it remains a legal instrument which cannot operate without humans. This constitutes RoN’s main limit, since it renders it vulnerable for the same risk factors as modern environmental law (**3.1**). Moreover, RoN entails an active obligation from humans to the environment and therefore cannot be distinguished from more anthropocentrically phrased rights, such as the human right to a healthy environment (**3.2**). There is nothing revolutionary in this.

#### **3.1 The ultimate paradox: RoN cannot operate without humans**

The RoN’s theory implies that in order to protect nature’s intrinsic value, it is necessary to grant legal personality to Nature in order to avoid that its interests would permanently be overridden by human interests. According to the RoN’s maxim, nature should be able to defend its own interests, which are different from humans’ interests. And thus it would be more sensible to directly grant legal personhood to nature instead of opening new avenues to

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<sup>56</sup> Following a ius-naturalist approach, which is not mine in this article, it would be possible to conclude that RoN already exists in the context of modern environmental law, even if RoN are not explicitly recognized, because positive law already implements it by protecting the intrinsic value of Nature.

allow an indirect representation of nature before court, before through environmental NGOs<sup>57</sup>.

Yet this gives rise to the well-know *aporia* linked to RoN. For, as long as Law is an instrument produced by Humans (which is not challenged, even not by RoN advocates), any attempt to protect nature by using legal instrument necessarily goes through human interaction. That's why RoNs needs humans – in the role of “guardians” - just as modern environmental law cannot properly function without human interventions. To be sure, this *aporia* has been identified a long time ago by other authors, who held that:

“since all of law is a human construct, it follows that we can identify any matter of concern and legislate about it, if we want to. Whether or not non-humans have rights, only humans can be actors in the legal system”<sup>58</sup>.

Moreover, seeing that RoN cannot properly function without human intervention, it ultimately runs the same risk as modern environmental law, namely to give precedence to anthropocentric viewpoints. For example, regardless of the fact whether legal personhood has been granted to elusive species, such as Brown Bears, these animals will always be dependent on humans to go to courts. Either an independent guardian, appointed by the law, might assume this task, or, as is often the case today, environmental NGOs might represent the rights of Brown bears indirectly before court. Bears have no choice: also within the context of RoN the anthropocentric approach ultimately prevails. And thus the fault line between RoN and modern environmental law is not that sharp as is often depicted in the legal discourse. Serge Gutwirth describes such issue as follows:

“granting rights to non-human entities may degenerate to an even bigger anthropocentrism. Indeed, only humans are able to translate nature's “interests” into the legal language”<sup>59</sup>.

This finding cannot be denounced. For example, article 71 of the Ecuadorian Constitution provides that: “all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature”. For sure, this provision might be qualified as an *actio popularis*, which might be beneficial for the enforcement of the existing provisions of nature conservation law. Yet it is far from being legally revolutionary. Some countries, such as New Zealand, have adopted similar legislation when granting rights to nature<sup>60</sup>. Under the provisions of the recently adopted legislation regarding legal personhood for nature, humans are still appointed as guardians. In fact, this is not some different from the provisions under EU environmental law. Within the European Union, there are comparable provisions, for

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<sup>57</sup> About the representation of Nature before judges, see Marie-Pierre Camproux & Jochen Sohnle (ed.), *La représentation de la nature devant le juge : approches comparatives et prospectives*, VertigO, 2015.

<sup>58</sup> P.S. Elder, « Legal Rights for Nature: the Wrong Answer to the Right(s) Question », *Osgoode Hall Law Journal*, vol. 22, n° 2, 1984, p. 291.

<sup>59</sup> Serge Gutwirth, « Culture contre Nature », in *Des droits pour la nature*, Editions Utopia, 2016, p. 41.

<sup>60</sup> About the development of the rights of rivers, see Victor David, « La nouvelle vague des droits de la nature. La personnalité juridique reconnue aux fleuves Whanganui, Gange et Yamuna », *Revue juridique de l'environnement*, 2017, pp. 409-424.

instance in the context of EU water law, when, which stipulate that humans are in charge of managing watersheds and river systems in a sustainable manner<sup>61</sup>.

Against this backdrop, one should be more cautious before speaking about a legal “revolution” when discussing RoN. As Dinah Shelton held:

“Environmentalists may be concerned that inevitably the legal personhood of nature will have to be defended by humans. If these humans are appointed by the government, environmental concerns may not always be paramount. Any guardians will have responsibility for developing a management plan and deciding on what particular activities should be permitted. In theory, environmental agencies already undertake these responsibilities in respect to public lands and protected areas”<sup>62</sup>.

However, the critique goes deeper. One might even submit that the substantive norms put forward by RoN do not differ substantially from the protection schemes set out by modern environmental law.

### **3.2 Not so different in terms of substance: RoN remains a human obligation towards nature**

In my view, RoN are not fundamentally different from the protection duties present in the existing environmental laws. This is based on the basic idea which assumes that rights and obligations are two sides of the same coin. Of course, the latter might be seen as an oversimplification of the legal debate concerning RoN. Even so, I still believe that it is relevant to frame the debate in these terms. To put it simply, one might qualify a legal right as a permission to do something or not. Accordingly, an obligation is an injunction for someone to do something<sup>63</sup>. In other words, a permission necessarily implies an obligation and, conversely, an obligation implies a permission. If *X* has the right to do *A*, *Y* must abstain from impeding the enjoyment of *X*'s right. Therefore, *Y* has the obligation to do something or to abstain for *X* to enjoy its right. Also, if *Y* has an obligation regarding *A*, for example to protect it, it means that *X* has the permission to enjoy *A*.

What if one would apply this rationale to nature? If there exists a right to healthy environment, it entails - at least in theory - that the environment must be protected by everyone. Thus, everybody has the obligation to protect the environment. Yet what about RoN? If nature enjoys the right to be respected and/or restored, as is often put forward in recent legislation

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<sup>61</sup> In France, two specific kinds of legal persons are in charge of managing the watersheds: the “Agences de l’eau” and the “Établissements publics territoriaux de bassin” (see Michel Prieur, Julien Bétaille, Marie-Anne Cohendet, Hubert Delzangles, Jessica Makowiak & Pascale Steichen, *Droit de l’environnement*, 7<sup>e</sup> éd., Précis, Dalloz, 2016, n° 433-437; Bernard Drobenko, *Introduction au droit de l’eau*, Editions Johanet, 2014, p. 80 et seq.).

<sup>62</sup> Dinah Shelton, « Nature as a legal person », *VertigO*, Hors-série 22, septembre 2015, n° 47.

<sup>63</sup> This equivalence is clearly exposed by Hans Kelsen in his *General Theory of Norms*: “If someone has a duty to another person to behave in a certain way, we say that the other person has a right to this behaviour. (...). The right of one person is the duty of the other seen from the perspective of the person to whom the duty is owed. (...). The right of one person is the duty of the other seen from the perspective of the person to whom the duty is owed. That is why we call it [in German] a right in the subjective sense of the word. (...) “Entitlement” in all senses of the word presupposes the imposition of duties, i.e. commanding” (Hans Kelsen, *General Theory of Norms*, 1979, translated by Michael Hartney, Clarendon Press, Oxford, 1991, p. 136-137).

concerning RoN, it implies that all persons have the obligation to protect nature<sup>64</sup>. As a consequence, one might submit that both modern environmental law as well as RoN are giving way to the same substantive norm, namely the obligation to protect the environment.

This remarkable similarity is conformed in recent case-law. Indeed, in Ecuador, courts tend to « use(...) the environmental right and the right of nature interchangeably without any clear distinction as to their respective application”<sup>65</sup>.

It is obvious that objective norms are not just about humans. Non-humans can be beneficiaries of the obligation too, as is the cases with nature conservation law. Yet, ultimately, only natural and legal persons are bound to comply with such obligation. This is what Hans Kelsen recalled in its *Pure Theory of Law* when stating that:

“Although modern legal orders regulate only the behavior of men, not of animals, plants, and things, it is not excluded that these orders prescribe the behavior of man toward animals, plants, and things. For example, the killing of certain animals (in general or at specific times), the damaging of rare plants or historically valuable buildings may be prohibited. But these legal norms do not regulate the behavior of the protected animals, plants, and things, but of the men against whom the threat of punishment is directed”<sup>66</sup>.

Ultimately, this is what modern environmental law does. It uses objective norms to oblige all persons to respect the environment, including nature.

In the end, RoN approaches cannot do more than that. The rights granted to nature are grounded upon the same substantive underpinnings as the protection schemes present within modern environmental law. Hence, granting rights to nature is not to be dubbed a “legal revolution”. Even in the absence of RoN, it is possible to contend that nature enjoys already certain rights, i.e. the corollary of the protection duties set forth by the existing environmental statutes.

Along those lines, one might submit that focusing much energy on RoN would yield only limited results on the ground. The ensuing discussion about the best theoretical approach to be used when enacting environmental norms, is obfuscating the main challenge, i.e. a better enforcement of the existing environmental statutes. The seminal question to be addressed in this regard is akin to the one pondered by Christopher Stone in 1972: are humans willing to restraint their appetite for environmental destruction and to what extent can the law be used to enforce the protection duties towards nature?

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<sup>64</sup> It is also admitted by David Boyd when he states that “Rights of Nature impose responsibilities on humans to modify our behavior” (David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World*, *op. cit.*, p. 230).

<sup>65</sup> Louis J. Kotzé and Paola Villavicencio Calzadilla, ‘somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador’, *Transnational Environmental Law*, 6:3 (2017), p. 428.

<sup>66</sup> Hans Kelsen, *Pure Theory of Law*, 2<sup>nd</sup> ed., 1960, transl. By Max Knight, The Lawbook Exchange, Ltd. Clark, New Jersey, 2005, p. 32.

#### 4. Rights of Nature might not keep its promises regarding saving the world

The third and ultimate assumption upon which RoN is based, is that it might be a more effective tool to enhance environmental protection in the ground. It is a relatively easy premise to kickstart a plea in favour of RoN. For example, without any more arguments, an author claims that “if animals and plants were legal persons, it would be much more difficult to kill or destroy them: they would have subjective rights then, which could be enforced in court”<sup>67</sup>. Another author claims that: “by granting rights to Nature, it is easier to improve nature conservation”<sup>68</sup>. According to David Boyd, “rights of nature movement has the potential to create a world where people live in genuine harmony with nature”<sup>69</sup>. Their argumentation is principally based on the idea that modern environmental law is not effective and thus a new paradigm is necessary in order to bolster environmental protection<sup>70</sup>. Some authors even go a step further by contending that “in the Anthropocene, the anthropocentrism of environmental law more generally, and rights specifically, is considered to justify and promote ecological ravaging”<sup>71</sup>. In my view, this characterization of modern environmental law as a justification for the further destruction of the ecosystems on our planet is misleading. Whereas the latter statement might be true for “law” in itself, one should at least acknowledge that modern environmental law precisely aims to limit the “freedom” to destruct nature. One might even go a step further and defend that modern environmental law was one of the first branches of the Law to protect the interest of non-human entities, whereas the bulk of the Law merely deals with humans and the economy. Along these lines, modern environmental Law is to be seen as a part of the solution, not the problem. By deliberately targeting modern environmental law, RoN advocates are choosing the wrong target.

First, the idea that modern environmental law is not effective is to be approached as a “truism”. In the face of the ongoing ecological destruction, stating that “environmental law” is not working well enough, amounts to stating the obvious. However, it is not correct to subsequently submit that every single piece of environmental legislation is ineffective. It is therefore wrong to submit that environmental law “as a whole” is not working. On the contrary, if properly enforced, some pieces of environmental law appear very effective in achieving their objectives (4.1). RoN propagators often submit that turn nature into a “subject

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<sup>67</sup> Jens Kersten, « Who Needs Rights of Nature », in Anna Leah Tabios Hillebrecht María Valeria Berros (ed.), *Can Nature Have Rights? Legal and Political Insights, RCC Perspectives, Transformations in Environment and Society*, 2017 / 6, p. 10.

<sup>68</sup> Victor David, « La lente consécration de la nature, sujet de droit. Le monde est-il enfin Stone ? », *Revue juridique de l'environnement*, 2012, p. 483. In French : “avec la reconnaissance de droits à la nature, il devient plus facile de renforcer la protection de la nature”.

<sup>69</sup> David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World*, *op. cit.*, p. 232.

<sup>70</sup> David R. Boyd, *ibidem*, p. xix; Victor David, « La lente consécration de la nature, sujet de droit. Le monde est-il enfin Stone ? », *Revue juridique de l'environnement*, 2012, p. 470 ; 485 (the author starts to argue about a particular case, where facility pollution was not sentenced before the first instance judge. Then he says that RoN would do better in such a case. And finally, at the end of the article, he has to say that the facility was sentenced by the court of appeal, applying classic environmental law).

<sup>71</sup> Louis J. Kotzé and Paola Villavicencio Calzadilla, ‘somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador’, *Transnational Environmental Law*, 6:3 (2017), p. 403.

of law” is the right approach to step up environmental protection on the ground. However, merely focusing on the “objective” of ‘subjective” nature of legal rules might be misleading. For, in itself, RoN appears to be facing the same challenges as modern environmental law, namely issues relating to compliance, implementation, enforcement and effectiveness (4.2).

#### 4.1 Modern environmental law can be relatively effective

Modern environmental law appears to be powerless in front of the ongoing ecological crisis. Ultimately environmental law is facing a certain paradox. While, on the one hand environmental law, has never been so sophisticated, on the other hand, environmental degradation has never been so all encompassing. It might be tempting to link the ongoing crisis to the many deficiencies environmental law has fallen victim to.

However, generally stating the “environmental law” as a whole is ineffective is not persuasive in itself. Below I list two major reasons why this proposition is not as convincing as it might appear on the first sight.

First, reference can be made to the many successes of modern environmental law over the past decades. Next to the well-know example of the Montreal Protocol on substances that deplete the ozone layer of 1987<sup>72</sup>, which was effective restoring the ozone layer, reference is to be made to the Natura 2000 Network of protected areas<sup>73</sup> and the positive results that have been made in the fight against oil spill, etc. In spite of the ongoing ecological crisis, scientific studies underpin the effectiveness of the Bern convention and of the Birds directive in Europe<sup>74</sup>: species with the highest level of protection are more likely to increase their population, and this is even more pronounced in States which have been members of the European Union for a long time. Other scientific studies reveal that strict protection schemes were instrumental for carnivore populations’ recent recovery in the EU<sup>75</sup>. At a very minimum, the referenced examples demonstrate that environmental law can be effective when properly enforced on the ground.

Second, it is important to remember the so-called “zero-alternative”. In order to do so, suffice it to carry out the following thought experiment. What would happen if there was no environmental law at all? In the absence of environmental legislation, the ecological crisis

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<sup>72</sup> See Andrew Klekociuk et Paul Krummel, « After 30 years of the Montreal Protocol, the ozone layer is gradually healing », *The Conversation*, 17<sup>th</sup> September 2017.

<sup>73</sup> For example, whereas the Natura 2000 network could arguably include even more vulnerable sites, it already 18% of the European Union territory. If the protection regimes are effectively applied, this entails that the ecological integrity in a substantial part of the EU territory is well protected.

<sup>74</sup> See Fiona J. Sanderson et al., « Assessing the Performance of EU Nature Legislation in Protecting Target Bird Species in an Era of Climate Change », *Conservation Letters*, July 2015, 0(0), 1–9. See as well Elie Galet, Thomas Galewski, Frédéric Jiguet & Isabelle Le Viol, « Waterbird communities adjust to climate warming according to conservation policy and species protection status », *Biological Conservation*, Volume 227, November 2018, pp. 205-212.

<sup>75</sup> Adrian Treves, Guillaume Chapron, Jose V. López-Bao, Chase Shoemaker, Apollonia R. Goeckner & Jeremy T. Bruskotter, “Predators and the public trust”, *Biol. Rev.* (2017),92, pp. 248–270; Guillaume Chapron & Adrian Treves, “Blood does not buy goodwill: allowing culling increases poaching of a large carnivore”, 2016, *Proc. R. Soc. B* 283: 20152939.

would be even more serious. When no strict emission standards would be integrated in environmental permits, industrial pollution would have been much more serious throughout the past decades. Of course, setting environmental standards through the issuance of permit legalizes pollution, at least up to a certain extent, legalizes a degree of pollution. However, in the absence of such permitting schemes, the environment would be worse off. A similar conclusion arises when it comes to EU nature conservation law, which has also been confirmed by the outcome of the REFIT-analysis of the Habitats and Birds directives<sup>76</sup>.

And thus, whereas a lot of the existing criticism toward modern environmental law is much deserved, one should be cautious not to oversimplify the debate. For one, simply ridding oneself of the whole body of environmental law might not be realistic either. And, here comes the rub, RoN would ultimately face the same challenges as modern environmental law.

#### **4.2 Effectiveness, or a lack thereof, after all?**

Whereas it remains relatively easy to posit that modern environmental law is failing to reach its objective, the track-record of RoN is not much better. The first empirical studies regarding the effectiveness of RoN in countries, such as Ecuador and Bolivia, clearly reveal the myriad of limitations to be faced in this respect. For example, some authors have concluded that “Ecuador’s (RoN) amendments are more likely to have an impact if Ecuador implements structural and procedural changes”<sup>77</sup>. This should come as no surprise. Simply granting legal personhood to nature will not make a big difference when it is not supplemented with structural changes. For one, even when everybody can act as a guardian when nature’s rights are encroached upon, nature will still disappear if no-one is effectively willing to take manifest violations before court. Even when nature’s rights are explicitly protected in a constitution, other provisions in the same constitution might still prioritize economic development and lead to ongoing environmental destruction. In fact, most of it is linked to what Herbert Hart named “secondary norms”<sup>78</sup>.

Whereas primary norms prescribe human beings to perform or abstain from certain behaviors, secondary norms ensure that new primary rules are enforced whenever cases of non-compliance arise. In other words, simply endowing substantive rights upon nature might matter little if not accompanied by strict enforcement commitments. Of course, one might admit that whenever RoN are included in the primary norms, this might ultimately also influence the legislator when enacting secondary norms. In other words, implementing RoN in primary norms might ultimately also trickle down in the body of secondary norms, which might be more centered on ensuring a better enforcement of the existing rights.

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<sup>76</sup> “It is clear that the status and trends of bird species as well as other species and habitats protected by the Directives would be significantly worse in their absence” (European Commission, *Executive summary of the fitness check of the EU Nature Legislation*, 16<sup>th</sup> December 2016; SWD(2016) 473 final).

<sup>77</sup> Mary Elizabeth Whittemore, « The Problem of Enforcing Nature’s Rights under Ecuador’s Constitution: Why the 2008 Environmental Amendments Have No Bite », *Pacific Rim Law & Policy Journal*, Vol. 20, n° 3, 2011, p. 691.

<sup>78</sup> See Herbert Lionel Adolphus Hart, *Le concept de droit*, 1961, (trad. Michel van de Kerchove), Publications des Facultés Universitaires Saint Louis, 1976, p. 105.

Be that as it may, we always end up with the “effectiveness challenge” when contemplating new environmental norms. Even if all countries would immediately decide to implement RoN into their legislation, there exists no guarantee that the environmental decline would be cured. One might submit that ensuring effectiveness has little to do with the legal nature of the obligation towards nature. To put it bluntly: opting for a RoN approach might inflict additional harm the environment if not properly enforced, especially when measured up against modern environmental statutes which are properly applied in the field. It is well-known that both legal and extra-legal factors are to be addressed in order to ensure proper compliance with environmental norms. And thus, if RoN advocates are really serious about ‘saving the world”, they ought to invest all their time and efforts in finding solutions for the multitude of challenges when it comes to compliance. In this regard, the focus should be on the following items: coherent legislation, strict sanctions, tackling corruption, impartiality of public authorities and judges, administrative inertia, regulators’ capture, access to justice, judges’ interpretation, execution of judicial decisions, etc.<sup>79</sup>.

As a result, it is thus much more sensible to prioritize the environmental Rule of Law as a tool to address the many factors that are impeding a proper implementation and enforcement of the existing environmental norms.

## 5. Conclusion

The principal aim of this article was to objective analyze the assumption underlying the shift towards RoN in some jurisdiction. This analysis yielded mixed result. If the ultimate goal is to “save the world”, than I contend that merely focusing on the philosophical underpinnings of modern environmental law might be misleading. Whereas RoN can surely help to improve environmental performance, “saving the world” would probably require a broader template. Rather than focusing on the question whether it makes sense to grant legal personhood to nature, one should step up the scrutiny with which the existing environmental norms and regulations are enforced. This might be a less daunting pathway when compared with RoN, yet it would maybe matter more for the survival of many species. Rather than a paradigm shift, more radical and effective legislation is required to face the ecological crisis.

Instead of positing that RoN might lead to a legal revolution, one should pay more lip service to the many benefits linked to the coming of age of modern environmental law. Indeed, “the emergence and development of environmental law represents a shifting conception of the relationship between property and environmental values ultimately removed from the utilitarian framework inherited from the eighteenth-century positivists”<sup>80</sup>. Therefore, I conclude that while RoN might bring about some positive changes to the current

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<sup>79</sup> The identification of those factors was the topic of my doctoral thesis. See Julien Bétaille, *Les conditions juridiques de l’effectivité de la norme en droit public interne, illustrations en droit de l’urbanisme et en droit de l’environnement*, thèse, droit, Limoges, 2012, 765 pages.

<sup>80</sup> Sean Coyle et Karren Morrow, *The philosophical foundations of environmental law – Property, Rights and Nature*, Hart publishing, Oxford and Portland, Oregon, 2004, p. 107-108.

environmental paradigms, modern environmental law is not in need of yet another revolution. In fact, environmental law, as it stands today, is to be hailed as an ecological revolution itself. Even when modern environmental law has a relatively young age, it still represents a meaningful route to better environmental protection in the short run. After all, legal revolutions are not always easy to identify. Only in retrospect, one might be able to fully appreciate the revolutionary impact of environmental law on the state of the environment on our planet.