RESEARCH COLLABORATION CONTRACT (n°221265)

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RIGHTS OF NATURE AND EUROPEAN UNION LAW: PATHS OF DIALOGUE

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FINAL REPORT

LIST OF ABBREVIATIONS

Art.	Article
CJEC	Court of Justice of the European Communities
CJEU	Court of justice of the European Union
Coll.	Collection
COP	Conference of the Parties
COR	Committee of Regions
EC	European Community
ECI	European Citizen Initiative
ECHA	European Chemical Agency
ECHR	European Convention of Human Rights
ECSC	European Coal and Steel Community
Ed.	Edition
EEA	European Environment Agency
EEC	European Economic Community
EESC	European Economic Social Committee
EHRA	European Human Rights Agency
EP	European Parliament
EU	European Union
IACHR	Inter-American Court of Human Rights
IPBES	Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem services
IPCC	Intergovernmental Panel on Climate Change
IUCN	International Union for the Conservation of Nature
JOCE	Official Journal of European Communities
JORF	Official Journal of the French Republic
NGO	Non-Governmental Organisation
OCS	Organised Civil Society
OJEU	Official Journal of the European Union
REDE	European Environmental Law Review
RJE	French Environmental Law Review
RTD Civ.	Civil Rights Quarterly Review
SEA	Single European Act
SDGs	Sustainable Development Goals
SWOT	Strengths, Weaknesses, Opportunities and Threats
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
WFD	Water Framework Directive

ACKNOWLEDGEMENTS

I warmly thank the members of the team for our exchanges during this study, Nina SALAÜN, study engineer, for her support during this research, and especially, for their precious proofreading, Alexandra ARAGAO Professor of University of Coimbra Portugal, Marie-Pierre CAMPROUX-DUFFRENE, Professor of Law at the University of Strasbourg (UMR SAGE CNRS), Sophie LEMAÎTRE, Doctor of Laws and Senior Adviser at U4 Anti-Corruption Resource Centre and Adélie POMADE, Lecturer HDR in law at the University of Western Brittany (UMR AMURE CNRS-IFREMER).

AVERTISSEMENT

Finalisée en janvier 2023, la présente étude comporte une actualisation des références des propositions législatives en cours et futures législations de l'Union européenne jusqu'en mars 2024.

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INTRODUCTION

Environmental law resolutely questions our place in nature and our interdependence with the living and mineral worlds. Against all odds, it contributes to breaking down the thinking of our legal systems and promoting a different vision of society. For almost 50 years, the European Union's (EU) environmental policy has been striving to be part of this complex dynamic. From the first Environmental Action Programme[1] to the Biodiversity Strategy 2030[2], a certain vision of nature and our responsibilities for the present and the future is taking shape.

> *"The natural environment provides limited resources (...). It is an asset that can be used but not abused and that must be managed as well as possible"[3]. "Wild flora species and wild animal species and populations are part of the common heritage of humankind"[4]. "We have a moral responsibility to safeguard biological diversity for its intrinsic value but also because it provides the food, fibre and drink we need"[5]. "Children should grow up aware of the nature around them. "We humans belong to this web of life and are entirely dependent on it (...) we need nature in our lives"[6]. "It is the backdrop to our human existence and provides the conditions for good physical and mental health as well as emotional and spiritual fulfilment"*[7].

This medley of European declarations expresses the anchoring in a dialectical representation of the relationship between humans and nature. However, this epistemological foundation of environmental policy is not exclusive. As an expression of the '*thinking of links and limits*'[8], this representation is confronted with processes of instrumentalisation or eviction in favour of anthropocentric logics marked by controversial pragmatism. Natural capital, environmental services, green infrastructure, nature-based solutions (...) the choice of words is never neutral. The construction of environmental law and the integration of ecological requirements into EU policies are thus marked by a waltz of hybrid concepts[9]. These semantic alliances reflect the thorny reconciliation of discordant socio-economic and ecological temporalities and the powerful obstacles to the transformation of production and consumption patterns. They reveal the many reefs against which any new conception of '*living one's human condition*'[10] and of ordering values and priorities of action differently.

Theodicy, anthropodicy (...), over the course of time, these theorised representations have structured the architecture of political, economic and legal systems and the relationships of force and power. Any change in the foundations of thought and action is exposed to strong resistance and is accompanied by phases of awareness, transition and transformation. In the era of the Anthropocene, *where will we land?*[11] invites us to reflect. The seriousness and spatial and temporal extent of environmental damage are profoundly unprecedented and are undermining the conditions of habitability of the planet. From one scientific assessment to another, ecological emergencies are growing and clashing with the growth of inequalities and widespread insecurity, demonstrating the obvious inadequacy of our development model.

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[1] Declaration by the Council of the European Communities and the Representatives of the Governments of the Member States meeting within the Council of 22 November 1973 concerning an EC action programme on environmental protection (OJEC C 112/1 of 20 December 1973).

[2] COM (2020) 380 final, Communication from the European Commission (Commission), EU Biodiversity Strategy 2030 "Bringing nature into our lives"

[3] First Action Programme 1973, op. cit.

[4] Second action programme: Resolution of the Council and of the Representatives of the Governments meeting within the Council on an EC action programme on environmental protection (OJEC C 139/1 of 13/6/1977)

[5] COM 2001 (162) final, Biodiversity Action Plan for Natural Resources Protection, Agriculture, Fisheries and Development Aid and Cooperation

[6] European Union (EU) Biodiversity Strategy 2030, 2020, op. *cit.*

[7] H. BRUYNINCKX, Executive Director of the European Environment Agency (EEA), "*EEA Signals 2021 - The Nature of Europe*".

[8] F. OST, *La nature hors la loi*, Ed. La découverte, 1995, 343 p.

[9] Article 11 Treaty on the Functioning of the European Union (TFEU) and Article 37 of the EU Charter of Fundamental Rights.

[10] P. DESCOLA, *Les formes du visibles*, Ed. Le Seuil 2021, 757 p.

[11] B. LATOUR, *Où atterrir ? Comment s'orienter en politique*, Ed. La découverte, 2017, 160 p.

As the "*discreet servant of the established order*"[12] but also as an "*instrument of profound change*"[13], the law contains undeniable "*creative*"[14] and "*imaginative forces*"[15] conducive to the construction of new models of society. Mireille DELMAS MARTY shows that "*traditional legal types are cracking as if subterranean forces, previously unknown, were causing a surge of previously unknown concepts, institutions and norms*"[16].

Quietly but surely, environmental law has set off these seismic waves at the heart of legal systems; admittedly, not as quickly or as intensely as it should have. To conclude that it has failed obscures the root causes that are counteracting these paradigm shifts. Far from being unknown, these have been deciphered for several years by researchers from all disciplines. There is no shortage of proposals for the recognition of new legal concepts and principles or the adoption of new, more democratic decision-making methods. Similarly, studies deplore the striking contrast between the substantial body of law dedicated to the environment and the general state of accelerated degradation of its constituent natural elements. Such a phenomenon of ineffectiveness of the law is clearly "*a warning sign that should alert the legislator and lead him to suspect defects in the foundations or construction of his work*"[17] . This warning by Dean CARBONNIER invites us to question the robustness of the conceptual foundations of environmental law, but more broadly, to overcome the insufficient sustainability of the policies and related rights that govern the global economic system.

"Living in harmony with nature"[18], "*Bringing nature back into our lives*"[19], "Do *no harm*"[20], "*Leave no one behind*"[21], the oaths are multiplying all the time. From the "*right to destroy*"[22] to the right to live and the rights of things in nature[23], is an axiological shift taking place that will lead to new ecocentric visions? Is a new '*oikonomical*' order[24] being constructed at the crossroads of multiple currents of thought and pluralistic representations of the relationship between man and nature that is gradually being recognised by law? For a long time in the shadow of any legal translation and exposed to lively doctrinal disputes, the rights of nature movement has received a renewed echo since the consecration of the rights of Mother Earth in the Ecuadorian Constitution in 2008[25]. Echoing the International Mother Earth Day associated with the UN programme "*Living in harmony with nature*"[26], the multiplication of citizen and association mobilisations are encouraging processes of recognition of the rights of nature and/or natural entities in several legal systems.

The European Union and its Member States are not immune to these waves of claims promising a legal revolution that could "*save the world*"[27]. The result of a popular legislative initiative[28], the recent Spanish

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[12] R. LECOURT, *Le juge devant le marché commun*, (studies and works of the university institute of Advanced International Studies), n°10, Geneva, 1970, 69 p.
[13] *Ibid*.
[14] J. RIPERT, *Les forces créatrices du droit*, LGDJ, 2d edition, 1995, 431 p.
[15] M. DELMAS-MARTY, *Les forces imaginantes du droit*, Tome 1 Le relatif et l'universel, Seuil 2004, 439 p.
[16] *Ibid*.
[17] J. CARBONNIER, *Essais sur les lois*, Répertoire du notariat de Frénois, 1979, 298 p.
[18] 5th programme: Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council of 1/2/1993 on a community programme of policy and action in relation to the environment and sustainable development, OJ C 138/1 of 17/5/1993.
[19] EU Biodiversity Strategy 2030, 2020, *aforementioned*
[20] COM (2019) 640 final, Communication from the Commission on the Green Deal for Europe
[21] Ibid. Sustainable Development Goals (SDGs) of the UN 2030 Agenda.
[22] M.REMOND-GOUILLOUD, *Du droit de détruire-essai sur le droit de l'environnement*, Ed. PUF, 1989, 300 p.
[23] S. VANUXEM, *Des choses de la nature et de leurs droits*, Ed. Quae 2020, 115 p.
[24] A. ZABALZA, *La maison (oikos) protégée par le droit (nomos) - Éloge d'une théorie oikonomique face à l'urgence écologique,* special issue of Revue Juridique de l'Environnement (RJE) 2022, *Urgence(s) écologique(s) : quelle(s) urgence(s) pour le droit ?* HERVE-FOURNEREAU & A. LANGLAIS.
[25] In particular Chapter 7 on the rights of nature. https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html
[26] First report of the Secretary-general on Harmony with Nature (A/65/314), 2009. http://www.harmonywithnatureun.org
[27] D R. BOYD, *Rights of Nature, a legal revolution that could save the world*, ECW Press 2017, 312 p.
[28] Genesis of the process: Boletin Oficial de Las Cortes Generales, Congreso de los diputados, n°208-1, 3/12/2021, proposicion de Ley para el reconocimiento de personalidad juridica a la laguna del Mar Menor y su cuenca. This ILP was brought by Maria Teresa VICENTE GIMENEZ, Director of the Chair of Human Rights and Nature of the University of Murcia in support of a study carried out by the University's legal clinic. She presented the project on 22/4/2022 at the 11th dialogue of the UN programme Harmony with Nature. https://www.marmenorpersona.legal

law 19/2022 of 30/9/2022 recognises the legal personality of the Mar Menor lagoon and its basin[29]. Examined by the Congress of Deputies under the emergency procedure[30], this law illustrates the determination of the promoters of the rights of nature to challenge the legislator on the insufficiency of existing legal mechanisms[31].

The opening up of the European Parliament (EP) and the European Economic and Social Committee (EESC) to these issues attests to the gradual political visibility of the rights of nature at EU level. It demonstrates the influence of the transnational structuring of associative movements on the rights of nature and the strategic deployment of political and legal actions to defend their cause[32]. The publication of the study "*Towards an EU Charter of the Fundamental Rights of* Nature"[33] (2020) commissioned by the EESC and that on "*Can Nature get it Right? Rights on Nature in the European Context*"[34] (2021) commissioned by the EP's Legal Affairs Committee reflects the topicality of the debates. This study questions the added value of the recognition of the rights of nature in the light of a critical analysis of EU law. Before identifying the paths that could be taken (**PART II**), it is essential to contextualise the questions raised by rights of nature without losing sight of the singularity of the EU legal system (**PART I**).

[29] Boletin official del Estado, n°237, 3/10/2022, p 135131. In February 2023, the Spanish Constitutional Court agreed to admit for examination the appeal for unconstitutionality presented by 50 deputies from the Vox parliamentary group against Law 19/2022 recognising the legal personality of the Mar Menor lagoon.

[30] https://www.congreso.es/en/notas-de-prensa?p_p_id=notasprensa&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_notasprensa_mvcPath=detalle&_notasprensa_notaId=41829

[31] In this case, the Mar Menor lagoon is one of the largest lagoons in Europe, designated as a Ramsar wetland and Natura 2000 site. The lagoon is exposed to a major eutrophication phenomenon due to agricultural pollution and continuous urbanisation. In 2018, the management plan for the Natura 2000 site was still not adopted; since then two texts have been adopted by the regional authority (decreto-ley 2/2019 of 26/12/2019 and Ley 3/2020 de recuperacion y proteccion del Mar Menor.)

[32] HUB Europe of the Global Alliance for the Rights of Nature (https://www.garn.org/hubs/). Nature Rights (http://www.naturerights.com/blog/; http://www.natures-rights.org).

[33] CARDUCCI M., BAGNI S., MONTINI M., MUMTA I., LORUBBIO V., BARRECA A., DI FRANCESCO MAESA C., MUSARÒ E., SPINKS L., POWLESLAND P. (1/2020) *Towards an EU Charter of the Fundamental Rights of Nature*. Study, Brussels: European Economic and Social Committee (EESC/CESE)

[34] Study requested by the JURI Committee, Policy Department for citizens' rights and constitutional affairs, PE 689.328, 3/2021.

PART I - CONTEXTUALISATION AND EUROPEAN SINGULARITY

This part resituates the context in which the dynamics of the recognition of the rights of nature take place and deciphers the main disputes related to this theory (**Ch. I**). The singularity of the encounter between the rights of nature and EU law is highlighted to question the added value of the reception of this theory within this *sui generis* legal system (**Ch. II**).

CHAPTER I - THE THEORY OF THE RIGHTS OF NATURE BETWEEN EXPANSION AND RESISTANCE

The study "*Towards an EU Charter of the Fundamental Rights of Nature*" (CESE 2020)[35] follows in the footsteps of the founders of the theory of the rights of nature at the intersection of ethics and law. It promotes a jusnaturalist approach justifying a legal paradigm shift "*from a purely anthropocentric world view to a worldview that sees the human as one species in a radically interconnected web of life, where the wellbeing of each part is dependent on the wellbeing of the earth system as a* whole"[36].

Since Christopher Stone's eponymous article "*Should Trees have Standing? Towards Legal Rights for Natural* Objects"[37], the story of eco-centric thinking and its development has been the subject of numerous analyses. From the recognition of natural entities as "*legal persons*" by the US city of Tamaqua Borough (2006)[38] to the constitutional recognition of the rights of the Pacha Mama by Ecuador (2008), the rights of nature movement is undergoing continuous expansion. The current proliferation of publications and other dedicated events confirms the growing interest in the rights of nature.

The rights of nature movement has several schools of thought, which are reflected in the choice of foundations and recognition methods, depending on the legal system concerned. This diversity of discourse does not make it easy to understand the theory of rights of nature. Moreover, the movement transcends disciplines and expresses divergent conceptions of the place of law in the construction of a common world. Furthermore, the movement extends beyond the academic sphere, fostering alliances between researchers, associations and citizens. Such characteristics require deciphering them, certainly from a legal perspective, while underlining the importance of an interdisciplinary analysis to apprehend the multiple facets and societal meanings of this movement.

Between expansion and resistance, the theory of the rights of nature is gaining support from environmental lawyers in all professional spheres, who are actively involved in its promotion. Notwithstanding doctrinal opposition, the diagnosis of ecological urgency is clearly shared by environmental lawyers, the promoters of rights of nature and researchers in environmental sciences (**A**). On the other hand, the identification of the causes at the origin of this accelerated overstepping of planetary limits by several defenders of the rights of nature presents a certain ambivalence (**B**). Additionally, while the recognition of nature's rights in different legal orders is reflected in a number of dynamics, it is also met with mixed results in terms of implementation (**C**). It reactivates lively controversies[39] concerning its added value and the risks of destructuring that it may entail for Western legal systems (**D**).

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[35] *Towards an EU Charter of the Fundamental Rights of Nature*. Study, EESC/CESE, *op. cit.*

[36] *Towards an EU Charter of the Fundamental Rights of Nature*, EESC, 2020, *op. cit.* "*We are Nature, part of the interdependent web of life".*

[37] In *Southern California Law Review*, 1972,45, 450-501. This lengthy demonstration is set in the context of the Sierra Club's opposition to Walt Disney's proposed ski resort in Sequoia National Park in 1890.

[38] UN Harmony with Nature Programme: http://files.harmonywithnatureun.org/uploads/upload666.pdf

[39] Including by other communities, as C. LARRERE, *Entre juristes et philosophes, peut-il y avoir un débat sur les droits de la nature,* in *A quoi sert le droit de l'environnement ? Réalité et spécificité de son apport au droit et à la société*, coord. D. MISONNE, Ed. Bruylant 2018, 390 p.

A - A shared diagnosis of the ecological emergency

As scientific assessments of the state of the planet and the Conferences of the Parties (COP) progress, the speeches of the UN Secretary General, Antonio GUTERRES, are increasingly alarmist and express the urgency of radical changes at the risk of a fatal outcome for humanity.

> *"Many ecosystems have reached the point of no return (...) the facts are undeniable (...) Every voice can make a difference. And every second counts (...) To waste time is to perish*"[40]. "*Humanity has a choice: cooperate or perish. It is either a Climate Solidarity Pact or a Collective Suicide Pact*"[41]. "*We are waging war on nature (...) it is urgent to make peace. Because today we are not in harmony with nature*.[42]

In 2022, the 6th IPCC report confirms the extreme seriousness of the situation and resonates with the IPBES analyses demonstrating the accelerated decline in biodiversity. 75% of the earth's surface and 66% of the oceans are thus exposed to increasingly significant pressures, with 25% of species under serious threat[43]. However, forecasts of exponential exploitation of natural resources are very worrying and will be a source of new and profound social injustices. Resource use could double by 2060, water needs would increase by 55% by 2050 and energy needs by 30% by 2040[44].

At the EU level, Natura 2000 is the largest network of protected areas in the world. However, the record of protection of species and habitats of Community importance is very worrying. According to the latest assessment (2013-2018)[45], only 23% of species and 16% of natural habitats have a favourable conservation status according to Directive 92/43/EEC[46]. While the favourable conservation status of bird populations is 47%, this is 5 points lower than the previous assessment. The status of several protected species is deteriorating and the continuing lack of data, particularly in the marine areas of the Natura network, is causing further concern. The Commission recognises that the 2020 Biodiversity Strategy target of 34% of favourable assessments for natural habitats in the Natura 2000 network has not been met[47]. Although the surface of marine areas in the Natura network has doubled since 2015, as has the number of Special Areas of Conservation, the evidence of deterioration is clear, despite some improvements. Moreover, the European network does not cover all European species and natural habitats and represents only 17.9% of the EU's land area and 9.7% of its marine waters, with great disparities between Member States[48]. There are gaps in knowledge about the extent of the degradation of European biodiversity and many warning signs confirm the dangerous decline of pollinators[49] and the collapse of insect populations[50]. Similarly, the quality status of water bodies reveals serious concerns in

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[40] Speech by UN Secretary General A. Guterres at the release of the second part of the 6th IPCC report in February 2022. https://news.un.org/fr/story/2022/02/1115262

[41] Speech by UN Secretary General A. Guterres at the opening of the COP 27 UN Framework Convention on Climate Change in November 2022. https://press.un.org/fr/2022/sgsm21573.doc.htm

[42] Speech of the UN Secretary General, A. GUTERRES, at the COP 15 Convention on Biological Diversity in December 2022, https://press.un.org/fr/2022/sgsm21619.doc.htm

[43] IPBES, The Global Biodiversity and Ecosystem Services Assessment Report, Summary for Policymakers, 2019, 60 p.

[44] European Environment Agency (EEA) Europe's Environment, State and Outlook 2020, Summary 2019, 18 p.

[45] COM (2020) 635 final, Report from the Commission on the state of nature conservation in the EU - report on the conservation status of species and habitats protected under the Birds and Habitats Directives and trends over the period 2013-2018.

[46] Council Directive 92/43/EEC of 21/5/1992 on the conservation of natural habitats and of wild fauna and flora. OJEC series L 206 of 22/7/1992 p 7. Directive 2009/147/EC of the EP and of the Council of 30/11/2009 on the conservation of wild birds, OJEU L 20 of 26/1/2010 p 7) (consolidation) - Original text: Council Directive 79/409/EEC on the conservation of wild birds, Official Journal of the EC (OJEC) series L 103 of 25/4/79 p 1

[47] COM (2020) 635 final, op. *cit.*

[48] COM (2020) 635 final, *prec*

[49] COM (2021) 261 final, Report from the Commission on the progress made in the implementation of the European Pollinator Initiative adopted in 2018 (COM (2018) 395 of 1 June 2018).

[50] H. JACTEL, JL. IMLER, L. LAMBRECHTS, AB. FAILLOUX, JD. LEBRETON, Y. LE MAHO, JC. DUPLESSY, P. COSSART, P. GRANDCOLAS, Insect decline, immediate action is needed, *Académie des sciences*, *Compte rendus Biologies*, V. 343, issue 3 (2020) p 267-293.

relation to the ambitious objectives of the Water Framework Directive (WFD) 2000/60/EC[51]. According to the 2019 report[52], only 38% of surface waters are in good chemical status and 40% are in good ecological status or good ecological potential. It is true that 74% of groundwater bodies have good chemical status and 89% have good quantitative status. On the other hand, little information is provided on the respect of minimum ecological flows supposed to ensure the "*water needs (...) of terrestrial ecosystems and wetlands directly dependent on them*"[53].

The many environmental pressures resulting from the production and consumption patterns of the EU and its Member States extend beyond European borders. The EP points out that deforestation rates in the Brazilian Amazon are estimated to have increased by 88% between 2018 and 2019 and "*EU consumption is estimated to contribute at least 10% to global deforestation*"[54]. Similarly, the development of the digital age considerably increases the need for rare earths and critical raw materials, the exploitation of which is far from sustainable in most producing countries. Yet the EU remains extremely dependent on these foreign sources of mining[55].

These alarming diagnoses are widely shared by the global scientific community. Nowadays, few European and/or UN political speeches ignore them. "*Living within planetary limits*"[56], "*Overshoot day*"[57]. Six of the nine biogeophysical limits of the Earth system have now been exceeded[58], jeopardising the "*safe operating space for Humanity*"[59]. Understanding the issues at stake in the light of the notions of threshold and finitude reinforces the imperative to act urgently to protect the critical zone, this "*thin film*"[60] where "*the heterogeneous, near-surface environment in which complex interactions involving rock, soil, water, air and living organisms regulate the natural habitat and determine the availability of life-sustaining resources*"[61].

These diagnoses would be incomplete if the socio-cultural side of these emergencies and threats were to be avoided or minimised. In the logic of identifying biophysical planetary limits, researchers propose to define social limits in terms of essential needs for all, fundamental rights and the territorial socio-cultural fabric. The representation of a safe and just space for humanity within the planetary and social limits[62] is

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[51] Directive 2000/60/EC of the EP and of the Council of 23/10/2000 establishing a framework for community action in the field of water policy (WFD) - OJEC series L 327 of 22/12/2000.
[52] COM (2019) 95 final, Commission report on the implementation of the WFD.
[53] Article 1 a) of the WFD.
[54] EP resolution of 22/10/2020 with recommendations to the Commission on an EU legal framework to halt and reverse deforestation for which the EU is responsible on a global scale, OJEU 2021 C 404/175 of 6/10/2021. COM (2021) 706 final, Proposal for a Regulation of the EP and of the Council on making available on the EU market and exporting from the EU certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) 995/2010. Adopted text: Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31/5/2023, OJEU L 150/206.
[55] EESC opinion on the Communication from the Commission on the resilience of critical raw materials: the way forward for greater security and sustainability, OJEU 2021 C 220/118. N. HERVE-FOURNEREAU, Pacte vert et boussole numérique : balises juridiques pour une double transition soutenable, in *La construction d'une politique européenne du numérique* " B. BERTRAND (ed.), Bruylant, 2023, 782 p., 563-605.
[56] 7th Action Programme: EP and Council Decision 1386/2013/EU of 20/11/2013 on a general Union Environment Action Programme for 2020 Living Well Within Our Planet, OJEU L 354/171 of 28/12/2013.
[57] This concept was initiated by A. SIMMS of the Think Tank New economics Foundations UK and the Global Footprint Network. https://www.overshootday.org
[58] The limit for the freshwater cycle and the limit for new substances join the 4 other limits that have already been exceeded since 2015 (climate change, biodiversity erosion, global disruption of the nitrogen and phosphorus cycle, land use change). L. PERSSON, B.M. CARNEY ALMROTH & al, "Outside the Safe Operating Space of the Planetary Boundary for Novel Entities", *Environ.Sci. Technol*, 2022, 56, 1510-1521.
[59] J. ROCKSTRÖM, W. STEFFEN & al. A safe operating space for humanity, *Nature*, 2009, 461, 742-475.
[60] Several research networks are dedicated to the study of the critical zone, such as the French OZCAR platform on water and soil resources. https://www.ozcar-ri.org/fr/la-zone-critique/quest-zone-critique/
[61] National Research Council, Basic Research Opportunities in Earth Science, 2001, Washington.
[62] 11 are proposed by researchers in 2013: Food, water, health, income, education, gender, resilience, social equity, energy, employment, voice: M. LEACH, K. RAWORTH AND J. ROCKSTRÖM, Between social and planetary limits: moving in a safe and just space for humanity, in World Social Science Report: *Global Environmental Change*, International Social Science Council, Unesco Publishing 2013, 682 p.

drawn in the form of a diagram like the iconic doughnut proposed by the economist Kate RAWORTH[63]. The recent analysis of the *Doughnut Economics Action Lab* shows that none of the 140 countries studied live in this space of ecological security and social justice[64]. The 2019 UN report on the implementation of the Sustainable Development Goals[65] deplores a general trend of worsening ecosystem health and growing social and territorial vulnerabilities and inequalities, including in Europe[66].

Faced with the scale of multidimensional threats and insecurities, environmental lawyers agree on the identification of the anthropic pressures responsible, with great geographical variability. This consensus breaks down when it comes to assessing the role of law in the occurrence of these socio-ecosystem emergencies. The promoters of the rights of nature thus develop arguments against environmental law that are somewhat ambivalent (b).

B - The seal of ambivalence

The proponents of the rights of nature theory systematically question the conceptual basis on which environmental law has been built. Like the authors of the study *Towards an EU Charter of the Fundamental Rights of Nature,* they believe that all these "*eco-legal emergencies have the same root cause", namely, "an old paradigm, structures and systems that separate human beings from the rest of the interconnected web of* life"[67]. They are not the only ones to point to the original anthropocentric tropism of environmental law that frustrates the grasp of the complexity of our interdependencies with nature. Moreover, the fragile authority inherent in any new branch of law has been combined with a reception in the Western legal world that has oscillated between indifference, relative interest and opposition. A law to protect the environment in the long term could hardly arouse enthusiastic reactions from existing forces, which at best reserved it a function of *minimising* the undesirable effects of the economic branches of law.

An analysis of the first thirty years of this atypical law shows, according to Serge GUTWIRTH, that "*the theoretical discussion in environmental law is (...) marked by the conflict between two diametrically opposed conceptions*": a "*strong anthropocentric perspective*" in which man "*reigns over the non-human*" and a "*non-anthropocentric perspective*" maintaining that "*humanity is a non-privileged part of an ecological whole*"[68]. For many authors, the liberal foundations of modern Western thought thus bore the seeds of an unparalleled predation and overexploitation of nature[69]. The sacredness of individual freedoms emancipating themselves from a nature represented as an infinite reservoir of resources, erected this culture/nature boundary which is now strongly questioned[70]. The hegemonic expansion of this '*Western naturalism*'[71] has ousted three other ontologies (animism, totemism, analogism) conceptualised by the anthropologist Philippe DESCOLA. Without advocating the recognition

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[63] K. RAWORTH, *La théorie du Donut, l'économie de demain en 7 principes,* Ed. Plon 2018, 428 p. (translation of "*Doughnut economics, seven ways to think a 21th-century economist*", Ed. Random House Libri, 2018). https://www.kateraworth.com/doughnut/

[64] A-L . FANNING, D. W. O'NEILL, J. HICKEL, N. ROUX & al, The social shortfall and ecological overshoot of nations, *Nature Sustainability*, 5, 26-36 (2022).

[65] https://www.un.org/sustainabledevelopment/fr/rapports-sur-les-objectifs-de-developpement-durable/

[66] Report of the United Nations Economic Commission for Europe, March 2022. One in 5 people would be facing multidimensional poverty (extreme poverty remains rare according to this study). https://news.un.org/fr/story/2022/03/1117072

[67] *Towards an EU Charter of the Fundamental Rights of Nature,* EESC, 2020, op. *cit.*

[68] Thirty years of environmental law theory: concepts and opinion, *Environment & Society*, 26, 2001, 5-17.

[69] O. BARRIERE, *L'urgence écologique, un impératif juridique*, *in* RJE 2022 special issue, *Urgence(s) écologique(s) : quelle(s) urgence(s) pour le droit ?*

[70] A. PAPAUX, *De la nature au milieu : l'homme plongé dans l'environnement, Revue interdisciplinaire d'études juridiques*, 2008/1, vol. 60, 29-57. F. OST, The philosophical foundation of environmental Law: an excursion beyond Descartes, Facultés universitaires Saint Louis, 2001, http://www.dhdi.free.fr/recherches/environnement/articles/ostenvlaw.pdf

[71] P. DESCOLA, *La composition des mondes*, interview with P. Charbonnier, Ed. Flammarion, 2017, 384 p. Naturalism expresses the situation where '*non-humans undergo the same kind of physical determinations*' that humans do '*experience but they have no interiority*'.

of rights to nature, several jurists plead for a reinterpretation of this very utilitarian anthropocentric conception of nature, or even for a move away from '*anthropocentrism to an ecocentric vision*'[72].

The indictment of the Western model extends to a critique of its legal system, including its cardinal categories and structuring principles. The *summa divisio of* persons and things, the right of ownership, and the principle of sovereignty over natural resources are the systematic targets[73]. Several authors consider that the categorisation of nature as a mere thing and the granting of powerful individual rights of appropriation, including destruction, have opened the way to a liberal economy driven by an unrestricted extractive logic. For nature's rights advocates, "*the structure of Law that treats Nature as an object separate to us*" is therefore "*the root of the* problem"[74].

Clearly, the construction of environmental law in such a scheme has been and is akin to a Herculean construction site or for others to the tragic myth of Sisyphus. "*Environmental Law in its current form can slow the rate of degeneration but it can never be regenerative because it comes from the same paradigm that causes the degenerative cycle in the first* place"[75]. This radical statement by promoters of the rights of nature theory can hardly leave anyone indifferent. It is certainly important not to minimise the weaknesses of environmental law, including in the European Union. They are regularly highlighted. The complex tree structure of this law and its spatial and temporal scales of expression offer a profuse and disordered vision that is difficult to understand, and even questionable. Several commentators criticise this "*baroque edifice*"[76] for its reactive and fragmented nature; this siloed sedimentation still exists, but the reason for these sectoral approaches and the gradual deployment of integrated environmental protection mechanisms should not be forgotten. Moreover, to claim that environmental law "*misjudges the complex and circular structure of ecosystem and climate dynamics*"[77] by even describing it as *eco-illiterate*[78] ultimately weakens the robustness of the demonstration, the undesirable effects of which should not be overlooked against the authority of this law, which is already exposed to the risks of regression. Obviously, it is essential to highlight the flaws in this law, whose matrix is rooted in an anthropocentric vision; but to summarise it in this way would be to disregard the consecration of the principle of ecological solidarity, of ecological damage, or even of the principle of non-regression in legal systems such as French law[79].

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[72] M-P CAMPROUX-DUFFRENE and V. JAWORSKI, *Des changements de paradigme juridique pour un droit de l'environnement rénové*, report to the Green Group in the European Parliament, May 2021, 58 p. W. KUHLMANN, Making the Law more ecocentric: responding to Leopold and conservation biology, *Duke Environmental Law & Policy Forum*, 1996, 133-166. This injunction for an "*eco-centric turn*" is systematically put forward by promoters and sympathisers of the rights of nature, for example: P. BURDON, *Exploring Wild Law: the philosophy of Earth Jurisprudence*, Wakefield Press 2011, 357 p. I. MUNTA, Nature's rights: why the European Union needs a paradigm shift in Law to achieve its 2050 vision, *Revista Argumentum*, 2020, Vol. 21, n°3, 1473-1504, H. SCHOUKENS, Rights of Nature in the European Union: contemplating the operationalization of an Eco-centric Concept, in an Anthropocentric Environment, in *"Non-Human Nature in World Politics*", J CASTRO PEREIRA & A. SARAMAGO (eds), Springer, 2020, 352 p. M. TANASESCU, *Understanding the Rights of Nature: a critical introduction*, Ed. Verlag, 2022, 168 p.

[73] *Towards an EU Charter of the Fundamental Rights of Nature,* EESC, 2020*, op. cit.*

[74] *Towards an EU Charter of the Fundamental Rights of Nature,* 2020*, op. cit.*

[75] *Towards an EU Charter of the Fundamental Rights of Nature,* 2020*, op. cit.*

[76] J. UNTERMAIER, *Le droit de l'environnement, réflexions pour un premier bilan*, *Année de l'environnement*, PUF, vol 1, 1980.

[77] *Towards an EU Charter of the Fundamental Rights of Nature (2020), op. cit.*

[78] *Towards an EU Charter of the Fundamental Rights of Nature (2020), precised by* K. HOVDEN, The Best is not enough: ecological (Il) literacy and the Rights of Nature in the European Union, *Journal for European Environmental & Planning Law* (2018).

[79] The 2016/1087 law for the reconquest of biodiversity, nature and landscapes is the source of notable principled advances with the enshrinement of the principle of non-regression and the principle of solidarity in Article 110-1 of the Environmental Code and ecological damage and its reparation in Articles 1246 to 1252 of the Civil Code; we will come back to this.

Moreover, the main pitfalls of environmental law are rooted in the DNA of the current economic system[80] protected by other branches of law, which at best internalises external ecological costs in a logic of complete or limited substitutability of the three forms of capital (economic, social, natural)[81].

Although the law recognises environmental protection as an objective of general interest and/or an "*objective of constitutional value*"[82], the balance of interests and the "*conciliation/reasonable compromise*"[83] between the components of the general interest or between individual rights and freedoms and the said objectives remains a test far from favourable to the environment. Environmental lawyers from all schools of thought agree on this point and call for a rethink of these conflict resolution methods. These imbalances in the weighing of interests result in very heterogeneous processes for integrating environmental requirements, depending on the branches of law and the host policies. These situations of environmental incoherence[84] or minimalist or incomplete integration have long been deplored and have been one of the major sources of the emergencies we are now experiencing. In addition to this, the effectiveness of environmental law has been severely hampered, giving rise to numerous criticisms[85] beyond its contentious expression. The many difficulties in implementing this law justify seeking strategic solutions to overcome them. In response to these challenges to the greening of law, the promoters of the theory of the rights of nature argue for a generalised recognition of the rights of nature in legal systems (C).

[80] In 2009 the economist T. JACKSON stressed that, "*the most vital task (...) is the need to confront the ecologically illiterate macroeconomics according to which structural stability is achieved only through continued consumption growth" in* Beyond the Growth Economy, *Journal of Industrial Ecology*, vol.13, n°4, 2009 p 487-490.

[81] C. LEJEUNE & C. GUIMONT (dir.), *Dossier " Regards disciplinaires et perspectives critiques sur la durabilité forte en sciences humaines et sociales* " in *Revue Développement durable & territoire*, vol.10, n°1, April 2019.

[82] In France: decision n°2019-823 of the Constitutional Council of 31/1/2020, *Union des industries de la protection des plantes, Question prioritaire de Constitutionnalité*. In EU law, the CJEC deduced from the interpretation of the EEC Treaty the existence of an environmental objective of general interest of the EC in 1985 (CJEC of 7/2/1985, Prosecutor v. Association of defense of used oil burners, case (aff.) 240/83, Coll. 1985 p 531.

[83] In EU law, these two expressions are used by the Advocates General and the CJEU to overcome contradictions of objectives with all the complexity that this implies.

[84] S. CAUDAL, *La protection intégrée de l'environnement en droit public français,* Thesis 1993, University of Lyon 3. C-M ALVES, *La protection intégrée de l'environnement en droit communautaire*, Thèse 2002 Bordeaux, N.M.L DHONT, *Integration of environmental protection into other EC Policies, legal theory and practice*, 2003, Europa Law Publishing, N. HERVE-FOURNEREAU, *Le concept de cohérence environnementale au service d'une dynamique communautaire d'intégration*, *in " La dynamique de la démarche communautaire dans la construction européenne "*, (dir. F HERVOUET), Documentation française, 2002, vol 2, p. 31-56. *La conditionnalité environnementale dans les politiques de l'Union européenne*, F. FINES & H. DELZANGLES (dir), Bruylant 2019, 188 p. *L'environnementalisation du droit*, studies in honour of S. CAUDAL, C. ROUX (dir), Fondation de Varenne/IFJD, 2020, 336 p.

[85] This phenomenon has been studied for a long time and is the subject of numerous analyses. J. WERKSMAN, J. CAMERON, P. RODERICK, Improving compliance with international environmental law, Routledge, 1996, 360 p. J. 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 2012 Université de Limoges. S. MALJEAN-DUBOIS, *The effectiveness of Environmental Law*, Ed. Intersentia, 2017, 348 p. L. SQUINTANI, *Addressing the (lack of) effectiveness of environmental Law and the Gap between Law in the Books and Law in Action*, Journal for Environmental & Planning Law, 17, 2020, 133-135. M. PRIEUR, C. BASTIN, A. MEKOUAR, *Measuring the Effectiveness of Environmental Law,* Peter Lang, 2021, 268 p.

C - The plural dynamics of recognition of the rights of nature

"Is the world finally STONE?"[86] asks Victor DAVID. Of course, STONE like Christopher STONE, who proposed in 1972 to recognize legal rights to trees and other natural entities to sue[87] and not stone as in the emblematic song "*Le monde est stone*" from *Starmania*, a dystopian rock opera from 1979. Would *a world finally STONE* be the cure for a world that has become stoned and totalitarian in which Zero Janvier, a candidate for the Presidency of the West, promised that when "*we have emptied the bottom of the seas, we will be ready to live somewhere other than on earth, our next capital will be a space station*"[88].

Since the major plea of Christopher Stone, an American jurist specialising in property law, the consecration of the rights of nature has been part of multiple spatio-temporal dynamics. Since 2006, there has been a diversification of discussion forums and an accelerated process of recognition in several legal systems. Debates are no longer confined to the doctrinal sphere. They are now expressed in several associative, indigenous, political and legal forums where the circulation of ideas transcends borders. The multiplication of scientific publications[89] illustrates the enthusiasm and curiosity while fuelling legal controversies.

The transnational mobilisation of associative movements promoting the rights of nature[90] favours the politicisation of the issues at stake, such as the institution of the UN programme Harmony with Nature in 2009. Several representatives of indigenous communities are joining forces to strengthen the defence of their cultural and political identities, based on the 2007 UN Declaration on the Rights of Indigenous Peoples. Philippe DESCOLA deciphers these alliances, which reflect a "*syncretism established through an intellectual complicity between clear-sighted indigenous leaders who understand the workings of the Western world and Latin American, then European and North American activists*"[91]. He thus highlights the strategic use by indigenous peoples of "*concepts such as nature, mother forest or cosmic harmony that do not exist in their language but which speak to their addresses*"[92] of the Western world. The legal recognition of the rights of the Pachamama in Ecuador (2008)[93] and Bolivia (2010)[94], of nature in Panama (2022)[95] the Ganges River and its main tributary Yamuna (2017)[96], the Whanganui River in New Zealand

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[86] V. DAVID, *La lente consécration de la nature, sujet de droit*. Is the world finally Stone, *RJE*, 2012, vol. 37, 469-485.
[87] C. STONE, Should Trees have Standing? Towards Legal Rights for Natural Objects, *Southern California Law Review*, 1972, 45, 450-501. This analysis (52 p.) is set in the context of the Sierra Club's opposition to Walt Disney's 1890 ski resort project in Sequoia National Park; translation in "*Should Trees have Standing? Vers la reconnaissance de droits juridiques aux objets naturels"*, Ed. Passage clandestin, 2017, Preface Catherine LARRERE, 130 p.
[88] "Election speech', Rock Starmania opera, https://www.frmusique.ru/texts/s/starmania88/discourselectoral.htm
[89] There are many references, as illustrated by the annotated bibliography of this report and the bibliographic inventory of the two studies on the subject carried out for the EESC (2020) and the EP's JURI Committee (2021). D. BOYD, *The Rights of Nature: A Legal Revolution that could save the World*, 2017, op. *cit.* C. M. KAUFFMAN & P. L MARTIN, *The Politics of Rights of Nature: Strategies for Building a more Sustainable Future*, The MIT Press 2021, 274 pp. D. P. CORRIGAN & M. OKSANEN (eds), *Rights of Nature: a re-examination*, Routlege 2021, 209 p. *Les droits de la Nature: vers un nouveau paradigm de protection du vivant*, *Notre affaire à tous*, Ed. Pommier, 2022, 456 p. P. BURDON (ed), *Exploring Wild Law*, Waterfield Press 2012. C. CULLINAN, *Wild Law: Protecting Biological and Cultural Diversity*, Green Book, 2003, 240 p.; including French translations of key works in the rights of nature movement such as T. BERRY, *Le rêve de la terre*, Ed. Novalis 2021, 348 p.,
[90] Like the Global Alliance for the Rights of Nature (2010, a coalition of organisations and individuals in 99 countries, with a European Hub to be created in 2019) and its Nature Rights Tribunal (https://www.garn.org), the French association NatureRights (2009, linked to the Belgian-based Nature Rights Foundation) http://naturerights.com/divers/2019-2018_RapportNR_complete.pdf.
[91] P. DESCOLA, La composition des mondes, 2017, *prec.*
[92] *Ibid*. Native American nations are seizing on the rights of nature and incorporating them into their legal systems to counter resource exploitation projects (Ho-Chunk Tribal Constitution (Wisconsin) amended in 2016, Ponca (Oklahoma), Chippewa (Minnesota) (...). https://www.ejatlas.org/conflict/ho-chunk-tribal, https://www.garn.org/ponca-rights-of-nature/
[93] Ecuadorian Constitution of October 2008, of which several provisions (preamble and several articles, of which chapter 7 concerns the rights of nature recognised to the Pacha Mana). https://vlex.ec/vid/constitucion-republica-ecuador-631446215
[94] Law no. 71 of 21/3/2010 on the rights of the motherland, http://www.gacetaoficialdebolivia.gob.bo/normas/buscar/71
[95] Law 287/2022 of 24/2/2022 recognising the rights of nature and the obligations of the State in relation to these rights, Official Gazette no. 29484-A of 24/2/2022.
[96] High Court of Uttarakhand at Nainital Mohd, Salim *vs.* State of Uttarakhand & others, Writ Petition No. 126 of 2014, March 2017

(2017)[97] or the Atrato River in Colombia (2016)[98] are emblematic examples of these concordances of interests rooted in complex historical and present-day narratives[99].

The rights of nature movement is not monochrome; it presents a varied palette of nuances and schools of thought[100] . This diversity offers a necessary richness in terms of the adaptability of actions to the reality of the groups and their needs. It also encourages the emergence of links with other currents, including animal rights[101]. *On the other hand,* this diversity results in demonstrations whose conceptual foundations diverge and give rise to misunderstandings and strong reservations, particularly within European doctrine. The recognition of the intrinsic value of nature and our interdependence with it constitutes a common basis for the reflections of environmental lawyers beyond the promoters of the theory of the rights of nature; on the other hand, this is not the case for the legal consequences that follow from it according to the schools of thought, including at the heart of the movement of the rights of nature.

The jusnaturalist inspiration of an Earth jurisprudence[102] advocated by the American theologian Thomas BERRY is one of the influential currents in the theory of the rights of nature. He defends the idea that the planet and all species have rights "*by virtue of their existence as component members of a single Earth community*"[103]. A key figure in this line of thought, South African lawyer Cormac CULLINAN[104] actively contributed to the drafting of the 2010 Universal Declaration of the Rights of Mother Earth[105] and to the formation of the associative entity of the International Tribunal for the Rights of Nature in 2015[106]. This representation of a "*Great* Law"[107] overhanging human rights is reflected in several studies, including one commissioned by the EESC[108]. In this case, they advocate the need to "*realign our human laws with the rest of Nature ensuring that all our systems operate in harmony to produce the desired result of a healthy Earth system that supports all life, including human life (...) that see the human as one species in a radically interconnected web of* life"[109].

Christopher STONE's demonstration is based on a different epistem and favours a logic of legal operationality. His proposal that the authorities grant "*legal rights*"[110] to natural entities is essentially a response to the inadequacy of jurisdictional protection of the environment (standing and compensation for ecological damage). He expressed his desire to inspire the US Supreme Court *in concreto* in the dispute between the Sierra Club Association and Walt Disney over a proposed ski resort in Mineral King

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[97] Whanganui River Act 7 of 20/3/2017 -Te Awa Tupua Whanganui River Claims Settlements Act 2017, https://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html

[98] Constitutional Court of 10/11/2016, T-622/2016, https://www.corteconstitucional.gov.co/relatoria/2016/t-622-16.htm

[99] In particular for indigenous communities, descendants of slaves and mixed-race communities in these territories.

[100] See the annotated bibliography of this report and those of the studies *Towards an EU Charter of the Fundamental Rights of Nature (EESC 2020)* and *Rights on Nature in the European context* (2021 PE JURI Committee).

[101] J-P. MARGUENAUD, *La personnalité juridique des animaux*, Recueil Dalloz 1998, p 205*; L'animal sujet de droit ou la modernité d'une vieille idée* by R. DEMOGUE, Revue Trimestrielle de Droit civil (RTD.civ), 2021, 591. A. PELIZZON & M. GAGLIANAO, The sentience of Plants: Animal rights and rights of Nature intersecting, *Australian Animal Protection Law Journal*, 2015, vol. 11, 5-11.

[102] P. BURDON, Earth Jurisprudence: Private Property and Earth Community, Thesis of Philosophy, University of Adelaide 2011, P. BURDON (ed), *Exploring Wild Law: the philosophy of Earth Jurisprudence*, Wakefield Press, 2011, 368 p.

[103] T. BERRY (2001) quoted by D. C. WAHL, *Designing regenerative cultures*, Triachy Press, 2016, 288 p.

[104] C. CULLINAN, *Wild Law: A manifesto for Earth Justice*, Green Books, 2003, 224 p; 2nd Ed. 2011.

[105] Presented at the Peoples' World Climate Change Conference in April 2010 in Bolivia http://rio20.net/fr/propuestas/declaration-universelle-des-droits-de-la-terre-mere/

[106] Since its establishment by the World Alliance for the Rights of Nature (statute adopted in 2015), several hearings have been organised in different countries, including with European cases (Sessions 2021: European Tribunal in defence of aquatic ecosystems). https://www.rightsofnaturetribunal.org/about-us/?lang=fr

[107] P. BURDON, A theory of Earth Jurisprudence, *Australian Journal of Legal Philosophy*, 2012, 37, 28-60. Thomas BERRY*, The Great Work: our way into the Future*, Random House, 2000, 256 p.

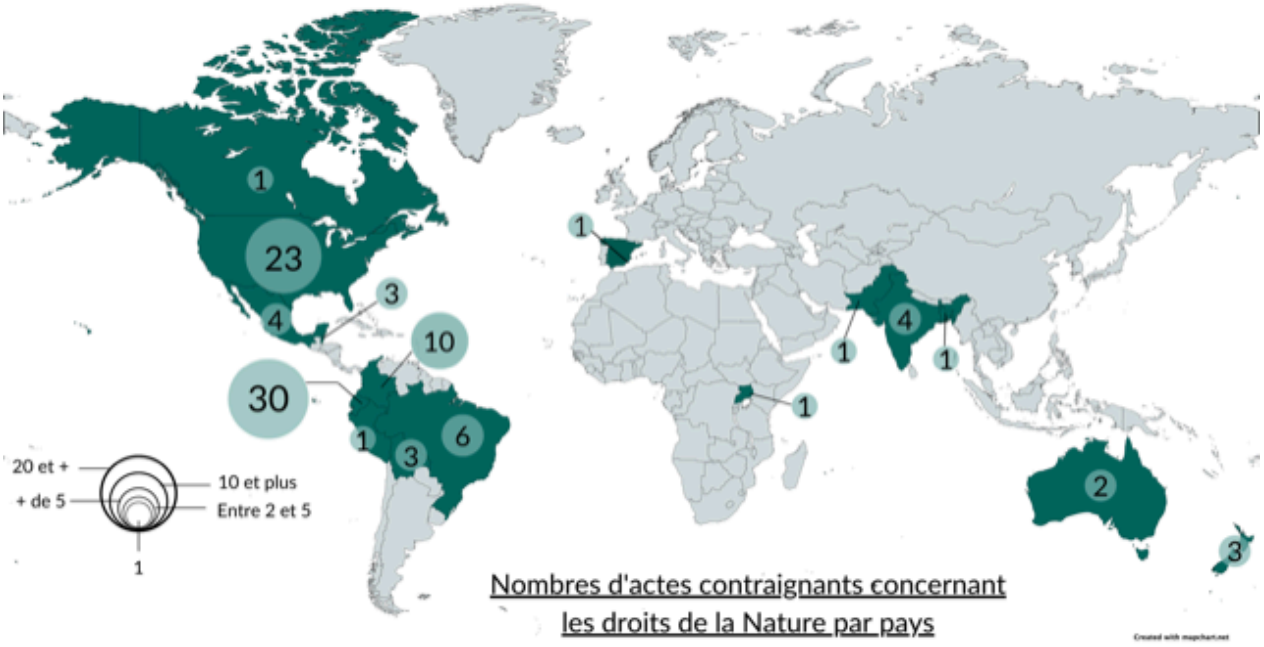
[108] Including the one on the draft European Charter on the Rights of Nature (EESC 2020), op. *cit.*

[109] Draft European Charter on the Rights of Nature (EESC 2020), *prec*

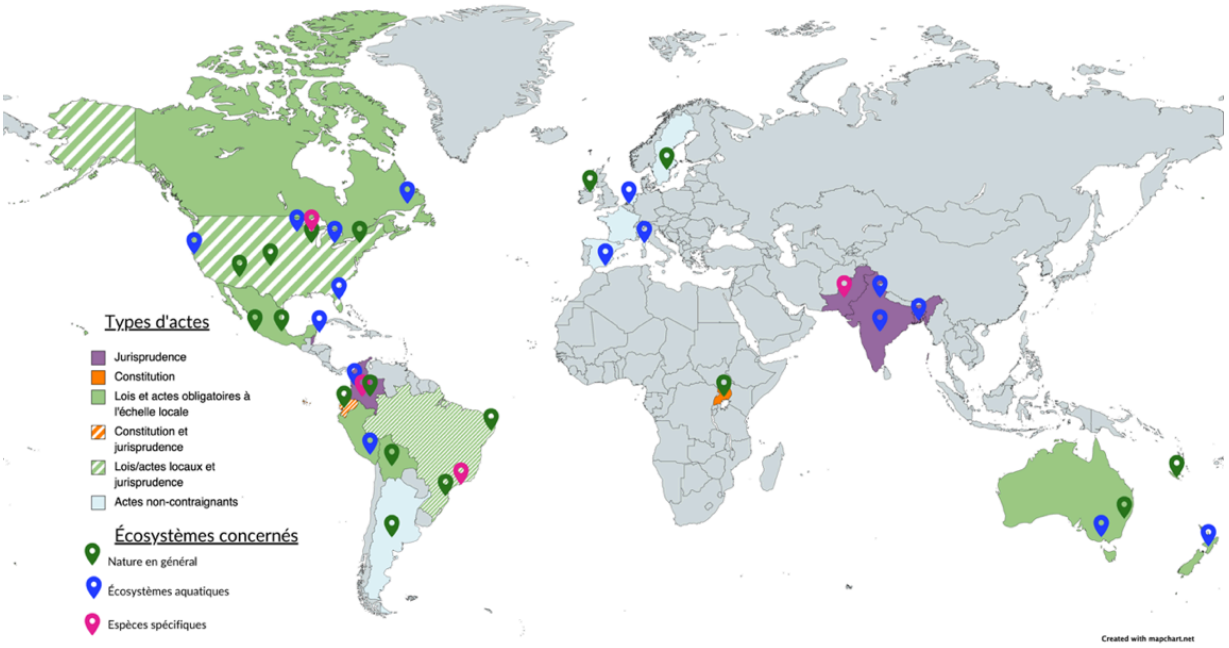
[110] In the sense of rights established by a competent legal authority: C. STONE, Should Trees have Standing? Towards Legal Rights for Natural Objects, *Southern California Law Review*, 1972, *supra*.

Valley in Sequoia National Park. Although the Court remained unmoved by this interpretation[111], this was not the case, in particular, of Justice DOUGLAS[112] who, in his minority opinion, adopted the reasoning of jurist STONE. Several other researchers extended these reflections by basing themselves on a technical conception of the legal operation consisting in recognising the quality of legal subject to natural entities and rights adapted to their singularities[113].

Under the combined impetus of these doctrinal proposals and the dynamism of associations and indigenous peoples, the recognition of the rights of nature has taken concrete form in several national legal systems. The UN Harmony with Nature programme regularly updates the inventory of forums, legal norms (Constitution, Laws, jurisprudence, municipal ordinances...) and other political declarations on the rights of nature. This frieze and the attached maps[114] illustrate this expansion, which is cautiously reaching the European continent with the recent adoption of the Spanish law on the Mar Menor lagoon in September 2022[115]. According to the data, nearly thirty countries are concerned with diverse translations, from simple declarations by public and/or private authorities to binding legal norms[116].



[111] US. Supreme Court, Sierra Club v. Morton, 405 US 72, April 19, 1972, https://supreme.justia.com/cases/federal/us/405/727/
[112] C. STONE underlines the environmental sensitivity of this judge ("*Mr. Justice DOUGLAS, our jurist most closely associated with conservation sympathies in his private life*"). C. STONE, Should Trees have Standing? Towards Legal Rights for Natural Objects, op. *cit.*
[113] B. EDELMAN and M-A. HERMITTE (eds), *Man, Nature and the Law*, Ed. Bourgeois, 1988. M-A HERMITTE, *Nature, sujet de droit ? Annales, Histoire, Sciences sociales*, 2011/1, 66th year, 173-212. S. GUTWIRTH, *Penser le statut juridique des animaux avec J-P. MARGUENAUD et R. DEMOGUE : Plaidoyer pour la technique juridique de la personnalité*, *RJE*, 2015/1, Vol. 40, 67-72,
[114] Prepared by Nina SALAÜN for this report as part of this report in 2021/2022.
[115] We will come back to this in detail.
[116] http://www.harmonywithnatureun.org/rightsOfNature/



Like the doctrinal proposals, these processes of recognition of the rights of nature are based on plural epistemological foundations confirming the influence of the historical, legal and societal context. Several authors have analysed the sources of inspiration and reasoning of the Ecuadorian Constituent, Bolivian and New Zealand legislators, judges and the various actors involved[117]. Following the example of Pierre BRUNET, who deciphered the emblematic Colombian[118] and Indian[119] rulings, they underline the absence of "*common foundations for one to speak of a transnational model*"[120]. Similarly, the diversity of the purposes underlying the recognition of these rights and/or the legal personality of nature or the natural entity[121] is highlighted.

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[117] C. CLÉMENT de COLOMBIERES, *Towards the recognition and implementation of rights of Nature in the European Union? Lessons learned from the legislative experiences of Ecuador, Bolivia and New Zealand*, Master's Thesis, University of Eastern Finland 2020, 85 p. (https://erepo.uef.fi/handle/123456789/23637). C. M. KAUFMANN & L. SHEEHAN, The rights of Nature: guiding our responsibilities through standards, in *Environmental Rights, the development of Standards*, S.J. TURNER, D. L. SHELTON, J. RAZZAQUE, O. Mc INTYRRE, J. R. MAY, Cambridge, 2019, pp 342-366. V. DAVID, The new wave of nature's rights. *La personnalité juridique reconnue aux fleuves Whanganui, Gange et Yamuna*, *RJE* 2017/3, Vol. 42, 409-424.

[118] Colombian Supreme Court T-622/2016 (Atrato River), cited above. Supreme Court of Colombia, STC4360-2018 (Colombian Amazon) https://cortesuprema.gov.co/corte/wp-content/uploads/2018/04/STC4360-2018-2018-00319-011.pdf. In both judgments, the Court relies on the concept of so-called biocultural rights '*which result from the recognition of the deep and intrinsic link between nature, its resources and the culture of the ethnic and indigenous communities that inhabit them, which are interdependent and cannot be understood in isolation*'

[119]Hight Court of Uttarakhand, Mohd Salim v. State of Uttarakhand & others, Writ Petition (PIL) No. 126 of 2014, March 20, 2017 (Rivers Ganges and Yamuna) https://elaw.org/system/files/attachments/publicresource/in_Salim__riverpersonhood_2017.pdf, Hight Court of Uttarakhand, Lalit Miglani v. State of Uttarakhand & others, Writ Petition (PIL) No. 140 of 2015, March 20, 2017 (Gangotri & Yamunotri Glaciers), http://www.indiaenvironmentportal.org.in/content/441278/order-of-the-uttarakhand-high-court-regarding-glaciers-rivers-streams-forests-grasslands-having-the-status-of-a-legal-person-living-entity-in-the-state-of-uttarakhand-30032017/. The Supreme Court stayed both judgments in view of the *ratio spatio* jurisdiction of the judges. Erin L O'DONNELL, At the intersection of the sacred and the legal rights for Nature in Uttarakhand, *Journal of Environmental Law*, Vol. 30, 135-144.

[120] P. BRUNET, The ecology of judges. *La personnalité juridique des entités naturelles (Nouvelle Zélande, Inde, Colombie)* in *Droit constitutionnel de l'environnement : regards croisés*, M-A. COHENDET (ed), Ed. Mare & Martin, 2021, 303-325.

[121] Ecuadorian Constitution 2008: nature or Pacha Mama "*is the object of rights that the constitution recognises*" (Article 10) https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html. The Bolivian Law on the Rights of Mother Earth states that "*Mother Earth adopts the character of a collective subject of public interest*" (free translation)

This *juris-diversity* is reflected in the choice of recognised rights (substantive[122] and/or procedural[123]) and beneficiary entities (*Pacha Mama*[124], aquatic ecosystems[125], other natural entities (...)[126]. It reveals different interpretations of the structuring concepts of legal subject, legal personality and subjective rights.

Notwithstanding their recent dynamics, these processes remain incomplete, including in the host legal systems. Only the Ecuadorian Constitution expressly recognises rights to Mother Earth, but their effectiveness remains open to question. Similarly, simple laws, however emblematic they may be, are not immune to contradictions or challenges, as illustrated by the Bolivian example and the power of mining interests. Finally, although judges have a decisive interpretative function, their judgments are only one of the bricks in the construction. Ludwig KRAMER rightly points out that "*Court decisions on the right of nature can help raising awareness, but are limited in causing themselves a shift in policies towards the realisation of these long-term* objectives"[127]. Moreover, the boldness of certain judges can also be assessed in the light of the caution of other courts[128].

Similarly, studies on the consequences of the Colombian Constitutional Court's ruling recognising the legal personality of the Atrato River show mixed results[129]. The adoption of the action plans on illegal mining, ecological damage repair and environmental restoration required by the Court, has been delayed due to the strong difficulties linked to the socio-economic context of the territory. Nevertheless, the analyses underline the importance of the river guardians appointed by the Court for the collective construction of these plans based on dialogue between the communities and the local and ministerial authorities[130]. In view of these initial contrasting results, Philipp WESCHE invites the promoters of the rights of nature theory to be '*humble in their expectations with respect to the impacts of this approach on environmental protection in weak governance settings*'[131]. From this he deduces, in view of the shortcomings of the Colombian legal system, that improving environmental protection "*in such a setting*

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[122] Example: Right to exist, right to maintenance and regeneration of life cycles, right to restoration. The Ecuadorian Constitution (Title 2 on Rights - Chapter 7 on the rights of nature: the right to full respect for its existence and to the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes (art. 71), the right to be restored (art. 72). Law no. 71 of 21/3/2010 on the rights of mother earth sets out several rights while specifying that this list does not "*limit the existence of other rights*": right to life (integrity of life systems and natural processes, capacities and conditions necessary for their regeneration, right to diversity, right to water, to clean air, to balance, to restoration, to live without pollution.

[123] Right to participation (including being represented by its designated guardians), right to sue (...).

[124] Ecuadorian Constitution 2008, Bolivian Law on the Rights of Mother Earth (defined as "*a dynamic living system consisting of the indivisible community of all life systems and living beings, interrelated, interdependent and complementary, sharing a common destiny*. (free translation)

[125] Rivers (Atrato Colombian Constitutional Court 2016, Ganges & Yamuni High Court of Uttarakhand (2017), Whanganui New Zealand Law (2017). Bangladesh High Court (2019) recognises the Turag River as a '*legal entity*' like all other rivers (Human Rights and Peace for Bangladesh and others v. Secretary of the Ministry of Shipping and others, Writ Petition No. 13989) (...). Lagoons (Mar Menor Spanish Law 2022).

[126] Gangotri and Yamunotri Glaciers where the Ganges and Yamuna Rivers originate (India, Uttarakhand High Court 2017), Te Urewera Nature Park (New Zealand, Te Urewera Act 2014 No. 51 https://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html), the Manoomin wild rice of the White Earth territory where the Obibwe community lives (Chippewa American Indian Nation of Minnesota USA): 2018 Rights of Manoomin Tribal Law, action in the White Earth Tribal Court: Manoomin v. Minnesota Department of Natural resources to oppose the issuance of a water withdrawal permit, August 2021); https://www.centerforenvironmentalrights.org/rights-of-manoomin

[127] L. KRÄMER, Rights of Nature and their implementation, *Journal for European Environmental Policy & Law*, 2020, prec.

[128] In his thesis on *the theoretical analysis of the legal status of Nature* (2018 Université d'Aix Marseille, 597 p), P. MILLION cites Justice JAFFE of the Supreme Court of the State of New York (Non-human Rights Project inc. v. Stanley NY Slip Op 25257-2015, Hercules and Leo monkeys), who considers that *the question of granting fundamental rights to animals* is a *political issue to be settled by the representatives of the citizens, the Congress*. Several US community ordinances recognising rights to nature have been challenged in court, some of which have been struck down as unconstitutional (Mora County, Grant Township and the City of Toledo (Bill of rights of the Lake Erie: Federal Court February 2020: https://nationalaglawcenter.org/turning-the-tides-judge-finds-lake-erie-bill-of-rights-unconstitutional/

[129] See in particular P. WESCHE, Rights of Nature in practice: a case study on the impacts of the Colombian Atrato River decision, *Journal of Environmental Law*, 2021, 33, 531-556.

[130] He reminds us that the riparian communities (indigenous people, mestizo farmers, African descendants, etc.) of the river are rarely involved in the governance of their territory. Other authors show the importance of governance that makes it possible to link "*the diversity of people who have one thing in common: being riparians, an identity based on the relationship with the river*": D. CAGUENAS, M. I. GALINDO ORREGO, S. RASMUSSEN, El Atrato y sus guardianes: imaginacion ecopolitica para hilar nuevos derechos ", *Revista colombiana de anthropologia*, Vol. 56, n°2, 2020, 169-196.

[131] P. WESCHE, Rights of Nature in practice: a case study on the impacts of the Colombian Atrato River decision, op. *cit.*

requires much more than awarding legal rights to a natural entity in a courtroom"[132]. Craig M. KAUFFMAN & Pamela L. MARTIN also show the obstacles encountered in respecting the constitutional rights of Mother Earth in Ecuador due to the insufficiency of operational legislation, while highlighting the role of judges who are gradually becoming aware of ecological issues and emergencies[133].

As the dynamics of the recognition of the rights of nature in several legal systems continue, several researchers are questioning and even challenging their radical transformative ambitions. Christopher STONE's proposal had already caused turbulence in the doctrinal arena, but the current situation has a completely different resonance and scope. From utopian vision to legal reality, various authors show the inconsistencies and undesirable boomerang effects of the legal recognition of the rights of nature. The current active mobilisation of the rights of nature movement on the European continent is leading to an amplified reactivation of controversies and doctrinal disputes (D).

D- Rights of nature at the heart of lively doctrinal disputes

The title of a publication is rarely neutral when researchers wish to attract attention and challenge each other on a sensitive issue. The article "*Rights of Nature: Why it might not save the entire world?*"[134] by Julien BETAILLE, in response to the title of David BOYD's book *"The rights of Nature: a legal revolution that could save the world"*[135], is in line with the doctrinal jousting that has marked out the processes of recognising the rights of nature. "*Legal rights for Nature: the wrong answer to the right(s) question?", "Where Nature's rights go wrong?"*[136]*, "The rights of Nature: saving the planet or harmful to humanity?"*[137]*.* The theory of rights to nature questions, seduces and divides, as do the still lively discussions on the legal personification of the animal[138].

> *"A temptation to be rejected"*[139]*, "A useless debate? "*[140]*, "the mirages of personification"*[141]*, "granting rights to nature is illusory"*[142]*, "no entity in nature can be elevated to the status of a legal subject"*[143]*, "somehow, the academic debate about Rights of Nature is a lack of time"*[144]*,*

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[132] P. WESCHE, Rights of Nature in practice: a case study on the impacts of the Colombian Atrato River decision, *supra*. Other analyses of environmental protection in Colombia put the added value of these jurisprudential recognitions on the improvement of the legal protection of nature into perspective: D.C. GUALDRON-TOLOSA, "*Les conflits d'usage liés à l'implantation des énergies renouvelables en Colombie, étude juridique à la lumière du droit français*" Thèse Nantes 2022, 402 p.

[133] The authors analysed 13 cases, 6 of which were brought by public authorities (all of which were successful). C. M. KAUFFMAN & P. L. MARTIN, Can Rights of Nature make Development more Sustainable? Why some Ecuadorian Lawsuits Succeed and others Fail" *World Development*, Vol. 92, 2017, 130-142. L. J. KOTZÉ & P. VILLAVICENCIO CALZADILLA, Somewhere between Rhetoric and Reality: environmental constitutionalism and the rights of nature in Ecuador, *Transnational Environmental Law*, vol.6, issue 3, 2017, 401-433.

[134] J. BÉTAILLE, Rights of Nature: why it might not save the entire world, *Journal for European Environmental & Planning* Law, 2019, 16 (1), 35-64.

[135] D R. BOYD, *Rights of Nature, a legal revolution that could save the world*, ECW 2017, 272 pp. Since 2018, David Boyd has been the United Nations Special Rapporteur on Human Rights and the Environment.

[136] M. GUIM, Where Nature's Rights go Wrong, *Virginia Law & Economics* 2021, vol. 107, issue 7, 1347-1420

[137] Title of the October 2021 debate (Gonzaga University) between American lawyers T. LINZEY (Center for climate, society and the environment) & W. J. SMITH (Discovery Institute) https://www.centerforenvironmentalrights.org/news/debate-the-rights-of-nature-saving-the-planet-or-harmful-to-humanity-recording-available-now

[138] For example, in French civil law doctrine, see the response of J-P. MARGUENAUD*, L'animal sujet de droit ou la modernité d'une vieille idée* by René DEMOGUE (*Revue Trimestrielle de Droit Civil* 2021, 591-606) to G. LARDEUX, Humanity, personality, animality (Revue Trimestrielle de Droit Civil 2021, 573-590).

[139] A-M. SOHM-BOURGEOIS, *La personnification de l'animal : une tentation à repousser, Recueil Dalloz*, 1990, 33-.

[140] F. CHENEDÉ, *La personnification de l'animal : un débat inutile ?* Actualité Juridique, Famille, Dalloz 2012, 72-73.

[141] A. GAILLIARD*, Sacraliser la nature plutôt que la personnifier (ou les mirages de la personnification)*, *Recueil Dalloz* 2018, 2422-2423.

[142] Opinion column by L. NEYRET, *Le Monde*, March 2017.

[143] G. LARDEUX, Humanity, Personality, Animality", 2021, op. *cit.*

[144] J. BÉTAILLE, Rights of Nature: why it might not save the entire world, *prec.*

[145], "an absolute legal nonsense", "falsely simplifying and dangerous"[146], "the proponents of Rights of Nature do not succeed in showing that this is a paradigmatic shift in environmental regulation"[147].

These positions bear witness to the content of the disputes in which powerful conflicts of values, divergent legal reasoning and strategic postures are intertwined. Questioning the relevance of the classifications that structure the representation of the relationship between human beings and nature is not a simple question of legal mechanics. Rethinking, deconstructing, proposing a new architecture or expanding the *ratio materiae of* existing matrix categories is a sensitive, even epidermal exercise at the crossroads of academic knowledge, culture and emotional forces. This porosity of boundaries is perceptible in many jousts and pleas for the rights of nature, including in legal doctrine. The intertwining of these registers encourages misunderstandings and arguments that sometimes oscillate between exaggeration, shortcuts and oversights. The result is a certain uneasiness in the face of front lines that all the more justify clarification and calm discussions, including in the community of environmental lawyers[148].

The crisis of legal categories[149] is not a new phenomenon and resurfaces as a result of technological developments and the needs of society. The prospect of the institution of new categories or the extension of the *rationae personae* scope of existing matrix categories necessarily raises opposition and questions. In his eponymous article, Christopher STONE acknowledges that "*each successive extension of rights to some new entity has been, therefore, a bit unthinkable*"[150]. The recent enshrinement of the rights of nature and/or natural entities in several legal systems has reactivated the debate, particularly in European countries.

The purpose of this report is not to decipher in detail all the reasoning behind these doctrinal discussions, which will be illustrated by a number of quotations in order to better understand the issues at stake. However, their analysis sheds light on and guides the reflection on the rights of nature and EU law. Two main stumbling blocks fuel the discord and misunderstandings, confirming that not every comparison is a legal reason. In the background, they question the plasticity of the fictional character of the founding categories of law and their anchorage in the facts, values and needs of societies[151].

The robustness of the demonstration in favour of extending the category of legal person to nature and/or natural entities is thus contested (1). More classically, the problem of the articulation of legal rights and interests raises the question of the added value of the theory of the rights of nature in the resolution of conflicts (2).

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[145] L. de REDON, *in Deux regards sur la personnalité juridique de la nature*, Société française d'écologie, June 2020, https://sfecologie.org/regard/ro12-et-ro13-juin-2020-louis-de-redon-adelie-pomade/

[146] G. MARTIN, Can the tree be a victim? White paper "*Le droit prend-il vraiment en compte l'environnement*", Collège supérieur de Lyon, 2019, p 5-17; https://droit.collegesuperieur.com/lecteur-publications-droit/le-droit-prend-il-vraiment-en-compte-l-environnement.html

[147] J. DARPO author of the study *Rights on Nature in the European Context*, JURI Committee of the EP 2021, op. *cit.*

[148] In his article, J. BETAILLE specifies that his objective "*is not to raise a dispute in the environmental lawyers family but to offer a constructive criticism*", *in* Rights of Nature: why it might not save the entire world? *above*. A. ZABALZA, 'Parologisme des droits de la nature et personnification des communs environnementaux', *RJE*, 2023/HS22, volume 48, 427-429.

[149] M-A. HERMITTE, *Le droit est un autre monde, Revue Enquête*, 7/1999, 17-37. Y. THOMAS, *Le sujet de droit, la personne et la nature, sur la critique contemporaine du sujet de droit* ", *Le Débat*, 1998/3, n°100, 85-107. He stresses that "*the subjectivation of nature is symptomatic of a crisis, if not of the subject of law, at least of the understanding we have had of it*".

[150] C. STONE, Should Trees have Standing? Towards Legal Rights for Natural Objects, op. *cit.*

[151] J. SOHNLE, *Les droits de la nature face à l'urgence climatique, European Journal of Human Rights*, 2022/2, 154-169. The author considers that law as a fictional system is open to the personalisation of elements of nature.

1) The contested robustness of the demonstration in favour of extending the category of legal person to natural entities

Several authors call for '*extreme caution*'[152] against any new legal construction whose risks and benefits have not been assessed in a democratic manner. The epidermal nature of the disputes is commensurate with the nature of the legal categories that are rethought by the theory of the rights of nature. The concepts of juridical person, juridical personality, subject of law and the *summa divisio* of persons and things are definitely foundations of Western legal systems. Beyond mere fictions or legal mechanisms, they are powerful bearers of values and representations of living together and of otherness. "*Personality is a mirror in which concerns about the humanity of beings are reflected*"[153]. "At *a deeper level, it is a question of deciding what these realities should be for us*"[154]. The points of contention are mainly about the theoretical foundations of the recognition of rights to nature (a) and the plasticity of the concept of legal personhood (b).

a) Theoretical foundations of rights of nature hotly debated

For the radical current of the theory of the rights of nature, the interdependence of living beings inscribed in a biological continuum, their intrinsic value and "*the universal laws that govern all of* life"[155] constitute the basis for the recognition of the quality of nature as a legal subject. Rather than moving "away *from the human exceptionalism*"[156] , this jusnaturalist representation breaks down the boundaries established by legal systems between the human, the mere animal species, and the other species of mother nature. Though of a minority, this vision is denounced by several authors as a "*serious danger of suffocating humanity*"[157] and a *profound regression*[158].

Such criticisms are also expressed by nature and animal rights activists[159] who reason in law and advocate a broad understanding of the concepts of person, rights and interests. They call upon illustrious former jurists such as Rudolf VON JHERING[160], René DEMOGUE[161], Léon MICHOUD[162], Wesley Newcomb HOHFELD[163], John W. SALMOND[164] to support their interpretations in order to welcome new legal persons onto the legal scene. From the status of a mere thing, they are now instituted as legal persons and holders of rights. Is it "*convenient, in order to centralise desirable results, to consider even animals as subjects of law?*"[165] asked the French civil lawyer René DEMOGUE in 1909. Sharing the idea that "*the*

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[152] Following the example of G. *MARTIN L'arbre peut-il être une victime*, 2019, *préc*.
[153] R. LIBCHABER, *Réalité ou fiction ? Une nouvelle querelle de la personnalité est pour demain, RTD civ.* 2003, 166-.
[154] F. ROUVIERE, What is civil law today? *RTD Civ*. 2020, 538-545.
[155] *Towards an EU Charter of the Fundamental Rights of Nature*, EESC, op. *cit.* Without explicitly establishing a causal link between these universal laws governing life and the recognition of rights to nature, this formulation may lead to controversial interpretations.
[156] H. SCHOUKENS, Rights of Nature in the European Union: contemplating the operationalisation of an eco-centric concept in Anthropocentric Environment? 2020, op. *cit.*
[157] *Dictionnaire de la culture juridique,* (dir : Denis ALLAND & Stéphane RIALS), Ed. Quadrige Lamy-PUF, 2003, 1649 p, p 59-63 : Animal written by J-P. MARGUENAUD, the author rejects the recognition of a legal personality for animals which would be comparable to that conferred on human physical persons.
[158] G. MARTIN *L'arbre peut-il être une victime*? *prec*. M. DELMAS-MARTY, *Humanité, espèce humaine et droit pénal, Revue de Science criminelle et de droit pénal comparé,* 2012/3, 495-503.
[159] J-P. MARGUENAUD, *L'animal sujet de droit ou la modernité d'une vieille idée* de René DEMOGUE, RTD Civ. 2021, prec. M-A HERMITTE, *La nature, sujet de droit ? Annales Histoire Sciences sociales*, n° 1/2011, 173-212.
[160] R. Von JHERING, *L'esprit du droit romain dans les diverses phases de son développement, tome IV*, Ed. A Maresq Paris, 3rd éd, 1880. From the same author: *La lutte pour le droit*, 1890 reprinted by Dalloz 2016, 178 p (presentation Olivier Jouanjan).
[161] R. DEMOGUE, *La notion de sujet de droit : caractère et conséquences*, RTD Civ, 1909, n°3, 45 p.
[162] L. MICHOUD, *La théorie de la personnalité morale,* 1906. Reprinted in "*La théorie de la personnalité morale et son application au droit français*", 2020, Ed. Panthéon-Assas, 560 p. This theory inspired the French Court of Cassation in 1954 in relation to works councils (Chambre civile, *Comité d'établissement de Saint-Chamond* 28/1/1954, 54-07.081)
[163] W.N. HOHFELD, Fundamental legal conceptions as applied in judicial Reasoning, Yale Law Journal, 1913 (vol. 23, 16-59) & 1917 (vol. 26, 710-770).
[164] Justice of the Supreme Court of New Zealand at the beginning of the 20th; in their article "Can personhood protect the environment? PAIN & R. PEPPER point out that Sir John W. SALMOND "*conceived of the juristic person as an entity, whether real or imaginary to whom personality has been attributed by way of fiction such as corporation or trust". Fordham International Law Journal 2021*, Vol.45, issue 2, 315-377.
[165] R. DEMOGUE, *La notion de sujet de droit: caractère et conséquences*, *prec*.

subject of the law is the person to whom the law is intended to be useful, the recipient and the mission of the law ... to guarantee this usefulness"[166], René DEMOGUE considered that "the *quality of subject of the law belongs to the interests that men living in society recognise as sufficiently important to protect them by the technical process of personality*"[167]. Described as purely technical, the concept of legal personality appears to be a point of imputation of legal rules whose "*essential substratum is the protected interest*"[168]. Several defenders of the legal personality of nature and/or natural entities construct their demonstration in line with this conception while drawing inspiration from Léon MICHOUD's 1906 work on the recognition of legal persons[169].

Even if René DEMOGUE invited the '*legislator' not to* '*ignore the abuses, the foolishness, the foolish vanities to which the theory of animals as legal subjects may lend itself*', some authors underline the risks of an exclusively technical conception of the category of legal person which would be '*purged of all scientific-naturalistic elements*'[170]. In particular, they point to the drifts of such an approach, which would open the field to a series of claims for future humans with enhanced performance or for entities endowed with artificial intelligence[171].

The various legal texts recognising the rights of nature and/or natural entities bear the imprint of these currents of thought. The preamble to the recent Spanish law recognising the legal personality of the Mar Menor lagoon (2022) expresses the objective of '*adopting a new legal-political model in line with the international legal vanguard and the global movement for the recognition of the rights of nature*'[172]. Oscillating between an ecocentric logic[173] integrating bio-cultural rights and a jusnaturalist tone in the statement of lagoon rights, the law recognises the right to exist and evolve naturally in the Mar Menor ecosystem "*governed by a natural order or ecological law*" which constitutes an "*ecological right*"[174] that must be respected. Such a mix of theoretical foundations is not without its own questions[175].

b) The discussed plasticity of the concept of legal person

The extension of the circle of legal persons to natural entities questions the plasticity of the concept of legal person and the adaptability of the criteria for attributing the status of legal subject

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[166] R. von JHERING quoted by R. DEMOGUE in his *aforementioned* article.
[167] *Ibid*
[168] *Ibid*
[169] L. MICHOUD, *La théorie de la personnalité morale*, LGDJ 1906, *supra*. J-P. MARGUENAUD, *La personnalité juridique des animaux*, Dalloz 1998, *op. cit.* He considers that it is *"possible to transpose* this theory *to animals*", provided that the two conditions (having a distinct interest and an organ capable of implementing it) are met.
[170] *Dictionnaire de la culture juridique*, op. *cit.* p 1452-1456: Word "*Sujet de droit*" written by A. PAYNOT-ROUVILLOIS.
[171] M-A. HERMITTE, *Nature, sujet de droit?* The author underlines this "most likely *dark perspective*" represented by the trans-humanist movement to differentiate the human species according to their enhanced performance, regardless of whether or not rights are granted to nature. M. BOUTEILLE-BRIGANT, *Intelligence artificielle et droit : entre tentation d'une personne juridique du troisième type et avènement d'un transjuridisme*, *Les petites affiches*, n°62/2018,7-14. T. DAUPS, *Le Robot, bien ou personne ? un enjeu de civilisation ? Les Petites affiches*, n° 94/2017, 7-10. In a 2017 report, the European Parliament calls on the Commission to examine "*all possible legal solutions"* including the *creation of a specific legal personality for "electronic person" robots that "make autonomous decisions or interact independently with third parties*" (A8-5/2017, Recommendations on civil law rules on robotics).
[172] *Aforementioned*.
[173] A. PENALVER I CABRÉ, The first case recognizing the rights of nature in Europe: the Spanish Parliament's brave step towards ecocentrism, *Chemins publics*, 16/11/2022.
[174] Free translation of extracts from Article 2 "*El Mar Menor esta regido por un orden natural o ley ecologica que hace posible que exista como ecosistema lagunar y como ecosistema terrestre en su cuenca. El derecho a existir significa el respeto a esta ley ecologica, para asegurar el equilirbo y la capacidad de regulacion del ecosistema ante el desequilibro provocado por las presiones anthropicas procedentes mayoritariamente de la cuenca vertiente* ".
[175] A. Garcia FIGUEROA, Las falacias del Mar Menor, Nov. 2022, Fundacion democracia y gobierno local, https://www.gobiernolocal.org/acento-local/las-falacias-del-mar-menor/. For the author, the jusnaturalist tone of the preamble and Article 2 represents what he calls the "*Falacia* naturalista" error of deducing from "*descriptive judgments" ("the earth is a living being") "prescriptive judgments" ("the earth must have rights*").

according to the singularity of the beneficiary. Where to stop, asked François OST in 2003?[176] What natural entities should be included in the privileged enclosure of subjects of law? Who should be left in the enclosure of things that are the objects of law? What types of specific individual/collective, substantial/procedural rights (...) should be conferred on these new legal persons?

René DEMOGUE already proposed to distinguish "*the subjects of enjoyment (...) which can extend beyond humanity, to any being capable of suffering, and the subjects of enjoyment disposition, which are limited to reasonable or presumed humanity*". For Marie-Angèle HERMITTE, the status of subject of law "*may be conferred as needed, particularly for anything that is living, and therefore has needs that ensure the survival of the individual, the population or the species, which does not imply that all of them must be satisfied*". These considerations result in a differentiation of rights according to the holder and a possible borderline between entities (species, ecosystems, nature (...)) that will be recognised as legal persons and others left in the legal world of things and goods.

Four main issues are debated by opposing or sceptical authors, who may or may not rely on[177] recent illustrations of legal recognition of rights to nature.

I. The multiplication of legal persons is identified as a source of insecurity

Several defenders of nature and animal rights reject the standard model of the legal personality of natural persons to counter any anti-speciesist drift. On the other hand, the model of legal persons inspires them to construct an appropriate legal person with the recognition of specific individual and/or collective rights[178]. In addition to the classic distinction between natural persons and legal persons, a third type of legal person is emerging which would be adjusted to the protected interests and characteristics of each of the entities; this requires precise clarification of the criteria for attributing the category of legal subject[179]. However, a certain vagueness remains, in particular concerning the democratic modalities of recognition of such new legal subjects. The preamble to the recent Spanish law declaring the Mar Menor lagoon (2022) a legal entity merely mentions that "*the extension of the category of legal subject should be extended to natural entities on the basis of the evidence provided by the life sciences and the earth system*"[180] without any further details or justification.

II. The "*idea of gradual personification*"[181] combined with a distorted representation of the links between rights and duties constitutes for some authors a "*dead end*"[182]

Advocates of nature's rights anticipate a legal personality centred on special rights. Many shift the burden of duties from nature and/or the natural entities benefiting from these rights onto the designated representative, parent, guardian or custodian. However, several authors question such a

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[176] F. OST, *"La nature hors la loi, l'écologie à l'épreuve du droit"* (chapter 5 "*Entre sujet et objet : l'équivoque condition de l'animal, ce vivant qui nous ressemble*), 2003, Ed. La Découverte, 350 p.

[177] For example, the recent article by G. LARDEUX, *Humanity, personality, animality*, 2021, *préc*

[178] Many insist on this specificity of the rights conferred not covering all the rights of natural persons.

[179] Specific or generic ecosystems such as rivers (Whanganui, Atrato, Ganges...), lagoons (Mar Menor...), animal and/or plant species (Manoomin wild rice) (...). M. GUIM, Where Nature's Rights go Wrong, 2021, op. *cit.* According to the author, "*if there is no principled way to decide how to define the relevant entities, the decision of whether a policy is, on balance, desirable will be contingent on arbitrary line-drawing choices*.

[180] *Prec*. Free translation: "*ampliar la categoria de sujeto de derecho a las entidades con base en las evidencias aportadas por las ciencias de la vida y del sistema tierra*".

[181] J. ROCHFELD, Introductory remarks *in "Les notions fondamentales de droit privé à l'épreuve des questions environnementales",* (ed. M. MEKKI), Ed. Bruylant, 2016, 238 p., 7-29.

[182] G. LARDEUX, *Humanity, personality, animality*, 2021, *préc*. According to this author, this twofold impasse results from "*the impossibility of granting animals the rights of physical persons, their alienability being an insurmountable obstacle*" and the rights of legal persons, "*economic actors totally alien to the idea of sentience*".

construction, which *ultimately* leads to reinforcing the duties of humans; in their view, such a result does not require the granting of rights to these entities and the recognition of a legal personality, however singular.

The examples of recognition of the rights of nature reflect the cultural diversity of legal systems that are more receptive to expanding the circle of legal persons with interests to be protected and appointing their representatives. The common law principle of *Parens Patriae* was mobilised by the Uttarakhand High Court in relation to the recognition of the legal personality of the Ganges and Yamuna rivers and the Yamunotri and Gangotri glaciers. New Zealand law recognises the Whanganui River as a legal person with rights, duties and powers to be exercised by its representative. Systematically, opposing or sceptical authors insist on the need not to ignore these differences and the political purposes underlying these processes before considering a copy-paste into European legal systems. While the recent Spanish Mar Menor Law (2022) sets out a series of rights to the protection, conservation and restoration of the lagoon, including the "*right to exist as an ecosystem*", the notion of duties of the natural entity does not appear, unlike the imperative to extend "*our responsibility towards the natural environment*" (preamble).[183]

III. **The discussed equation of the concepts of protected interests, rights and legal person**

For the promoters of the rights of nature and animals, the existence of interests specific to these entities requires their legal protection and therefore the attribution of rights, including to defend themselves in court. They consider that "it *seems reasonable to think that every living being has an interest in its own survival and/or that of its species*"[184]. As soon as these intrinsic interests are legally recognised and protected, such interests constitute rights for the entity concerned.

Authors such as Yaffa EPSTEIN and Hendrik SHOUKENS propose to interpret nature protection obligations as the implicit expression of rights conferred on natural entities[185]. To do this, they rely on a re-reading of the work of the American jurist W.N. HOHFELD[186] who in 1913 proposed a theory of rights from the point of view of legal relations based on 8 notions: right and duty, privilege and non-right, power and subjection, immunity and incapacity. Other authors were inspired by the analyses of the German jurist JHERING who considered that the possession of an interest combined with the faculty of enjoyment constituted the necessary condition for having a right[187]. Several promoters of the rights of nature conclude that it is necessary to grant legal personality to natural entities in order to allow them to benefit from substantive (*living, prospering, circulating, regenerating, healthy environment* (...)) and procedural rights via their representatives and translators[188].

This reasoning leads to a reexamination of the concept of rights, its foundations and the dynamics of the fundamentalization of rights, the expression of the cardinal values of the legal system under study. The recognition of the rights of nature thus questions their place in the tree of subjective rights, including

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[183] J. SOHNLE, La personnification juridique de Mar Menor en Espagne. Un premier pas en Europe vers l'émancipation juridico-politique des éléments de nature, RJE 2023/2, Volume 48, 271-287. The author proposes a " *hybrid concept halfway between person and thing: the notion of 'patiens', a legal figure enjoying certain rights without having any obligations* ".

[184] *Dictionnaire encyclopédique de théorie et de sociologie du droit*, LGDJ, 2nd éd.1993, 758 p, word: Animals " 28-31.

[185] Y. EPSTEIN & H. SCHOUKENS, A positivist approach to Right of Nature in the European Union*, Journal of Human Rights and the Environment*, vol. 12, n° 12, September 2021, 205-227

[186] W.N. HOHFELD, Fundamental legal conceptions as applied in judicial Reasoning, *supra*. M. BENNET, Le droit et l'analyse philosophique des droits selon W.N. HOHFELD, *Klesis Revue philosophique*, n°21/2011, http://nomodos.blogspot.com/2011/12/klesis-revue-philosophique-n21-2011.html.

[187] PJ DELAGE, *La condition animale, essai juridique sur les justes places de l'Homme et de l'animal*, thesis University of Limoges 2013, 833 p.

[188] J. LAITOS, Towards a new legal alignment of humans and Nature, in *Why environmental policies fail* (J. LAITOS with J. OKULSKI) Cambridge University Press, 2017, 228 p

human rights described as fundamental[189]. It is difficult not to detect in the enumeration of rights recognised to Nature and/or natural entities a reflection of fundamental human rights. Without recognising such rights of nature, the Inter-American Court of Human Rights, in its 2017 advisory opinion, stresses the singularity and autonomy of the right to a healthy environment which *'protects the components of the environment, such as forests, rivers, seas and the like, as legal interests in themselves*'[190]. However, it notes "*a trend towards recognition of legal personality, and hence rights to* nature"[191].

The search for a stronger legal protection of nature's interests leads other authors to advocate other theoretical solutions without widening the circle of legal persons. Sarah VANUXEM thus imagines an alternative to personification, by proposing the recognition of rights to things in nature[192]. René DEMOGUE had also identified other legal techniques such as that of centres of interest, which was promoted by Gérard FARJAT in 2002 by describing it as an "*intermediate category*" between persons and things[193]. Rightly, René DEMOGUE already invited to choose the "*solution able to satisfy this great interest of security*"[194] to guarantee the legal protection of the interests of the entities and according to the characteristics of the legal systems concerned.

IV. **Finally, the risk of not overcoming the human-nature divide, or even shifting and/or creating new boundaries, is discussed**

For several authors, the '*subjectivation of nature is technically possible*'[195], but it seems to them that '*this approach maintains the relationship between Man and nature in a divided, dissociated world of opposing interests between Man and nature as it exists in our Western world*'[196]. Certainly, the Bolivian definition of the Pacha Mama "a *dynamic living system made up of the community of all life systems and living beings linked together, interdependent and complementary, sharing a common destiny*"[197] expresses an inclusive representation echoing the Andean cosmologies.

The desire to reweave the links between humans and nature invites other authors to "*think the common*"[198] and the rise of the commons movement in Europe illustrates these dynamics. "*Instead of opposing interests between nature and culture, between non-humans and humans*"[199], the theorists of the natural commons, following the example of Marie-Pierre CAMPROUX-DUFFRENE, defend a vision of the commons as a "*composite and systemic whole based on relations of interdependence between*

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[189] On the notion of fundamental right and the debates it raises: E. PICARD, Droits fondamentaux, in Dictionnaire de la culture juridique, (dir: Denis ALLAND & Stéphane RIALS), Ed. Quadrige Lamy-PUF, 2003, 1649 p, p 544-549. L. BURGORGNE-LARSEN, Les concepts de liberté publique et de droit fondamental, *in " L'influence du droit européen sur les catégories juridiques du droit public ",* JB AUBY (Dir.), Ed. Dalloz 2010, 990 p, 389-407.

[190] Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Columbia, https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf

[191] *Ibid.*

[192] S. VANUXEM, *Des choses de la nature et de leurs droits*, Ed. Quae, 2020, *prec.*

[193] G. FARJAT, Entre les personnes et les choses, les centres d'intérêts. Prolégomènes pour une recherche, *RDT Civ*. 2002, 221-245. He specifies that if "*legal action characterises legal personality*", "*the absence of legal action is one of the characteristics of the centre of interest*".

[194] R. DEMOGUE, *supra*.

[195] M-P. CAMPROUX-DUFFRENE and V. JAWORSKI, *Des changements de paradigme juridique pour un droit de l'environnement rénové*, 2021, *prec*.

[196] *Ibid*.

[197] Free translation. The 2008 Ecuadorian Constitution states that '*nature or Pacha Mama, where life reproduces and fulfils itself has the right to the integral respect of its existence (...)*' (Article 71 '*La naturaleza o pacha mama, donde se reproduce y realiza la vida derecho a que se respete integralmente su existencia (...)*').

[198] M-S. de CLIPPELE, *La réception juridique diffuse des communs, au-delà du public et du privé,* in "*Distinction (droit) public/(droit) privé : brouillage, innovations et influences croisées*" (ed. J van MEERBEECK, A. BAILLEUX, D. BERNARD, Presses Université de Saint Louis, Brussels 2021. Special issue *Les communs, nouvelles perspectives pour le droit*, *Journal des tribunaux*, Oct. 2022, n°6913.

[199] *in Des changements de paradigme juridique pour un droit de l'environnement rénové*, 2021, *prec*.

elements, regardless of their legal qualification"[200]. They support the idea of determining an interest of the common composed of human interests and non-human entities "*united in a relationship of interdependence and sharing*"[201].

2) The classic problem of the articulation of legal rights and interests: what added value do the rights of nature have in the resolution of conflicts?

This is the second stumbling block in the doctrinal discussions. One of the founding purposes of the recognition of rights to nature is to counteract the weighing of interests that are very unfavourable to the protection of natural entities. The state of the environment, as illustrated by the fact that global limits are being exceeded, confirms the inadequate integration of ecological requirements into the hierarchy of rights and interests. These observations are unanimously shared by environmental lawyers, who for several years have been proposing various avenues for improvement, which are also reflected in the arguments of the defenders of the rights of nature.

The main debates concern the spatio-temporal resolution of conflicts and the weighing of interests and rights. A reading of the debates in the French National Assembly concerning the proposal to include '*animals as sentient beings'* in the Book of Property of the Civil Code is illuminating. Although the deputies agreed to grant animals a special status, the rapporteur of the bill explained that this development should not lead to "*any upheaval in the legal order*"[202] and should guarantee that animals "*remain within the sphere of property*"[203] , thus excluding "*any uncontrolled legal effect*"[204]. However, for the defenders of the rights of nature and animals "*crusading for the rightsless*"[205], the aura of the concepts of fundamental rights and legal person seems to them to be sufficiently powerful to ensure that the interests of natural entities are respected without being diluted in the general interest.

Mumta ITO, one of the leading figures of the rights of nature movement in Europe, argues for a model of interlocking rights where economic rights that "*undermine human rights and rights of Nature (...) would no longer be considered to be in the public interest when viewed through this* lens"[206]. But what do these economic rights cover in this representation? Should we deduce from this a principal hierarchy between human rights and break with the logic of conciliation promoted in different legal systems?

Recent litigation in the name of nature rights in Ecuador[207] shows that the processes of conciliation and/or prioritisation of rights remain complex. In light of these decisions and their uncertain implementation, several authors doubt that the recognition of rights to nature will quickly change the situation in the absence of strengthened mechanisms. Furthermore, the Inter-American Court of Human Rights insists on '*the interdependence and invisibility of the civil and political rights, and the economic,*

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[200] *in Des changements de paradigme juridique pour un droit de l'environnement rénové*, 2021, *prec*.
[201] *in Des changements de paradigme juridique pour un droit de l'environnement rénové*, 2021, *prec*.
[202] C. CAPDEVIELLE, rapporteur for the bill on the modernisation and simplification of the law and procedures in the fields of justice and home affairs: debates of 15/4/2014 on amendment no. 59 tabled on the initiative of deputy GLAVANY. https://www.assemblee-nationale.fr/14/cri/2013-2014/20140190.asp Unlike the Rural Code, which recognises that "*any animal being a sentient being must be placed by its owner in conditions compatible with the biological imperatives of its species*" (L 214-1), the Civil Code considered suitable animals as movable or immovable property by destination. New Article 515-4: '*Animals are living beings endowed with sentience. Subject to the laws that protect them, animals are subject to the regime of property*". In 1990, A-M. SOHM-BOURGEOIS opposed any recognition of animals as subjects of law, stressing that in this case it would be necessary to '*prohibit any transaction involving them*' and questioned the economic consequences of the change from object to subject of law (Personnification de l'animal : tentation à repousser, *préc*.).
[203] C. CAPDEVIELLE, *ibid*.
[204] C. CAPDEVIELLE, *ibid*.
[205] S. NADAUD, *La promotion de l'animal au niveau de l'humain, la reconnaissance de la personnalité animale, nouveau credo des juristes*, *Revue du droit des religions*, 12/1, 101-112.
[206] M. ITO, Nature's rights: why the European Union needs a paradigm shift in Law to achieve its 2050 vision, *Revista*, 2020, supra. Wording taken up in the study *Towards an EU Charter of the Fundamental Rights of Nature, EESC, supra.*
[207] C. M. KAUFFMAN & P. L. MARTIN, Can Rights of Nature make Development more Sustainable? Why some Ecuadorian Lawsuits Succeed and others Fail", *prec*. L. J. KOTZÉ & P. VILLAVICENCIO CALZADILLA, Somewhere between Rhetoric and Reality: environmental constitutionalism and the rights of nature in Ecuador, op. *cit.*

social and cultural rights because they should be understood integrally and comprehensively as human rights, with no order of precedence, that are enforceable in all cases before the competent authorities'[208]. Its interpretation of the interaction between human rights and the environment offers avenues for enhanced protection for natural entities. In addition to recognising the intrinsic interdependence between human rights and the environment, it emphasises that "*some human rights are more susceptible than others to certain types of environmental damage*"[209]. It also states that the right to a healthy environment "*unlike the other rights, (...) protects Nature and the environment, not only because of the benefits they provide to humanity from the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms which we share the planet that also deserve protection in their own rights"[210].*

One of the weaknesses of environmental legal protection is the absence, vagueness or inadequacy of democratic conflict resolution procedures. Various studies show the random respect of the principles of environmental law, the excessive scope of the discretionary power of public authorities or the double-edged interpretation of the principle of proportionality. These shortcomings are regularly deplored and several proposed improvements (principles, procedures, interpretation) are taken up by nature's rights advocates. The recognition of the in *dubio pro natura* principle in several Latin American legal systems aims to ensure a balance of interests favourable to the environment in cases of doubt. Ecuador's 2008 constitution thus provides that "*in the event of doubt about the scope of legal provisions for environmental issues, it is the most favourable interpretation of their effective force for the protection of Nature that shall* prevail"[211]. Similarly, the Colombian Constitutional Court in its decision on the Atrato River calls for a more rigorous application of the principles of environmental protection in the light of the "*higher criterion*" in *dubio pro natura*, which requires the authority, in the event of "*tension between contradictory principles and rights*", to adopt the interpretation that is most consistent with the guarantee and enjoyment of a healthy environment. Several legal experts[212] advocate the widespread adoption of such a requirement, which would boost the effectiveness of existing environmental principles and strengthen the procedures for impact assessment and evaluation of environmental impacts and damage[213]. Such a dynamic also requires widening the circle of participants in the decision-making process and increasing the due diligence obligations of public and private authorities.

Faced with the current process of recognition of rights to nature in several legal systems, including in Europe, doctrinal disputes are therefore being reactivated. The virulent tone of certain disputes is reflected in "*truth*" discourses[214] in which the rigour of legal reasoning is eroded by ideological postulates that are rarely declared[215]. Depending on the authors, their professional profile and the legal system under study, the debates often reveal a fine interweaving of registers of a different nature that

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[208] Advisory Opinion OC-23/17, para 57, cited above https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf
[209] Advisory Opinion OC-23/17, paragraph 64.
[210] Advisory Opinion OC-23/17, point 62.
[211] Article 395. The 2017 Environmental Code establishes as a principle (Article 9): *'In case of lack of information, legal vacuum or contradiction of norms, or in case of doubt about the scope of legal provisions in environmental matters, the one that is more favourable to the environment and nature shall be applied. The same applies in the event of a conflict between these provisions*.
[212] World Declaration on the Rule of Environmental Law, 2016. Principle 5 In dubio pro natura "*in cases of uncertainty, all matters before courts, administrative bodies and other decision-makers shall be resolved in the manner most favourable to the protection of the environment, giving preference to the least environmentally damaging alternatives. Actions should not be taken when their potential negative impacts on the environment are disproportionate or excessive in relation to the benefits derived from them*". https://www.iucn.org/sites/dev/files/content/documents/french_declaration_mondiale_de_luicn_sur_letat_de_droit_environnemental_final.pdf
[213] On the question of criteria in the weighing of interests: M. GUIM, Where Nature's Rights go Wrong, *Virginia Law & Economics* 2021, *supra*.
[214] Both advocates and opponents of the rights of nature.
[215] Some demonstrations include arguments that oscillate between exaggerations, blind spots or shortcuts to support the recognition of rights to nature or, on the contrary, to oppose it.

must be carefully deciphered[216]. Some authors take the position of radically refusing to recognise the rights of nature on the grounds that the concept of a legal person would be emptied of meaning[217]; others reexamine the legal status conferred on nature and natural entities and compare the various legal approaches that could be envisaged to strengthen their protection. Several jurists advocate a substantial strengthening of human duties and responsibilities[218] towards nature without calling into question the *summa divisio of* persons and things. On the other hand, some jurists propose to imagine a new structuring at the heart of legal persons or things[219], or even envisage the creation of a new specific category or the recognition of centres of interest[220]. Finally, others reexamine existing concepts and offer them a new legal vitality in order to build relationships of solidarity in shared places beyond the classic dualism. The doctrinal constructions of the commons[221], *commoning*[222], natural commons[223], rights of things in nature[224], and rights of nature are multiplying and converging *in the end* towards the need to draw up new representations of the relationship between humans and nature. Clearly, a recomposition of our legal relations with nature and non-human living beings is underway. The qualification of animals as '*living beings endowed with sentience*'[225] bears witness to this, even if, as French civil law currently stands, they remain '*subject to the regime of property* (...) *subject to the laws protecting them*'[226]. Similarly, Belgian civil law now distinguishes between things, *'natural or artificial, corporeal or incorporeal',* animals and persons while applying to animals the regime of *corporeal* things[227].

The various examples of legal recognition of the rights of nature reflect the different doctrinal inspirations in the background, and even the hybridisation of solutions proposed[228]. Beyond the question

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[216] In particular, registers of a political and emotional nature where ideal visions rub shoulders with worries and other anxieties. P. Brunet, "*the recognition of rights to nature seems to be motivated by the desperate need to stop ecological destruction*" (*Les droits de la nature et la personnalité juridique des entités naturelles: un commun qui s'ignore*", 2019, *préc*. According to C. LARRERE, "*Nature is no more a place of pure violence than it is a haven of peace*" (his article "*Entre juristes et philosophes, peut-il y avoir un débat sur les droits de la nature*" in "*A quoi sert le droit de l'environnement, réalité et spécificité de son apport au droit et à la société*", D. MISONNE (ed.) Bruylant 2018, 390 p., 325-341). *Towards an EU Charter of the Fundamental Rights of Nature*, EESC ("*Simply inserting legal personality and rights for ecosystems and species puts a Trojan horse into the system but, for it to truly deliver systemic results and be true to the spirit of the Earth Jurisprudence to the methods of the ecological mandate*") *prec.*

[217] G. LARDEUX " Humanity, personality, animality ", 2021, *préc*

[218] M. DELMAS-MARTY, *Humanité, espèce humaine et droit pénal*, *Revue de Science criminelle et de droit pénal comparé,* 2012, préc. According to the author, the duty to protect the ecosystem would constitute a meta-principle and calls for the consecration of a "*humanism of protection*" and "*responsibility".*

[219] L. de REDON, *in Deux regards sur la personnalité juridique de la nature*, *Société française d'écologie*, June 2020, op. cit. He proposes to invest the reflection on the principle of a common patrimoniality based on the default unavailability of nature.

[220] G. FARJAT, *Entre les personnes et les choses, les centres d'intérêts. Prolégomènes pour une recherche*, *prec*.

[221] *Dictionnaire des biens communs*, M. CORNU, F. ORSI, J. ROCHFELD (dir) PUF 2017, 1240 p. B. WESTON & D. BOLLIER, *Green Governance: ecological survival, human Rights and the Law of the Commons*", Cambridge University Press, 2013, 390 p.

[222] S. GUTWIRTH, *Quel(s) droit(s) pour quel(s) commun(s), Revue interdisciplinaire d'études juridiques*, 2018/2, vol.81, 83-107. A. TANAS & S. GUTWIRTH, *Une approche écologique des communs dans le droit, regards sur le patrimoine transpropriatif, les usi civici et la rivière personne*, *In Situ. Au regard des sciences sociales*, 2021 *Patrimoine et commun(s*), https://journals.openedition.org/insituarss/521.

[223] M-P. CAMPROUX-DUFFRENE, *Les communs naturels comme expression de la solidarité écologique*, RJE 2020/4, Vol. 45, 689-713*, Réflexion critique sur l'attribution de droits aux écosystèmes, pour une approche par les communs*, in *Droits des êtres humains et droits des autres entités : une nouvelle frontière ?* (C. VIDAL & J-P. MARGUENAUD, dir.), Ed. Mare & Martin, 2022, 300 p

[224] S. VANUXEM, *Of the things of nature and their rights, op. cit.*

[225] French Civil Code Book II: Property and the various modifications of ownership, Article 515-14 (issued from law 2015/177 on the modernisation of law and procedures in the fields of justice and home affairs, JORF n°40 of 17/2/2015). For the record, the qualification of the animal as a "sentient being" appears in Law 76/629 on the protection of nature which, however, apprehended only the animal "*placed by its owner in conditions compatible with the biological imperatives of its species*" (integrated into the Rural and Maritime Fishing Code, art. L 214-1). See also Article 13 of the TFEU on the *"welfare of animals as sentient beings*".

[226] French Civil Code, Article 515-14.

[227] Belgian Civil Code (reformed in 2020), Book 3 Property, Title 2 Classification of property, Art. 3.38 "*Things, natural or artificial, corporeal or incorporeal, are distinguished from animals. Things and animals are distinct from persons*"; Article 3.39 "*Animals are sentient and have biological needs. The provisions relating to tangible things apply to animals in compliance with the legal and regulatory provisions protecting them and with public order*".

[228] The example of the recognition of the legal personality of the Wanganui River is also interpreted as having characteristic features of the commons with the institution of the guardian (Te Pou Tupua), the human face of the entity; for P. BRUNET, the device resembles a complex common ("*Les droits de la nature et la personnalité juridique des entités naturelles: un commun qui s'ignore*" *Journal of Constitutional History*, 2019/2 (38), 39-53).

of whether or not it is appropriate to generalise the recognition of the rights of nature in legal systems, it is also necessary to consider what the amplification of this movement of the rights of nature shows us, including in Europe. "*Elusive river? Elusive person? If reality is shaped by law, this game of culture to culture has the merit of forcing us to decentre our gaze, to leave the quietude of our certainties, and that seems to be a lot*"[229]. This recent thought by the jurist Michel Vivant, concerning the recognition of the legal personality of the Whanganui River, offers a thread that seems judicious to keep in mind. Caution in the face of any major upheaval is not in itself surprising in the legal world, as Serge GUTWIRTH points out: '*How to innovate without betraying? How to incorporate without contaminating? The law hesitates and therefore procrastinates. It assimilates cautiously and slowly (...) it establishes an obligatory passage through restrictive, meticulous and capillary procedures*"[230]. At the level of the European Union, such caution can be appreciated in the light of the legal singularity of the encounter between EU law and the rights of nature (Ch. II).

[229] M. VIVANT, *Quand la rivière est une personne*, *Recueil Dalloz* 2021, p 73-74.
[230] S. GUTWIRTH, "*Le cosmopolitique, le droit et les choses*", in *Pratiques cosmopolitique du droit* (F. AUREN & L. DE SUTTER), Cosmopolitiques, vol, 8/2004, Ed. de l'Aube, 190 p, 77-88. https://www.boullier.bzh/cosmopolitiques-archives/

CHAPTER 2 - RIGHTS OF NATURE AND EUROPEAN UNION LAW: A UNIQUE ENCOUNTER

European states and the European Union are no longer immune to the dynamics of the rights of nature movement. Since 2015, the creation in Europe of dedicated associations[231] and the multiplication of initiatives reflect the determination to act differently for the legal protection of nature (A). The recent adoption of the Spanish law declaring the Mar Menor lagoon and its basin to be a legal entity demonstrates this. However, the fact that this issue has been placed on the European agenda calls for the singularity of the encounter between the rights of nature and European Union law to be highlighted (B).

A - The recent placing of nature's rights on the European agenda: from national initiatives to the European Union

Lagoons[232], rivers[233], lakes[234], rivers and meadows[235], glaciers[236], coastal seas[237], trees[238] (...) are the focus of national and transnational mobilisations in Europe. For several of these natural entities, the inadequacy, inconsistency and random effectiveness of legal protection standards, whatever the policy, are systematically deplored. Thus, despite complex stratifications of legal regimes from multiple legal sources (from international to local), the ecological and biophysical state of these entities remains a matter of great concern. Such situations are experienced as failures revealing the lack of political will to radically transform socio-economic development models.

Conferences, petitions, training courses, workshops and socio-cultural experiments, declarations, mock trials (...) the rights of nature movement is spreading its ideas in many forms at different scales in several Member States. The example of the popular legislative initiative (ILP)[239] for the recognition of the legal personality of the Mar Menor lagoon and its basin confirms the ambition to confront the legislator with its responsibilities in the face of the attacks on this lagoon, which has been designated as a Ramsar wetland and Natura 2000 site[240]. The examination of this bill by the Spanish Congress of Deputies under

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[231] These associations are mostly established or composed of several lawyers. Rights of Nature Europe in 2015 (new name in 2017 Nature'Rights), http://natures-rights.org. Hub Europe of GARN Global Alliance Right (https://www.garn.org/hubs/), one of the coordinators (M. CALMET) of this hub Europe creates the association Wild Legal in 2019 in Paris with the adoption of a training programme and a pleading competition associating other associations, (https://www.wildlegal.eu). The association *Notre affaire à tous*, created in 2015 by M. TOUSSAINT, J. BAYOU, V. CABANES, includes among its actions the promotion of the rights of nature & the recognition of ecocide (https://notreaffaireatous.org/nos-actions/).

[232] Ex. Mar Menor Lagoon located in the south-east of Spain in the region of Murcia.

[233] Examples in France: Tavignanu (Corsica), Têt (Pyrénées-Orientales), Loire, Seine, Maroni (French Guyana), Rhône (France-Switzerland). Proclamation European Waters to the people of Europe (2023) by the Confluence of European Waters https://www.embassyofthenorthsea.com/letter-from-the-confluence-of-european-waters-to-the-people-of-europe/

[234] Lake Vättern (Sweden), the second largest lake in the country.

[235] River Frome & Rodden Meadow (North East Bristol, UK).

[236] Glacier in France, the Mer de Glace, the subject of the first hearing of the Global Alliance for the Rights of Nature's European Tribunal for Aquatic Ecosystems, together with Our Common Cause and Mountain Wilderness.

[237] Wadden Sea (Dutch part). Embassy of the North Sea (https://www.embassyofthenorthsea.com).

[238] Declaration of the rights of trees (France 2019) by the association Arbres remarquables created in 1994. https://www.arbres.org/declaration-des-droits-de-l-arbre.htm

[239] Process following a demonstration of more than 55,000 people in the city of Cartagena demanding measures to save the lagoon, which in addition to its intrinsic ecological value, represents a strong cultural value of the Murcia region. Boletin Oficial de Las Cortes Generales, Congreso de los diputados, n°208-1, 3/12/2021, proposicion de Ley para el reconocimiento de personalidad juridica a la laguna del Mar Menor y su cuenca. This ILP was brought by Maria Teresa VICENTE GIMENEZ, Director of the Chair of Human Rights and Nature of the University of Murcia in support of a study carried out by the University's legal clinic. She presented the project on 22/4/2022 at the 11th dialogue of the UN programme Harmony with Nature. https://www.marmenorpersona.legal

[240] This lagoon, one of the largest lagoons in Europe, is exposed to a major eutrophication phenomenon due to agricultural pollution and continuous urbanisation. In 2018, the management plan of the Natura 2000 site was not adopted; since then two texts have been adopted by the regional authority (decreto-ley 2/2019 & ley 3/2020 de recuperacion y proteccion del Mar Menor). L. KRÄMER, Rights of Nature in Europe: the Spanish lagoon Mar Menor becomes a legal person, Journal for European Environmental & planning Law, 2023, volume 20/1, 5-23. M. TORRE-SCHAUB, La nature sujet de droits en Espagne, la loi sur la protection de la Mar Menor, entre révolution juridique et outil de gestion durable, RJE 2023/2, 289-308.

the emergency procedure in April 2022[241] leads to its adoption on 30 September 2022. The seriousness of the ecological state of the lagoon and the ineffectiveness of the legal protection of this ecosystem are presented in the preamble of this law as the two reasons for "*a qualitative leap*" towards a new legal-political model.

Other reasons motivated the Province of the Loyalty Islands of New Caledonia to provide in its environmental code in 2016 that '*certain elements of nature may be recognised as having a legal personality with rights of their own, subject to the legislative and regulatory provisions in force*'[242]. Such a perspective is based on the '*unitary principle of life*' described as 'the *founding principle of Kanak society (...)*', which '*means that man belongs to the natural environment that surrounds him and conceives his identity in the elements of this natural environment*'[243]. In June 2023, the Province of the Loyalty Islands conferred on sharks and marine turtles[244] the unique status of "*natural entities subject to law*[245], holders of rights and not subject to duties[246].

Echoing these indigenous views of nature '*as an animated, living being stands in strong contrast to the Western view of nature*'[247], the Sámi Parliament in Sweden decided in 2018 to politically support the Universal Declaration of Mother Earth's Rights[248]. The tables in Annex 1 provide a summary of the main initiatives in the EU Member States, some of which are cross-border in nature; these show the diversity of the channels mobilised or the associative, scientific and political support. Although a Swedish MP's motion to include recognition of the rights of nature in the Constitution was rejected in 2021[249], debates on the rights of nature are gradually making their way into the hemicycles[250]. As far as initiatives are concerned, with the exception of France for the Loyalty Islands and Spain, they have not resulted in the adoption of binding legal texts.

Reflections and discussions are also taking place in the arenas of the European institutions and bodies[251]. In March 2017, the conference "*Nature's rights: the Missing Piece of the Puzzle*" marked the entry of nature's rights into the parliamentary arena. Organised by members of the European Parliament and the association Nature's Rights, this meeting helped to publicise the rights of nature movement and international UN and IUCN initiatives. It provides a springboard for the drafting of a European citizens' initiative proposing the adoption of a directive on the rights of nature with the support of the association

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[241] 274 votes in favour, 53 against and 6 abstentions. https://www.congreso.es/en/notas-de-prensa?p_p_id=notasprensa&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_notasprensa_mvcPath=detalle&_notasprensa_notaId=41829

[242] New Caledonia has a specific status in the French Constitution (Title XIII) and its three provinces exercise their environmental competences and each province has its own Environmental Code.

[243] L 110-3 of the said Code adopted in April 2016 (Délibération n°2016 -13/API of 6 April 2016) *JO de la Nouvelle Calédonie*, n°9290s of 23/6/2016. V. DAVID, *Le métissage de la norme par la co-construction du droit : l'exemple du code de l'environnement de la province des îles Loyauté* ", *Revue juridique, politique, économique de Nouvelle Calédonie*, déc. 2017, 102-107.

[244] Entities likely to be recognised include totemic animals (certain sharks, turtles) and sites of spiritual value. Report by C. MUSCHOTTI, MP. MUSCHOTTI, Création d'un défenseur de l'environnement et des générations futures, submitted to the Prime Minister in July 2021, 66 pages. https://cidce.org/wp-content/uploads/2021/07/Rapport-Muschotti-2021.pdf

[245] Deliberation of 29/6/2023 by the Loyalty Islands Province: article 242-17 of the Province's environmental code.

[246] Actu-Environnement, La protection du vivant en Province des îles Loyauté, 9/11/2023. V. DAVID, Les entités naturelles juridiques, Animaux sauvages, n°13, 16/10/2023. https://savoir-animal.fr/entites-naturelles-juridiques/

[247] Sami Environmental Program revised 2021 (https://www.sametinget.se/10179).

[248] https://naturensrattigheter.se/2018/05/29/sametinget-ger-stod-till-deklarationen-om-moder-jords-rattigheter/

[249] April 2021 (https://data.riksdagen.se/fil/504A1300-3DD1-43D8-BF4D-9AFE935EE2B9). In Switzerland, such an initiative to revise the constitution was also proposed by parliamentarians in March 2021: recognition of the fundamental right to a healthy environment and that nature be given at least partial status as a subject of law.

[250] Example of the German Parliament study "Zur diskussion über die Anerkennung einer eigenen Rechtspersönlichkeit für Natur und Umwelt, November 2021, WD 8-3000-089/21; https://www.bundestag.de/resource/blob/876916/12655a8f9a2118dda5eb45075e1dbd50/WD-8-089-21-pdf-data.pdf

[251] The tables in the annex provide a summary of the key moments in putting the issue of nature's rights on the European agenda.

Nature's Rights and its founder Mumta ITO[252]. On this occasion, several speakers[253] and MEPs[254] pleaded for the recognition of the rights of nature and the legal personality of nature. Without all coming together under the banner of a radical ecocentric approach, they call for going "*beyond our actual notion of rights, to extend it to include non-human beings, to include future generations and to include non-individualistic living beings like ecosystems and nature as* such"[255].

Such a perspective is included in the programme of the Green party for the European elections in June 2019. In the manifesto of the Europe Ecology list, the project "*For a European environmental treaty*"[256] is composed of 5 titles, one of which is dedicated to the rights of nature; this political commitment confirms the mobilisation of new elected representatives following the example of Marie TOUSSAINT MP, co-founder of the French association *Notre affaire à tous*. On her initiative, a series of conferences "*Towards a European recognition of the rights of nature*" from October 2020 to April 2021[257] and a European consultation on the subject[258] have been organised[259]. These events illustrate the dynamic of discussions at EP level[260], which is the context of the study *Rights on Nature in the European context* commissioned by the EP Legal Affairs Committee (March 2021) and the present study.

The European Economic and Social Committee (EESC) also expresses some interest in the recognition of nature's rights. In its own-initiative opinion on climate justice of October 2017, it proposes to discuss "*a European charter of climate rights that would summarise the rights of EU citizens and nature*"[261]. In September 2019, it "*reiterates the call for the recognition of nature's rights to ensure parity with the rights of individuals and businesses*"[262]. The study *Towards an EU Charter of the Fundamental Rights of Nature* (Dec. 2019) carried out for the EESC[263] advocates the recognition of nature's rights in EU law. A reading of the first studies (EESC & JURI PE Committee) thus presents two contrasting views reflecting the doctrinal questions examined above.

The strategy for promoting rights of nature at the European level is gradually becoming more judicial. In two references for preliminary rulings in June and August 2021 to the Court of Justice of the European Union, the District Court of Erfurt (Germany) posed one of its questions on the rights of nature, the recognition of which it deduced from a very bold interpretation of the EU's Charter of Fundamental Rights. This case concerns claims for compensation in the context of the diesel scandal, to which we will return in detail in the second part. In essence, the court is asking whether "*Union law, and in particular the principle of effectiveness and the fundamental rights of Union law such as the principles and rights proper to nature, imposes a right to compensation based on the civil liability of the vehicle manufacturer where that manufacturer has been at fault (negligently or intentionally) in placing on the market a*

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[252] https://natures-rights.org/ECI-DraftDirective-Draft.pdf

[253] H. BRUYNINCKX (executive director of the European environment agency), L. BAS (director IUCN European regional office), M. M. SANCHEZ (UN Harmony with Nature initiative), M. MONTI (Sienna University)

[254] P. POC (Progressive Alliance of Socialists and Democrats) & B. JAVOR (Greens), Vice-chair of the EP Committee on the Environment, Public Health and Food Safety, M. AFFRONTE (Greens), S. PIETIKÄINEN (EPP).

[255] MEP B. JAVOR, http://files.harmonywithnatureun.org/uploads/upload52.pdf

[256] https://fr.calameo.com/read/006245912b238621fb51b

[257] https://www.marietoussaint.eu/une-initiative-europeenne-pour-les-droits-de-la-nature

[258] https://purpoz.com/consultation/reconnaitre-les-droits-de-la-nature-en-europe/presentation/contexte

[259] Including by participating in the UN interactive dialogue on harmony with nature in April 2022: http://files.harmonywithnatureun.org/uploads/upload1241.pdf

[260] In its opinion on the proposal for a directive on the protection of the environment through criminal law and replacing Directive 2008/99/EC, the EP's Committee on Development suggests incorporating a recital noting legal developments on the recognition of nature's rights in third countries and also in Spain (7/12/2022, 2021/0422 (COD).

[261] Adopted on 19/10/2017, OJEU C 081/04 of 2/3/2018. C. LOHAN (Ireland, Group III), rapporteur for this opinion, is an advocate of the Mother Earth approach as expressed in particular during the UN interactive dialogue on harmony with nature in April 2019. http://files.harmonywithnatureun.org/uploads/upload819.pdf

[262] EESC opinion on the European Commission's discussion paper "Towards a sustainable Europe 2030" (COM (2019) 22 final), C. LOHAN, Rapporteur (Ireland, Group III) & P. SCHMIDT, Co-rapporteur (Germany, Group II), OJEU C 14/95 15/1/2020 NAT/760

[263] Commissioned by the EESC Sustainable Development Observatory, https://www.eesc.europa.eu/fr/sections-other-bodies/observatories/sustainable-development-observatory/publications-other-work

vehicle fitted with an invalidating device which is prohibited in accordance with Article 5(2) of Regulation (EC) No 715/2007"[264].

The rights of nature movement is thus taking over the European scene. In line with the experiences of the so-called courts of opinion, the "verdicts" of the European tribunal for the defence of aquatic ecosystems[265] are based on arguments at the crossroads of *lege lata* and *lege ferenda*. In the case in point, in the 5 cases examined in 2020/2021[266], the aforementioned Tribunal chaired by Cormac CULLINAN[267] concludes that the rights recognised by the Universal Declaration of the Rights of Nature have been violated, as well as the Water Framework Directive (2000/60/EC) and the Natura 2000 Directive (92/43/EEC). Thus, while these mock trials aim, through their media coverage, to plead the cause of the rights of nature, they clearly aim to encourage 'normative developments'[268] in favour of a different legal status for nature and recognition of the crime of ecocide. In the case of the fictitious trial on the Balkan rivers (Kopaonik Mountains), the State of Serbia, a party to the Energy Community Treaty[269] and a candidate for accession to the EU[270], is not the only public authority whose responsibility and shortcomings are denounced. The European Union is also being questioned and Commissioners Frans TIMMERMANS and Kadri SIMSON have declined to attend the hearing following the invitation of the Court of Opinion. MEP Marie TOUSSAINT was present as a political expert alongside other witnesses heard by the five "judges"[271] in this arena. Like the other verdicts of this European court in defence of aquatic ecosystems, the Serbian state and the EU are "enjoined" to recognise the rights of aquatic ecosystems; the other injunctions are not without surprise in view of the radicalness of their enunciation: "*Exclusion of new hydroelectric power plants from the category of renewable energies within the framework of the objectives set out in the directive on renewable energies, because this form of energy production degrades aquatic ecosystems. Subsidies for small hydropower must be completely eliminated*"[272].

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[264] C-506/21, UM/Daimler, (Landgericht Erfurt), reference filed on 18/9/2021 (https://curia.europa.eu/juris/showPdf.jsf?text=&docid=248351&pageIndex=0&doclang=fr&mode=req&dir=&occ=first&part=1&cid=577308) and C-388/21, A/B (Landgericht Erfurt), reference filed on 23 June 2021 (https://curia.europa.eu/juris/showPdf.jsf?text=&docid=245242&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=577308). Both cases were removed from the CJEU's register in February 2024 (C-388/21, order 29/2/24: ECLI:EU:C:2024:276) and March 2024 (C-506/21, order 4/3/2024, ECLI:EU:C:2024:248). The Erfurt Regional Court withdrew its reference for a preliminary ruling in the light of the judgment of 21 March 2023 in Case C-100/21 Mercedes-Benz Group (EU:C:2023:229): In that judgment, the Court replied that, in the absence of provisions of EU law, "*it is for the law of the Member State concerned to determine the rules relating to compensation for damage actually caused to the purchaser of a vehicle fitted with a prohibited defeat device, within the meaning of Article 5(2) of Regulation*^{No} *715/2007, provided that such compensation is adequate to the damage suffered*"

[265] As a reminder, this entity is an offshoot of the associative entity of the International Tribunal for the Rights of Nature in 2015

[266] *Mer de glace*/French State and Total cases (hearing 30/1/2020).Case Fleuve Maroni/French State (hearing 27/2/2021), Case Lake Vättern/Swedish State, Tasman Metals, Alhström-Munksjö Aspa Bruck, Lundin Mining zinc Mine, Swedish armed forces and Vätternvardsförbunde (hearing 27/3/2021) Case Les rivières des Monts Kopaonik/Serbian State (hearing 24/4/2021), Case Mer Méditerranée/French State and Alteo Gardanne (hearing 29/5/2021), https://www.rightsofnaturetribunal.org/tribunals/europe-tribunal-2021/

[267] As a reminder: one of the key figures in the theory of the rights of nature

[268] E. TRUILHE, *Les procès fictifs en matière environnementale : faux procès, vrais effets* ? *Energy, Environment, Infrastructures,* April 2019, n°4. C. COURNIL, *Réflexions sur les méthodes d'une doctrine environnementale à travers l'exemple des tribunaux environnementaux des peuples*, *RJE* n° spécial, 2016, 201-218. M. MALONEY, Building an alternative jurisprudence for the Earth: the international rights of Nature Tribunal, *Vermont Law Review*, 2016, Vol. 41,129-142

[269] Decision of the Ministerial Council of the Energy Community on the extension of the Energy Community Treaty (established in 2005), OJEU L 320 of 30/11/2013 p 81. The decision extends the said Treaty by 10 years (Council Decision 2006/500/EC on the conclusion by the EC of the Energy Community Treaty OJEC 2006 L 198/15, Creation of an integrated gas and electricity market in South-East Europe: Republic of Serbia, Contracting State).

[270] https://www.consilium.europa.eu/fr/policies/enlargement/serbia/

[271] R. FALK (Professor Emeritus of International Law, Princeton University), V. CABANES (international lawyer, essayist and honorary president of the association *Notre affaire à tous*), C. CULLINAN (South African lawyer, director of the Wild Law Institute, one of the founders of the World Alliance for the Rights of Nature and the drafting of the Universal Declaration of Mother Earth's Rights), T. GOLDTOOTH (Datoka Native American, Executive Director of the Indigenous Environmental Network), L. MEAD, UK lawyer and co-founder and coordinator of the Earth Law Alliance)

[272] https://566259-1829772-1-raikfcquaxqncofqfm.stackpathdns.com/wp-content/uploads/2018/04/FR-Verdict-Barrages-Balkans-sin-firmas.pdf

The multiplication of these calls for the recognition of nature's rights by the European Union inevitably raises the question of the legal added value. In his study "*Can Nature get it rights?*", Jan DARPO poses this question from the outset without coming to a positive conclusion, opting for a series of ten recommendations designed to strengthen the authority of EU environmental law. In contrast, the title of the study "*Towards an EU Charter of the Fundamental Rights of Nature*" is self-evident. Before examining the various possible scenarios in detail, it is important to emphasise the singularity of the encounter between the theory of the rights of nature and EU law (B).

B - The sui generis nature of the EU legal order: a singularity that must not be overlooked

The *sui generis* nature of the EU legal order, not to mention its substantial corpus in favour of the environment, makes the encounter with the theory of the rights of nature unique. A synthetic analysis of the major specificities of the EU allows to better appreciate the potentialities and the limits of a recognition of the rights of nature in EU law.

The uniqueness of this "*legal order integrated into the legal system of the Member States*"[273] is amply demonstrated. The Court of Justice of the European Communities has made a masterly contribution to shaping the DNA of this legal system, guaranteeing its autonomy and its interweaving with the legal orders of the Member States. Primacy[274], direct effect[275], liability of the Member State for infringement of Community law[276], equivalence and effectiveness of the law[277] (...), these principles of praetorian origin are gradually structuring the EU legal system and aim to ensure the maintenance and development of the Community acquis. These principles also enable the subjects of this legal order, who are "*not only the Member States but also their nationals*"[278], to benefit from the rights conferred by EU law. Thus, as early as 1963, the Court deduced that "*Community law, which is independent of the legislation of the Member States, just as it creates burdens on individuals, is also intended to give rise to rights which form part of their legal heritage*"[279]. It concludes that "*the vigilance of individuals interested in safeguarding their rights entails effective control*" and that "the *domestic courts must safeguard the individual rights*" arising from a provision producing *"immediate*" legal effects[280].

Since its founding rulings, the Court has been vigilant, albeit not without criticism, in ensuring respect for the autonomy of the EU legal order vis-à-vis the law of the Member States and international law[281]. This process of autonomy has been strengthened as Europe has been built up, while at the same time it has been combined with a necessary anchoring in the national legal orders where EU law is implemented. Such a configuration results in a complex and evolving tangle of European and national competences in

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[273] judgment of the Court of 15 July 1964, Flaminio Costa v. N.E.L., case C/64, Coll. 1964 p 1141
[274] *Ibid*.
[275] judgment of the Court of 5/2/1963, Van Gend en Loos v Administratie der Belastingen, 26/62, *ECLI:EU:C:1963*.
[276] State liability for damage arising from the breach of obligations under Community law: judgment of the Court of 19/11/1991, Francovich and Others, C-6/90 and C-9/90, ECLI:EU:C:1991:428.
[277] Each Member State shall designate the courts and tribunals having jurisdiction and the procedural arrangements for bringing proceedings in order to *"ensure that the rights which individuals derive from Community law are safeguarded, provided that those arrangements are not less favourable than those governing domestic actions (principle of equivalence) and do not render impossible or excessively difficult the exercise of rights conferred by the Community legal order*". judgment of the Court of Justice of 15 September 1998, Edis, C-231/96, ECLI:EU:C:1998:401.
[278] judgment of the Court of 5/2/1963, Van Gend en Loos v Administratie der Belastingen, 26/62, ECLI:EU:C:1963.
[279] *Ibid*.
[280] *Ibid*.
[281] Among the rulings and opinions of the CJEU concerning the preservation of the specific characteristics of the EU legal order and its autonomy: judgment of 24/6/2019, Commission v. Poland, C 619/18, ECLI:EU:C:2019:531; Opinion 2/13 of 18/12/2014, draft accession of the EU to the ECHR, ECLI:EU:C:2014:2454; Opinion 1/09 of 8/3/2011, draft agreement for the creation of a unified patent dispute resolution system, ECLI:EU:C:2011:123

which the principles of indirect administration and the procedural and institutional autonomy of the Member States play a cardinal role.

The EU's legal system is also marked by a consubstantial legal incompleteness. The EU differs from the Member States, which have competence over competences. According to the principle of conferred powers, the Union "*shall act only within the limits of the powers conferred on it by the Member States in the Treaties in order to attain the objectives set out in those Treaties*"[282] . Furthermore, depending on the area concerned, the type of competence[283] attributed to the EU varies, resulting in different types of legal action[284]. Notwithstanding this complex categorisation of EU competences, the EU "*ensures coherence between its different policies and actions, taking into account its objectives*"[285]. While the EU has exclusive competence in the key areas of competition policy, common commercial policy or monetary policy, environmental policy falls within the framework of shared competences between the EU and the Member States[286]. In this case, the EU "shall *act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central, regional or local level, but can, by reason of the scale or effects of the proposed action, be better achieved at EU level*"[287]. However, EU policies and actions must integrate environmental protection requirements into their definition and implementation, "*in particular with a view to promoting sustainable development*"[288].

In the light of the singularities of this legal order, the question of the rights of nature invites questions about the legal status(s) recognised to nature in EU law. More generally, it leads to questioning the meaning and scope of the term "*rights*" in the tree of rights guaranteed by EU law.

The study "*Towards an EU Charter of the Fundamental rights of Nature*" (CESE 2020) follows the logic of attributing the status of legal subject to nature and promotes a constitutional consecration of fundamental rights for the benefit of nature. The authors explain that they are inspired by the praetorian process of fundamentalisation of rights and freedoms and the Charter of Fundamental Rights, which was the subject of a simple declaration in 2000[289] and now has *the same* "*legal value*"[290] as the EU Treaty (Lisbon). They recognise the risk that Member States might oppose the adoption of a Charter on Fundamental Rights of Nature incorporated into the TEU on the grounds that "*such a reform would be outside the EU's competences or would affect the fundamental constitutional principles of certain States*"[291]. This risk is indeed far from minor. Apart from the agreement of the Member States to launch such a project, there are many "pitfalls" in the process of revising the TEU.

As it stands, the EU Charter of Fundamental Rights cannot extend "*the scope of Union law beyond the competences of the Union*" or create "*any new competence or task for the Union*"[292]. Based on the principles of universality ("*everyone* has") and indivisibility of human rights, it "*reaffirms (...) the rights which result, in particular, from the constitutional traditions and international obligations common to the*

[282] Article 5§2 of the TFEU.
[283] Exclusive competence (customs union, competition, monetary, conservation of marine biological resources, common commercial policy), shared competence, supporting competence (human health, industry, culture, education, civil protection, administrative cooperation).
[284] For example, in areas where the EU has supporting powers, binding legal acts adopted in this framework "*may not involve harmonisation of the laws and regulations of the Member States*" (Article 2 of the TFEU).
[285] Article 7 of the TFEU.
[286] Article 4 of the TFEU.
[287] Article 5§3 of the TFEU. As a reminder, the principle of the most appropriate level of decision-making set out in the first action programme is enshrined in the Environment Title of the EU Treaty (Article 130R§4).
[288] Article 11 of the TFEU. Article 37 of the Charter of Fundamental Rights of the EU takes up this principle in a different formulation. For the record, the principle of integration has been laid down in primary law since the SEA (Environment Title, Art. 130r(2)).
[289] Declaration of the Heads of State and Government at the signing of the Treaty (TEU) of Nice.
[290] Article 6 TEU.
[291] CESER, Study *Towards an EU Charter of the Fundamental Rights of Nature, op. cit.*
[292] Article 51 of the Charter. Article 6 of the TEU reaffirms this requirement: "*The provisions of the Charter shall not in any way extend the powers of the EU as defined in the Treaty*.

Member States, from the European Convention for the Protection of Human Rights and Fundamental Freedoms, from the social charters adopted by the Union and by the Council of Europe, and from the case law of the CJEU and the European Court of Human *Rights*"[293]. Notwithstanding the constitutional recognition of a right to a healthy environment in several Member States, the EU Charter of Fundamental Rights does not recognise a fundamental right to a healthy environment. *The* "*rightful inclusion of the environment in the Charter*"[294] expresses the choice of a restrictive apprehension of the notion of fundamental right which will give rise to several criticisms[295]. The distinction between fundamental rights and principles introduced into the Charter *ultimately makes it* possible to include the environment in the section entitled "Solidarity". The insertion in Article 37 of a watered-down version of the integration principle set out in Article 6 of the TEC (now Article 11 of the TFEU) expresses an ambivalent compromise. Despite the EU's ratification of the Aarhus Convention on public information, participation and access to justice[296], the Member States decided not to revise the Charter to enshrine these environmental procedural rights. The political priority is to provide a constitutional basis for the Charter in the negotiations on the Lisbon Treaty. Environmental protection currently remains among the principles of the EU Charter of Fundamental Rights. Unlike fundamental rights, the principles are observed and promoted by the EU and its Member States[297].

As its case law stands, the CJEU has not chosen to reveal a human right to the environment as a general principle of law in the same way as other fundamental rights before their enshrinement in the Charter. This caution, or even reservation on the part of the CJEU, is an important parameter in the analysis of the prospects for the reception and recognition of the rights of Nature in EU law[298]. Like other critical analyses, the rights of nature movement also invites us to go beyond the individual tropism of fundamental rights and the rights conferred by EU law. It thus joins the analysis of Julien BARROCHE who underlines that "*by dint of reducing the rights of citizenship to a heap of individual rights, one refrains from identifying the collective stakes which necessarily arise from the very fact of invoking the concept of citizenship*"[299]. One inevitably thinks of the very restrictive conditions of access to the CJEU for individuals in the context of actions for annulment of legislative acts and regulatory acts not involving implementing measures. In such a configuration, actions brought by collective entities such as the Saminuorra association[300], or the Inuit Tapiriit Kanatami organisation[301], come up against the inflexibility of the CJEU, which has so far refused to interpret the individualisation condition in the light of the singularity of indigenous collective rights[302].

In the wake of other studies, the theory of the rights of nature questions the axiological foundations of the EU legal order and the legal status granted to the environment. In particular, it

[293] Preamble to the Charter.
[294] N. HERVE-FOURNEREAU, *Droit à l'environnement et ordre juridique communautaire : une alliance d'ombres et de lumières*, *Mélanges Michel PRIEUR*, Ed. Dalloz 2007, 1740 p, 527-566.
[295] M. PRIEUR, "*Commentaire de l'article 97*" *in* "*Traité établissant une Constitution pour l'Europe, Partie II La charte des droits fondamentaux*", L BURGORGUE LARSEN, A LEVADE et F PICOD (dir), 2005, 837 p., 483 -493. A KISS, "*Un droit à l'environnement, un droit fondamental dans l'union européenne*", *Revue européenne de droit de l'environnement (REDE)* 2001/4, 381 -382. H SMETS, A Charter of Fundamental Rights without a right to the environment, *REDE* 2001/4, 383-417.
[296] We will come back to this in detail in Part 2.
[297] Article 51 of the Charter "*The provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity, and to the Member States only when they are implementing Union law. Accordingly, they shall respect the rights, observe the principles and promote the application thereof* (...)".
[298] Idem.
[299] J. BARROCHE, *La citoyenneté européenne victime de ses propres contradictions : de la nationalité étatique à la rationalité économique*, *Jus Politicum-revue de droit politique*, n°19, January 2018.
[300] Representing the young Swedish Sami indigenous people: judgment of the General Court of 8/5/2019, A. Carvalho & al./PE, T-330/18, ECLI:EU:T:2019:324 and judgment of the Court of 25/3/2021 (Appeal), Reduction of greenhouse gas emissions, C-565/19 P, ECLI:EU:C:2021:252.
[301] Representing the 4 Canadian Inuit regions: judgment of the Court of 3/9/2015, Inuit Tapiriit Kanatami & al./Commission, C-389/13 p, (application for annulment of the judgment of the General Court of 25/4/2013, T-526/13), trade in seal products. .
[302] A. LAURENT, *La reconnaissance des droits et des ordres normatifs autochtones en droit européen*, in *Peuples autochtones et intégrations régionales. Pour une durabilité repensée des ressources naturelles et de la biodiversité*, N. HERVE-FOURNEREAU & S. THÉRIAULT (dir) Ed. PUR 2020, 524 p.

deplores the instrumental conception of the environment and nature in a European construction that is anchored and driven by a market logic that often takes priority. These criticisms are not new and transcend the environmental issue. In the case of Oliver Brüstle v Greenpeace eV, Advocate General Yves BOT recalled that "*the Union is not just a market to be regulated*"[303]. In this case, he insisted on the ethical basis for excluding the human embryo from any patentability "in order to *prevent the economic operation from giving rise to competition at the cost of sacrificing the founding values of the Union*", including human dignity.

The Lisbon TEU makes numerous references to the EU's founding values of "*respect for human dignity, freedom, democracy, the rule of law, and respect for human rights, including the rights of persons belonging to minorities*". However, the tropism of the market, competition and short-term consumerism remains a recurrent criticism shared by the rights of nature movement. The extended praetorian interpretation of the notion of interference with economic freedoms or that of merchandise leads to questionable proportionality checks. In 2016, Frédérique MICHEA pointed out that the Court of Justice of the EU (CJEU) "*ignores in its recent judgments the deterioration in working conditions that may result from competition based on labour costs and, on the contrary, encourages this movement*"[304]. Similarly, Elsa BERNARD also recognises that "*in its reconciliation of European values with economic freedoms, the Court has difficulty in imposing the former at the expense of the latter*"[305] recalling the prevalence of the narrative of a market Europe over the other founding narratives[306]. Such criticisms are in line with those developed by lawyers specialising in EU environmental law[307].

Indeed, echoing the 1972 Stockholm Conference on the Environment, the 6 EC Heads of State and Government declared in the same year that "*economic expansion, which is not an end in itself, must as a matter of priority make it possible to reduce the disparity in living conditions (...) be reflected in an improvement in the quality of life as well as in the standard of living*"[308]. They call for "*special attention to be paid to non-material values and goods and to the protection of the environment*", inviting the European institutions to draw up a programme of action before July 1973. In the absence of express competences of the EEC in this field, and until the entry into force of the Single European Act (SEA), the first Community actions will be deployed on the basis of Article 235 to "*achieve in the functioning of the common market one of the objectives of the Community*"[309]; several actions will be founded on a double legal basis (Article 235 and Article 100 concerning the approximation of national legislations "*having a*

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[303] Conclusions presented in March 2021: C-34/10, Oliver Brüstle v Greenpeace eV, (Directive 98/44 of the EP and the Council on the legal protection of biotechnological inventions), ECLI:EU:C:2011:138. Judgment of the Court of 18/11/2011, the Court will not take up the terminology of the founding values of the Union limiting itself to an "*autonomous and uniform*" legal interpretation of the concept of embryo not defined by the directive "*without addressing issues of a medical or ethical nature".* ECLI:EU:C:2011:

[304] F. MICHEA, "*Les catégories juridiques du droit de l'Union européenne*" (B. BERTRAND, ed), Ed. Bruylant 2016, 442 p, 249-295.

[305] "The Europe of shared values: a judicial narrative" *European Union Law Yearbook*, 2017, February 2019, 3-29.

[306] A. BAILLEUX, "*Enjeux, jalons et esquisse d'une recherche sur les récits judiciaires de l'Europe*" in "*Les récits judiciaires de l'Europe : concepts et typologie*", A. BAILLEUX, E. BERNARD, S. JACQUOT (dir), Ed. Bruylant 2019, 262 p.

[307] L. KRÄMER, *Environmental Law of the European Union*, Helbing Lichtenhan, 2011, 352 p. N. DE SADELEER, "*Environnement et marché intérieur*", Commentaire J. MEGRET, Ed. de l'Université de Bruxelles, 2010, 580 p. (English version 2014, Oxford University press, 560 p). J. NOWAG, *Environmental integration in Competition and free movement Laws*, Oxford University press, 2016, 368 p. M. PEETERS & M ELLIANTONIO (eds.) *EU Environmental Law Research Handbook*, Edward Elgar Publishing, 2020, 552 p.

[308] Paris Summit of October 1972, https://www.cvce.eu/obj/declaration_du_sommet_de_paris_19_au_21_octobre_1972-fr-b1dd3d57-5f31-4796-85c3-cfd2210d6901.html

[309] For the record, the teleological and systemic interpretation of the preamble to the EC Treaty "the constant improvement of the living and working conditions of their peoples" and of Article 2, which sets out the EEC's mission "*to promote the harmonious development of economic activities throughout the Community, and their continuous and balanced expansion",* will serve as the basis for Community action in the environmental field. On the basis of Article 235, Directive 79/409 on the conservation of wild birds and Regulation 2626/82/EEC on the implementation in the Community of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (a convention which was not open to signature by regional integration organisations such as the EEC at that time) were adopted.

direct bearing on the establishment or functioning of the common market")[310]. The vision of an environmental policy as a policy accompanying the internal market by 1992[311] reflects the influence of an economic logic on the construction of the environmental legal corpus.

Even though the protection of the environment was qualified as an objective of general interest by the Court of Justice in 1985[312], the representation of the environment and the relationship between humans and nature is still mainly governed by an instrumental conception. However, the EU's environmental policy does not exclude heritage representations and the recognition of the intrinsic value of nature.

As early as the first action programme in 1973, the Commission emphasised that the environment "*cannot be regarded as an external environment from which man suffers damage and aggression*" but "*as an inseparable factor in promoting human progress*"[313]. Similarly, in the 6th environmental action programme, it is stated that "*as a species*, *we have a responsibility to preserve the intrinsic value of nature both for ourselves and for future generations*". The preservation of biodiversity at the heart of the Natura 2000 network is part of a long-term heritage protection and management dynamic[314]. Directive 79/409/EEC recognises that "*species of birds naturally occurring in the wild state in the territory of the Member States (...) constitute a common heritage*"[315]; similarly, Directive 92/43/EEC states that "*threatened habitats and species form part of the Community's natural heritage*" and lays down a series of obligations to *"ensure that natural habitats and species of wild fauna and flora of Community interest are maintained and restored to a favourable conservation status*"[316]. This heritage representation of species and habitats of Community importance underpins the EU's biodiversity conservation policy "*while taking account of economic, social, cultural and regional requirements*"[317]. However, it is not explicitly disseminated throughout the tree structure of the EU's environmental protection legal corpus.

Nevertheless, the vision of the environment and nature as mere reservoirs of resources and services subject to commercial transactions and priority anthropic uses remains prevalent. Several legal qualifications in European legislation[318] show this while insisting on the singularity of environmental goods or waste.

"Water is not a market good like any other but a heritage to be protected and treated as such"[319]. This introductory qualification reflects the interweaving of the heritage and market conceptions of the resource and aquatic environments in the Water Framework Directive 2000/60/EC (WFD). It confirms the complexity but also the ambivalence of the legal status conferred on the environment and its components.

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[310] From 1975 to the SEA, the majority of directives will be based on Article 235 and Article 100: Directive 75/440/EEC on the quality of surface water intended for the abstraction of drinking water, Directive 76/160/EEC on the quality of bathing water, Directive 75/442/EEC on waste, Directive 75/439/EEC on the disposal of waste oils, etc.

[311] As is the case with social and cohesion policy.

[312] Judgment of 7 February 1985, Prosecutor v. Association for the Defence of Waste Oil Burners, case 240/83, Coll. 1985 p. 531.

[313] *Prec*.

[314] Land, water and marine: Directive 2008/56/EC of the EP and of the Council establishing a Framework for Community Action in the field of Marine Environmental Policy. Recital 3: "*The marine environment is a valuable heritage which should be protected, preserved and, where practicable, restored*. CHEEK 2008 L 164/19.

[315] Consolidated Directive: Directive 2009/147/EC, *supra*.

[316] Directive 92/43/EEC, *supra*.

[317] Recital 3 of Directive 92/43/EC.

[318] The notion of natural resource used in Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage is not appropriate even if it is stripped of all connotations of anthropic use; in this case, the notion refers to "*protected species and natural habitats, water and soil*" (Article 2 Definitions). CHEEK 2004 L 143/56.

[319] Directive 2000/60/EC, *supra*.

Although in 1971 the European Commission defined the environment as "*all the elements which, interacting in complex fashion, shape the world in which we live and move and have our being*"[320], only general environmental objectives at the crossroads of ecological imperatives and socio-economic interests are set out in the environment title of the Treaty[321]. This choice is in line with the logic of the Community treaties *'based entirely on a notion of objectives to be achieved*'[322]. It is thus supposed to contribute to the adaptability of the law to the new aspirations and values of society.

The commitment of the EU and the Member States to take "*full account of the welfare requirements of animals as sentient beings*"[323] expresses this dynamic. In an emblematic judgment in 2020, the CJEU emphasised that the Charter of Fundamental Rights is a "*living instrument to be interpreted in the light of current living conditions and the conceptions prevailing in democratic States today*"[324]. It concludes that animal welfare is an objective of general interest and a "*value to which contemporary societies have attached increasing importance for a number of years*"[325] which is likely to limit the right to freedom to manifest one's religion guaranteed by the Charter.

This enrichment of the EU's founding values is conducive to the evolution of the legal status of natural entities and their protective regimes. The current European strategy on biodiversity recognises that "*areas of high actual or potential value (...) require special attention*" justifying "*special precautions (...) in the form of strict protection*"[326]. Echoing this, the new forest strategy (2021) envisages, in the context of the revision of the Renewable Energy Directive[327], "*prohibiting the supply of forest biomass from primary forests and limiting it in forests with a high level of biodiversity in order to avoid any interference with nature conservation objectives*"[328]. In the wake of the first European reflections on wilderness areas[329], the Commission stresses the need to "*leave the dynamics of the forest cycle in these forests as much as possible to natural processes by limiting extractive human activities*"[330]. The intrinsic value of forest ecosystems and biodiversity "*beyond their useful value for humans*"[331] is again emphasised without, however, promoting the transition to an ecocentric protection model based on the recognition of rights for the benefit of natural entities. As Olivier CLERC reminds us, the EU's environmental policy was built in the wake of conservationist logics governing the protection and management of nature[332].

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[320] SEC (71) 2616, 22/7/1971, First communication of the Commission about the Community's policy on the environment

[321] Art. 191 of the TFEU "*the preservation, protection and improvement of the quality of the environment, - the protection of human health, - the prudent and rational utilisation of natural resources, - the promotion at international level of measures designed to deal with regional or worldwide environmental problems"* (added by the Maastricht Treaty), "*and in particular the combating of climate change"* (added by the Lisbon Treaty)

[322] Judge P. PESCATORE, foreword to the book by V. CONSTANTINESCO, "*Compétences et pouvoirs*", International Law Library, Paris, 1974, 433 p.

[323] Article 13 of the TFEU - Provision repeats (with the addition of fisheries policy) the wording of the Protocol on protection and welfare of animals to the Amsterdam Treaty 1997.

[324] Judgment of the Court of 17/12/2020, Centraal Israelitisch Consistorie van België, C-336/19, ECLI:EU:C:2020:1031

[325] Asked to interpret Regulation 1099/2009/EC on the protection of animals at the time of killing 'in the *light of Article 13 of the TFEU and Article 10§1 of the Charter', the* Court concluded that this text *'does not preclude the legislation of a Member State which imposes, in the context of ritual slaughter, a reversible stunning procedure which is not likely to result in the death of an animal*'.

[326] COM (2020) 380 final, op. *cit.*

[327] The said Directive was adopted in October 2023: Directive (EU) 2023/2414 of the EP and of the Council amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC and repealing Directive (EU) 2015/652 (OJEU L 2023/2413) : the amended Article 29 provides that biofuels, bioliquids and biomass fuels produced from agricultural biomass (...) shall not be produced from raw materials originating from land of high biodiversity value" (including primary forests and other primary wooded areas, forests of high biodiversity value (...)

[328] COM (2021) 572 final, A new EU forest strategy for 2030.

[329] EP report on wilderness areas in Europe, A6-478/2008 of 5/12/2008. EP resolution of 3/2/2009 on wilderness areas in Europe, OJEU C 67 of 18/3/2010. European Commission, Guidelines on wilderness in Natura 2000, report 2013/69, 106 p. K. BASTMEIJER (ed), *Wilderness protection in Europe*, Cambridge University Press, 2016, 550 p. R BARRAUD, V ANDREU-BOUSSUT, C. CHADENAS, C. PORTAL & S. GUYOT, *Ensauvagement et ré-ensauvagement de l'Europe : controverse et postures scientifiques, Bulletin de l'association de géographes français*, 2019. A. LOCQUET & S. HERITIER, *Interrogation autour de la nature et du sauvage à propos de l'établissement de wilderness areas en Europe*, Cybergeo, European journal of Geography, 2020.

[330] COM (2021) 572 final, op. *cit.*

[331] EP resolution of 22/10/2020 with recommendations to the Commission on an EU legal framework to halt and reverse deforestation for which the EU is responsible on a global scale. CHEEK 2021 C 404/175.

[332] O. CLERC, *Ethique et droit de la préservation de la nature sauvage dans l'Union européenne*, Bruylant, 2021, 435 p.

In the light of alarming reports on the general decline in biodiversity and the state of the planet, it is inevitable to ask why EU environmental law has fallen *victim to* "*contradictory logics*"[333] and why European policies are inconsistent in their environmental impact. Many authors thus call for a paradigm shift to overcome the pitfalls throughout the life cycle of environmental standards[334]. The shortcomings in their implementation are systematically deplored; the inadequacy of the controls carried out and the sanctions imposed, not to mention the hazards of public access to justice, are highlighted[335]. Criticism also focuses on the persistence of a reductionist vision of the dynamics of ecological processes and natural entities, which is reflected in particular in a normative and territorial fragmentation[336]. Despite the basic structure of environmental law[337] and the diversification of cross-cutting instruments[338], integrated and ecosystem approaches, without being limited to the services approach, are struggling to be translated into strengthened legal obligations[339]. Among the conditions for achieving the priority objectives of the 8th general environmental action programme, it is planned to "make *full use of ecosystem approaches and green infrastructure, including biodiversity-friendly nature-based solutions"*[340] without specifying the concrete actions that will be taken. Paradoxically, there is no legislation for biodiversity equivalent to the WFD or the "climate law" (Regulation 21/1119/EU)[341]. However commendable and necessary the future regulation setting binding nature restoration targets[342] presented by the Commission in June 2022, it contributes to maintaining a fragmented body of law.

In the current state of EU environmental law and the process of integrating environmental requirements into other branches of law, several conceptual developments are therefore emerging at the confluence of several schools of thought and stakeholder mobilisations. Ecosystem services, green infrastructure, nature-based solutions, a single health[343], natural commons, rewilding, rights of nature (...) are all approaches in synergy or in tension that invite the EU to rethink its environmental protection and management model. At the launch of the European Bauhaus in 2021, the Commission thus invites us to

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[333] N. DE SADELEER, "*Environment and Internal Market*", op. cit.

[334] Environmental law but also the integration of environmental requirements into other branches of law.

[335] L. KRÄMER, 60 years of environmental policy and law in the European Union, *European Union Law Review*, 3/2018, 11-29.

[336] The legal corpus of environmental policy has traditionally been built in response to pollution and degradation phenomena, leading to a complex tree of sectoral texts; from the end of the 1990s a rationalisation process took place with the adoption of framework legislation and a harmonisation of sectoral application texts.

[337] As early as the first action programme, several structuring principles were identified and were integrated into the Treaty; however, since the Maastricht Treaty, no other principle has been 'constitutionalised' despite calls from the doctrine (for example, the principle of non-regression).

[338] Examples include the Directives on the environmental impact assessment of certain public and private projects, plans and programmes, on public access to information, on environmental liability and the Regulation on compliance by EU institutions and bodies with the Aarhus Convention.

[339] I. BOUWMA & al. Adoption of the ecosystem services concept in EU policies, *Ecosystem services,* 29 (2018), 213-222. N. HERVÉ-FOURNEREAU & A. LANGLAIS, Does the concept of ecosystem services promote synergies between European strategies for climate and biodiversity? in *Biodiversity and Climate Change: Linkages at International, National and Local Levels*, Academy of environmental Law IUCN colloquium 2010, ed. MAES, F, CLIQUET, A. DU PLESSIS W., MCLEOD-KILMURRAY, H. Edward Elgar Editor, London, 2013,462 p., 65-93. Mélodie FEVRE, *Les services écologiques et le droit : une approche juridique des systèmes complexes*, PhD thesis in law defended in Nice in 2016.

[340] EP and Council Decision (EU) 2022/591 of 6/4/2022 on a general Union Environment Action Programme for 2030, Article 3. The instrumental view of nature is still very much present, as demonstrated by the ambition to strengthen the capacity of ecosystems to "*act as sinks and stocks of greenhouse gases*".

[341] Regulation (EU) 2021/1119 of the EP and of the Council of 30/6/2021 establishing the framework for achieving climate neutrality and amending Regulations 401/2009/EC and 2018/1999, OJEU 2021 L 243/1.

[342] COM (2022) 304 final, Proposal for an EP and Council Regulation on nature restoration. By 2030, the proposal requires Member States to put in place restoration measures covering "at *least*" 20% of the EU's land and marine areas "*without delay"*; and by 2050 "all ecosystems in need of restoration" (Art. 1). A political agreement between the Council and the EP was reached on 9/11/2023 on the text following very heated negotiations and discussions in the parliamentary hemicycle from May to July. N. HERVE-FOURNEREAU, "Urgence Biodiversité dans la tourmente : le récit pathétique du futur règlement de l'Union européenne sur la restauration de la nature", in Le Livre vert, volume 2, Ed. Le Pommier, forthcoming 2024.

[343] The one health approach (humans, animals, ecosystems) is now being promoted by the European institutions, including in the 8th general action programme for the environment, which calls for "*contributing to the full integration*" of this approach "*at all levels of policy-making*". The COVID pandemic is accelerating the European promotion of this concept, including in Member States such as France: study day "A law for a single health in France", December 2021, https://videos.univ-lr.fr/droit-economie-gestion/journees-detudes-une-loi-pour-une-seule-sante-en-france/

"move beyond a human-centred perspective to a life-centred perspective by drawing inspiration from nature and learning from it"[344].

So how can the theory of the rights of nature be reflected in EU law? Can the EU provide a forum for democratic debate on these issues? Can or should it play a leadership role or simply leave it to the Member States to decide whether to incorporate this theory of the rights of nature into their legal systems? Between the urgency of action and the imperative of a paradigm shift, the clash of temporalities is inevitable, as is the clash of divergent interests. It is obvious, as Jan DARPO points out, "*that it certainly does not suffice to make a difference in a legal system by simply introducing a nice-looking provision in the* Constitution"[345]. Beyond the controversies, the rights of nature movement, like other currents of thought, invites us to imagine the fields of legal possibilities for rethinking our relations with nature and natural entities. The increased ecological awareness of many European citizens and youth is reflected in the expression of many expectations for change. In May 2022, the recommendations of the European citizens' panels at the Conference on the Future of Europe illustrate these demands for greater protection of nature[346].

In order to appreciate the added value of the recognition of the rights of nature in EU law, it was essential to contextualise the issue in order to identify and clarify the legal issues at stake. An ordered and commented state of the art (official EU documentation and doctrine)[347] has allowed to identify the main elements necessary for the present reflection. The second part of the study aims to identify different scenarios in the light of a critical analysis of the EU's legal protection of the environment, particularly in the field of biodiversity and aquatic environments (**PART II**).

[344] COM (2021) 573 final, Communication New European Bauhaus, aesthetic, sustainable, open to all.
[345] Study J. DARPO *Rights on Nature in the European Context*, JURI Committee of the EP, 2021.
[346] We will come back to this in the second part. Conference on the Future of Europe, Report on the Final Results, May 2022, 236 p. One of the recommendations of the European Citizens' Panel on "European Democracy: Values and Rights, Rule of Law, Security" is entitled "Protecting human rights and the rights of nature and animals". Panel 3 on the environment and climate does not include the term 'rights of nature'. https://futureu.europa.eu/pages/reporting?format=html&locale=fr
[347] Attached.

PART II - PATHWAYS AND SCENARIOS UNDER EU LAW

"Neither water nor the fish that swim in it can act before courts and tribunals. Nor do trees have standing"[348].

The implicit reference to Christopher STONE by Advocate General Eleanor SHARPSTON in her 2017 Opinion in the Protect-Nature case is not insignificant. It expresses the need to ensure the jurisdictional protection of natural entities. While Eleanor SHARPSTON does not invite the CJEU to recognise the existence of rights to nature, she insists on the "*essential role*" of environmental organisations "*in protecting our common environmental heritage*", including outside the courtroom[349]. Her demonstration reflects the doctrinal positions of several environmental lawyers, such as Ludwig Kramer, who emphasises that "*the environment has no voice, no vote and no major social group behind it like agricultural law (...) competition law (...*)"[350].

Already in 1973, in his book on the law of nature and environmental protection, Jean LAMARQUE stated that "*Nature must be protected for its own sake*"[351].

The classic 'intrinsic versus instrumental value' confrontation of nature and the environment is inevitably expressed at EU level. Several doctrinal interpretations clash, as illustrated in the first part of this study: some regret that EU law does not adequately enshrine the intrinsic value of nature, or even does not do so at all, while others cite the obligations to protect natural entities independently of human interests under the Birds Directive (2009/147/EC[352]), the Habitats Directive (92/43/EEC) or the Environmental Liability Directive (2004/35/EC).

The equation between the concepts of values, needs, interests and rights is therefore particularly complex (Chapter I). Similarly, the assessment of the encounter between the theory of the rights of nature and EU law invites us to question the representation of nature in the European decision-making process (Chapter II). Finally, it leads to an assessment of the ways in which nature is defended in the courtroom (Chapter III). At the invitation of the Green Group in the European Parliament, which commissioned this study, these three thematic angles will be addressed in the light of a critical analysis of EU law. Due to the scope of the project and its ramifications in the different areas of EU law, choices had to be made and the study of the EU's external policies could not be pursued in depth here. The construction of this part of the study was based on a grid of questions (Annex IV) completed during meetings and discussions with the project team in 2021[353]. In support of these paths, several legal guidelines make it possible to draw up scenarios, from the *status quo* to a recognition of the rights of nature, to substantially strengthen the protection of nature in EU law (Chapter IV).

[348] Opinion of Advocate General E. SHARPSTON in Case C-664/15 Protect-Nature & al. submitted on 12/10/2017, (Reference for a preliminary ruling from the Austrian Administrative Court, Water Framework Directive) ECLI:EU:C:2017:760

[349] N. HERVE-FOURNEREAU, *La participation de la société civile organisée à la politique environnementale de l'Union européenne, entre prudence, résistance et dynamique démocratique : L'illustration emblématique de la participation des organisations de défense de l'environnement*, *in* " *Union européenne et société civile organisée : Pygmalion et Golem* ? A. MILLET-DEVALLE (ed), forthcoming 2023.

[350] L. KRÄMER, *Environmental Law of the European Union*, Helbing Lichtenhahm 2011, op. *cit.* The author was a European official (Directorate-General for the Environment of the European Commission) for many years until 2004.

[351] Published by Ed. LGDJ 1973, with the collaboration of B. PACTEAU, F. CONSTANTIN and R. MACREZ, 974 p.

[352] This Directive is a codified version of the original Directive 79/409/EEC.

[353] Two team meetings in June and October 2021.

Chapter 1 - Values, needs, interests and rights: a complex equation

In his book on the ethics and law of wilderness preservation in the European Union, Olivier CLERC is particularly critical and considers that "*the legal-ethical aporia of environmental law is therefore unsurpassable: it cannot, at one and the same time, affirm the intrinsic value of nature and confine it to the rank of object (...)".* In line with the promoters of the rights of nature, he deduces that "*if the law of nature protection evolves towards eco-centric foundations, it takes note of the fact that nature is an end in itself, affirms its intrinsic value and must, consequently, recognise its quality of ethical subject, and subsequently the quality of legal subject*"[354].

Without systematically taking into consideration the particularities of the EU legal system, the promoters of the rights of nature deploy two argumentation strategies based on an extensive understanding of the concepts of rights and legal subjects. These two approaches can be combined: one consists in proposing new texts of a constitutional nature (Charter of the Rights of Nature), and/or legislative (draft ECI for a directive on the rights of nature) and/or declaratory (...)[355] depending on the maturity of the discussions. The second approach relies on a bold interpretation of existing law to "reveal" the existence of rights of nature. As EU law currently stands, it must be remembered that rights of nature are not explicitly recognised. Therefore, the interpretation of EU environmental law can be a key lever. The CJEU plays a role as a spur in these interpretative dynamics that inspire the promoters of nature's rights. Oscillating between useful effect and political advocacy, these interpretative games underpin the evolution of representations and values beyond the mere clarification of the meaning of normative statements (**A**). With the exception of positions taken by the EESC and the EP or the Committee of the Regions[356], respect for the protected interests of nature continues to be expressed through the language of human rights and duties. Could the prospect of a 'constitutional' recognition of a right to the environment thus constitute a favourable crucible for the promotion of nature's rights? (**B**). The complex equation of values, needs, interests and rights is also reflected in the balance of interests, which represents a formidable sword of Damocles for environmental protection. New balancing and prioritisation guidelines have been proposed for several years by EU environmental lawyers and resonate with those supported by the proponents of rights of nature (**C**).

A- The interpretation of EU environmental law between useful effect and political advocacy

Depending on the doctrinal theories invoked, the proponents of the rights of nature equate the concepts of intrinsic value, needs and legally protected interests to conclude that rights 'of' and 'to' nature as a singular subject of law are logically enshrined.

Through a very bold interpretation, Y. EPSTEIN and H. SCHOUKENS argue that nature already has legal rights in the EU legal order. They propose to interpret existing nature protection obligations in the light of WN. HOHFELD[357]. In his seminal article of 1913, this American jurist drew up a framework for analysing situations and relationships established by law. He starts from the postulate that a "*legal interest is a legal relation"*[358] and lays a systematic correlativity of rights and duties in the sense that "*there is a right*

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[354] O. CLERC, *Éthique et droit de la préservation de la nature sauvage dans l'Union européenne*, Ed. Bruylant, 2021, *prec*.

[355] A step-by-step phasing is justified as the discussions evolve.

[356] Example of a 2011 opinion on the role of local and regional authorities in promoting sustainable water management (rapporteur for the opinion: President of the Region of Puglia) "*recognises that every moral community, whether or not it is a living being, must respect its intrinsic rights as regards water needs*", OJEU 2011 C 259/13

[357] Several proponents of the rights of nature propose such "re-readings" to defend their cause, by articulating different families of theories with a teleological aim, such as the theory of interest and the analytical framework of HOHFELD. M. TANASESCU, Understanding the rights of Nature - a critical introduction, *New ecology*, Vol. 6, 2022, https://library.oapen.org/bitstream/handle/20.500.12657/53088/9783839454312.pdf?sequence=1

[358] M. BENNET, *Le droit et l'analyse philosophique des droits selon W.H. HOHFELD*, *Revue philosophique*, 2011, 21 Legal Analytic Philosophy

because there is an obligation"[359]. Y. EPSTEIN and H. SCHOUKENS thus consider "*that currently existing obligations to Nature can be understood as legal rights of Nature*"[360]. In support of their initial hypothesis "*what does it mean to have a right, if not the beneficiary of a legal duty?"*[361], they develop a "*selected*" rereading of HOHFELD's relational theory of rights. However, recalling HOHFELD's conceptual scheme (rights, privileges, powers, immunities), P. BURDON states "*that is clearly nonsense to speak of Nature holding privileges, immunities or the corresponding categories such as duties. Nature can only enter this framework as a* right-holder"[362]. Like other authors, Y. EPSTEIN and H. SCHOUKENS include in their reasoning elements of the theory of interests, considering that as soon as the interests of natural entities are protected by EU law, they can be considered "as" legal rights. With regard to their interpretation of the case law of the CJEU on the obligation of strict protection of species (Directive 92/43/EEC Natura), they conclude "*that existing rights have at time been implicitly treated as rights by EU Courts when they strictly interpret protective laws without regard to utilitarium or economic considerations*.

Such an interpretation has a strong *lege feranda* tone and is close to political advocacy. Of course, the interpretation of law does not amount to a simple mechanism clarifying the meaning of provisions. An act of knowledge *par excellence*, interpretation also expresses an act of will of the authority within the limits of its competence. It is difficult to detect in the case law studied by Y. EPSTEIN and H. SCHOUKENS the intention, however hidden, of the CJEU to act as if strictly protected species had rights. Admittedly, the equation "intrinsic value - needs - protected interests (obligation) = legal rights" could be attractive, but it is important to identify the obstacles and impacts of such reasoning transposed into EU law. Furthermore, the authors do not clarify where they situate such rights in the tree of existing rights. They do not specify whether these rights are conferred on nature and all natural entities or whether these rights enjoy the fundamentality of human rights.

The language of rights has an undeniable aura, including in the EU legal order. Despite the greening of the discourse, it must be stressed that the recognition of the intrinsic value of nature is not yet fully translated into law. Many commentators welcome the determination of the CJEU to ensure the effectiveness of EU environmental legislation in the Member States. Its strategies of teleological and systemic interpretation are undeniable, particularly in light of the Aarhus Convention. Its interpretation of Article 10a of Directive 85/337/EEC (revised in 2003) in favour of the right of NGOs to invoke in court the violation of environmental rules, including those that protect the interests of the community alone, expresses, among other examples, its voluntarism. Similarly, the litigation concerning the Birds and Habitats Directives illustrates this praetorian vigilance, which is growing in step with the awareness of the decline in biodiversity and the state of natural environments, a vigilance that is all the more important given that these laws are not recent. Should these interpretations therefore be seen as the crucible of an implicit recognition of the rights of nature, as some authors maintain? Or the expression of a 'legal animism'[363] emerging at the crossroads of a '*historical animism of indigenous peoples*' and a '*scientific animism*' in which vital facts would impose themselves on legal reasoning enlightened by scientific and technical knowledge and data? Or more simply the imperative need to strengthen environmental obligations for the authorities to ensure compliance?

Two main lessons can be drawn from the Court's case law on the Natura network and the Water Framework Directive (WFD). The first shows the Court's willingness to provide enhanced protection for the existential needs of natural entities (1); the second demonstrates that its interpretations are based on an evolving principled matrix (2).

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[359] M. BENNET, *L'analyse des droits de WN. HOHFELD à S. KANGER*, thesis of the Master 2 of Philosophy of the ENS-LSH, 2007, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287172

[360] Y. EPSTEIN & H. SCHOUKENS, A positivist approach to rights of Nature in the European Union, *Journal of Human Rights and the Environment,* Vol. 12, n°2, September 2021, 205-227.

[361] Y. EPSTEIN & H. SCHOUKENS, A positivist approach to rights of Nature in the European Union, op. *cit.*

[362] P. BURDON, The Rights of Nature: reconsidered, *Australian Humanities Review*, Vol. 49, 2010, 69-89.

[363] Expression used by M-A. HERMITTE, *Artificialisation de la nature et droit(s) du vivant*, in "*Les natures en question*" (P. DESCOLA, ed.), Ed. O. Jacob, 2018, 257-284.

1) The interpretation of the CJEU in the service of a stronger protection of the existential needs of protected natural entities, a source of inspiration for the promoters of the rights of nature

The intrinsic value of certain species, natural habitats or ecosystems is not ignored by the EU, even if there are many gaps in existing legislation. Often forgotten, the first objective of the Water Framework Directive is to prevent "*any further deterioration*", to preserve and improve "*the status of aquatic ecosystems and, with regard to their water needs, of terrestrial ecosystems and wetlands directly depending on them*". Similarly, the definition and assessment of the ecological status of surface water bodies focuses on the "*quality of the structure and functioning of aquatic ecosystems"*.

Criticism of the Natura network has focused on the fact that *economic, social and cultural requirements, as well as regional and local particularities"*[364], are counteracting compliance with the objective of "*maintaining or restoring to a favourable conservation status natural habitats and species of wild fauna and flora of Community interest*"[365]. Despite their negative impact on sites, plans or projects authorised for imperative reasons of overriding public interest have fuelled criticism and disputes brought before the courts. In contrast, only '*relevant*' scientific knowledge[366] should govern the designation of conservation sites and the identification of habitats and wildlife species of Community interest. A series of obligations and prohibitions aim to ensure the protection of their needs and conditions of existence throughout their life cycle, regardless of their anthropogenic utility.

In its case law, the CJEU has laid the foundations for a highly protective interpretation of these requirements, particularly for species enjoying strict protection[367]; it overcomes the directives' silence on the definitions of key concepts such as natural range or resting place or the selectivity of capture methods.

The Court thus emphasised the legislature's intention "*to afford breeding sites or resting places greater protection against acts causing their deterioration or destruction*"[368]. It considers that the strict protection of species implies the need to preserve their natural habitats in order to ensure "*essential conditions, in particular for resting*"[369] in accordance with Article 12§1(d) of the Habitats Directive (92/43/EEC). In this judgment on the Great Hamster (C-477/19), the Court deduced that the protection of the resting places of this strictly protected species is necessary, even if these areas are no longer occupied, if "*there is a sufficiently high probability that the species will return to those areas*"[370].

In another case (C-88/19), a Romanian judge questioned it on the protection of a wolf captured outside a Natura site. The CJEU opted for a broad interpretation of the concept of natural range. It considers that the range "*corresponds to the geographical area in which the species concerned is present or extends as part of its natural behaviour*"[371]. The Court concludes that the obligation of strict protection of species set out in Article 12§1 of the Habitats Directive "*does not have any limits or boundaries and does not allow a wild specimen of a protected animal species found near or within areas of human settlement, transiting through such areas or feeding on resources produced by man, to be regarded as an animal which has left its natural range*"[372]. Consequently, any intentional capture or transport of specimens, including outside the Natura site, remains subject to the strict conditions of the derogations provided for in Article 16. These different interpretations express the Court's determination to ensure that the specific needs of natural entities and their natural cycles of vulnerability are taken into account.

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[364] Article 2§3 of Directive 92/43/EEC Natural Habitats, op. cit.
[365] Article 2§1 of Directive 92/43/EEC
[366] Article 4§1 of Directive 92/43/EEC
[367] On this issue, the Commission has updated its 2007 guidance document on the strict protection of animal species of Community interest in 2021: Communication published in the OJEU 2021 C 496/1.
[368] Judgment of the Court of 2/7/2020, IE v Magistrat der Stadt Wien, C 477/19, ECLI:EU:C:2020:517
[369] *Ibid*.
[370] *Ibid*.
[371] Judgment of the Court of 11/6/2020, Alianta pentru combaterea abuzurilor, C-88/19, ECLI:EU:C:2020:458
[372] *Ibid*.

The infringement proceedings against Poland concerning the Bialowieska Forest, one of the "*best preserved natural forests in Europe*"[373] classified as a Unesco natural heritage site, illustrate the voluntarism of the CJEU against the strong pressures and attacks on the integrity of the Natura Puszcza site[374]. In 2017, following an interim injunction on grounds of urgency, the Court required Poland to immediately cease the felling and removal of dead trees in the absence of other means to "*preserve the safety of persons in the immediate vicinity of communication routes or other important infrastructure*"[375]. In its 2018 judgment[376], the Court recognises the possibility for a Member State to apply forest management measures to control the spread of organisms that may affect the integrity of a Natura site. However, their adoption does not preclude an assessment of their impact on the conservation objectives of the site in accordance with Article 6§3 of the Natural Habitats Directive. Furthermore, it stresses that "a *certain balance must be found, in order to control the spread of the bark beetle, between active and passive forest management measures*"[377] (i.e. no human intervention). Furthermore, it acknowledges the scientific controversies on the "*most appropriate methods*", including the decision not to control the spread of the bark beetle in view of the natural processes and cycles at work in this forest ecosystem with stands that are more than a century old. On the basis of the evidence and the precautionary principle, it concluded that Poland had failed to adequately assess the impact of active forest management operations (sanitary felling, removal of dead trees) on the integrity of the Puszcza site. However, it remains to be seen whether this court decision will be complied with over time and, more generally, whether the obligations to maintain the site in a favourable state of conservation will be fulfilled[378].

2) Interpretative dynamics of the CJEU based on an evolving principled matrix, potential source of recognition of the rights of nature?

These interpretative dynamics of the CJEU are based on an evolving principled matrix in which the requirement of '*best scientific knowledge*'[379] plays a key role in ensuring a high level of protection. Thus, the Court has developed a broad interpretation of the obligations of the Habitats and Birds Directives through the prism of the precautionary principle, from the designation of Natura sites to their management, including requests for derogations[380]. An impact assessment of a plan or project is not appropriate if it does not contain "*complete, precise and definitive findings and conclusions capable of dispelling any reasonable scientific doubt as to the effects*"[381] on the conservation objectives of the site.

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[373] Argument of the European Commission in the judgment of the Court of 17/4/2018, Commission v Poland, C-441/17, (ECLI:EU:C:2018:255) and in the order of the Vice-President of the Court of 11/10/2017, Commission v Poland, C-441/17 R, ECLI:EU:C:2017:877

[374] In April 2022, the Commission was questioned by MEPs (Written Question E_1912/2022) about the construction of a wall by Poland in the Bialowieza primary forest on the border with Belarus in order to prevent the arrival of asylum seekers from that country. At the beginning of July, the Commission stated that it had sent a letter to the Polish authorities reminding them of their Natura 2000 obligations and that, as things stand, no infringement procedure, such as an interim injunction, is underway. https://www.europarl.europa.eu/doceo/document/E-9-2022-001912-ASW_FR.html

[375] Order of the Court of 11/10/2017, Commission v Poland, C-441/17 R, ECLI:EU:C:2017:877. The Commission put forward the risk of serious and irreparable harm to the habitats and integrity of the site. J. BETAILLE, *Le référé au service du principe de précaution : à propos du secours porté par la CJUE à la forêt de Bialowieza, Commentaire de l'ordonnance de référé*, *Droit de l'environnement*, n°263, 2018, 14-22.

[376] This action was also brought under an accelerated procedure (Order of the President of the Court of 11/10/2017, ECLI:EU:C:2017:794). Judgment of the Court of 17/4/2018, Commission v Poland, C-441/17, ECLI:EU:C:2018:255.

[377] Judgment of the Court of 17/4/2018, Commission v Poland, C-441/17, *cited above*.

[378] T. TADEUSZ KONCEWICZ, The Bialowieza case. The tragedy in six acts, May 2018, https://verfassungsblog.de/the-bialowieza-case-a-tragedy-in-six-acts/

[379] Cross-cutting requirement to the obligations of the Habitats and Birds Directives, from designation, to site management and strict protection of animal species (including derogations): Judgment of the Court of 7/9/2004, Landelijke vereniging tot Behoud van de Waddenzee, C 127/02, (article 6§3 on the assessment of the effects of a plan or project on the conservation objectives of a Natura site) of the Habitats Directive ECLI:EU:C:2004:482) or regarding the Court's judgment of 10/10/2019, Luonnonsuojeluyhdistys Tapiola Pohjois-Savo, C 674-17, (Articles 12 & 16 Habitats Directive, on wolf hunting Finland), ECLI:EU:C:2019:851.

[380] For example, in the recent case C 217/19, the Court considered that the precautionary principle "*requires the use of calculation methods which ensure that the limit of the order of 1% of the species subject to hunting is maintained in order to comply with the selectivity requirement laid down in Article 9 of the Birds Directive*. Judgment of the Court of 23/4/2020, Commission v Finland, C 217/19, ECLI:EU:C:2020:291. Judgment of the Court of 21/6/2018, Commission v Malta, C 557/15, ECLI:EU:C:2018:477

[381] Judgment of the Court of 9/9/2020, Friends of the Irish Environment, C 254/19, ECLI:EU:C:2020:680

Consequently, "*pursuant to Article 6§3 of the Habitats Directive, the authority must refuse to authorise the plan or project if there is uncertainty as to the absence of adverse effects on the integrity of the site concerned*"[382]. Furthermore, even if the project is located at a "*considerable distance*" from Natura 2000 areas, this "*does not exclude the applicability of the requirements set out in Article 6§3*"[383], as it is likely to have a significant effect on those areas.

Following a reference for a preliminary ruling from the French State Council concerning the use of birdlime for the capture of black thrushes and blackbirds[384], the Court recalls that the authorities must rely on the *"best relevant knowledge*"[385] to demonstrate compliance with the conditions of the derogation in the Birds Directive. It constructs its demonstration in particular in the light of Article 13 of the TFEU on animal welfare, which implies that wild birds caught in this way must enjoy respect for their welfare[386]. In this case, the CJEU considers that this non-lethal method of capture "*does not meet the requirement of selectivity*" of Article 9 of the Birds Directive. As a reminder, in 1988[387], the Court had considered that the Commission had not sufficiently demonstrated that France's authorisation of catches with birdlime and horizontal nets was incompatible with the judicious exploitation of certain birds in small quantities. Since Spain's failure to fulfil its obligations in 2004 for this same type of catch[388], the Court has clarified the elements constituting the requirement of selectivity, as illustrated by the One Voice-LPO judgment of 2021[389].

The principle of non-regression is not expressly included among the structuring principles of environmental policy. Nevertheless, the Court is gradually revealing the potential for such recognition to benefit the protection of aquatic ecosystems and other species and natural habitats. The WFD imposes a general obligation on Member States to prevent the deterioration of all bodies of surface water and groundwater[390], including during authorisation procedures for particular projects as the Court will interpret it. In the absence of a definition of the concept of deterioration, the Court has developed a progressive interpretation in an attempt to counteract the deficient implementation of this obligation in Member States that take advantage of the imprecise and ambiguous wording of Article 4§1 and 4§7. In this case, it considers that the obligation to prevent deterioration should be given an "*autonomous legal status*"[391] distinct from the obligation to improve the status of water bodies. According to the Court, the concept "*encompasses any change likely to compromise the achievement of the principal objective of Directive 2000/60*" and not, as the German State suggests, only serious harm. More specifically, the Court considers "*that there is deterioration as soon as the status of at least one of the quality elements within the meaning of Annex V (...) deteriorates by one class, even if that deterioration does not result in a deterioration in the classification, as a whole, of the body of surface water*"[392]. Furthermore, it states

[382] Judgment of the Court of 16/7/2020, WWF Italia Onlus, C 411/19, ECLI:EU:C:2020:580

[383] Judgment of the Court of 26/4/2017, Commission v Federal Republic of Germany, C-142/16, ECLI:EU:C:2017:301 In the present case the project concerned the construction of a coal-fired power plant in Moorburg on the south bank of the southern slope of the river Elbe, which constitutes a migratory route for certain species of fish listed in Annex 2 to the Habitats Directive and provides an "*important function for a series of Natura 2000 areas, some of which are located at a distance of up to approximately 600 km from the power plant.*"

[384] Court judgment of 17/3/2021, One Voice & LPO, C-900/19, ECLI:EU:C:2021:211.

[385] judgment of the Court of 23/4/2020, Commission v Finland, C 217/19, ECLI:EU:C:2020:291. In this case, for the Court, it "cannot be *maintained that a Member State has*" such knowledge "*as to the time when the competent authority adopts its decision, which is based on a study published 7 years previously*", it thus insists on the need for more current data with a "*significantly higher degree of accuracy and relevance*".

[386] It follows that it is against the *background of reasonable options and best available techniques that the adequacy of alternative solutions must be assessed*.

[387] judgment of the Court of 27/7/1988, Commission v France, Case 252/85, ECLI:EU:C:1988:202

[388] judgment of the Court of 9 December 2004, Commission v Spain, C-79/03, ECLI:EU:C:2004:782, (ORNIS Committee for the adaptation to technical and scientific progress of the Directive).

[389] Court judgment of 17/3/2021, One Voice & LPO, C-900/19. In this case, for the Court, a non-lethal method of capture resulting in low-volume by-catches for a limited period of time does not meet the requirement of selectivity if it is "*likely to cause other than negligible damage to the non-target species captured*".

[390] Judgment of the Court of 1/7/2015, Bund für Umwelt und Naturschutz Deutschland, C-461/13, (binding nature of the prevention of deterioration of water bodies), ECLI:EU:C:2015:433.

[391] Judgment of the Court of 1/7/2015, Bund für Umwelt und Naturschutz Deutschland, C-461/13

[392] *Ibid*.

that "*if the quality element concerned (...) is already in the lowest class, any deterioration of that element constitutes a deterioration in the status of a body of surface water*"[393].

In 2021, for example, the Court finds that the Guadalquivir hydrological plan 2015-2021 does not include any measures to halt the deterioration of protected habitat types, such as the temporary Mediterranean pools in the Donana protected area. In support of the scientific studies presented by the Commission, the Court concludes that the intensive abstraction of groundwater to supply the urban tourist area of Matalascanas has a "*clear* negative effect *on the level of the water tables and therefore on the water needs of the environment, such as vegetation or wetlands*"[394].

More recently, on the occasion of a reference for a preliminary ruling from the French State Council, the Court specified that the Member States must take account of temporary impacts of short duration and without long-term consequences on the quality of water when assessing the compatibility of a programme or project with regard to the obligation to prevent deterioration. In the event of even temporary deterioration, authorisation of such a project or programme is therefore subject to the derogation conditions of Article 4§7.

Directive 92/43/EEC also contains a '*general protection obligation*'[395] to avoid the deterioration of natural habitats and habitats of species in special areas of conservation and significant disturbance of species; and in accordance with Article 11 of the WFD, the programme of measures contains basic measures, including those for Natura protected areas, to ensure compliance with the obligation to avoid deterioration of habitats From this interweaving of obligations in Case C-559/19, the Court concludes that in order to demonstrate a breach of Article 6§2 of the Habitats Directive, it is for the Commission to "*establish the existence of a likelihood or a risk that an action or inaction will cause significant deterioration or disturbance*". In the present case, the Commission concludes that Spain has failed to fulfil its obligations under the Habitats Directive in view of the sufficient evidence at its disposal concerning the excessive abstraction of water which is detrimental to the conservation of the habitats of the Donana site.

However, the Court has not taken the step of expressly enshrining a principle of non-regression that is transversal to all legal protection of the environment, even though several constituent elements make it possible to identify its contours (autonomous status, general obligation, significant/manifest nature of the deterioration)[396]. The European institutions have not been very prolix, with the exception of a few EESC opinions and EP resolutions in favour of recognition or non-regression clauses[397]. Since then, the expression 'non-regression principle' has become more widespread, including in trade agreements[398] or in European financial frameworks, where it is specified, for example, that Member States '*should not reduce the environmental ambition of their existing rural development programmes*'[399].

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[393] *Ibid*.

[394] judgment of the Court of 24/6/2021, Commission v Spain, C 559/19, ECLI:EU:C:2021:512. judgment of the CJEU of 16/7/2020, WWF Italia Onlus, C 411/19 ("*general obligation"*).

[395] Judgment of the Court of 7/9/2004, Landelijke Vereniging, C 127/02, ECLI:EU:C:2004:482

[396] In its interpretation of the WFD, the Court distinguishes between the obligation to prevent deterioration and the obligation to improve the quality status. The French law 2016/1087 on biodiversity, which introduces the principle of non-regression into the Environment Code (L 110), transcends this distinction: "*the principle of non-regression, according to which the protection of the environment, ensured by legislative and regulatory provisions relating to the environment, can only be subject to constant improvement, taking into account the scientific and technical knowledge of the moment*".

[397] EESC opinion of 16/5/2018, EU actions to improve compliance with environmental legislation and environmental governance. Nat 730. EP resolution of 22/10/2020 with recommendations to the Commission on an EU legal framework to halt and reverse deforestation for which the EU is responsible on a global scale (protection of human rights, formal and customary rights of indigenous peoples and local communities and the general level of environmental protection). P9-TA (2020) 0285, *supra*.

[398] Insertion of non-regression clauses in the EU-UK Trade and Cooperation Agreement concerning the respect of levels of protection, in particular in the environmental field (art 391): OJEU 2021 L 149/10. COM (2022) 226 final, Report from the Commission on the application of EU health and environmental standards to imported agricultural and agri-food products. EP resolution of 20/10/2021 on a farm-to-table strategy for a fair, healthy and environmentally friendly food system (OJEU 2002 C 184/2

[399] Regulation (EU) 2020/2220 of the EP and of the Council of 23/12/2020 laying down transitional provisions on support from the European Agricultural Fund for Rural Development and the European Agricultural Guarantee Fund; OJEU 2020 L 437/1.

The promoters of the theory of the rights of nature join environmental lawyers who advocate constitutional recognition of a principle of non-regression[400] in close interaction with the requirement of a high level of environmental protection. The authors of the draft European Charter on the Rights of Nature (EESC 2020) include this "*rule of non-regression*" among the five pillars of their construction. Faced with a growing number of disputes that undermine the foundations of the EU, the CJEU has stated that respect for the values set out in Article 2 of the TFEU is a "*condition for the enjoyment of all the rights under the Treaties*"[401]. From this it follows that a Member State "*may not amend its legislation in such a way as to entail a regression in the value of the rule of law*"[402]. Such a general principle of non-regression should offer promising prospects for nature protection, including "*ensuring the effective application of EU law which is inherent in the value of the rule of law*"[403].

This brief overview of the case law of the CJEU confirms that the needs and interests of habitats and species protected by European legislation are taken into consideration. Its voluntarist interpretations of the obligations to conserve natural entities and their resting, breeding, distribution and movement areas "*in the wild*"[404] show this. However, there is still some doubt as to whether this reasoning implicitly recognises the rights of nature, legal rights in the Hohlfedian sense. The judges' thought processes, as expressed in the judgments studied, do not reveal their intention to draw inspiration from such an equation of 'needs, protected interests = legal rights, or even fundamental rights'.

Indeed, as early as 2011, Marie-Angèle HERMITTE considered that although '*non-humans are not yet subjects of law accepted as such*', they 'increasingly *borrow traits of character reserved for humans*', leading '*the judge to act '<u>as if</u>' he had subjects in front of him*'[405]. Clearly, all living beings share this base of existential needs which are expressed differently according to the singularities inherent in the entities and their way of life. Such observations lead the promoters of the rights of nature, following the example of the authors of the study on the draft European Charter on the Rights of Nature or the promoters of the draft ECI on the rights of nature, to recognise substantive rights such as the right to life and existence, to the maintenance of the integrity of natural cycles, to health, to habitat, to evolve naturally, to water, to effective restoration (...).

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[400] M. PRIEUR AND G. SOZZO (eds), "*Le principe de non régression en droit de l'environnement",* Bruylant, 2012, 547 p. In this book: A. ARAGAO, *Le fondement européen de la prohibition de régression : le niveau élevé de protection de l'environnement*, 347-364, N. HERVE-FOURNEREAU, *Le principe de non régression environnementale en droit de l'Union européenne : entre idéalité et réalité normative* ?, 197-220. M. PRIEUR & L. VASSALO, *Le principe de non-régression et la biodiversité*", *RJE* 2019/3, 499-503. A. POMADE, *Préjudice écologique et principe de non régression : expression de la capacité d'impulsion et d'initiative du juge français pour préserver la biodiversité*, *RJE* 2021/1, 21-35.

[401] judgment of the Court of 20/4/2021, Repubblika/Prim Ministru, (reference for a preliminary ruling from the Civil Court sitting as a constitutional court, Malta), C-896/19, ECLI:EU:C:2021:311

[402] *Ibid*. The Court repeated this analysis in other cases in 2021 concerning Poland (judgment of 15/7/2021, Commission v Poland, C-791/19, ECLI:EU:C:2021:596) and Romania (judgment of 21/12/2021, Criminal proceedings against PM and others C-357/19 & al, ECLI:EU:C:2021:1034 and judgment of 18/5/2021 Asociaţia "Forumul Judecătorilor din România C 83/19, ECLI:EU:C:2021:393) regarding their respective organisation of justice; and then in 2022 regarding the horizontal conditionality mechanism provided for the implementation of the EU budget in compliance with Article 2 of the TEU (judgment of 16/2/2022, Hungary v EP and Council, C-156/2021 ECLI:EU:C:2022:97).

[403] Order of the Court of 20/11/2017, Commission v Poland, C-441/17 R (Natura 2000 Site Puszcza Bialowieska), *supra*.

[404] In Case C-88/19, the CJEU interprets the term "*in the wild*" in Article 12 of Directive 92/43/EEC (derogations from the strict protection of animal species) as including areas of human settlement: judgment of 11/6/2020, Alianta pentru combaterea abuzurilor, (Capture and transport of a wolf) ECLI:EU:C:2020:458

[405] M-A HERMITTE, Nature, subject of law ?

Table of EU-wide initiatives (on 31/01/2023)

	Project 2017 European Citizens' Initiative on the Rights of Nature	**European Elections 2019-** Europe Ecology: Manifesto for a European Environmental Treaty	**Study *Towards an EU Charter of the Fundamental Rights of Nature (EESC - 2020)***
Holders	Nature & Natural Systems: "*includes but is not limited to: land, ecosystems, natural communities, species, climate* Natural communities: "*species of wild fauna and flora, soil organisms, aquatic organisms, and human communities that have established sustainable interdependencies within this diverse matrix of organisms within an ecosystem*	*The earth and all its living beings and the natural commons have intrinsic rights "(...) every ecosystem and all living beings are entitled to be defended in justice (...)".*	Nature
Substantive and procedural rights	Non-exhaustive list of rights qualified as "collective", to : - life and existence -maintain the integrity of natural cycles and life processes and conditions for regeneration -housing -natural evolution and the preservation of the diversity of life -the preservation of the functionality of the water cycle (quantity and quality) -fast and efficient restoration -defence, protection and enforcement of these rights *Rights of nature: a necessary condition for the right of every person to a healthy environment Recognition of duties of care and protection: all natural persons, governments and legal entities have a legal duty of care towards nature	Title 2 Rights of Nature of the European Environmental Treaty: "*The earth and all living beings (...) as well as the natural commons possess the intrinsic rights to*: -live and exist, -respect, -regeneration and continuity of their life cycles and processes without human disturbance, -maintain their identity and integrity, -water, fresh air, -their full health, -be free from contamination, pollution and toxic or radioactive waste, -not be genetically modified or transformed in a way that adversely affects their integrity or vital functioning, -full and prompt redress for violations of rights resulting from human activities, -welfare and not to be subjected to torture or cruel treatment by human beings, -be defended in court	Open list, to : -life, existence, -the regeneration of its life cycles and evolutionary processes, -be respected and not to compromise its genetic viability, -diversity, water and clean air, -be free of contamination, -health, restoration -defend themselves, -participate in decision-making processes
Proposed legal personality	legal personality	Not specified	yes

Notwithstanding several ambitious interpretations of EU environmental law, the CJEU has not yet deduced or induced a recognition of the rights of nature. However, the Court does not reduce the legal status of natural living entities to that of a thing, an appropriate good or a product exclusively at the disposal of human interests and rights. In 1999, it thus refuted the European Commission's argument that trees and forests "as a *whole are agricultural products*"[406]. In this case, the Court annulled Regulations 307/97/EC and 2158/92/EC on the protection of forests against atmospheric pollution and against fire adopted on the basis of the common agricultural policy. It thus considers that the "*primary purpose*" of those laws is the protection of the natural forest heritage "*without merely taking into consideration their usefulness for agriculture*"[407] justifying the choice of environmental policy as the legal basis.

Similarly, in the One Voice judgment (C-900/19), the CJEU strengthened the restrictive conditions relating to the selectivity of the capture of wild birds by requiring that the welfare of animals "*as sentient beings*" be taken into account. These interpretative advances demonstrate the evolution of legal representations of nature and natural species. However, while the term natural entities and/or natural communities is sometimes used by the EU institutions, the scientific meaning prevails for the moment[408]. Similarly, in its Communication on Integrated Coastal Zone Management in 2000, the Commission distinguishes between "*administrative, natural and socio-economic entities*"[409], but does not extract any consequences in terms of legal qualification.

It will be illuminating to see whether and how the CJEU will respond to the German judge who submitted two references for preliminary rulings in the summer of 2021[410], one of the questions of which includes the '*inherent rights of nature*'. In this case, the Regional Court of Erfurt (Civil Chamber) is dealing with a claim for damages against the car manufacturer Daimler in connection with the Dieselgate scandal. In contrast to the references for preliminary rulings submitted by German courts on the subject[411], this court wishes to know whether '*European Union law, and in particular the principle of effectiveness and the fundamental rights of Union law, such as principles and rights of nature, impose (...) a right to compensation based on the principle of the protection of the environment.) a right to compensation based on the civil liability of the vehicle manufacturer where that manufacturer has committed a fault (negligent or intentional) by placing on the market a vehicle equipped with a disabling device prohibited under Article 5§2 of Regulation (EC) No 715/2007*". The German judge's argument goes beyond classical legal reasoning and resembles a politically motivated plea for the rights of nature. His interpretation of the EU Charter of Fundamental Rights reflects the rhetoric of the promoters of nature's rights, without explicit reference to the applicant's pleas. The German court thus considers that nature rights '*can be derived from the Charter (...) and the European treaties for example by analogy*' and that '*many (fundamental) rights are by their nature applicable to ecosystems, as well as individually to trees or plants*'[412]. Similarly, he considers that "*nature or ecosystems such as rivers and forests, as subjects of law,*

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[406] judgment of the Court of 25/2/1999, EP v. Council supported by the Commission, C-164/97 and C-165/97, ECLI:EU:C:1999:99.

[407] judgment of the Court of 25/2/1999, EP v. Council supported by the Commission, C-164/97 and C-165/97, ECLI:EU:C:1999:99.

[408] judgment of the Court of 8 February 1996, Godefridus van der Feesten, C-202/94, ECLI:EU:C:1996:39. For the purposes of interpreting Directive 79/409/EEC on the conservation of wild birds, the Court emphasises that the "*concept of species covers a biological entity the scientific definition of which is widely known and which is based on characteristics forming part of the genetic heritage of the individuals of the species concerned*". Communication from the Commission on the guidance document on the strict protection of animal species of Community interest under the Habitats Directive (OJEU 2021 C 496/1): "*Notion of natural communities of bat species*", "*sensitive communities of wild plants and animals*", or "*sensitive ecological communities*".

[409] COM (2000) 547 final, Communication on Integrated Coastal Zone Management: A Strategy for Europe. The Commission identifies river basins, flood plains, coastal cells (...)

[410] Reference for a preliminary ruling filed on 23/6/2021: C-388/21, A/B (Landgericht Erfurt), (https://curia.europa.eu/juris/showPdf.jsf?text=&docid=245242&pageIndex=0&doclang=fr&mode=req&dir=&occ=first&part=1&cid=577308)

[411] For example, reference for a preliminary ruling from the Ravensburg Regional Court in 2021. Opinion of the Advocate General of 2/6/2022, QB v Mercedes Benz, formerly Daimler, C 100/21 (interpretation of Directive 2007/46/EC and recognition of a right to compensation for vehicle purchasers). ECLI:EU:C:2022:420.

[412] Reference for a preliminary ruling filed on 18/8/2021: C-506/21, UM/Daimler, (Landgericht Erfurt), (https://curia.europa.eu/juris/showPdf.jsf?text=&docid=248351&pageIndex=0&doclang=fr&mode=req&dir=&occ=first&part=1&cid=577308). As a reminder, the case was struck off the register of the CJEU in March 2024.

fall within the 'open' 'broad' notion of a person, including in relation to the access to justice guaranteed by Article 47 of the Charter". It concludes that "*emissions of oxides which are extremely harmful to the environment and which exceed the permitted level violate the rights of nature, first and foremost the right to life enshrined in Article 2§1 of the Charter, and the right to integrity and regeneration enshrined in Article 3 of the Charter*"[413].

Do these two references for preliminary rulings mark the emergence of a strategy to give media coverage to the concept of the rights of nature in the courts of national jurisdictions and, by way of ricochet, of the CJEU? It is to be imagined that the CJEU will ensure that it provides a useful response to the national court to enable it to decide *in concreto* the dispute brought before it in accordance with the spirit of judicial cooperation. The hypothesis of a reformulation of the question asked or of a response from the CJEU that leaves the question of rights of nature unanswered is highly probable in the current state of the case law. It also seems premature to imagine the Court extracting rights of nature from one of the principles of environmental law. The parallelism with the 1969 Stauder case[414], where the Court detected the existence of fundamental human rights in the general principles of Community law, remains anachronistic. The context is not comparable. Moreover, the CJEU has not enshrined the right to a healthy environment in general principles or even in Article 37 of the Charter of Fundamental Rights. Moreover, the subject of the rights of nature remains a sensitive issue in our national legal systems, a situation that can only heighten the caution of the CJEU.

The contribution of the CJEU and the national courts is undeniable, but it cannot counteract all the spatial, temporal and material shortcomings of environmental legislation or the principle of integration of environmental requirements. The prospect of recognition of the rights of nature in EU law and/or in the legal orders of the Member States cannot avoid democratic debates in which the legislator and/or the constituent must exercise their role as conductor. Interpretation games in EU law are essential to ensure the effectiveness of legislation. They contribute to the adaptability of the law to the ecological emergency in order to strengthen the obligations to protect natural entities; however, they remain within the limits of the EU's competences and of existing EU law, however plastic it may be. While the incremental approach (revision of existing legislation) may be useful, the adoption of a Biodiversity Framework Directive would be a significant step forward in introducing more ambitious concepts and operational arrangements breaking with the fragmented approach[415]. The CJEU would certainly pursue these voluntarist interpretation games, including drawing on soft law[416].

In this complex search for a balance between "intrinsic value, needs, interests of natural entities and recognition of rights", the express recognition of a right to the environment could be one of the paths to be taken in the short term. Several defenders of the rights of nature argue for an interweaving of the processes of recognition of the right to the environment and the rights of nature (**B**).

[413] C-506/21, *supra*.
[414] judgment of the Court of 12/11/1969, E. Stauder v. City of Ulm, Case 29/69, ECLI:EU:C:1969:57
[415] We will come back to this in Chapter IV on scenarios and recommendations.
[416] For example, the guidelines for the implementation of the directives.

B - The right to the environment and the rights of nature: a process of shared recognition?

Article 37 of the EU Charter of Fundamental Rights does not explicitly state the right of every person to a healthy and/or ecologically balanced environment, let alone the existence of rights granted to natural entities. As EU law stands, this recognition process remains incomplete (**1**). On the other hand, the awareness of the consubstantial links between the protection of nature and the guarantee of fundamental rights is leading to a broad and inclusive conception of the right to an environment (**2**).

1) The recognition of a right to the environment: an unfinished process in EU law

In 2005, Advocate General Ruiz-Jarabo COLOMER supported a proactive interpretation of the EU Charter of Fundamental Rights. He considers that "*the concepts of sustainable development and quality of life used in the EC Treaty appear to be closely linked to those of the environment, evoking a subjective dimension which cannot be ignored when it comes to protecting and improving it"*[417]*.* He concludes that "*the subjective dimension of this environmental concern is implicit in the EU, including the Charter of Fundamental Rights*". Moreover, he considers that such a right "*to enjoy a healthy environment is outlined, not for the benefit of an individual as such, but for the benefit of a member of the community, in which he shares common social interests"*[418]*. Seven years later, Advocate* General Pedro Cruz VILLALON shares the desire of Advocates General Ruiz-Jarabo COLOMER and Niilo JÄÄSKINEN[419] to offer a dynamic interpretation of Article 37 of the Charter of Fundamental Rights. According to him, this provision "*expressly* recognises *a right to protection of the environment*"[420]. However, the CJEU has not yet adopted this dynamic interpretation promoted by three Advocates General since the adoption of the EU Charter of Fundamental Rights.

On the other hand, when assessing the validity of Article 3 of Directive 2001/42[421] in the light of Article 37, it constructs a reasoning based on Article 52§2 of the Charter concerning the scope and interpretation of rights and not on Article 52§5 concerning principles. It notes the expression "*principle*" mentioned in the explanations to the Charter in relation to Article 37[422], which is based on Articles 3§3 of the TEU and 11 and 191 of the TFEU[423]. Without elaborating on its reasoning, it concludes that *"it should be noted that Article 52§2 of the Charter provides that the rights recognised by the Charter shall be exercised under the conditions and within the limits defined by the Treaties. This is the case with Article 37 of the Charter*"[424]. Thus, despite its classification as a "principle", the Court interprets Article 37 as if it were a "right", given its basis in the Treaty, and therefore enjoys a broader invocability than that

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[417] Conclusions presented on 26/5/2005, Commission v. Council of the EU, C-176/03, Protection of the environment through criminal law, legal basis of the EU act, ECLI:EU:C:2005:311. The CJEU did not take up this argument, although it came to the same conclusions as the Advocate General in favour of annulling Council Framework Decision 2003/80/JHA.

[418] Conclusions presented on 26/5/2005, Commission v. Council of the EU, C-176/03, Protection of the environment through criminal law, legal basis of the EU act, ECLI:EU:C:2005:311. The CJEU did not take up this argument, although it came to the same conclusions as the Advocate General in favour of annulling Council Framework Decision 2003/80/JHA.

[419] Advocate General N. JÄÄSKINEN Opinion 23/10/2014, C-461/13, Bund für Umwelt und Naturschutz Deutschland (reference), C 461/13, ECLI:EU:C:2014:2324. According to him "*the interpretation of the Water Framework Directive (WFD) must comply with the fundamental right to protection of the environment enshrined in Article 37 of the Charter*". The CJEU did not take up this argument.

[420] Opinion delivered on 17/2/2011, European Air Transport SA (reference Belgian Council of State), C-120/10, ECLI:EU:C:2011:94. The CJEU does not take up this argument.

[421] Directive 2001/42/EC of the EP and of the Council of 27/6/2001 on the assessment of the effects of certain plans and programmes on the environment, OJEC 2001 L 197/30.

[422] Explanations on the Charter of Fundamental Rights, OJEU 2007 C 303/17: "*The principle contained in this article was based on Articles 2, 6 and 174 which are now replaced by Article 3§3 of the TEU and Articles 11 and 191 of the TFEU.*

[423] The Court has repeatedly made clear the imperative nature of these obligations; furthermore, while the Charter of Fundamental Rights must not create new powers or tasks for the EU, it need not alter them either; in other words, it must not undermine the provisions and obligations of the Treaty. This is no doubt a determination of the Court in Case C-444/15 to prevent the risk of regression of integration obligations and the objective of a high level of protection.

[424] judgment of the Court of 21/12/2016, Associazione Italia Nostra Onlus, C-444/15, Directive 2001/42 on the assessment of the environmental effects of certain plans and programmes, ECLI:EU:C:2016:978. Advocate General J. KOKOTT did not develop such an argument, which demonstrates the Court's willingness to introduce this dimension into its reasoning.

reserved for principles (Article 52§5)[425]. Does this interpretation foreshadow the beginnings of a right to the environment through the recognition of a general principle of a high level of protection or will the CJEU prefer to wait for the revision of the Charter?[426]

In addition to the need for a proactive interpretation of the EU Charter of Rights, the constitutional traditions common to the Member States[427] and international human rights instruments are relevant to the reasoning of the CJEU. Several European states have recognised a constitutional right to the environment and impose a series of obligations on public authorities[428]. Despite the lack of express recognition of a right to the environment in the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court has developed a body of case law concerning significant environmental risks and violations of several guaranteed human rights[429]. In 2020, the decision of the European Court of Human Rights to give priority to the application of young Portuguese citizens[430], without exhausting national remedies, provides a new arena for climate litigation strategies[431]. The treatment of this case by the Grand Chamber confirms the awareness of the climate emergency and the seriousness of the attacks on fundamental rights. These choices of the Court resonate with the positions of the Parliamentary Assembly of the Council of Europe and the UN Human Rights Council.

Recommendation 2211 (2021) and Resolution 2396 (2021) entitled "*Anchoring the right to a healthy environment*"[432] of the Parliamentary Assembly of the Council of Europe reiterate the need for an additional protocol to the ECHR on the right to a safe, clean, healthy and sustainable environment. It also proposes the adoption of an additional protocol to the European Social Charter to include such a right and recognise the interdependence between social rights and environmental protection.

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[425] Article 52§5) "*The provisions of this Charter which contain principles may be implemented by legislative and executive acts of the institutions, bodies, offices and agencies of the Union and by acts of the Member States when they are implementing Union law in the exercise of their respective powers* (...)".

[426] D. MISONNE AND N. DE SADELER, Article 37 Protection of the environment, *in "Charter of Fundamental Rights of the European Union, article by article commentary"*, F. PICOD and S. Van DROOGHENBROECK (eds), Bruylant 2018, 789-814. E. SCOTFORD, Environmental rights and principles: investigating article 37 of the EU Charter of Fundamental Rights *in "Environmental Rights in Europe and beyond"*, S. BOGOJEVIC & R RAYFUSE (eds), Ed. Oxford, 2018, 320 p.

[427] Article 6 of the TEU "*Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall form part of Union law as general principles*". Article 52§4) of the Charter of Fundamental Rights "*Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights must be interpreted in harmony with those traditions*". In case C 120/10, the Advocate states that the right to the environment "*is articulated as a principle and, moreover, does not emerge from nothing but is the result of a recent process of constitutional recognition of environmental protection in which the constitutional traditions of the Member States have participated*".

[428] According to the Council of Europe, 32 of its 47 member states have recognised a constitutional right to a healthy environment. Portugal is a pioneer in recognising a right to a healthy and ecologically balanced environment in its 1976 constitution.

[429] European Court of Human Rights, Guide to the Case Law of the ECHR - Environment, April 2022. J. DARPO *Rights on Nature in the European Context*, JURI Committee of the EP 2021, *op. cit.* E. LAMBERT, Environnement et droits de l'Homme, introductory report to the high-level conference "*Environmental Protection and Human Rights*", Strasbourg 27/2/2020 (https://rm.coe.int/rapport-e-lambert-fr/16809c8281). P. BAUMANN, "*Le droit à un environnement sain et la Convention européenne des droits de l'Homme"*, LGDJ, collection Thèses, 2021, 642 p. R BENTIROU MATHLOUTHI, "*Le droit à une environnement sain en droit européen, dynamique normative et mise en œuvre jurisprudentielle*", Ed. L'Harmattan, 2021, 534 p. C. COURNIL, *Verdissement des systèmes régionaux de protection des droits de l'Homme : circulation et standardisation des normes*, *European Journal of Human Rights*, 2016, 3-31.

[430] In June 2022, the Chamber of the European Court of Human Rights relinquished jurisdiction in favour of the Grand Chamber.

[431] Since the application of the Portuguese young people (aged 10 to 23) filed in September 2020 (n°39371/20 Duarte AGOSTINHO & others/Portugal and 32 other States), other "climate" applications have been filed with the European Court: that of the Swiss Senior Citizens for Climate Protection against Switzerland (November 2020, n°53600/20 case Verein KlimaSeniorinnen Schweiz & al. /Switzerland), application MEX/Austria (Austrian citizen suffering from Uhthoff syndrome, extremely sensitive to rising temperatures) filed in March 2021, application by the former Mayor of the French commune of Grande Synthe/France (application no. 7189/21) for inadequacy of France's climate action with regard to the rights to life and respect for private and family life. Another application No. 34068/21 (Greenpeace Nordic & others/Norway) by Greenpeace Nordic, Young Friends of Earth and 6 young people was filed in June 2021 regarding Norwegian drilling projects in the Barents Sea (filed in June 2021).

[432] *"Anchoring the right to a healthy environment: the need for enhanced Council of Europe action*", Report /doc. 15367, 13/9/2021, rapporteur Mr S. MOUTQUIN.

In line with this regional initiative, the UN Human Rights Council in its resolution 48/13 of October 2021 on "the *right to a clean, healthy and sustainable environment*" affirms that "*environmental degradation, climate change and unsustainable development are among the most urgent and serious threats to the enjoyment of human rights, including the right to life, by present and future generations*"[433]. Similarly, in its resolution 76/300 on the right to a clean, healthy and sustainable environment (July 2022), the UN General Assembly considers that "the right to a clean, healthy and sustainable environment is a human right" and "*calls upon States, international organisations, corporations and other relevant actors to (…) intensify efforts to ensure a clean, healthy and sustainable environment for all*"[434].

How will these international dynamics be reflected in the European legal system beyond the diplomatic support of the EU expressed in the adoption of UN resolutions? Similarly, while the EU's accession to the ECHR is still pending, the interpretations of the European Court are likely to inspire the CJEU[435]. Furthermore, none of the provisions of the EU Charter of Fundamental Rights "*shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised (...) by Union law, international law and international conventions to which the Union or all the Member States are party, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the constitutions of the Member States*" (Art. 53).

Until now, proposals for a full recognition of a right to the environment in the Charter of Fundamental Rights have remained merely wishful thinking. Following the success of the European Citizens' Initiative Right2water in 2013[436] the Commission recognises that access to safe drinking water and sanitation "*is inseparable from the right to life and human dignity*"[437]. It also specifies that several rights of the Charter of Fundamental Rights have a "*direct relevance to access to drinking water and sanitation"* (human dignity and right to life). It thus reaffirms the "*fundamental nature of the human rights dimension of access to drinking water*" and its commitment to ensuring that "these *principles remain at the heart of its policies*"; however, unsurprisingly, it does not take the step of recognising an autonomous fundamental right to drinking water when proposing a new directive on water intended for human consumption. Adopted in 2020, the said text does not expressly enshrine such a right to water[438].

In its June 2021 resolution on the biodiversity strategy, the EP suggests that the "*right to a healthy environment should be recognised in the Charter*"[439] without further specifying the contours of such a right. On the occasion of the launch of the French Presidency of the Council of the EU in January 2022,

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[433] Resolution of 8/10/2021, A/HRC/RES/48/13. C. PERRUSO, *L'affirmation d'un droit à un environnement propre, sain et durable universel, note sur la résolution 48/13 du Conseil des droits de l'Homme des Nations Unies*, *Revue des droits de l'Homme*, Nov. 2021. As international law currently stands, the proposed Global Compact for the Environment (which included a provision on the right to the environment) 2017 or an international covenant on the human right to the environment have not materialised. C. LE BRIS, Towards a global pact on the right to the environment: waiting for Godot, *RJE* 2020/2, Vol. 45, 241-257. J.H. KNOX, Constructing the Human Right to a Healthy Environment, *Annual Review of Law and Social Science*, 2020, Vol. 16, 79-95.

[434] A/RES/76/300 of 28/7/2022. All EU Member States voted in favour of this resolution. States such as China and Russia abstained.

[435] The EU's accession to the ECHR has still not been completed (new negotiations under way since 2020 with the sensitive issue of respect for the competences of the CJEU systematically highlighted in its negative advisory opinions on the EU's accession to the ECHR, opinion 2/13), so the Convention is not "*formally integrated into the EU's legal order*", as the CJEU regularly reminds us (cf. C-398/13 P, Inuit Tapiriit Kanatami v. Commission, *op. cit.) On the other hand,* the "*fundamental rights guaranteed by the ECHR form part of EU law as general principles*" (Article 6 TEU); similarly, as stated in Article 52§3 of the Charter, "*insofar as* the Charter of Fundamental Rights '*contains rights corresponding to rights guaranteed*' by the ECHR, '*their meaning and scope shall be the same as those conferred by the said Convention*', while allowing the EU to grant more extensive protection if necessary. N. DE SADELEER, *Droits fondamentaux et protection de l'environnement dans l'ordre juridique de l'UE et dans la CEDH*, *Revue européenne du droit de la consommation*, n°1/2011, 25-51. N. HERVE-FOURNEREAU, *Droit à l'environnement et ordre juridique communautaire : une alliance d'ombres et de lumières*, *Mélanges Michel PRIEUR,* Dalloz 2007, *prec.*

[436] First ECI validated (https://europa.eu/citizens-initiative/initiatives/details/2012/000003_fr)

[437] COM (2014) 177 final, Communication on the ECI water and sanitation is a human right! water is a public good, not a commodity.

[438] Directive (EU) 2020/2184 of the EP and Council of 16/12/2020 on the quality of water intended for human consumption, OJEU 2020 L 435/1. Repeal of Directive 98/83/EC in January 2023.

[439] EP resolution of 9 June 2021, P9_TA (2021)0277.

E. Macron proposed to update the Charter of Fundamental Rights, "*in particular to be more explicit on the environment*", without any further indication[440]. Paradoxically, the citizens' proposals of the conference on the future of Europe do not mention such a perspective[441]. It is true that the EU is a party to the Aarhus Convention, the preamble to which states "*the right of everyone to live in an environment adequate to his or her health and well-being*"[442] and the rights to information, participation and access to justice constitute the procedural basis for exercising a right to the environment and strengthening democracy[443].

2) The consubstantial links between the environment and fundamental rights

The consubstantial links between the environment and fundamental rights such as the right to life, dignity and health are explicitly recognised. The full exercise of rights and freedoms inevitably depends on the quality of the environment, the proper functioning of ecosystems and the effectiveness of the legal protection of natural environments and entities. Michel Prieur rightly emphasises that "*the right to the environment is not a human right like any other*"[444]. Several authors insist on the material and spatio-temporal singularity of this right and plead for constitutional recognition of an intangible fundamental right in legal systems[445].

This awareness of these interdependencies is gradually being expressed within the CJEU, as illustrated by the conclusions of Advocate General J. KOKOTT on the interpretation of Directive 2008/50/EC. In this case, she considers that "*the rules on ambient air quality are the concrete expression of the protection obligations incumbent on the Union, arising from the fundamental right to life enshrined in Article 2§1 of the Charter and the high level of protection required by Article 3§3 of the TEU, Article 37 of the Charter and Article 191§2 of the TFEU*"[446]. It concludes that '*measures likely to compromise the effective application of Directive 2008/50/EC* (ambient air quality) (...) *are therefore, by virtue of the weight of that directive, entirely comparable to serious interference with fundamental rights*'[447]. The CJEU does not take up this argument and does not explicitly draw on the case law of the ECHR, although it reaches the same conclusions as the Advocate General[448].

The recognition of a right to the environment postulates the necessary interdependence of fundamental rights and their inclusion in the long term of generations[449].

The Inter-American Court of Human Rights (IACHR) promotes an inclusive interpretation of this singular fundamental right. In 2017, the Court recalled that "*effective environmental protection often depends on the exercise of human rights*"[450] including procedural rights that "*support better environmental policy*

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[440] Speech by the President of the French Republic to the EP on 19/1/2022-https://www.elysee.fr/front/pdf/elysee-module-19159-fr.pdf

[441] Report on the Final Outcome of the Conference on the Future of Europe, Opoce, May 2022, 236 p (only mention of a proposal on "animal rights, agriculture" which recalls the importance of protecting the welfare of farm animals.

[442] Aarhus Convention, https://unece.org/fileadmin/DAM/env/pp/documents/cep43f.pdf

[443] Aarhus Convention, preamble.

[444] M. PRIEUR, *Le principe de non régression au cœur du droit de l'Homme à l'environnement*, in *Changements environnementaux globaux et droits de l'Homme*, C. COURNIL & C. COLARD-FABREGOULE (eds.), 656 p, 107-125.

[445] Among the many books: *The Human Right to a Healthy Environment*, J. H. KNOX (ed.), Cambridge University Press, 2018; S. ATAPATTU & A. SCHAPER *Human rights and the Environment*, Ed. Routledge 2019, 384 p; D K ANTON, D. L. SHELTON, *Environmental Protection and Human Rights*, Cambridge University Press, 2011, 1124 p.

[446] Opinion of 28/2/2019, Lies Craeynest & al, C-723/17, ECLI:EU:C:2019:168

[447] Ibid.

[448] judgment of the Court of 26/6/2019, Lies Craeynest & al, C-723/17, ECLI:EU:C:2019:533

[449] The preamble of the Constitutional Charter of the Environment states that "*the environment is the common heritage of human beings*" (universal dimension) in the generational perspective of sustainable development. In its decision n°2019-823 (Priority Question of Constitutionality, Crop Protection Industry Association) of 31/1/2020, the Constitutional Council deduced that *"the protection of the environment, common heritage of human beings, constitutes an objective of constitutional value*".

[450] IACHR judgment of 6/2/2020, Indigenous Communities of the Lhaka Honhat (Our Land) association v. Argentina. The Court cites in this case an extract from the report of the UN Human Rights Council under the coordination of the special report KJ Knox "*Human Rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*", 2012.

making"[451]. Similarly, it emphasised that environmental damage can affect human rights that are "*particularly vulnerable to environmental impact include the rights to life, personal integrity, private life, health, water, food, housing, participation in cultural life, property and the right not to be forcibly displaced (...) rights to liberty and security of the individual (...) the right to peace (...)*"[452]. It concludes that the right to a healthy environment "*is a fundamental right for the existence of Humankind*"[453].

Its 2017 advisory opinion and the emblematic 2020 judgment offer ways of broadly interpreting human rights that may inspire responses to criticisms of the individualistic and anthropocentric bias of European systems for safeguarding rights and freedoms. In the light of the legal systems of the States Parties to the American Convention on Human Rights and their international commitments, the IACHR emphasises that the right to the environment has both a collective ("*universal value that owned to both present and future generations"*[454]) and an individual ("*direct and indirect impact on the individual"*[455]) dimension. Moreover, in its 2017 opinion, it insists on the singularity of this right to the environment, which it describes as autonomous, which "*unlike other rights, protects the components of the environment such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals*"[456]. It concludes that the right to a healthy environment *"protects nature and the environment not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms which we share the planet that also deserve protection in their own right*"[457]. In a complaint lodged by the indigenous peoples of Lhaka Honhat, the IACHR reiterated this interpretation in an emblematic ruling in 2020[458]. It found, in a voluntarist demonstration, that Argentina had violated several human rights (collective ownership of their ancestral territory, right to a healthy environment, to food, to water, to participate in cultural life) of 132 indigenous communities represented by the *Lhaka Honhat (Our Land)* association[459]. The Court enjoins Argentina to pay two million dollars to a community fund intended to implement the measures it prescribes, including the resettlement of Creole populations outside the indigenous territories within the next six years[460].

As the ECHR system currently stands, only individuals whose fundamental rights are affected by significant environmental damage are concerned. As Jan DARPO summarises, "*there is a limitation which excludes those who want to use the Convention for general purposes of environmental protection or nature conservation, the so-called direct victim requirement*"[461]. In a 2020 report, Elisabeth Lambert supports the Council of Europe's recognition of an individual and collective right to a decent or ecologically viable environment based on an ecocentric and intergenerational approach[462]. Since the constitutional consecration of a "*right to a healthy and ecologically balanced human environment*" in Portugal[463], several developments, or even transformations, are gradually taking place in European legal systems. They invite us to reinterrogate the *ratione loci, temporis, materiae and personae* components of

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[451] IACHR Advisory Opinion of 15/11/2017, at the request of Colombia, OC-23/17, The environment and Human rights (state obligations in relation to the environment in the context of the protection and guarantee of the rights of life and to personal integrity: interpretation and scope of articles 1§1 & 5§1 in relation to articles 1§1 & 2§1 of the American Convention on Human Rights).
[452] IACHR Advisory Opinion of 15/11/2017, *supra*.
[453] IACHR Advisory Opinion of 15/11/2017, *supra*.
[454] IACHR Advisory Opinion of 15/11/2017, *supra*.
[455] IACHR Advisory Opinion of 15/11/2017, *supra*.
[456] IACHR Advisory Opinion of 15/11/2017, *supra*.
[457] IACHR Advisory Opinion of 15/11/2017, *supra*.
[458] IACHR judgment of 6/2/2020, Indigenous Communities of the Lhaka Honhat (Our Land) association v. Argentina. "*Nature must be protected, not only because of its benefits or effects for humanity, but because of its importance for the other living organisms with which we share the planet*.
[459] Both for indigenous communities and for the right to a healthy environment and its interrelation with the right to water and food. M.A. TIGRE, Indigenous Communities of the Lhaka Honhat (our Land) Association v. Argentina. *American Journal of International Law*, 2021, Vol. 115, issue 4, 706-713.
[460] This ruling is part of a case of more than 20 years of opposition between the aforementioned association and Argentina, with the filing of a complaint with the Inter-American Commission on Human Rights in 1998.
[461] Study J. DARPO *Rights on Nature in the European Context*, JURI Committee of the EP, 2021, op. *cit.*
[462] E. LAMBERT, Environment and Human Rights, introductory report to the high-level conference "*Environmental Protection and Human Rights*", Strasbourg 27/2/2020, op. *cit.*
[463] Article 66 of the Constitution.

a right to the environment, including a transgenerational dimension[464] and this, beyond its procedural focus[465].

Proponents of the rights of nature include the importance of this fundamental right to the environment in their reasoning. However, they believe that "*the human right to a healthy environment is not enough because there are no binding regulatory parameters based on ecology to define when and how an environment is* healthy"[466], without always demonstrating such an assertion robustly.

In the current state of EU law, and in particular the case law of the CJEU, the prospect of a judicial recognition of a right to the environment remains uncertain. The pressure of the ecological and climate emergency, recent international pronouncements and future judgments of the ECHR could perhaps accelerate the process of recognition in EU law. Similarly, the strengthening of procedural rights in the field of the environment[467] is helping to establish a '*right to a high level of environmental protection*'[468]. The constitutional recognition by the EU of an individual and collective right to a "*safe, clean, healthy and sustainable environment*" for present and future generations, which also benefits natural entities, is also necessary in order to honour its commitment to contribute *"to peace, security and sustainable development of the planet, solidarity and mutual respect among peoples (...)*"[469]. This essential first step depends on the determination of the Member States to engage in a process of revision of the Charter of Fundamental Rights.

On the other hand, does the European context lend itself from the outset to enshrine a fundamental right to the environment, including natural entities? The active deployment of nature rights strategies in several Member States and the recent Spanish law declaring the Mar Menor lagoon a legal entity (2022) may show that the national level is initially a more suitable place to start.

If the EU is to engage in such a process of recognising a fundamental right to the environment based on an ecosystem logic and non-regression, it is necessary to identify all the addressees of the duties[470] and due diligence obligations beyond the essential role of public authorities. Since the initiative of the UN Human Rights Council in 2014, many vicissitudes, including the positioning of the EU[471], have marked the discussions on the elaboration of a treaty on "*transnational corporations and other business enterprises*

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[464] Example of the German Constitutional Court ruling of 24/3/2021, BvR 2656/18, Constitutional complaints against the Federal climate change Act. According to the Court, the state's duty to protect life and health (Article 2 of the Basic Law) includes the duty to protect them from the risks of climate change, including for future generations (GF). It interprets the State's duty to "*protect the natural foundations of life*" (Article 20(a) environmental protection) in the light of the GFs so as not to force them into "*radical abstinence*". https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html

[465] The terms "*healthy, decent, safe, sustainable, clean, ecologically balanced*" aim to clarify and specify the very substance of this right to the environment *("clean air", "access to water", "safe climate", "non-toxic environment", "healthy ecosystems and biodiversity", "healthy food*") in interaction with human rights and the SDGs. Cf. at the UN level: the reports of the current Special Rapporteur D. R. BOYD on the right to a clean, healthy and sustainable environment, including the report on "*The right to a healthy environment: good practices*", December 2019. https://www.ohchr.org/fr/special-procedures/sr-environment

[466] *Towards an EU Charter of the Fundamental Rights of Nature*, EESC, *prec*

[467] An example is the procedure for requesting a review which has been extended following the amendment in 2021 of Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention to EC institutions and bodies (Regulation (EU) 2021/1767 of the EP and of the Council of 6/10/2021, OJEU 2021 L 356/1). We will come back to this later.

[468] Recital 109 of Directive (EU) 2019/1937 of the EP and of the Council of 23/10/2019 on the protection of persons reporting breaches of EU law, OJEU 2019 L 305/17. This statement simply stated in a recital may be an element for the CJEU to inform its interpretations.

[469] Art. 3§5 of the TEU Lisbon.

[470] Example of the French Constitutional Charter on the Environment: Article 2 "*Every person has the duty to take part in the preservation and improvement of the environment*", or the Portuguese Constitution of 1976: Article 66 on the right to an environment: "*every person (...) has the duty to defend it*".

[471] 5th session of the working group in October 2019. In 2018, the EU disassociated itself from the conclusions of the Working Group at its 4th session, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/000/38/PDF/G1900038.pdf?OpenElement. The Commission still lacks a mandate from the Council to participate in the negotiations. The EP and the EESC are calling for a clear mandate for the Commission (EESC opinion of 24/1/2019 on a binding UN treaty on business and human rights, OJEU 2020 C 97/9).

and human rights"[472]. Opposing several national delegations, several NGOs are pushing for the inclusion of the term '*environmental rights*' in the draft, not just environmental damage[473]. The revised draft of July 2019 still included the notion of environmental rights in the definition of human rights violations'[474]. The Commission's February 2022 proposal for a directive on corporate sustainability due diligence lacks clarity on this issue[475]. The latter establishes a set of obligations to prevent and reduce negative impacts on human rights and the environment to be integrated into the policy of the companies concerned throughout the value chain. Paradoxically, in its opinion on the draft treaty on "*transnational corporations and other business enterprises and human rights",* the EESC insists on the need to explicitly mention the right to a healthy environment[476], yet it remains silent in its opinion on the draft directive on due diligence. Moreover, while the EESC is highly critical of several of the draft's inaccuracies, it merely recalls the key role of civil society organisations "*in establishing reliable conditions of transparency with regard to the violation of human rights and environmental rights*"[477].

Finally, the effectiveness and added value of an extended recognition of a right to the environment is assessed in terms of its invocability and the extent of control, particularly in situations of conflicting rights[478]. Many authors, including promoters of the rights of nature, have proposed new guidelines for weighing up rights and interests in a way that is not systematically to the detriment of nature (**C**).

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[472] Human Rights Council Resolution 26/9, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/53/PDF/G1408253.pdf?OpenElement. All EU Member States represented in the Council voted against such a constitution (Austria, Estonia, France, Germany, Ireland, Italy, Czech Republic, Romania, UK).

[473] Report on the 5th session of the working group on transnational corporations and other business enterprises and human rights, https://ap.ohchr.org/documents/F/HRC/other/A_HRC_43_55%20F.pdf

[474] "*Human rights violation or abuse shall mean any harm committed by a State or a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights*." https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf, 16/7/2019.

[475] COM (2022) 71 final, Proposal for a Directive of the EP and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937. The term "*human rights and the environment*" is used alongside the term "negative impacts on *human rights and the environment*". Approval of the text by the Council in March 2024 following the1st EP reading.

[476] EESC own-initiative opinion of 24/1/2019 on a binding UN treaty on business and human rights, REX/518

[477] EESC opinion of 1/7/2022 on the Proposal for a Directive of the EP and of the Council on corporate sustainability due diligence, INT/973.

[478] We will come back to this in more detail.

C - The balance of interests and rights: new guidelines for protecting nature?

Rights of Nature theory advocates a '*natural nested hierarchy of rights*'[479]. Such a hierarchy of rights '*that follows the natural hierarchy of* systems'[480] is rooted in an all-encompassing conception of rights of nature that '*encompasses both human and economic rights in right relationship*'[481]. According to the hierarchy of rights proposed by Mumta ITO[482], "*the rights operate in synergy with each other, as competing rights would undermine the wellbeing and integrity of the* whole"[483]. This ambition to change "*the mainstream model of sustainability to a model of nested hierarchies that follow the natural orders of life with each level being dependent on the one above for its* existence"[484] raises questions and controversies, even beyond the legal sphere[485].

Can the recognition of rights of nature constitute a solution capable of reexamining the "*reasonable conciliation*" and/or the "*fair balance*"[486] of interests without altering the substance of fundamental rights and freedoms or distorting them? What criteria should be rethought, instituted or extended to ensure the reasonable, proportionate nature of interference with rights and freedoms and/or the failure of the public authority to fulfil its positive obligations?

The current processes for balancing rights and interests are far from satisfactory, as demonstrated by the ecological emergency, growing inequalities and widespread insecurity. The CJEU has consistently held that "*where several rights protected by the EU legal order come into conflict with each other, that assessment must be carried out with due regard to the need to reconcile the requirements of the protection of those various rights and to strike a fair balance between them*"[487]. Similarly, it specifies that these rights, such as the right to property, freedom of trade[488] , freedom of enterprise[489] (...) are not "*absolute prerogatives but must be taken into consideration in relation to their function in society*"[490]. In the name of general interest objectives, restrictions on the exercise of rights and freedoms are permissible without constituting "*disproportionate and intolerable intervention*"[491]. On several occasions, the Court has confirmed the validity of EU environmental legislation with regard to limitations on property rights and other economic freedoms. Notwithstanding a few inflections, the Court maintains a defensive posture of internal market and competition rules against national environmental legislation, with or without Community harmonisation. In the light of the principle of proportionality[492], a general principle of EU law, it recalls that the national obstacle to free movement must *be* "*appropriate to guarantee the attainment of the objective pursued and must not go beyond what is necessary to attain*

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[479] *Towards an EU Charter of the Fundamental Rights of Nature*. Study for the EESC, 2020, op. *cit.*
[480] *Towards an EU Charter of the Fundamental Rights of Nature*. Study for the EESC, 2020, op. *cit.*
[481] *Towards an EU Charter of the Fundamental Rights of Nature*. Study for the EESC, 2020, op. *cit.*
[482] Mumta ITO, Nature's Rights: why the European Union needs a paradigm shift in Law to achieve its 2050 vision, *Revista Argumentum*, 2020, *supra*.
[483] *Towards an EU Charter of the Fundamental Rights of Nature*. Study for the EESC, 2020, op. *cit.*
[484] *Towards an EU Charter of the Fundamental Rights of Nature*. Study for the EESC, 2020, op. *cit.*
[485] Cf. the heated arguments mentioned in the introduction.
[486] Recurrent expressions in the case law of the CJEU, for example: balance between rights, balance between rights and general interest objectives, balance between general interest and particular interest (...)
[487] judgment of the Court of 31/1/2013, D. McDonagh, C-12/11, (air transport and Icelandic volcano eruption), ECLI:EU:C:2013:43
[488] Court judgment of 7/2/1985, Association for the Defence of Waste Oil Burners, Case 240/83. It was in this case that the Court recognised that the protection of the environment constitutes an objective of general interest. ECLI:EU:C:1985:59
[489] Example: Court judgment of 3/9/2015, Inuit Tapiriit Kanatami v Commission, C-398/13 P, ECLI:EU:C:2015:535
[490] Constant formulation of the Court, even before the EU Charter of Fundamental Rights, in particular concerning the recognition of rights via the general principles of Community law: judgment of 11/7/1989, H. Schräder v Hauptzollamt Gronau, 265/87, (agricultural sector), ECLI:EU:C:1989:303. In the environmental field: judgment of 29/4/1999, Standley e.a, C-263/97, (property rights/Directive 91/676/EEC protection of waters against pollution by nitrates) ECLI:EU:C:1999:215; judgment of 9/3/2010, ERG, C-379/08, Environmental Liability Directive 2004/35, ECLI:EU:C:2010:127; judgment of 15/1/2013, J Krizan, C-416/10, property rights and several environmental directives) ECLI:EU:C:2013:8 (...)
[491] Recurrent formulation since the Court's judgment of 13/12/1979, Hauer, C-44/79, ECLI:EU:C:1979:290
[492] Article 5§4 of the TEU Lisbon '*In accordance with the principle of proportionality, the content and form of Union action shall not go beyond what is necessary to achieve the objectives of the Treaties. The Union institutions shall apply the principle of proportionality in accordance with the Protocol on the application of the principles of subsidiarity and proportionality*.

it"[493], that principle "*requires that the acts of the Union institutions be suitable for achieving the legitimate objectives pursued by the regulation in question and not go beyond what is necessary for the attainment of those objectives, it being understood that, where there is a choice between several appropriate measures, the least restrictive should be used and that the inconvenience caused must not be disproportionate to the aims pursued*"[494].

As an objective of general interest of constitutional value and an "*imperative requirement*"[495], environmental protection is nevertheless given a variable reception in the weighing of human rights and interests. A number of studies have amply demonstrated this, regardless of the legal system. In the search for new ways of reconciling and/or prioritising in favour of nature, two paths are presented and converge. An ecological rereading of the principle of proportionality and recognition of the principle in *dubio pro natura* (**1)**. EU environmental law contains elements that resonate with such principled approaches, the generalisation of which may constitute a fruitful beacon (**2**).

1) The greening of the principle of proportionality and the principle in dubio pro natura: converging logics

The search for new ways of reconciling or even prioritising for the benefit of nature conservation cannot be summed up *in abstracto* as "*reframing rights from adversarial to synergistic*"[496]. Conflicts are not only confrontations between civil and social rights and economic rights and freedoms. Confrontations are also at the heart of environmental objectives (biodiversity vs. climate, biodiversity vs. renewable energy (...)) where the temporalities of the urgency of the present and the preservation of the future collide. It is now difficult to ignore or minimise the increasing weight of ecological emergencies in the weighing of rights and interests. The singularity and spatio-temporal complexity of ecological issues and emergencies require a rethinking of the processes for weighing up interests and rights. What model(s) of conciliation and/or prioritisation should be devised and generalised?

In 2014, Gerd WINTER calls for the recognition of a general principle of eco-proportionality "*as a means of restricting the power of human society over nature*"[497] requiring society to justify its uses of nature. Drawing on the criteria of the classic principle of proportionality, he proposes that such uses of nature must be aimed at a "*justifiable societal objective*" ("*realisation of* individual *rights*", "*public service*") and that the human activity must be "*effective*" (useful for the objective), "*necessary*" (absence of less intrusive alternative activity) and "*balanced*" (uses). Without excluding other ways of strengthening the recognition of nature in law, such as the rights of nature, he considers that the "*concept of subjective rights does not provide guidelines for finding the optimal solution*" of "*balancing conflicting subjective rights and finding a compromise*".

In the wake of doctrinal proposals, new interpretations of the principle of proportionality are gradually taking shape in the courts. In 2021, the German Constitutional Court noted the inadequacy of the greenhouse gas reduction targets and the disproportionate distribution of risks and burdens between

[493] judgment of the Court of 4/10/2018, LEGO, C-242/17, renewable energy, ECLI:EU:C:2018:804, judgment of the Court of 22/6/2017, E.ON Biofor, C-549/19, renewable energy, ECLI:EU:C:2017:490, judgment of the Court of 12/11/2015, Valev Visnapuu, C-198/14, (packaging deposit system), ECLI:EU:C:2015:751

[494] judgment of the Court of 13/3/2019, Poland/PE & Council, C-128/17, Directive (EU) 2016/2284 reducing emissions of air pollutants, ECLI:EU:C:2019:194, Settled case law.

[495] Since 1988, the Court has recognised that environmental protection "constitutes an imperative requirement which may limit the application of Article 30 of the Treaty" (for the record, a provision which prohibits quantitative restrictions on trade between Member States, including measures having equivalent effect). judgment of the Court of 20 September 1988, Commission v Denmark, C-302/86, ECLI:EU:C:1988:421

[496] *Towards an EU Charter of the Fundamental Rights of Nature*. Study for the EESC, 2020, op. *cit.*

[497] G. WINTER, Ecological proportionality: an emerging principle, *Revue environnement et développement durable*, Dec. 2014, 20-26.

present and future generations[498]. It emphasises the constitutional duty of the state to protect the '*natural foundations of life*'[499] in such a way 'that *they can be passed on to future generations in a state that leaves them a choice other than radical austerity if they wish to continue to preserve these foundations*'[500]. The German Constitutional Court further clarifies that '*this obligation of intergenerational protection is, however, of a purely objective nature, since future generations cannot, either as a whole or as a concept covering all individuals who will be living at that time, be regarded as current holders of fundamental rights*'[501].

The Court concludes that the Federal Climate Change Act 2019 fails to comply with "*the requirement of the principle of proportionality, according to which it is incumbent on the legislature to establish a regime whereby the reduction in CO2 emissions imposed by the Constitution in Article 20 a FA (Basic Law) with a view to achieving climate neutrality must be carried out with foresight and be spread over time in a manner that safeguards fundamental rights*". From the principle of proportionality, it deduces "*that a certain generation cannot be allowed to use up most of the residual CO2 budget by reducing emissions only relatively moderately, if such an approach would result in an overwhelming burden being placed on subsequent generations (...) and confronting these generations with a vast loss of their freedom"*[502].

Rights of nature advocates also promote another model of the interaction of rights and interests in which the *in dubio pro natura* principle plays a cardinal function.

Since the Costa Rican Constitutional Court's interpretation in 1995, this principle of interpretation *in dubio pro natura* has gradually become autonomous from the precautionary principle and has been disseminated in particular in several Latin American legal systems[503]. Article 395 of the Ecuadorian Constitution of 2008 states that "*in case of doubt about the scope of environmental legal provisions, they shall be applied in the sense most favourable to the protection of nature*"[504]. In 2017, Ecuador's Environmental Code explicitly enshrines the in dubio pro natura principle: "in the *event of a lack of information, legal vacuum or contradiction of norms, or in the event of doubt as to the scope of environmental legal provisions, the one that is most favourable to the environment and nature shall be applied. The same applies in the event of a conflict between these provisions*"[505].

In its 2016 Global Statement on the State of Environmental Law, the IUCN enshrines among the substantive principles for environmental justice, the principle in *dubio pro natura*, which states that "in *cases of uncertainty, all matters before courts, administrative agencies and other decision-makers should be resolved in the manner most favourable to environmental protection, giving preference to the least environmentally damaging alternatives. Actions should not be taken when their potential negative environmental impacts are disproportionate or excessive in relation to the benefits derived from them*"[506]. More recently, the Council of Europe's Committee on Social Affairs, Health and Sustainable Development

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[498] judgment of the German Constitutional Court of 24/3/2021, BvR 2656/18, BvR 288/20, BvR 96/20, BvR78/20, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/FR/2021/03/rs20210324_1bvr265618fr.html;jsessionid=1BEDCBA19180443A321DE7EB4BD48CEE.1_cid507

[499] Article 20 a of the Basic Law

[500] Ruling of the German Constitutional Court of 24/3/2021, BvR 2656/18, BvR 288/20, BvR 96/20, BvR78/20.

[501] The Court thus deploys a reasoning based on the subjective approach to the rights of present generations and an objective approach to the obligation to take future generations into consideration.

[502] judgment of 24/3/2021, BvR 2656/18, , BvR 288/20, , BvR 96/20, , BvR78/20, *aforementioned*.

[503] A. OLIVARES & J. LUCERO, Contenido y desarrollo del principio in dubio pro natura. Hacia la proteccion integral del medio ambiente, Ius et Praxis, vol. 24, n°3, 2018. https://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-00122018000300619&lng=es&nrm=iso&tlng=es

[504] Free translation of "*en caso de duda sobre el alcance de las disposiciones legales en materia ambiental, estas se aplicaran en el sentido mas favorable a la protección de la naturaleza*".

[505] Free translation: "*when there is a lack of information, legal vacuum or contradiction of norms, or when there is a doubt about the scope of the legal provisions on environmental matters, the most favourable to the environment and nature shall be applied. De igual manera procederá en caso de conflicto entre esas disposiciones*".

[506] Report "*Anchoring the right to a healthy environment: the need for enhanced Council of Europe action*", 13/9/2021, op. cit. Reiterated in Parliamentary Assembly Recommendation 2011 (2021) of 29/9/2021, op. *cit.*

suggests that the principle *in dubio pro natura*[507] should be included in its proposal for an additional protocol on the right to the environment, in line with the IUCN formulation.

Although the interpretative principle *in dubio pro natura has* not been enshrined in EU law, its spirit is cautiously reflected in EU law on nature protection. These laws have several elements that may favour the promotion of new logics for weighing up rights and interests (2).

2) The recognition of new logics of weighing rights and interests, between caution and potential in EU law

In the current state of EU law, the balance of interests, rights and freedoms presents a disparate configuration depending on the policies concerned, despite the obligation to integrate "*a high level of environmental protection and the improvement of its quality*". Whether or not they support the rights of nature, the vast majority of authors agree on the need for a paradigm shift, including in the reconciliation and prioritisation processes.

Notwithstanding the attractiveness of Munta ITO's hierarchy of rights scheme, its philosophy and spatio-temporal logic, as well as its legal operationality, raise questions. What precisely is covered by the idea of "*nested concentric circles that follow the natural hierarchies in Nature*" and the promotion of a "*natural hierarchy of Rights ensuring coordination and harmony*" emphasised by the authors of the EESC report? Are such considerations in line with Gerd WINTER's proposal for the recognition of a principle of eco-proportionality combined with rights to nature? Is the expression "*natural hierarchies in Nature*" to be understood in the "scientific" or "ethical" sense of planetary limits? Similarly, the draft directive on the rights of nature envisaged by the draft ECI (2017) remains very vague on how conflicts between rights are to be resolved[508].

EU environmental legislation offers some elements for building generalizable guidelines for weighing up rights and interests that give nature greater weight. Even if the *in dubio pro natura* principle is not expressly recognised in EU law, its spirit drives the judicial interpretation of the Natura 2000 regime. Furthermore, the function of this principle to give a most favourable meaning to nature in case of doubt is also expressed in the precautionary principle. The CJEU has worked to ensure, among other things, that impact assessments of plans or projects are "such as to *dispel any reasonable scientific doubt as to the effects*"[509] on the conservation objectives of the Natura site.

Similarly, the strict interpretation of Article 6§4 of Directive 92/43/EEC requires that the economic cost of the measures alone should not be "*decisive*"[510] when examining the absence of alternative solutions[511]. The praetorian assessment of the imperative reasons of overriding public interest[512] likely to

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[507] Art. 4 Principles of prevention, precaution, non-regression and *in dubio pro natura* "*In case of doubt, all questions submitted to the courts, administrative bodies and other decision-makers must be resolved in the manner most favourable to the protection and conservation of nature, giving preference to the alternatives least harmful to the environment*.

[508] It states that "*any conflict between the rights of nature and the rights of any other natural or legal person shall be resolved in such a way as to maintain the integrity, balance, health and equilibrium of nature as a whole, nature being the basis of life*", and that "*legal persons shall not enjoy special rights or privileges which subordinate the rights of natural persons and nature*".

[509] Established case law: e.g. Court judgment of 9/9/2020, Friends of the Irish Environment, C 254/19, ECLI:EU:C:2020:680.

[510] judgment of the Court of 14/1/2006, Grüne Liga Sachsen, C 399/14, Habitats Directive 92/43/EEC, article 6§2 A 4, construction project of the road bridge over the Elbe meadows, ECLI:EU:C:2016:10. judgment of the Court of 16/7/2020, WWF Italia Onlus, C 411/19, Habitats Directive 92/43/EEC, article 6, realisation of road section, ECLI:EU:C:2020:580.

[511] judgment of the Court of 22/6/2022, Commission v. Slovakia, C-661/20, "*A plan or project likely to affect the integrity of the territory may be approved or authorised only if it is shown that there are no other alternative solutions and must be implemented for imperative reasons of overriding public interest (...*)", ECLI:EU:C:2022:496. judgment of 16/7/2020, WWF Italia Onlus &. Al, C 411/19, "*Article 6§4 (...) requires that, even if justified, damage to the integrity of a special area of conservation must be authorised only if it is genuinely unavoidable, that is to say, if there are no alternative solutions*".

[512] In the absence of a definition of the concept in the directive, the Court specifies that it must be a '*major public project*' of such importance that it '*can be balanced against the objectives of habitat conservation*' (judgment of 16/2/2012, Marie-Noëlle Solvay,

authorise the realisation of a plan or project despite negative impacts on the Natura site aims at taking into account the long term in the balance of public interests and the objectives of conservation of natural entities[513]. In its guidance document on the strict protection of animal species (2021), the Commission recognises that "*in most cases, the public interest can only be overriding if it is long-term: interests that produce only short-term benefits would not be sufficient to outweigh the long-term conservation interests of the species*"[514]. The Natura 2000 regime, as interpreted by the Court, could thus be a source of inspiration concerning in particular the taking into account (or not) of economic interests and the mandatory determination of alternatives to plans or projects of activities. The designation of Natura sites thus excludes any balancing of ecological interests against economic interests[515].

The "do *no harm"* oath of the Green Deal for Europe cannot be reduced to a simple political slogan; it requires an ambitious legal translation beyond a logic of reinforced proceduralisation[516] which would evade democratic deliberations on the substance of decisions. The legislative coherence required to give concrete expression to this oath should require that the directives on the environmental impact assessment (EIA) of projects, plans and programmes serve as a mandatory reference. In addition to the Aarhus Regulation 2021/1767/EU, the adoption of a regulation to accompany these EIA directives and be binding on the EU institutions would give real impetus to the principle of integration of environmental requirements. As it stands, however, the 2016 Interinstitutional Agreement on “Better Lawmaking” does not impose or systematise impact assessment procedures[517]; moreover, these do not focus solely on the environmental impact of legislative and/or regulatory proposals but are based on an integrated approach aimed at the objective of sustainable development. Furthermore, the CJEU emphasises that "*the omission of an impact assessment cannot be regarded as a breach of the principle of proportionality where the EU legislature is in a particular situation requiring it to be dispensed with and has sufficient*

C 182/10, ECLI:EU:C:2012:82; among the reasons recognised as such : the security of energy supplies (judgment of the Court of 29/7/2019, Inter-Environnement Wallonie ASBL & Bond Beter Leefmilieu Vlaanderen ASBL v Council, C 411/17, ECLI:EU:C:2019:622), the supply of drinking water (Court judgment of 11/9/2012, Nomarchiaki Aftodiookisi Aitoloakarnanias, C-43/10, ECLI:EU:C:2012:560), a beach access platform for the disabled (Court judgment of 10/11/2016, Commission v Greece, C 504/14, ECLI:EU:C:2016:847). On the other hand, it considers that in the sites of priority habitats and species (invocable reasons according to the Directive: public health and safety), "*only the need to avert a real and serious threat to the disruption of electricity supply is such as to constitute, in circumstances such as those at issue in the main proceedings, a reason of public safety*" (C 411/17, *supra)*, similarly, it concludes that irrigation "*cannot, in principle, fall within considerations relating to human health and public safety*" (C 43/10, *supra*). Finally, while the Court is opposed to classifying the construction of an administrative centre for a private company (C 182/10, *aforementioned*) and the construction of ski slopes (judgment of the Court of 20 September 2007, Commission v. Italy, C 304/05, ECLI:EU:C:2007:532) as an imperative reason of overriding public interest, it considers that it "cannot *be ruled out that a private project is of overriding public interest in terms of its nature and socio-economic context*" (C 182/10, *aforementioned*). Notwithstanding the undeniable contribution of these legal interpretations, some of them raise questions, such as the one set out in Case C-43/10, where the Court considers that the transformation of a natural river ecosystem into a highly anthropogenic river and lake ecosystem is possible if the conditions of Article 6§4 of the Habitats Directive are met (overriding reason of overriding public interest, including social or economic interest, absence of alternative solutions, and in this case : compensatory measures to ensure the overall coherence of Natura 2000) are met: judgment of the Court of 11/9/2012, Nomarchiaki Aftodiookisi Aitoloakarnanias, C-43/10, deviation of the course of a river, *prec.*). Despite these judicial contributions, the minimalist interpretations adopted by the Member States are far from hypothetical, as illustrated by their arguments before the CJEU. It is also up to the national courts to follow the interpretations of the CJEU, and even go beyond them, in order to ensure that the provisions of the Directive have a useful effect.

[513] judgment of the Court of 29/7/2019, Inter-Environnement Wallonie ASBL & Bond Beter Leefmilieu Vlaanderen ASBL v. Council, C 411/17, project to restart the electricity production activity of a nuclear power plant at a standstill, ECLI:EU:C:2019:622

[514] Communication, Guidance document on the strict protection of animal species of Community interest under Directive 92/43/EEC, OJEU 2021 C 496/1.

[515] judgment of the Court of 23/3/2006, Commission v Austria, C 209/04, Birds Directive, corncrake, construction project for the federal expressway S 18. ECLI:EU:C:2006:195

[516] N. HERVE-FOURNEREAU, *Démocratie et procéduralisation du droit de l'environnement de l'Union européenne : de l'art du trompe l'œil*, in " *Procéduralisation du droit de l'Union européenne "*, S. ADALID & F. MICHEA (dir), PUR 2022, 482 p. 335-370.

[517] Interinstitutional Agreement between the EP, the Council and the Commission of 13/4/2016 "Better lawmaking", *OJEU* L 123, 12/5/2016, p. 1, replaces the 2003 agreement. In its judgment of 3/12/2019, the Court thus considers '*that an obligation to carry out an impact assessment in all circumstances does not follow (...) from the Interinstitutional Agreement*', C-482/17, Czechia/ EP & Council, (control and acquisition of arms), ECLI:EU:C:2019:1035.

information to enable it to assess the proportionality of a measure adopted"[518]. It thus specifies that the "*Union legislature may take account not only of the impact assessment but also of any other source of information*"[519]; in the present case, it refutes Poland's argument against the inadequacy of the impact assessment on the distribution of efforts to reduce greenhouse gas emissions among the Member States[520].

The substantial strengthening of the importance of the ecological objective of general interest in the balance of interests and rights thus requires robust procedural mechanisms and legal indicators[521]; it also requires the determination of clear and transparent criteria for holistic assessment according to the ecological damage (spatial and temporal scales, severity, irreversibility, cumulative/cocktail effect)[522] and the entity affected (ecological and social vulnerabilities, scarcity, sensitivity[523], functions in the ecosystem (...)) Several authors insist on the need for such reforms and to go beyond the logic of cost/benefit balances that are not very receptive to the challenges of incommensurability[524].

The amplification of ecological emergencies, the risks of irreversibility and tipping points in an earth system that is increasingly resistant to conventional predictions *ultimately* undermine the enjoyment of vital rights and freedoms, including economic ones. The EU's procedural responses to the intensity and severity of such interference with rights are indispensable. They must be accompanied by a reinforced framework with a re-reading of the principle of proportionality in conjunction with the enshrinement of the principle of non-regression[525], *in dubio pro natura* and the principle of ecological solidarity in the TEU. Similarly, the granting of a reinforced status to nature is an essential marker for this paradigm shift in the balance of interests and rights. The constitutional recognition of a right to the environment is essential and will have an impact on the decision-making process, including the margin of appreciation of the European legislator[526], the nature of the obligations[527] and the scope of judicial review[528].

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[518] C-482/17, Czech Republic v EP & Council, C-482/17, op. *cit.*

[519] judgment of the Court of 13/3/2019, Poland/PE & Council, C-128/17, (Directive (EU) 2016/2284), ECLI:EU:C:2019:194.

[520] *Ibid*.

[521] M. PRIEUR, C. BASTIN, A. MEKOUAR, *Measurer l'Effectivité du Droit de l'Environnement,* 2021, *prec*.

[522] Global but also social limits.

[523] A generalisation of the ecological sensitivity maps used in the framework of Natura 2000 would thus make it possible to guarantee systemic protection of natural entities before they become "vulnerable, rare or threatened with extinction". These elements would contribute to an appropriate and adjustable legal protection of these entities in the framework of a biodiversity directive. Example of species sensitivity maps in Member States cited in the Communication from the Commission on the guidance document on the strict protection of animal species of Community interest under the Habitats Directive, OJEU 2021 C 496/1. Natural History Museum "*Methodology for assessing the sensitivity of benthic habitats to anthropogenic pressures*", Dec. 2015, 53 p. In this report, sensitivity is defined as the characteristic of a habitat defined by the combination of its ability to tolerate external pressure (resistance) and the time required for its recovery from degradation (resilience).

[524] C. FIGUIERES & JM SALLES, Non-comparability and incommensurability - reflections on the evaluation of nature, in *Interactions Hommes Milieux*, R. CHENORKIAN & S. ROBERT (dir). Ed. Quae 2014, 163-177. P. DUCOULOMBIER, *Les conflits de droits fondamentaux devant la CEDH*, Ed. Bruylant, 2011, 746 p. S.U. COCELLA, The restriction of fundamental rights in the EU, Ed. Bruylant, 2018, 616 p. JC FRITZ*, Protection de l'environnement et marché : coexistence ou guerre des mondes*, in " *Marché et Environnement "*, M-P. CAMPROUX-DUFFRENE and J. SOHLNE, Ed. Bruylant, 2014, 528 p.

[525] Based in particular on the interpretation of the obligation to prevent the deterioration of bodies of water (Article 4 of the Water Framework Directive 2000/60/EC: see Case 461/13, supra), the Court of Justice of the European Communities has adopted the following approach ("*an interpretation according to which only 'serious harm' constitutes deterioration of the status of a body of water, an interpretation which is based, in substance, on a balancing of the negative impact on water, on the one hand, and the economic interests linked to water, on the other, cannot be deduced from the wording of Article 4§1(a)(i) of Directive 2000/60*"). The CJEU thus distinguishes between the obligation to prevent deterioration and the grounds for derogation in Article 4§7, which "*involve elements of balancing of interests*", and adopts a broad interpretation of the concept of deterioration in the sense of deterioration of "*the status of at least one of the ecological quality elements*".

[526] With, for example, the reinforced obligation to motivate.

[527] Not only EU commitments, such as the EU's external agreements on human rights conditionality, but also private economic actors.

[528] judgment of the General Court of 11/5/2017, Deza v ECHA, T 115/15, (substance bis(2-ethylhexyl) phthalate), ECLI:EU:T:2017:329. The court recalls that the EU courts "must (...) ensure a review, in principle comprehensive, of the legality of all EU acts with regard to the fundamental rights forming an integral part of the EU legal order".

In its established case-law, the CJEU recognises that the EU legislature has a broad discretion "*in areas where its action involves choices of a political, economic or social nature and where it is called upon to make complex assessments and evaluations*"[529]. In particular, it stresses *that* "it is *not a question of knowing whether a measure adopted (...) was the only one or the best possible, since it is only the inappropriateness of that measure in relation to the objective which the competent institutions intend to pursue which may affect the legality of that measure*"[530]. Therefore, for the CJEU, its review "*must be limited to ascertaining whether the measure at issue is vitiated by a manifest error or misuse of powers or whether the authority in question has manifestly exceeded the limits of its discretion*"[531]. Notwithstanding this current limited control of discretion, the importance of data and other measures to strengthen the judicial framework of the legislator's margin of discretion is all the more evident. All of these developments, or even transformations, lead us to question the democratic representation of nature in the EU's decision-making process (**Chapter II**).

[529] judgment of 16/2/2022, Poland/PE & Council, C-157/21, (Regulation 2020/2092 general regime of conditionality for the protection of the EU budget in case of violation of the principles of the rule of law). ECLI:EU:C:2022:98. judgment of the Court of 12/1/2006, Agraproduktion Staebelow, C 504/04, (Common agricultural policy and animal health) ECLI:EU:C:2006:30
judgment of the Court of 12/3/2002, The Queen/Secretary of State for the Environment, transports and regions, C-27/00, (Regulation 925/1999/EC on aircraft noise emissions, common transport policy ECLI:EU:C:2002:161; Court judgment of 29/4/1999, The Queen/Secretary of State for the Environment and Ministry of agriculture, Fisheries and Food, C 293/97, (Directive 91/676/EEC protection of waters against pollution caused by nitrates from agricultural sources), in this case the Court recognises a wide discretion for Member States in the definition of waters in view of the complexity of the assessments to be made. ECLI:EU:C:1999:215

[530] judgment of the Court of 16/2/2022, Poland/PE & Council, C-157/21, *cited above*.

[531] Court judgment of 7/9/2006, Spain v. Council, C-310/04 (Common Agricultural Policy), the Court confirms the broad discretionary power in the framework of this policy. ECLI:EU:C:2006:521

CHAPTER II - THE REPRESENTATION OF NATURE IN THE EUROPEAN UNION'S DECISION-MAKING PROCESS

Several *authors* question the "*voice*" and the place we are willing to give it and promote "*a more relational and sensitive intelligence*"[532]. "*Thinking like a Mountain*"[533], "*Thinking like a River*"[534], "*Thinking like an Iceberg*"[535], "*The River that Wanted to Write*"[536], "*Being the River*"[537], "*Living and Thinking like a Tree*"[538], "*Living as a Bird*"[539], "*Hearing the Earth*"[540] (...).

All these invitations express the search for new relationships to be built with natural entities. Like other currents of thought, the theory of rights of nature rethinks the representation of nature in decision-making processes. These changes in perspective raise a series of questions that go beyond the legal sphere. "*What does the river want to write*?[541] *"What language does it speak?*[542] *"What the river thinks, is not known?*"[543] (...). As Maud LE FLOCH, head of the Arts & Urbanism unit behind the Loire Parliament project in France, sums up, "*it is not a question of giving a grain of sand or a salamander a voice, but of setting up systems for translation, representation and cohabitation*"[544]. From 2019 to 2020, several speakers at the hearings of the Loire Parliament[545] have thus discussed the legal translations that are at work and/or possible in line with our European cultures.

The notion of representation plays a cardinal role at the crossroads of "*the world of reality and the world of law*"[546], which is conducive to dialogue between disciplines and plural sensibilities. It expresses the action of "*making sensitive*"[547], "*present to the eyes, to the mind, to the conscience* (...) *what is not perceived directly*"[548], via different communication channels. It also refers to the legal process "*by which one person called a representative acts in the name and on behalf of another person called a principal*"[549]. Does representing nature in decision-making processes imply a radical rethinking of the notion of political and legal representation? What models of representation should be promoted to ensure stronger legal protections for nature and natural entities?

Conservationists advocate for the establishment of independent watchdog entities, such as the emblematic Indian and Colombian court decisions or the Australian Whanganui River legislation. The recommendations of the European moot courts for the defence of aquatic ecosystems are in line with

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[532] JP PIERRON, *Penser comme un fleuve*, *prec*.
[533] A. LEOPOLD, *Thinking like a mountain*, Reprint, Penguin, 2021 128 p.
[534] JP PIERRON, Thinking like a river. The role of imagination in environmental action: forecasting, foresight, reverie, *Revue Géocarrefour*, 92/1, 2018.
[535] O. REMAUD, *Penser comme un iceberg*, Actes Sud 2020, 240 p.
[536] Les auditions du parlement de Loire, " *Le fleuve qui voulait écrire* ", Mise en récit par Camille de Toledo, Manuella Ed, les Liens qui libèrent, 2021, 377 p.
[537] S. BOURGEOIS-GIRONDE, *Être la rivière. Comment le fleuve Whanganui est devenu une personne vivante selon la loi*, Ed. PUR, 2020, 251 p.
[538] Special Issue No. 53, June-July 2022, S. ORTOLI (ed).
[539] V. DESPRET, *Habiter en oiseau*, Actes Sud, 2019, 207 p.
[540] A. BERQUE, *Hearing the Earth. A l'écoute des milieux*. Humains, 2022, 180 p.
[541] The hearings of the Loire Parliament, "*The river that wanted to write*", op. *cit.*
[542] The hearings of the Loire Parliament, "*The river that wanted to write*", op. *cit.*
[543] L. KRÄMER, Rights of Nature and their implementation, 2020, *op*. *cit.*
[544] The Loire Assemblies, 2021. https://usbeketrica.com/fr/article/la-loire-a-t-elle-besoin-d-un-parlement-pour-defendre-ses-droits
[545] https://livre.ciclic.fr/sites/default/files/fichiers/dossier_-_auditions_parlement_de_loire_compressed.pdf
[546] J. SOHNLE underlines that representation constitutes a communicative element between the world of law and the real world: J. SOHNLE, *La représentation de la nature devant le juge : plaidoyer pour une épistémologie juridique du fictif*, in "*La représentation de la nature devant le juge : approches comparatives et prospectives*" *Revue Vertigo*. Special issue 22, Sept. 2015
[547] *Le Robert dictionary*, online dictionary.
[548] J. SOHNLE, *La représentation de la nature devant le juge plaidoyer pour une épistémologie juridique du fictif*, *op. cit*.
[549] *Lexique des termes juridiques* 2010, 17th Ed. Dalloz, 769 p.

this logic. However, the context and nature of the legal systems involved should not be forgotten[550]. Moreover, entities representing environmental interests do exist in Europe, such as the French nature parks, which have a "*direct interest in obtaining compensation for the environmental damage suffered by the park's natural heritage*"[551]. Of course, the critical analysis of these governance systems does not hide the need to question the capacity of the model of representative democracy, on which our European legal systems are based, to build socio-ecosystemic trajectories that are sustainable in the long term.

Environmental law is a forerunner and a testing ground for the emergence of new democratic legitimacies. The BUDVA Declaration on "*Environmental Democracy for a Sustainable Future*" of 2017[552] reaffirms the democratic purpose of the Aarhus Convention[553] whose procedural rights (information, participation, access to justice) contribute to "*the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being*"[554].

In EU law, the concept of environmental democracy is part of a procedural model that has been given impetus by the Aarhus Convention and is primarily decentralised to the Member States[555]. Moreover, it is anchored in a system of representative democracy "*supplemented [...] by instruments of democracy [...] which aim to encourage the participation of citizens in the democratic process and to promote dialogue between citizens and the Union institutions"*[556]. The right of every citizen to "*participate in the democratic life of the Union*"[557] aims to ensure "*more effective public participation in the decision-making process so as to enhance the accountability of European bodies in the decision-making process with a view to raising public awareness of, and support for, the decisions taken*"[558]. However, this European model is facing challenges to our rule of law and is exposed to various criticisms in the face of socio-ecosystemic emergencies.

Several authors promote eco-citizenship and ecological democracy extended to include consideration of the long term[559] while calling for *"preventing the temptation to put democracy in*

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[550] P. WESCHE, Rights of Nature in practice: a case study on the impacts of the Colombian Atrato River decision, *Journal of Environmental Law* 2021, 33, 531-556. "*In fact, the Atrato case suggests that rights of Nature advocates should be humble in their expectations with respect to the impacts of this approach on environmental protection in weak governance settings*.

[551] *Tribunal de grande instance de Narbonne*, 4/10/2007, n°935/07. About the Narbonnaise regional nature park. In accordance with Article L 333-3 of the Environmental Code, the development and management of regional nature parks are entrusted to a mixed syndicate within the meaning of the General Code of Territorial Communities. The national nature parks are public establishments represented by a director and composed of a board of directors assisted by a scientific council. L. TOUZEAU-MOUFLARD, *Le rôle du juge dans l'évolution du droit des parcs naturels régionaux*, *RJE* 2018/2, 263-274.

[552] BUDVA Declaration on "*Environmental Democracy for a Sustainable Future*", adopted at the Meeting of the Parties to the Aarhus Convention in September 2017, Economic Commission for Europe, ECE/MP.PP/2017/CRP.3. "*We reaffirm our strong commitment to promote in the UNECE region and beyond, environmental democracy and its key elements, namely, access to environmental information, public participation and access to justice, which are indispensable for ensuring a sustainable future for present and future generations."*

[553] Preamble to the Convention: "*Convinced that the application of this Convention will contribute to the strengthening of democracy in the region of the United Nations Economic Commission for Europe*.

[554] Preamble to the Convention.

[555] The 8th general EU Environment Action Programme 2030 recalls this configuration of a "*highly decentralised*" environment policy and the importance of a *"collaborative approach to multi-level governance*". Decision (EU) 2022/591 of the EP and the Council of 6/4/2022, op. *cit.*

[556] judgment of the Court of 19/12/2019, Puppinck and Others v Commission, Case C-418/18 P (Citizens' Initiative One of Us), ECLI:EU:C:2019:1113.

[557] Article 10, paragraph 3 of the TEU. Article 46 of the draft establishing a European Constitution was entitled "*Participatory democracy*", and its content is found in Article 11 of the Lisbon Treaty without using this expression

[558] Regulation (EC) No.º 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, *OJ* L 264, 25/9/2006, p. 13.

[559] *Handbook of democracy and sustainability*, B. BORNELANN, H. KNAPPE & P. NANZ (eds). 2022, Routledge, 536 p.. D. SCHLOSBERG, K. BACKSTRAND, J. PICKERING, Reconciling ecological and democratic values: recent perspectives on ecological democracy, *Environmental Values*, 2019, vol. 28, issue 1. VIEIRA, *Eco-citizenship and environmental democracy*, Thesis Bordeaux 2017, 968 p. D. BOURG & al (dir), "Inventing the democracy of the 21st century. *L'assemblée citoyenne du futur*", Ed. Les liens qui libèrent, 2017, 96 p. R. BRETT, *La participation du public à l'élaboration des normes environnementales*, Thèse Paris Sud, 2015, 657 p. A. POMADE, *La société civile et le droit de l'environnement, contribution à la*

brackets in the name of the urgency of the transition"[560]. Some call for *a* "*democracy for the affected*"[561] extended to non-humans, offering the voiceless, the invisible "sacrificed" and exposed to ecological risks and damage, the possibility of participating in decision-making processes and in the jurisdictional defence of their rights and interests. "*Ko au te Awa, Ko te Awa ko au*"[562], *"We do not defend nature, we are nature defending itself*"[563]. "*We are the living defending itself*"[564], all ontologies and postures expressing conceptions of the inextricable relationship between living humans and non-humans. The promoters of the Rights of Nature share this thinking and, like the ICE project on the Rights of Nature, propose a system of ecological governance "*that embeds the Rights of Nature in all levels of decision-making and action, from the personal to the global*"[565].

However, the Green Deal for Europe and the recent 8th general action programme for the environment remain laconic on the necessary transformations of the current model of democracy and multi-level governance. Among the *"enabling conditions*" to achieve the objectives of the 8th programme are classical commitments to "*mobilise broad support from civil society", to "raise (...) awareness and empower citizens", to "assist civil society, public authorities, citizens, communities, social partners and the private sector (...) in particular by encouraging citizens' observation and reporting of environmental problems and compliance gaps (...*)".

The questionnaire "*Recognising nature's rights in Europe*" organised by Marie TOUSSAINT MEP in autumn 2021 included three themes on "nature's *entry into democracy*", among which the current consideration of nature "*in the public debate and decision-making*", ways to better reflect nature's interests in the "democratic debate" and the entities likely to represent nature. Of the 300 responses analysed, 53.51% of respondents considered that nature's interests are already represented but not sufficiently taken into account and 34.45% concluded that '*nature has no place in public debate and decision-making*'[566]. These results resonate with Eurobarometer surveys which show the growing importance of environmental issues in the concerns of Europeans; the recent Eurobarometer on Youth and Democracy shows that the priority themes for the European Year of Youth are: environmental protection and the fight against climate change (34%) on a par with mental health and well-being, followed by education and training (33%) and the fight against poverty and economic and social inequalities (32%)[567].

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réflexion sur les sources et la validité des normes juridiques, Paris, LGDJ, 2010. P. IDOUX, Les eaux troubles de la participation du public, *Revue Environnement*, 7/2005, study 26. D. BOURG & K. WHITESIDE, "*Vers une démocratie écologique*", Ed. Seuil 2010, 112 p. G. SMITH, "*Deliberative democracy and the environment*", Routledge 2003, 176 p. R. ECKERSLEY, "*Environmentalism and political theory: towards an ecocentric approach*", State University of New York Press, 1992, 288 p.

[560] *"La démocracie écologique. Une pensée indisciplinée*", J-M. FOURNIAU, L. BLONDIAUX, D. BOURG, M-A. COHENDET, Les colloques Cerisy, Ed. Hermann, 2022, 300 p.

[561] R. ECKERSLEY, Deliberative democracy, ecological representation and risk, in "*Democratic innovation, deliberation, representation and association*", M. SAWARD (ed), Ed Routledge, 2000, 256 p. R. ECKERSLEY, "*The green State: rethinking Democracy and Sovereignty*", The MIT Press, 2004, 348 p.

[562] Expresses the relationship between the Maori and the Whanganui River, which they regard as their ancestor. E. C HSIAO, Whanganui River Agreement, indigenous rights and rights of Nature, *Environmental Policy and Law* 42/6, 2012, 371-375; I. KELLY, Does self-determination flow from the conferral of legal personhood on Te Awa Tupua" *Journal of Maori and indigenous issues*, vol.7, 2020, 84-115.

[563] Slogan mobilised by environmental opponents of infrastructure projects, such as the defenders of the Notre Dame des Landes site who are opposed to the construction of a new airport between Nantes and Rennes (France-Brittany).

[564] B. MORIZOT, "*Nous sommes le vivant qui se défend*", *Socialter Hors-série n°8, le réveil des imaginaires* p 156-159

[565] https://natures-rights.org/ECI-DraftDirective-Draft.pdf

[566] https://purpoz.com/project/reconnaitre-les-droits-de-la-nature-en-europe/presentation/contexte

[567] Flash Eurobarometer 502. Youth and democracy in the framework of the European Year of Youth, Opoce 2022. From February to March 2022, 26,178 young people aged 15 to 30 were surveyed. Other priority themes: boosting employment and fighting unemployment (28%), promoting human rights and democracy (26%), promoting inclusive societies (22%), promoting the digital transformation of society (13%).

The representation of nature in decision-making processes thus invites questions about the democratic institution of its 'representatives' and 'guardians' and the choice of arenas for discussion and deliberation (**A**); it also leads to a discussion of the most relevant procedural mechanisms (**B**).

A - The figure of the guardians of nature, between symbolism and institutional translations

"Who is the best guardian ad litem of the rights of Nature and on which criterion to choose them in the best interest of Nature?"[568]*.* As early as the first programme in 1973, the institutions affirmed that *"environmental protection is everybody's business*", inviting "*everyone*" to be "*aware*" and to assume "*their responsibilities towards future generations*"[569]. Echoing the "let*'s work together*" spirit[570] of the 5th action programme, the 8th programme advocates a "*collaborative approach to multi-level governance*"[571]. Similarly, the Green Deal emphasises "*the participation and engagement of the general public and all stakeholders*"[572] without, however, mentioning the prospect of the establishment of nature guardians.

The notion of guardian is not, however, alien to EU semantics, but it has other potentially confusing meanings **(1**). Various studies show the need for independent public authorities to ensure the defence of the environment. What reforms to the EU's institutional architecture should be considered to ensure better representation of nature's interests in the decision-making process? Strengthening the tasks of existing institutions and bodies to ensure the representation of nature's interests is an area for improvement that should not be overlooked (**2**). Calls for the establishment of new autonomous bodies to 'safeguard' nature's interests and rights raise the question of whether they can be translated into EU law (**3**).

1) The notion of guardian in the state of EU law, between polysemy and political aim

The polysemy of the notion of guardian invites to clarify the nature and the functions that the European institutions confer to it.

The notion of '*guardian*' of the law, of rights or of legality is regularly used to describe one of the tasks of the Commission as '*guardian of the treaties*'[573], or that of the national courts as '*guardians of the legal order of the Union*'[574]. This function of "*guardian of compliance*"[575] resonates with the vigilance of environmental associations, veritable "*kingpins of our democracy*"[576] and "*public watchdogs*"[577] which,

[568] Study for the EESC "*Towards an EU Charter of the Fundamental Rights of Nature*", op. *cit.*
[569] Declaration by the Council of the EC and the Representatives of the Governments of the Member States meeting within the Council of 22/11/1973 concerning an EC action programme on the environment, OJEC C 112 of 20/12/73 p 1.
[570] Towards sustainability: A European Community programme of policy and action in relation to the environment and sustainable development, OJ C 138 of 17/5/1993 p 5.
[571] Decision (EU) 2022/591 of the EP and the Council, op. *cit.*
[572] COM (2019) 640 final, op. *cit.*
[573] Order of the Vice-President of the Court of 20/9/2021, C-121/21 R, Czech Republic v. Republic of Poland, Turów Lignite Mine, ECLI:EU:C:2021:752.
[574] Opinion of Advocate General BOBEK of 8/7/2021 in Case C-132/20, BN, DM EN v Getin Noble Bank (Supreme Court of Poland), The Advocate General thus recalls that "*the Court and the courts of the Member States play the role of guardians of the legal order of the Union*". ECLI:EU:C:2021:557.
[575] COM (2020) 380 final, EU Biodiversity Strategy 2030: The Commission states that it *will also "encourage civil society to play its role as guardian of compliance*".
[576] COM (1997) 241 final, Communication from the Commission on "*Promoting the role of associations and foundations in Europe*". The terms EDOs and environmental NGOs will be considered interchangeable in this study, notwithstanding their particularities.
[577] Qualifier used by the European Court of Human Rights: example of the case Animal defenders international/United Kingdom, req. 48876/08 of 22/4/2013 "*when an NGO draws the attention of the public to matters of public interest it exercises a role of*

according to the CJEU, are "*oriented towards the general interest and not towards the protection of the interests of individuals taken individually*"[578].

The term 'guardians of the environment' and 'the *natural environment*'[579] has been used in several Commission communications since the early 2000s.

However, the symbolic and political purpose of the expression predominates in the absence of any explanation or clarification of its legal meaning. Thus, farmers are very regularly presented as the "*guardians of our land*"[580], "of the environment"[581], "*of the landscape*"[582], "*of the countryside, of ecosystems*"[583]. Similarly, the role of fishermen is hailed as "*guardians of the seas*"[584]. In another 2019 Communication, the Commission stresses that "*farmers are the primary guardians of the environment: they take care of the natural resources on 48% of the EU territory*"[585]; such a formulation may suggest the seeds of a mission, or even a duty of stewardship towards the land[586]. However, the idea of a legal mission to represent nature and the environment is not made explicit.

On the other hand, in the Communication on a new EU forest strategy for 2030, there is a formulation that raises questions about the legal meaning that could possibly be found there. The Commission states that "*all measures should be designed and implemented in close cooperation with Member States and public and private forest owners and other forest custodians, as they are the catalysts for the necessary changes (...)*"[587]. However, it also states that European forest owners and managers are "*the main custodians of forests*"[588]. With regard to public authorities representing the public interest, the Commission emphasises the "*responsibility of States as global custodians of the marine environment*"[589] and the role of local authorities as "custodians of *natural ecosystems*"[590].

The notion of "*custodians of nature*" is not included in the draft directive drawn up by the promoters of the ECI project on the rights of nature (2017). This draft directive is very vague on how to integrate these

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public watchdog similar in importance to that of the press". Advocate General SHARPSTON quotes this formula in her conclusions (Case C 664/15, *supra*).

[578] Court judgment of 20/12/2017, Protec Natur-Arten und Landschaftsschutz Umweltorganisation, C-664/15, ECLI:EU:C:2017:987.

[579] COM (2017) 713 final, Communication "*The future of food and agriculture*": On farmers as "the first guardians of the environment.

[580] COM (2020) 380 final, EU Biodiversity Strategy 2030.

[581] In Case C 435/17, Advocate General E. SHARPSTON stated that "*farmers are considered to have obligations that extend beyond agricultural production. They also have a role as guardians of the environment*". Opinion of 7/6/2018, Argo Kalda Mardi Talu (Reference for a preliminary ruling from the Administrative Court of Tartu Estonia) ECLI:EU:C:2018:410.

[582] Expression found in several documents, including old ones such as the Commission report on the application of Council Regulation (EEC) 2078/92 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside, COM (1997) 620 final. EP resolution of 21/9/2010 on the Communication from the Commission on a Community approach on the prevention of natural and man-made disasters, OJEU 2010 C 50 E/30.

[583] COM (2001) 144 final, Communication "*Statistical information needed to develop indicators for the integration of environmental concerns into the CAP*".

[584] COM (2021) 240 final, Communication on "*A new approach for a sustainable blue economy in the EU - transforming the EU blue economy for a sustainable future*".

[585] COM (2019) 22 final, Reflection Paper "*Towards a sustainable Europe 2030*".

[586] The term is not currently used in EU environmental law: see the theoretical reflections on these *stewardship*issues: SK BAVIKATTE, "*Stewarding the Earth: rethinking property and the emergence of biocultural rights*", Oxford University Press 2014. B. GRIMONPREZ, *Forces et perspectives des politiques contractuelles de l'environnement, approche juridique de l'intendance du territoire*, Landlife seminar on territorial stewardship in France, April 2013. A. RIVAUD & B. PREVOST, *L'intendance du territoire: une alternative à la gouvernance néolibérale pour la conservation de la biodiversité dans les espaces naturels*, *Revue Développement durable & Territoires*, nov. 2018, vol. 9, n°3. S. VANUWEN, *Des choses de la nature et de leurs droits*, Ed. Quae, 2020, *prec*. P. BRUNET, *Les droits bioculturels, fondement d'une relation responsable des humains vers la nature?* in "*Droits des êtres humains et droits des autres entités: une nouvelle frontière"*, J-P. MARGUENAUD and C. VIAL (dir), Ed. Mare et Martin 2021, 300 p.

[587] COM (2021) 572 final, Communication "*A new EU Forest Strategy for 2030*".

[588] *Ibid.*

[589] COM (2017) 812 final. Recommendation for a Council Decision authorising the opening of negotiations on the elaboration of an international legally binding instrument on the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction within the framework of the United Nations Convention on the Law of the Sea.

[590] COM (2001) 162 final, Communication "*Biodiversity Action Plan for Economic and Development Cooperation*". Local authorities are presented *as* "*guardians*" of these ecosystems.

rights "*in all levels of decision-making and action from personal to the global*". It provides for the designation by the Member States of an ombudsman for the rights of nature; is this to be seen as one of several nature guardians with clearly defined missions? Moreover, this draft directive does not include any institutional innovations and its drafters merely mention the creation of "*adequate public or private institutions that guarantee that nature is allowed to continue its natural cycles and vital processes*"[591].

The institution of "nature guardians" in the sense of legitimate independent entities with sufficient means to represent nature questions the adequacy of the EU's institutional architecture and the distribution of competences. As representatives of the general interest, public authorities must ensure the protection of the environmental component of that interest and respect *the* "accountability"[592] in full transparency. In addition, European and national authorities, including the courts, assume the function of guardians of the legality and legal order of the EU. As the "*guardian of the Treaties*" and of the general interest of the EU, the European Commission is a key institution throughout the legislative cycle[593] from its power of initiative to the power to bring cases before the CJEU, in particular against Member States for failure to fulfil their Community obligations[594]. Complaints to the Commission, petitions to the EP, referrals to the European Ombudsman and even complaints to the European Anti-Fraud Office (OLAF)[595] are all ways of monitoring the EU authorities and ensuring that everyone's right to good administration[596] and the effectiveness of environmental legislation are respected.

However, several authors consider that these institutions do not ensure a real mission of representation of nature throughout the cycle of the legal norm. Such criticisms of these institutions and dedicated procedural mechanisms thus call into question the nature of the institutional reforms to be undertaken at EU and/or Member State level[597].

2) Expanding and strengthening the tasks of EU bodies to represent nature's interests

Notwithstanding its mission to "*widely disseminate reliable and comparable environmental information*", the European Environment Agency (EEA)[598], an autonomous entity, is primarily concerned with the collection, processing and provision of "*objective*" data to authorities from the development to the implementation of legislation.

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[591] Draft ECI on the Rights of Nature (2017) *supra*.

[592] Aarhus Regulation (EC) 1367/2006, recital, *above*. With the exception of reasons relating to confidentiality set out in the legislation on public access to documents (Regulation (EC) 1049/2001 of the EP and of the Council regarding public access to EP, Council and Commission documents, OJEU 2001 L 145/43) and environmental information (the so-called Aarhus Regulation for the EU institutions). In case C-57/16, the Court, while recognising that the Commission "*must be able to benefit from a space for reflection in order to be able to decide on the policy choices to be made and the proposals to be submitted*", considered that the Court of First Instance was wrong to conclude that there was a general presumption of confidentiality of documents drawn up in the context of an impact assessment (in this case, the said impact assessment reports concerned inspection procedures relating to environmental legislation and access to justice in environmental matters. judgment of the Court of 4/9/2018, ClientEarth v Commission, C-57/16 P, ECLI:EU:C:2018:660.

[593] As Article 17 of the Lisbon TEU reconfirms. The right of initiative is inextricably linked to the right of withdrawal in accordance with the principles of institutional balance, democracy and the principle of loyal cooperation: Court judgment of 14/4/2015, Council of the EU v Commission, C-409/13, ECLI:EU:C:2015:217.

[594] Including in particular ensuring the adaptation of legislation to new data, in particular in compliance with the precautionary principle: judgment of the Court of 9/6/2016, G. Pesce and Others & Cesare Serinelli, C-78/16 & C-79/16, (plant health protection), ECLI:EU:C:2016:428.

[595] Anyone can report suspected fraud to the Agency. The association Bloom has submitted complaints to the office in 2018 and 2019 concerning the definitive ban on electrofishing.

[596] Art. 41 EU Charter of Fundamental Rights.

[597] E.g. in France: J. BETAILLE, *Arguments en faveur d'une autorité publique indépendante environnementale*, "*Droit économique et droit de l'environnement*" (M. SOUSSE, dir.), Ed. Mare & Martin, 2020, 107-124.

[598] Established in 1990: Council Regulation (EEC) 1210/90 of 7/5/1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network, OJEC 1990 L 120/1 (amended by Regulation (EC) 933/1999 and then by Regulation (EC) Nº 401/2009 of the EP and the Council, OJEC 2009 L 126/13. Non-EU countries participate in the work of the EEA. COM (2003) 800, final, Report from the Commission on the evaluation of the EEA.

Indeed, in accordance with the 8th Environmental Action Programme (2022), it will support the Commission, together with the European Chemicals Agency (ECHA), in the annual monitoring and evaluation of the achievement of the priority objectives of the said programme[599].

However, the EEA does not have a broad institutional capacity to act, unlike other agencies such as the European Chemicals Agency (ECHA). ECHA's tasks and architecture differ in several respects from those of the EEA, both in terms of its normative power and the existence of a Board of Appeal[600]. However, it is difficult to see ECHA as a substitute for the EEA, both in terms of its scope of intervention and the criticism levelled at it.

Finally, the EEA only interacts with the public through the prism of environmental information dissemination. In the proposed regulation on nature restoration of June 2022, the EEA could be given new tasks such as "*supporting the definition of objectives related to recovery areas to help Member States (...) to draw up their national restoration plans*"[601]. Is this a sign of the future extension of the EEA's powers to ensure the effectiveness of environmental legislation? Should the EEA be consulted on a mandatory basis during the decision-making process for legislative proposals accompanied by impact assessments? Such opportune trajectories remain to be confirmed and supported while ensuring coordination with existing authorities.

Several other European agencies are also concerned by environmental obligations and imperatives; strengthening inter-agency coordination[602] therefore appears essential. One example is the European Human Rights Agency (EHRA), which is empowered to formulate, including on its own initiative, "*conclusions and opinions on specific thematic issues for the EU institutions and the Member States when implementing Community law*"[603]. If a right to the environment is explicitly enshrined in the Charter, this agency could play a role that should be strengthened for the protection of nature[604] and for its defenders, in close interaction with the EEA. Furthermore, the AEDH should cooperate "*closely with NGOs and civil society institutions working in the field of fundamental rights*"[605] and establish a cooperation network (dedicated platform) open to all interested parties[606]. However, this agency does not have the task of receiving individual complaints.

Inter-agency cooperation on environmental issues[607], such as the seminar on environmental crime in 2021[608] or on climate change[609], is therefore one of the guidelines to be followed and consolidated.

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[599] EP and Council Decision (EU) 2022/591 of 6/4/2022 on a comprehensive EU Environmental Action Programme for 2030 (8th Programme), OJEU 2022 L 114/22.
[600] Regulation (EC) 1907/2006 of the EP and of the Council of 18/12/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals and establishing a European Chemicals Agency, OJEU 2006 L 396/1.
[601] COM (2022) 304 final.
[602] The EU has more than 30 decentralised agencies, many of which should contribute to environmental protection and cooperate with the dedicated agencies.
[603] Council Regulation (EC) 168/2007 of 15/2/2007 establishing a Fundamental Rights Agency of the EU, OJEU 2007 L 53/1. Regulation amended by Council Regulation (EU) 2022/555 of 5/4/2022, OJEU 2022 L 108/1.
[604] The Commission invited the Agency to participate in working groups to support the implementation of the Green Deal for Europe in September 2020. In March 2022, at the meeting with national liaison officers on Business and Human Rights, the agency discussed the interaction between human rights, consumer protection and environmental rights. https://fra.europa.eu/en
[605] *Ibid*.
[606] https://fra.europa.eu/en/cooperation/civil-society
[607] Ex: Joint Statement by the Heads of Justice & Home Affairs agencies on the EU Green Deal, 22/11/2021. https://fra.europa.eu/sites/default/files/2022-01/Joint%20statement_JHA%20Agencies_EU%20Green%20Deal_en_3.pdf
[608] Organised by Frontex and the agencies of Justice & Home Affairs, the European Maritime Safety Agency, the European Fisheries Control Agency, the Environmental Crime Network, the European Network of Environmental Prosecutors, Interpol and other international organisations. https://frontex.europa.eu/media-centre/news/news-release/eu-agencies-against-environmental-crime-P7d4FR
[609] In February 2021 a seminar was organised by Frontex on the impact of climate change on migration with a focus on women and children.

The enlargement and strengthening of the tasks and resources of the EEA and other environmental agencies calls into question the institutional balance and competences of the other European institutions and advisory bodies. The European Parliament regularly reiterates the need to respect its prerogatives and to guarantee its control over these decentralised agencies[610]; however, it also proposes that "*all agencies* should be *empowered to present non-binding opinions on current dossiers falling within their remit*"[611].

There is also a need to improve the coordination of the tasks of agencies such as the EEA with other institutions, in particular with the European Commission in the process of ex-ante and ex-post evaluation of European policies and legislation.

An independent body that is still too little known by citizens[612], the European Ombudsman contributes to the respect of environmental legislation by the European institutions and bodies[613]; in accordance with the right of any natural or legal person to good administration[614], the current Ombudsman, Emily O'REILLY, who has received a number of complaints in this field, has succeeded in facilitating access to environmental information[615]. The launch in September 2022 by the European Ombudsman of a public consultation on "*transparency and participation in EU environmental decision-making*"[616] confirms her intention to strengthen her contribution to the environmental democratisation process of the European institutional game. Thus, in addition to the enquiries that the European Ombudsman conducts following the complaints she receives, she deploys strategic enquiries on her own initiative on specific issues impacting the European decision-making process[617]. It is therefore one of the pieces of the institutional puzzle to be reinforced with the extension of the EEA's missions and the institutionalisation of inter-agency coordination and between these authorities and the European institutions. Similarly, the European Network of Ombudsmen offers another channel for sharing strategies to ensure compliance with rights under EU environmental law.

The reflections on the necessary institutional transformations also concern the opportunity to institute new entities in charge of ensuring missions as "guardians of nature".

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[610] E.g. EP resolution of 11/9/2013 with recommendations to the Commission on Parliament's rights during the appointment procedure of future EEA Executive Directors (in this case, it asks to be able to hear the selected candidates), OJEU 2016 C 93/58.

[611] EP resolution of 14/2/2019 on the implementation of the legal provisions and the joint declaration ensuring parliamentary scrutiny of decentralised agencies, OJEU 2020 C 449/176. It also reiterates its request to relaunch the reflection on an inter-institutional agreement on these agencies. For its part, in 2015 the Commission deplored the lack of political will to move in this direction (COM 2015) 179 final, Report on the progress achieved in the implementation of the common approach on decentralised agencies; COM (2005) 59 final: Draft interinstitutional agreement on the operating framework for the European regulatory agencies.

[612] Entity created after the Maastricht Treaty - EP Decision 94/262/ECSC, EEC, Euratom of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, OJEC 1994 L 113/15,

[613] Excluding the CJEU in the exercise of its judicial functions. Text repealed by EP Regulation (EU, Euratom) 2021/1163 of 24/6/2021, OJEU 2021 L 253/1. Its seat is that of the European Parliament.

[614] EP Regulation (EU, Euratom) 2021/1163 of 24/6/2021 on the regulations and general conditions governing the performance of the Ombudsman's duties and repealing Decision 94/262/ECSC, EC, Euratom, OJEU 2021 L 253/1. 7 cross-cutting areas of investigation: transparency, fundamental rights, ethics, accountability and inclusive decision-making, management of EU public funds, administrative procedures and practices, EU staff.

[615] Access link to environment-related surveys: https://www.ombudsman.europa.eu/fr/search-inquiries?keys5=712

[616] https://www.ombudsman.europa.eu/fr/public-consultation/fr/160313

[617] For example: special report on the strategic enquiry 0I/2/2017/TE on the transparency of the Council's legislative process, https://www.ombudsman.europa.eu/fr/special-report/fr/94921

3) Towards the establishment of new independent entities representing nature and/or natural entities

National or regional authorities dedicated to the representation of the environment and/or future generations exist in European states[618] such as the Hungarian Ombudsman for Future Generations, or the Committee for the Future in the Finnish Parliament. More recently, the United Kingdom adopted an Environment Act (2021) which provides for the establishment of an *Office for Environmental Protection*[619] which will monitor compliance with environmental law by institutions. This authority will also advise ministers at their request on any changes to environmental legislation or any environmental issue. Finally, anyone can lodge a complaint if they feel that a public authority has failed to comply with environmental legislation. Other Member States prefer not to increase the number of authorities, mobilising existing bodies. For example, Malta has appointed an ombudsman within the office of the Maltese 'Parliamentary Ombudsman' to deal with environmental issues[620].

In 2011, the European Ombudsman already developed the idea of establishing an "*independent environmental watchdog in each Member State which can investigate whether the national authorities are properly applying and enforcing EU environmental law and which can receive complaints from citizens and civil society*"[621]. The establishment of an environmental ombudsman or even an environmental defender[622] is discussed.

In 2019, the French mission to evaluate the relationship between justice and the environment recommended the creation of an independent administrative authority "*guaranteeing the defence of common goods in the interest of future generations, able to act upon referral from citizens and with the power to issue opinions, recommendations and injunctions, including in cases of emergency, and responsible for the quality, transparency and impartiality of environmental expertise as well as the information provided to citizens*"[623]. More recently, in December 2022, a constitutional bill aims to create an environmental defender based on the model of the rights defender[624]. Its mission is thus to "ensure the preservation of the environment and the planetary commons" by public authorities, "*bodies with a public service mission*" and *"any person*"[625]. The independence of such an administrative authority with sanctioning powers is presented as a guarantee for improving the impartiality of the environmental assessment of policies. The choice of a constitutional law responds, according to the proponents of this project, to the need to ensure the autonomy of this authority in relation to the government. Similarly, provision is made for the authority to be referred to by "*any person who considers that the preservation of the environment*"[626], as well as for it to be self-referral, in line with the proposal for the creation of a

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[618] Example of the Future Generations Commissioner for Wales, https://www.futuregenerations.wales/about-us/future-generations-commissioner/. E. GAILLARD l'équité transgénérationnelle : perspectives de justice pour les générations futures, *in " Équité et environnement "* A. MICHELOT (dir), 2012, Ed. Larcier, 478 p, 51-69. Normandy Chair for Peace, hearings "*Ombudsman for future generations. Médiation et défense de l'environnement*", E. GAILLARD & S. FÜLÖP (coord.), 2021, https://chairenormandiepourlapaix.org/2021/04/08/auditions-ombudsman-pour-les-generations-futures-mediation-et-defense-de-l environnement-session2/. Conference of the Association of Ombudsmen and Mediators of the Francophonie in 2021 on the theme "*Protecting the rights of future generations: what role for Ombudsmen*" https://www.aomf-ombudsmans-francophonie.org/rencontres-2019-2021/

[619] Environment Act 2021, Chap. 2 "*The office for Environmental Protection*", https://www.legislation.gov.uk/ukpga/2021/30/contents/enacted

[620] Three commissioners for health, environment and planning and education have been appointed since 2010 https://ombudsman.org.mt

[621] P. NIKIFOROS DIAMANDOUROS, https://www.ombudsman.europa.eu/en/speech/en/10558

[622] In France, proposal by MP C. MUSCHOTTI in 2019 and parliamentary report "*creation of a defender of the environment and future generations*" https://cidce.org/wp-content/uploads/2021/07/Rapport-Muschotti-2021.pdf

[623] Final report, *Une justice pour l'environnement, mission d'évaluation des relations entre justice et environnement*, *Conseil général de l'environnement et du développement durable and Inspection générale de la justice*, 2019

[624] Proposal for a constitutional law to create an environmental defender, no. 608/2022. This proposal inserts a Title XI ter "The Environmental Defender" (Article 71-2) in the Constitution.

[625] Article 71-2 of the Constitution proposed by this bill.

[626] Article 71-2 of the Constitution proposed by this bill.

High Authority on the Planetary Limits of the Citizens' Climate Convention[627]. However, while it is specified that the defender will ensure "*that public policies respect the planetary limits that condition the earth's habitability*"[628], the designation of vice-presidents in charge of one or more planetary limits must not overshadow the socio-ecosystemic coherence that must be guaranteed.

Several institutional forms[629] are thus imagined, echoing Bruno Latour's idea of a Parliament of things, which would extend *'to things the privilege of representation, democratic discussion and law'*[630].

In the field of economic law, some authors suggest the establishment of a cross-sectoral environmental regulatory authority along the lines of competition authorities or independent regulatory authorities in other sectors[631]. In 2008, Gilles Martin argued in favour of an environmental regulatory authority and questioned the prerogatives to be conferred on such an entity[632] in a process of greening economic law[633].

Such a perspective is also envisaged at EU level to ensure the effective integration of environmental requirements into the decision-making process. Several other avenues for reforming the European institutional architecture are therefore being discussed to strengthen the legal protection of nature. The scenario of a recognition of nature's rights would necessarily impose an institutional dynamic.

Would it therefore be preferable to establish a European Environmental Ombudsman to ensure greater visibility? Wouldn't strengthening the prerogatives of the European Ombudsman in coordination between the different EU agencies and institutions be a simpler solution? The draft ECI on the rights of nature provides for the possibility for Member States to choose between the appointment of a dedicated ombudsman or the extension of the tasks of their existing ombudsman[634], without, however, mentioning the role of the European Ombudsman or envisaging new public authorities that could ensure the representation and defence of rights.

Finally, in accordance with EU environmental legislation, Member States are obliged to designate the competent authorities to ensure their implementation. Given the principle of institutional and procedural autonomy, there are so far few provisions detailing the organisation or composition of these administrative bodies[635]. Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment requires Member States to designate the authorities '*which must be consulted and which, given their specific responsibility for the environment, are likely to be affected by the environmental effects of the implementation of plans and programmes*'[636]. Similarly, Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment insists on the obligation to "*ensure the objectivity of the competent*

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[627] This proposal is supported by the association WildLegal (https://www.wildlegal.eu/haute-autorite-aux-limites-planetai) and by the Citizens' Climate Convention in France in its June 2020 report (https://propositions.conventioncitoyennepourleclimat.fr/pdf/ccc-rapport-final.pdf).

[628] Article 71-2 of the Constitution proposed by this bill.

[629] P. BRUNET, *Vouloir pour la nature*. The legal representation of natural entities. *Journal of Interdisciplinary History of Ideas*, 2019, vol. 8, issue 15, 2-44.

[630] B. LATOUR, *Esquisse d'un Parlement des choses*, *Ecologie & politique,* 2018/1, 47-64.

[631] Exemple en France: J. MALET-VIGNEAUX, *L'intégration du droit de l'environnement dans le droit de la concurrence*, Thesis 2014, University of Nice, 705 p.

[632] G.J. MARTIN, *Le marché d'unités de biodiversité : questions de mise en œuvre*, *RJE* n° spécial *2008 Biodiversité et évolution du droit de la protection de la nature,* 95-98. Report by the *Centre d'analyse stratégique*, "*Approche économique de la biodiversité et des services: contribution à la décision publique*", coordinated by B. CHEVASSUS-AU-LOUIS, 2009, 399 p. M FAURE, "*L'analyse économique du droit de l'environnement*", Ed. Bruylant 2007, 362 p.

[633] *"Pour un droit économique de l'environnement"*, Mélanges en l'honneur de G.J. MARTIN, Ed. Frison-Roche, 2013.

[634] *"The task of the Ombudsman shall be to receive and investigate complaints with respect to breaches of the rights of nature (...) may make recommendations which may cover any aspect of nature or the relationship between human, society and nature*.

[635] The Natural Habitats Directive only mentions that the competent authorities are responsible for the implementation of the obligations, but does not specify these authorities further. The WFD requires Member States to communicate the list of competent authorities with information on the geographical area of the river basin district, their responsibilities, membership and status (Annex I).

[636] Directive 2001/42/EC of the EP and of the Council of 27/6/2001 on the assessment of the effects of certain plans and programmes on the environment, OJEU 2001 L 197/30.

authorities" and to prevent any conflict of interest "*in particular by means of the functional separation between the competent authority and the developer*"[637]. Thus, the CJEU specifies that the creation or designation of a consultation authority under Directive 2001/42/EC is not required "*provided that, within the authority normally responsible for carrying out the consultation in environmental matters and designated as such, a functional separation is organised*"[638]. In the case in point, this implies *that* "*an administrative entity, internal to the authority, must have real autonomy, which means that it must be provided with its own administrative and human resources and thus be able to fulfil the tasks entrusted to the consultation authorities (...) in particular, to give its opinion objectively on the plan or programme envisaged by the authority to which it is attached*"[639].

More recently, Regulation 2021/1119 provides that each Member State "*is invited to establish a national climate advisory body to provide expert scientific advice on climate policy to the competent national authorities*"[640]. The creation of regulatory authorities is also envisaged by the European Commission in the environmental field. In its Communication on the Environment Policy Implementation Review (2017), it recommends to eight Member States the establishment of regulatory authorities for water pricing to ensure compliance with the principle of recovery of costs for water services (WFD)[641].

Several studies show that the competent authorities designated by the Member States to implement environmental legislation face a series of difficulties. The conditions laid down by the EIA Directives as interpreted by the CJEU (real autonomy, own administrative and human resources, functional separation) and the prevention of conflicts of interest should be generalised. The statutory model of French national nature parks (public establishment, representation and defence of interests) could inspire future EU legislation and legislative revisions. General rules on the governance of competent authorities could be considered to strengthen the representation of ecological interests. The mandatory establishment of a scientific council and the increased participation of NGOs in decision-making bodies would help to counterbalance unbalanced power relations.

In view of the principle of institutional autonomy of the Member States, it is up to them to designate authorities as "guardians" of the interests of protected natural entities and to entrust them with a series of information, consultation, decision-making and sanctioning tasks.

The recent Spanish law (2022) concerning the Mar Menor lagoon provides for three bodies to oversee the largest saltwater lagoon in Europe and its basin: a committee of representatives, a monitoring commission and a scientific committee. In the background, it reflects the inadequacies of the existing institutional structure and the inability of the authorities to halt the process of major eutrophication of the lagoon and thus comply with environmental legislation (WFD, Natura (...)). It will be enlightening to assess how these three bodies will work with the existing authorities and succeed in overcoming the conflicts of interest in this agricultural region of Murcia exposed to strong urbanisation. However, the remit and composition of these Mar Menor governance bodies raises questions about their ability to make decisions and represent the interests of this new legal entity.

This Spanish law is thus an institutional experiment, despite its limitations. It echoes examples of legal recognition of nature's rights around the world, but also the recommendations of the European moot

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[637] Directive 2014/52/EU of the EP and Council of 16/4/2014 amending Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment, OJEU 2014 L 124/1.

[638] judgment of the Court of 20/10/2011, Department of the Environment for Northern Ireland v Seaport (NI) Ltd, C-474/10, (reference for a preliminary ruling from the Court of Appeal in Northern Ireland), C-470/10, Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, ECLI:EU:C:2011:681

[639] Case C-470/10, *supra*. On the situation in France: E. WORMSER, *La mobilisation du droit de l'UE, le contentieux FNE autour de l'indépendance de l'autorité environnementale*, *RJE* 2019/ n° spécial, 83-93. A. FARINETTI, *La séparation des missions d'évaluation de la qualité des études d'impact et de soumission à étude d'impact des projets après examen au cas par cas : un affaiblissement de la garantie d'impartialité de l'examen au cas par cas*, *RJE* 2021/4, vol. 46, 711-726.

[640] Regulation (EU) 2021/1119 of the EP and of the Council of 30/6/2021, *above*. In the event of such a creation, the Member State must inform the EEA.

[641] COM (2017) 63 final, Communication on "*EU Environment Policy Implementation Review: Common challenges and how to combine our efforts to deliver better results*". Among the 8 Member States targeted: Italy, Belgium, Hungary, Spain (...).

court for the defence of aquatic ecosystems concerning the reform of the statutes of existing representative bodies or the creation of a council of guardians of the aquatic ecosystem[642]. Similarly, the recent declarations of rights of French rivers (Tavignano, La Têt) favour the choice of a system of guardians to represent the interests and rights of the natural entity; however, they do not clearly specify the organisational modalities[643] and coordination with the competent local water authorities[644].

Several avenues for institutional reform are available to strengthen the representation of nature's interests and compliance with European legislation. Far from being exclusive, they could also be combined to guarantee the coherence and effectiveness of the actions to be deployed.

A first approach is to strengthen or even expand the missions of existing public authorities while guaranteeing their independence and substantial resources.

Another is the institution of new entities representing the interests of nature. Several figures can be envisaged, such as an ombudsman for nature or a nature defender, or entities responsible for representing the interests of a natural entity at finer territorial scales. The establishment of environmental regulatory and/or supervisory authorities should also be considered in order to strengthen the 'ecological framework' of economic law and market instruments.

An in-depth evaluation of the advantages and disadvantages of such reforms thus requires clarification of their legal status and the range of tasks conferred on one or more independent administrative authorities for the environment (information, expertise, mediation, economic regulation, environmental assessment, control and sanctions[645] (...).

It is crucial in terms of efficiency, clarity and legal certainty. Excessive complexity of the institutional architecture would be counterproductive for nature protection, as would the establishment of authorities lacking sufficient powers and means to carry out their missions. These reforms also require determining the most appropriate administrative and/or ecological scales of action and organising their articulation.

Strengthening the tasks and coordination between the existing authorities is a first step. It is also up to the EU institutions and bodies to ensure that nature's interests are given a real place in the European decision-making process. Such reforms must be part of a process of democratisation, and must widen the spaces for dialogue and collective deliberation.

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[642] Lake Vättern case. In the case, he recommended the creation of a "*council of guardians of the Mediterranean Sea to enable the representation in court of its fundamental interests by the riparians concerned*".

[643] For example, concerning the Tavignanu River, it is mentioned that "*the guardians will be appointed at a later date and will include representatives of the signatories of the present declaration, as well as of any community that may be associated with it to defend the interests of the river*".

[644] Example for Corsica with the strategy for organising local water competences drawn up at the level of each river basin and the SDAGE 2022-2027 (the Corsican local authority is responsible for water policy). https://www.corse.eaufrance.fr/sites/siecorse/files/content/2022-04/socle_extraitdocdac_22_27.pdf

[645] L. NEYRET, *Les sanctions à l'épreuve des enjeux environnementaux*, in " *Les notions de droit privé à l'épreuve des questions environnementales* ", (dir. M. MEKKI), Ed. Bruylant, 2016, 238 p 171-186

B - Expanding spaces for dialogue and democratic deliberation

Several authors question the added value of appointing nature guardians in relation to the existing authorities responsible for implementing environmental legislation. According to Jan DARPO, "*we have formally speaking a system of enforcement in place which in a way is comparable with of a guardian, even if the role of the public concerned and the administration are somewhat different (...) but the key elements are a functioning administration and that the public concerned is able to challenge administrative action and inaction concerning obligations to the environment under EU Law by going to* Court"[646]. From the outset, the question of the criteria for designation and the related democratic procedure is debated, as is the scope of the tasks conferred on such an entity or entities empowered to be the spokesperson for the interests and rights of nature throughout the cycle of the legal norm.

However, the functioning of the national public authorities responsible for implementing environmental legislation raises the question of the place of the public and civil society organisations[647]; this goes beyond the obligations of information, consultation and participation[648].

Rights of nature advocates stress the importance of strengthening the participation of local actors and indigenous communities. In the case of the Maroni River, the European moot court for the defence of aquatic ecosystems called for a review of governance to include the Amerindian nations of Guyana and the peoples affected by mercury pollution; it recommended the creation of a body based on the same model as the commission of guardians of the Colombian river Atrato[649]. Following the example of the Loire Parliament and other commoning initiatives[650], several initiatives in Europe reveal the need for "*communities of inhabitants as full stakeholders in the achievement of conservation objectives that concern them in order to maintain the conditions for the long-term regeneration of the territory*"[651]. They also express the need to respond to the shortcomings of existing participatory mechanisms and to ensure the real involvement of citizens in the governance of water and natural resources[652].

The questionnaire "*Recognising the rights of nature in Europe*" organised by Marie TOUSSAINT MEP in 2021 invites to identify the actors in society (NGOs, scientists, artists, future generations (...)) who are most likely to play this role of guardians. Environmental organisations are in the lead (over 63%), followed by scientists (over 59%). Among the forms and places of democratic institutionalisation, the proposal to designate an "*assembly bringing together all the stakeholders at the level of an ecosystem*" receives more than 56% of favourable votes, followed by the proposal for "*local communities and/or groups of residents*" (more than 50%), then the proposal for "*an assembly bringing together all these stakeholders at the national level*" (more than 40%) and finally "*elected representatives to speak for the ecosystems*" (more than 33%).

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[646] J. DARPO study "*Can Nature get it right*", 2021, op. *cit.*

[647] For example, in the field of water, the composition of the basin committees in France includes non-economic users (including environmental associations). Example: Loire-Bretagne basin committee (190 members including 13 representatives of the said associations and 38 economic representatives). https://agence.eau-loire-bretagne.fr/home/comite-de-bassin/composition-du-comite-de-bassin.html

[648] F. DI QUARTO & A. ZINZANI, European environmental governance and the post-ecology perspective: a critical analysis of the Water Framework Directive", *GeoJournal* (2022) n°87, 2849-2861. N. HERVÉ-FOURNEREAU, *Beyond the 2019 Fitness Check of the Water Framework Directive: designing the future of European Water Law*, in EU Environmental Law Research Handbook, M. PEETERS & M ELLIANTONIO (eds), Edward Elgar Publishing, 2020. G. BOULEAU, Greening European water policy, governance by experimentation and learning, *European Policy* 2017/1, n°55, 36-59.

[649] Constitutional Court of 10/11/2016, T-622/2016, https://www.corteconstitucional.gov.co/relatoria/2016/t-622-16.htm

[650] These latter approaches are not necessarily part of a logic of attribution of nature's rights.

[651] A. TANAS & S. GUTWIRTH, *Une approche écologique des communs dans le droit. Regards sur le patrimoine transpropriatif, les usi civici et la rivière personne*", *In Situ. Au regard des sciences sociales, 2021 Patrimoine et communs*

[652] What alternatives for participation in water territories? E. CREMIN, J. LINTON, V. MITROI, JF DEROUBAIS, N. JACQUIN, *Participations* 2018/2, n°21 " *La démocratie des territoires de l'eau* ", 5-36. In France, the Rhône Méditerranée Corse agency has launched calls for projects on "*Water and citizen participation*" in 2020 and 2021. https://www.eaurmc.fr/jcms/pro_100728/fr/reglement-appel-a-projets-eau-et-participation-citoyenne ; also the Rhine Meuse water agency in 2022 with its call for projects "*For collective and citizen mobilisation around the Rhine*" https://www.eau-rhin-meuse.fr/actualites/pour-une-mobilisation-collective-et-citoyenne-autour-du-rhin-0. It remains to be seen what impact these actions and experiments will have on the institutional architecture of water governance.

The spirit of "*decisions taken as openly and as closely as possible to the citizens*"[653] is reflected in these results, even though the questionnaire focused mainly on the sub-EU levels. These responses reveal the need for citizen participation and deliberative democracy at the grassroots level, transcending territorial administrative boundaries or traditional democratic institutions.

The results of the questionnaire also raise questions about the representativeness and functioning of existing governance structures such as those set up by the Member States at the level of river basin districts or Natura 2000 sites. It is true that the Water Framework Directive 2000/60/EC requires Member States to "*encourage the active participation of all parties concerned in the implementation*" of the directive. While the CJEU recognises that the wording is "*rather programmatic in nature*"[654], it considers that Member States are obliged to "*respect the substance*" of Article 14 of the WFD "*consisting of the obligation to encourage the active participation of all parties concerned*"[655].

In the draft Citizens' Initiative on the Rights of Nature, Part IV "*Ecological Governance*" of the draft Directive requires Member States to identify factors "*which enhance ecological governance in support of the Rights of Nature*"[656]. To do so, they will have to examine their national law against indicators such as the degree of local community involvement in ecological governance and the degree of implementation of the public's rights to information, participation and access to justice.

The objective of fostering citizens' participation in the EU decision-making process "*shall be part of the existing institutional balance and shall be exercised within the limits of the powers conferred on each EU institution by the Treaties*"[657]. According to Article 11 of the TFEU, the EU institutions must thus maintain "*an open, transparent and regular dialogue with associations representing civil society*"[658].

As the institutional representative of organised civil society (OCS), including environmental organisations[659], the EESC sees itself as a major player at the interface between civil society and the European institutions. In several of its opinions, it stresses the importance of civil dialogue and the participation of civil society in environmental policy but also in the framework of other EU policies. The issue of the rights of nature receives a great deal of attention among EESC members, as the study commissioned on this subject has shown. The substantial strengthening of the role of environmental organisations[660] in the structuring of the EESC[661] and the wider participation of European citizens should be an avenue to be pursued rapidly, including in EU agencies. The example of the new composition of the French EESC, with its 4th group made up of 26 representatives for the protection of nature and the environment, could be a source of inspiration.

The special status conferred on environmental organisations (EOs) by EU law is part of the quest for greater representativeness of nature's interests. As early as 1987, the 4th action programme on the

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[653] Art. 10 of the TEU Lisbon.

[654] Judgment of the Court of 20/12/2017, Protec Natur-Arten und Landschaftsschutz Umweltorganisation, C-664/15, ECLI:EU:C:2017:987

[655] judgment of the Court of 20/12/2017, C-664/15, *cited above*.

[656] Op.cit.

[657] judgment of the Court of 19/12/2019, P. Gregor & al, C-418-18 P, (ECI "One of us"), ECLI:EU:C:2019:1113. The Court thus specifies that the authors of the European Citizens' Initiative mechanism did not "*intend (...) to deprive the Commission of the power of legislative initiative conferred on it by Article 17 TEU*".

[658] As an example of the constitution of a civil dialogue group: Commission Decision (EU) 2022/1368 of 3/8/2022 establishing civil dialogue groups in the field of the CAP and repealing Decision 2013/767/EU, seven expert groups are set up, including one dedicated to the environment and climate change, OJEU 2022 L 205/278.

[659] Nine national organisations representing the environment are in the EESC's Group III "*Diversity Europe*" (Fondation N. Hulot Foundation, France Nature Environnement, EuroNature Foundation (...).

[660] For the record, currently three groups: employers, workers, civil society organisations. Of the 329 members, 7 represent environmental associations.

[661] In addition to the addition of "*Environment*" to its name, in the image of the French EESC (2008 reform concerning the change of name and extension of its missions to the environmental field), it is the object of a recent reform: organic law 2021/27 of 15/1/2021 relating to the Economic, Social and Environmental Council JORF 14 of 16/1/2021 (with the institution of a 4th group composed of 26 representatives for the protection of nature and the environment) and the opening up to citizen participation with the possibility of referring to it by way of a citizen's petition

environment recognised that they *could be considered as representing general environmental interests and could act as partners of the decision-making bodies"*[662]. Forum-type bodies have thus been created by the Commission, such as the Forum on Environmental Compliance and Governance, in which NGOs can participate as observers[663]. More recently, on the occasion of the revision of the Aarhus Regulation 2006/1367/EC, the Commission again emphasises that NGOs "*are often best placed to represent effectively the public interest and civil society concerns in this area by means of a professional argument*[664]. Similarly, the Court confirms this uniqueness of EDOs by stressing the importance of their "*active participation" on the grounds that "only such organisations are geared to the general interest and not to the protection of the interests of individuals taken individually*"[665]. In this case, the recognition of their capacity to participate as members of the "*public*" and the "*public concerned" in the* context of environmental impact assessment procedures for certain private or public projects, plans and programmes illustrates their singularity and ability to guarantee a "certain representativeness" of nature's interests and the respect of the rights granted by EU environmental law. The most active EDOs at European level have developed offensive strategies for using these participation rights, not hesitating to combine them to amplify the strength of their actions. Several examples illustrate the *legal intelligence* of the EDOs in defending the general environmental interest, including in the courts. They do not confine themselves to the perimeter of environmental policy stricto sensu, arguing that environmental requirements must be integrated into other EU policies. In support of an extensive interpretation of existing procedural environmental rights, Yaffa EPSTEIN and Hendrik SCHOUKENS even conclude that environmental NGOs "*fulfil the role of legal guardians of rights-bearing natural entities when they represent Nature's rights in court to enforce EU environmental law*"[666].

There are several avenues for reform to broaden the spaces for dialogue and democratic deliberation and to strengthen the involvement of citizens and NGOs throughout the cycle of environmental policies and legislation and/or the integration of environmental requirements. While the creation of structures for dialogue and consultation of stakeholders at EU level is not new in the environmental field, it requires that these bodies be made permanent over time and that their opinions be taken more fully into account[667]. The establishment of these bodies also requires specifying the criteria for the representativeness of civil society players and guaranteeing compliance with the requirements of transparency and accountability. Improving the democratic functioning of the European institutions and existing bodies to better represent the interests of nature is one way forward. Similarly, strengthening the representativeness of organised civil society, in particular NGOs, within EU bodies (committees, agencies, EESC, etc.) is a key issue.

Finally, at finer spatial scales (biogeographical region, hydrographic district, Natura 2000 area, ecosystems, river entity (...)) these two tracks could also strengthen the representation of nature's interests. The Spanish law on the Mar Menor lagoon provides for greater citizen representation in the bodies responsible for the protection of this natural entity. Thus, the Committee of Representatives

[662] 4th action programme: Resolution of the Council of the EC and of the Representatives of the Governments of the Member States meeting within the Council of 19/10/1987 on the pursuit and implementation of an EC environmental policy and action programme (OJEC 1987 C 328/1)

[663] Commission Decision of 18/1/2018 on the establishment of the Expert Group on Environmental Compliance and Governance (Art. 4 no voting rights and no participation in the formulation of recommendations or opinions), OJEU C 19 of 19/1/2018 p 3. The priorities of the 2020-2022 work programme of this forum include the issue of access to justice in the Member States. https://ec.europa.eu/environment/legal/compliance_en.htm

[664] COM (2020) 642 final, Proposal for a Regulation of the EP and of the Council amending Regulation (EC) 1367/2006.

[665] Judgment of the Court of 20/12/2017, Protec Natur-Arten und Landschaftsschutz Umweltorganisation, C-664/15, *cited above*.

[666] Y. ESPSTEIN & H. SCHOUKENS, A positivist approach to rights of Nature in the European Union, *Journal of Human Rights and the Environment,* Vol. 12, n°2, September 2021, 205-227.

[667] Example of the limited lifespan of the 1993 Consultative Forum on the Environment (Commission Decision 93/701/EC of 7/12/1993 on the establishment of a general consultative forum on the environment (OJEC L 328 of 29/12/1993 p 53) repealed by Commission Decision 97/150/EC on the establishment of a European consultative forum on the environment and sustainable development, repealed by the Commission Decision of 26/9/2001 (OJEC L 258 of 27/9/2001 p 20). The Forum disappeared in favour of a Round Table on Sustainable Development created by the Commission in the framework of the sustainable development strategy (COM (2001) 264 of 19/6/2001).

includes 7 citizens who are members of the popular legislative initiative out of the 13 members of this body; however, it does not make this choice explicit, nor the criteria for its appointment. With a view to revising EU environmental legislation, it would be appropriate, within the limits of the principle of the institutional autonomy of the Member States, to consider introducing conditions guaranteeing the enhanced representativeness of citizens and NGOs within the competent authorities, in order to counterbalance the imbalance in representation between ecological and socio-economic interests[668].

Apart from the necessary institutionalisation of this representation, the choice of procedural mechanisms is decisive. The criticism of existing mechanisms is shared by several authors, whether or not they are in favour of recognising rights for nature.

C - What procedural guidelines should be used to guarantee respect for the interests of nature?

Substantial improvements in participatory procedures provide a basis for the further integration of environmental interests into decision-making processes.

The promoters of nature's rights advocate broadening access for all persons to the procedures that mark out the cycle of legal norms to ensure the defence of ecological interests. The promoters of the draft ECI thus provide in their proposal for a directive that "*Nature possesses a fundamental right to the defense, protection and enforcement of its rights under this Directive by any physical person acting individually or collectively, government, or non-governmental organization of the EU*" and that "*residents of the EU, individually and collectively, possess a fundamental right to defend, protect, and enforce the rights of nature, and to have their governments defend, protect, and enforce these* rights"[669]. They mention the development of procedures "*that guarantee that nature is allowed to continue its natural cycles and vital process*" without specifying their nature or modalities. However, these provisions are aimed almost exclusively at jurisdictional procedures in the tradition of Christopher STONE to defend the rights of nature.

Several authors, such as Jan DARPO, consider that there is only a "*little reason to deviate*"[670] from the existing European system, even if they recognise the need to strengthen the mechanisms for participation and access to justice. Thus, if the "*right to participate in the democratic life of the EU*" translates into the consecration and reinforcement of procedural rights and mechanisms, the model of representation and defence of the general environmental objective is not that of *the actio popularis*.

In line with the positions taken by the EU institutions and the Member States[671], Regulation (EU) 2021/1767, revising Regulation (EC) 1367/2006, known as the Aarhus Regulation, expresses their choice "*to avoid members of the public having an unconditional right to request an internal review ("action popularis") which is not required under the Aarhus Convention*"[672]. As summarised by Advocate General Eleanor SHARPSTON in 2017, "*the authors of the Convention chose to strengthen the role of*

[668] The composition of basin committees in France provides for the presence of non-economic users (including environmental associations), although one may wonder about their weight in the deliberations. Example: Loire-Bretagne basin committee (190 members, including 13 representatives of the said associations and 38 economic representatives). https://agence.eau-loire-bretagne.fr/home/comite-de-bassin/composition-du-comite-de-bassin.html

[669] *Prec*, https://natures-rights.org/ECI-DraftDirective-Draft.pdf

[670] J. DARPO study "*Can Nature get it right*", 2021, op. *cit.*

[671] This position of the European institutions (but also of the Member States) against *actio popularis* has not changed since the beginning and the Commission systematically recalls that Article 9 of the Aarhus Convention leaves a margin of discretion to the parties and that the Member States "*are not obliged to give standing to any and every member of the public (action popularis) or any and every NGO*" C (2017) 2616 final, Communication from the Commission "Commission Notice on access to *justice in environmental matters*". When presenting the proposal for a directive on access to justice in environmental matters, the Commission already explained that it was not in favour of the action popularis, considering that such a choice "falls within the competence of the Member States". COM (2003) 624 final, op. *cit.*

[672] Regulation (EU) 2021/1767 of the EP and of the Council, (recital), op. *cit.*

environmental organisations" opting "*for a middle ground between the maximalist approach (the actio popularis) and the minimalist approach (individual right of action limited to parties whose interests are directly at stake)*"[673].

The institution of the European Citizens' Initiative (ECI) and the recognition of the binding value of the EU Charter of Fundamental Rights have opened up new procedural horizons for public participation in decision-making. This phenomenon of proceduralisation is not specific to environmental protection and is part of a logic that governs the relationship between the issuers and recipients of decisions in a different way[674]. Moreover, the diversification of the modes of proceduralisation of EU law and EU environmental law provides the CJEU with new anchor points for its functions. Given the current state of legal heterogeneity and the diversity of beneficiaries affected by EU law, it is not possible to say that all persons have full rights to participate in the decision-making process at both EU and Member State level. It is true that Member States have the right to maintain and/or provide for enhanced safeguards in line with the requirements of Title Environment of the TFEU[675].

However, poor compliance with procedures and restrictive interpretations by Member States and/or EU institutions[676] are obstacles to the exercise of procedural rights to information and participation in environmental decision-making (**1**). Strengthening the legal protection of nature's interests requires a substantial improvement of existing procedural rights and other procedures, or even the introduction of new procedural dynamics (**2**).

1) Existing consultation and participation procedures: a thwarted added value

Notwithstanding the added value of these procedural rights and other existing mechanisms, the "*risks of misuse of proceduralization*"[677] of environmental law are far from hypothetical. Several authors have pointed out the weaknesses of these procedures, including the random compliance with the authorities' obligation to report transparently on the consideration of the public's and/or the public comments when making decisions.

As EU law currently stands, certain procedural rights, such as the right to participate in the decision-making process, are granted exclusively to persons qualified as members of the '*public concerned*'[678] by the proposed work, plan or programme in accordance with the Environmental Impact Assessment Directives.

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[673] Conclusions presented on 12/10/2017 in Case C-664/15 Protect-Nature & al. *aforementioned*.

[674] D. TERRE, *Les questions morales du droit*, Paris, PUF, 2007, (*3e partie sur la procéduralisation du droit*) ; K. BUHMANN, Towards legitimacy in above national rule making: proceduralisation in multi-stakeholder public regulation, *in "Law & legitimacy",* P. ANDERSEN, C. ERIKSEN, B. VISKUM, (eds.) Copenhagen, Djof Forlag Edit, 2015, pp. 101-124. M. ELIANTONIO, The proceduralisation of EU environmental legislation: international pressures, some victories and some way to go (study on directive 2004/35 related to environmental liability and the Aarhus Directive), *in "Proceduralisation of EU law through the backdoor"*, M. ELIANTONIO & E. MUIR, (eds)*, Review of European administrative law*, vol. 8, nº 1, June 2015

[675] Article 193 of the TFEU for memo "*The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission*.

[676] Example of the review application procedure under the so-called Aarhus Regulation: several of these applications were rejected by the Commission on the grounds of a rigorous interpretation of the notion of administrative act and/or considering the conformity of the said Regulation with the Aarhus Convention.

[677] N. HERVE-FOURNEREAU, *Démocratie et procéduralisation du droit de l'environnement de l'Union européenne: de l'art du trompe l'œil*, 2022, *prec*.

[678] This undefined expression appears in Directive 85/337/EEC (*above),* leaving it to the Member States to identify the said public. It was not until Directive 2003/35/EC, amending Directive 85/337/EEC in particular, that a definition of this concept was included (codified directive: Directive 2011/92/EU). We will come back to this later.

As a result of the Aarhus Convention[679], a harmonised definition of the public and the public concerned has been disseminated in environmental legislation[680], including in the so-called Aarhus Regulation (EC) 1367/2006. In addition, the Court has helped to ensure the exercise of these public rights to information and participation. Thus, it considered that the provisions of the Convention (in particular Articles 6 and 9§2) were "*such as to underpin the rights and freedoms guaranteed by Union law within the meaning of Article 47 of the Charter, either directly or by determining the content of provisions of secondary Union law or of the law of the Member States*"[681]. According to EU environmental legislation, the notion of the public covers "*one or more natural or legal persons and, in accordance with national law or practice, associations, organisations or groups constituted by such* persons"[682]; while the notion of the public concerned covers "*the public affected or likely to be affected by decision-making procedures*" referred to in the Directives and also NGOs "*promoting the environment and fulfilling the conditions which may be required under national law to be deemed to have an interest"[683].*

The latter, described as the "*linchpins of our democracy*"[684], are recognised as an essential interlocutor in the protection of nature and its elements[685]. The recognition of a presumption of interest[686] or of infringement of their rights gives them an enhanced right to participate in the decision-making process concerning the authorisation procedure for certain projects, or to request action from the authorities in the event of an imminent threat of environmental damage[687], including the right to challenge the decision taken before a "*court of law or other independent and impartial body established by law*"[688].

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[679] Article 2: the public "*one or more natural or legal persons and, in accordance with national law or custom, their associations, organisations or groups" and the public concerned "the public affected or likely to be affected by, or having an interest in, the decision-making process, (...) non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest*.

[680] Directive 2003/35/EC of the EP and of the Council of 26/5/2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC on public participation and access to justice, OJEU 2003 L 156/17

[681] In this case, it interpreted Directive 92/43/EEC in the light of the provisions of the Convention which are 'transposed' into the directives on environmental impact assessments requiring the right of the public concerned to participate in the decision-making process concerning the decisions covered by these texts. However, Article 6§3 of Directive 92/43/EC on the environmental impact assessment of plans and projects only provides for "*where appropriate, the opinion of the public*". Court judgment of 8/11/2016, Lesoochranarske Zoskupenie, C-243/15, ECLI:EU:C:2016:838.

[682] Directive 2011/92/EU of the EP and of the Council of 13/12/2011 on the assessment of the effects of certain public and private projects on the environment, (repeal Directive 85/337/EEC) OJEU 2011 L 26/1. Directive 2001/42/EC of the EP and of the Council of 27/6/2001 on the assessment of the effects of certain plans and programmes on the environment, OJEU 2001 L 197/30. The Aarhus Regulation 1367/2006/EU uses this definition "*one or more natural or legal persons and associations, organisations or groups made up of such persons*".

[683] Directive 2011/92/EU, (art. 1) *above*. Directive 2001/42 does not include a definition of the public concerned, but it is specified that states shall define the public '*affected or likely to be affected by, or having an interest in, the taking of the decision (...) including relevant NGOs such as those promoting environmental protection and other relevant organisations*' (Article 6).

[684] COM (1997) 241 final, Communication from the Commission on the promotion of the role of associations and foundations in Europe.

[685] N. BERNY, *Defending the cause of the environment*, PUR 2019, 298 p. Special issue *RJE/44/2019* on 50 years of environmental litigation: the contribution of the associative movement; S. OLLITRAULT, *Militer pour la planète*, PUR 2015, 226 p.; D. CHARTIER and S. OLLITRAULT, *Les ONG d'environnement dans un système international en mutation : des objets non identifiés* ? *in " Représenter la nature ? ONG et Biodiversité "*, C. AUBERTIN (dir), IRD Ed, 2013, 210 p. p 21-58

[686] In the proposal for a Directive replacing Directive 2008/99/EC on the protection of the environment through criminal law, the concept of the public concerned is introduced, which includes NGOs "*working for the protection of the environment and fulfilling all proportionate conditions laid down in national law shall be deemed to have an interest*" and as such, as members of the public concerned, they are entitled to participate in proceedings concerning offences "*for example as civil parties*" (Article 14). COM (2021) 851 final. Awaiting the Council's vote following the EP's first reading vote in February 2024. Directive 2008/99/EC did not contain such provisions.

[687] Directive 2004/35/EC of the EP and of the Council of 21/4/2004 on environmental liability with regard to the prevention and remedying of environmental damage: OJEU L 143 of 30/4/2004 p 56. Article 12 identifies three categories of natural or legal persons entitled to bring such claims: those affected or likely to be affected by the damage, those with a sufficient interest in the environmental decision-making process relating to the damage, and those claiming impairment of a right where the administrative procedural code of a Member State sets such a requirement. EDOs that meet the statutory requirements under national law are therefore entitled to submit requests for action to the competent authority in the event of the occurrence of environmental damage or an imminent threat of such damage (Art. 12).

[688] Art. 10 Directive 2011/92/EU, *supra*.

The EIA Directives also require Member States to ensure, at an "*early stage*"[689], the effective participation of the public concerned in the decision-making process, allowing them to submit, within "*reasonable time frames*"[690], any opinions and observations "*where all options are open (...) before the decision on the application for development consent is taken*"[691].

In Case C-664/15, the Court of Justice also emphasised that the right of participation "throughout the *decision-making process*" set out in Article 6 of the Aarhus Convention is distinct from judicial review (Article 9) and has a different purpose[692]. On the basis of a combined interpretation of Article 9§3 of the Convention, Article 47 of the EU Charter of Fundamental Rights and Article 14 of the WFD, the Court concludes that a national procedural law which excludes environmental associations from the right to participate in a project authorisation procedure and "*limits the right to challenge decisions resulting from such a procedure to persons having that status*" is not in conformity with the Convention[693].

At the European decision-making level, the so-called Aarhus Regulation (EC) 1367/2006 introduced a procedure for requesting internal review of certain categories of administrative acts of individual scope[694] and omissions '*under environmental law*'[695]. This unique procedure was open only to NGOs and not to all members of the public. The 4 conditions[696] for NGOs to apply for review are in line with the main criteria already set by the EU programmes for the promotion of environmental organisations[697] without imposing a minimum number of members or a geographical scope of action.

Notwithstanding the novelty of this mechanism in EU law and guaranteed by the right to refer to the CJEU, the restriction of the scope of the beneficiaries and the type of act subject to internal review revealed the legislator's cautious and resistant attitude towards the risk of an influx of such requests.

The 2021 revision of the so-called Aarhus Regulation (EC) 1367/2006 offers a significant step forward by broadening the scope of persons who can lodge a request for internal review with an EU institution or body that has issued the administrative act in question or where there is an allegation of administrative omission. As of 29/4/2023, this procedure will be open to other members of the public who meet one of the following conditions: demonstrate that "*the alleged breach of EU environmental law adversely affects their rights and that, unlike the rest of the public*", the members of the public are "*directly affected by the alleged breach*", or demonstrate the existence of a "*sufficient public interest*" and that the request is supported by at least 4,000 members of the public residing or established "*in at least 5*

[689] Directive 2011/92/EU and Directive 2001/42/EC, *supra*.
[690] Directive 2014/52/EU, which amends Directive 2011/92/EU, specifies that the period for consulting the public concerned on the environmental impact assessment report may not be less than 30 days. CHEEK 2014 L 124/1.
[691] Directive 2011/92/EU, *supra*.
[692] Judgment of the Court of 20/12/2017, Protec Natur-Arten und Landschaftsschutz Umweltorganisation, C-664/15, *cited above*.
[693] It reiterated this interpretation in Case C-826/18, concluding that '*Article 9§2 of the Aarhus Convention precludes the admissibility of the judicial remedies referred to therein, brought by NGOs forming part of the public concerned (...), from being made subject to their participation in the decision-making process leading to the adoption of the contested decision*'. judgment of the Court of 14/1/2021, LB Stichting Varkens in Nood, C-866/18, (Reference for a preliminary ruling from the Court of Limburg, Netherlands) ECLI:EU:C:2021:7
[694] Art. 2 Definition of an administrative act within the meaning of Regulation (EC) 1367/2006: "*of individual scope under environmental law and having legally binding and external effect*". This excludes measures taken or omitted by a Community institution or body in its capacity as an administrative control body, in particular under: competition rules, infringement proceedings, procedures relating to the Ombudsman and OLAF (art.2), *etc*.
[695] Article 10 of Regulation (EC) 1367/2006, *supra*.
[696] Art. 10 of Regulation (EC) 1367/2006: Be an independent non-profit legal person under the national law or practice of a Member State, have as its primary declared objective the promotion of environmental protection within the framework of environmental law, have been in existence for more than two years and actively pursue the objective of environmental protection, and the subject matter of the request for internal review is in line with the objective and activities of the organisation. In its initial proposal, the Commission took up the criteria laid down in the action programme for the promotion of environmental NGOs, in particular: being an organisation active at Community level (and if it is made up of several coordinated organisations: covering at least three Member States) and having accounts certified by a chartered accountant: Decision 466/2002 of the European Parliament and of the Council of 1/3/2002 laying down a Community action programme promoting NGOs primarily active in the field of environmental protection, OJEC L 75 of 16/3/2002 p 1.
[697] Decision 466/ 2002/EC, op. *cit.*

Member States and at least 250 members of the public come from each of the Member States. In addition, members of the public meeting these requirements must be represented by a non-governmental organisation meeting the criteria set out in the Regulation or by a lawyer "*authorised to practise before a court in a Member State*".

This Regulation (EU) 2021/1767 also extends the procedure for requesting a review to *"any non-legislative act having legal and external effect*" and not only to administrative acts of "*individual scope (...) having binding legal and external effect*". It also ambiguously rephrases the subject matter of the act to be reviewed. Thus, while Regulation 2006/1367 uses the expression "*under environmental law*" covering any legislative provision, regardless of its legal basis, which "*contributes to the pursuit of* environmental *policy objectives*", Regulation 2021/1767 specifies that the administrative act which is the subject of a request for review contains "*provisions which may conflict with environmental law*". The same wording also applies to cases of administrative omission in the sense of failure to act by an EU institution or body.

Notwithstanding the advances made in Regulation 2021/1767, the scope of the exclusions from this procedure is not called into question (Article 2.2). In this case, measures or omissions by Community institutions or bodies in their capacity as administrative control bodies in the context of competition policy, Ombudsman or OLAF procedures remain outside the scope of the procedure. Not surprisingly, measures or omissions in the context of infringement proceedings are also excluded. On the other hand, the wording of Article 2.2 retains the phrase "in particular", leaving the door open to questionable interpretations that are not in line with the requirement of legal certainty. Moreover, the exclusion of measures and omissions taken in the framework of competition policy has raised doubts about its conformity with the Aarhus Convention. In April 2021, the Aarhus Convention Review Committee concluded that the lack of administrative or judicial procedures available to the public to challenge Commission decisions on state aid was not in line with Article 9§3 and §4[698]. However, in October 2021 the EU obtained a postponement of the adoption of the draft decision VII.8f on this case to the next COP in 2025[699] while committing to assess the options for complying with the Committee's conclusions. This attitude calls into question the reality of the EU's environmental leadership on the international scene and, above all, its compliance with its treaty obligations, especially as the EU had already used this procedure in 2017 to obtain the postponement of the adoption of the draft COP decision on another case, ACCC/C/2008/32, in which the review committee had concluded that the EU was not in compliance with Article 9 of the Convention.

A cross-sectional analysis of these different procedures shows the place and essential role of environmental associations; similarly, the limited use of the flagship instrument of "citizen" democracy of the Lisbon Treaty reveals that the bearers of ECIs are not "ordinary" citizens; the lack of knowledge of the mechanism and its procedural complexity have favoured this professionalisation of informed citizens[700]. The ECI project on the rights of nature is no exception to this observation. Notwithstanding the role of alert and mediation played by NGOs, the real involvement of European citizens in the European decision-making process remains limited and random, including at state and sub-state levels. The reasons for this democratic disenchantment are well known: indifference, lack of knowledge, technical nature of the issues, difficulty in accessing European mechanisms and the linguistic and digital divide, which results in the exclusion of the most vulnerable citizens and those who "*have the fewest opportunities to express themselves*"[701]. In addition, the observations and other opinions expressed by

[698] ACCC/C/2015/128, conclusions and recommendations of the review committee on 17/3/2021.
[699] https://unece.org/sites/default/files/2021-12/6Dec2021-MOPsFull_summary.pdf
[700] C. LEQUESNE, O. COSTA, N. JABKO, P. MAGNETTE, *La diffusion des mécanismes de contrôle dans l'UE : vers une nouvelle forme de démocratie? Revue française de science politique*, nº 6, 2001, p. 859-866. M. DUFRASNE, *Les pratiques participatives à l'épreuve du dispositif institutionnel : la résistible révision de la réglementation de l'initiative citoyenne européenne*, *in* " *L'initiative citoyenne européenne ",* F. DUBOUT E, F. MARTUCCI, F. PICOD (dir.), Ed. Bruylant, 2019, 330 p.
[701] EP resolution of 30/5/2018 on the interpretation and implementation of the Interinstitutional Agreement on *Better Lawmaking*, 2016/2018 (INI).

members of the public and the public concerned were taken into consideration in a highly variable manner, and private interests defended by stakeholders who are highly experienced in decision-making were over-presented.

Finally, despite the lack of binding force of impact assessments of certain legislative proposals, public consultations organised by the Commission, and other procedures such as quality assessments of European legislation, the CJEU does not hesitate to use them to monitor *in concreto* compliance with the principles structuring the exercise of European powers and the European decision-making process[702].

2) The need to strengthen procedural rights, or even to establish new procedural dynamics

In view of these procedural difficulties and shortcomings in the decision-making process, what improvements can be made to ensure greater representativeness of nature?

Should the circle of members of the public concerned be widened in the context of procedures for assessing the impact of certain works, plans and programmes and other procedures for authorising industrial installations or the placing on the market of products? Should the privileged status enjoyed by environmental associations be extended to other members of the public? A further widening of the circle of persons entitled to submit a request for review of acts is premature in the short term in view of the recent revision of Regulation 2006/1367/EC. The prospect of *actio popularis* remains remote for the time being and the Commission does not seem ready to change its position, which has been consistent for many years.

The Environmental Impact Assessment Directives require Member States to ensure that "*authorities likely to be affected by the project by virtue of their specific environmental responsibilities have the opportunity to give their opinion on the information provided by the developer and on the application for development consent*". Is it therefore important to generalise this procedure to all environmental legislation or legislation with significant environmental impact?

If an independent environmental authority is established (of the ombudsman type, as suggested in the draft ECI on Nature Rights), it will be up to the Member States to organise the arrangements for consulting these authorities in accordance with the extent of their geographical scope of investigation. Once again, it will be necessary to ensure the integrated coordination and effectiveness of the consultation processes of the various authorities called upon to intervene.

The generalisation of the establishment of European networks of competent environmental authorities would contribute to strengthening the implementation of legislation and the exchange of good practices and information. In the recent proposal for a directive on due diligence, the establishment by the Commission of a European network of supervisory authorities is foreseen. However, it is simply mentioned that the Commission "*may invite EU agencies with the necessary expertise in the fields covered by the Directive*"[703] to join the network. However, if we are to understand the Commission's concern not to infringe on its competences, the participation of agencies such as the European Environment Agency (EEA) or the European Human Rights Agency should have been noted from the start. The participation of environmental authorities in such European networks would strengthen the consideration of environmental interests.

[702] Following the example of its judgment of 13/3/2019, Poland v Parliament and Council, C-128/17 (ECLI:EU:C:2019:194) and the Court's judgment of 8 July 2010, *Afton Chemical limited*, Case C-343/09 (Reference for a preliminary ruling from the High Court of Justice, validity of Directive nº 2009/30/EC fuel specifications and greenhouse gas emissions), ECLI:EU:C:2010:419.
[703] COM (2022) 71 final, Proposal for a Directive of the EP and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937. Approval by the Council in March 2024 following the EP's[1st] reading.

In addition to improving existing procedures and extending the circle of persons and authorities entitled to participate in them, should the creation of new procedures be considered in order to strengthen the representation of nature in the European decision-making process? The answer to this question is closely linked to the reform of the institutional architecture and the distribution of powers and competences of the EU institutions and bodies. If the EEA's functions were to be strengthened and extended, could we imagine its systematic consultation during impact assessments, or even in the legislative and regulatory process? It is clear that such a hypothesis could complicate the institutional game where the consultative bodies (EESC and COR) already carry out their tasks. Should we then also consider reviewing the organisation of procedures within the institutions and bodies themselves in order to strengthen the representativeness of nature? Can the Committee on the Future of Science and Technology in the European Parliament play an expanded role in this respect? Or should another committee be set up to represent nature and future generations and be consulted during the decision-making process?

The proliferation of procedures and entities is a pitfall that should not be overlooked in the reform of governance and democratic architecture. Moreover, it is important to ensure that they are used effectively and are environmentally useful. Similarly, learning to participate in democratic life requires preconditions of education and training and guarantees of information, assistance and accessibility[704]. By way of example, in Case C-589/15 P, the Court deduced from the creation of a contact point by the Commission for ECI organisers an obligation for that institution to "*provide its assistance and advice [...] with regard to the registration criteria*"[705]. The ECI Regulation (EU) 2019/788[706] now details these information and assistance obligations on the Commission and Member States. The update of the ECI Guide is part of this dynamic for European citizens[707]. In the specific context of environmental policy, the Citizens' Guide to Access to Justice[708] and the *Vademecum* on Complaints Handling and Citizen Engagement aim, according to the Commission, to "*improve citizen engagement (...) and strengthen citizens' confidence in EU environmental law and its implementation*"[709].

The use of these procedures and the exercise of environmental procedural rights require that citizens and any member of organised civil society be protected against any risk of reprisals. The Aarhus Convention specifically states that each Party "shall ensure *that persons exercising their rights in accordance with the provisions of this Convention are not in any way penalised, persecuted or subjected to vexatious measures as a result of their action*" (Article 3§8). On a global scale, the NGO Global Witness denounced in 2018 the murder of 4 environmental defenders per week, 50% of whom belonged to indigenous communities[710]. The UN Special Rapporteurs on Human Rights[711] and UNEP[712] also stress

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[704] With the exception of a few high-profile public consultations (the one on summer time in 2018: 4.6 million, or the consultation on the quality assessment of the Natura 2000 directive: 500,000 people), the number of participants remains very low and also depends on communication and public awareness efforts, including in the Member States.

[705] judgment of the Court of 12 September 2017, *A. Anagnostakis v Commission*, Case C-589/15 P (ECI suppression of public debt for Member States in a state of need), ECLI:EU:C:2017:663.

[706] Regulation (EU) 2019/788 of the EP and of the Council of 17/4/2019 on the European Citizens' Initiative, OJEU 2019 L 130/55. This regulation repeals the original regulation (EU) 211/2011 with effect from 1/1/2020.

[707] ECI Guide, help shape the EU, Opoce, Nov 2019.

[708] Guide published by the Commission in 2018 following its 2017 Communication on access to justice in environmental matters C (2017) 2616 final

[709] Vade-Mecum "Environmental Compliance Assurance - Complaints Handling and Citizen Engagement, Opoce 2020, https://op.europa.eu/fr/publication-detail/-/publication/1fc175c2-8051-11ea-b94a-01aa75ed71a1. This document is part of the Commission's Communication on "*EU actions to improve environmental compliance and governance*" (COM (2018) 10 final) and was produced in the framework of the Forum on Environmental Compliance and Governance. It is also accompanied by a short guide to handling environmental complaints for national administrations published by the Commission in 2020 (Opoce).

[710] Global Witness report "*Enemies of the State? How governments and business silence land and environmental defenders*", July 2019, 52 p. Office of the High Commissioner for Human Rights Report 2019 on the situation of human rights defenders: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/40/60.

[711] Office of the High Commissioner for Human Rights Report 2019 on the situation of human rights defenders: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/40/60. Report of the Special Rapporteur on the issue of human rights obligations relating to the means of enjoying a safe, clean, healthy and sustainable environment, 24/1/2018, Human Rights Council, A/HRC/37/59.

[712] UNEP's Defenders policy, https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/uneps?_ga=2.71563920.2079194158.1664981807-1450085538.1664981807

the grave situation of environmental defenders in several parts of the world. Europe is no exception to this phenomenon of human rights and rule of law abuse. The report "*Environmental Rights Activism and Advocacy in Europe*"[713] by the Council of Europe's Commissioner for Human Rights confirms the growing importance of these issues on the political agenda in Europe. At the EU level, the recent Directive (EU) 2019/1937 reflects the importance of protecting whistleblowers working in the private or public sector who report violations of EU law[714]. Environmental protection is among the 10 areas concerned. More recently, the future directive on "*the protection of persons taking part in the public debate against manifestly unfounded or abusive legal proceedings*"[715] is another piece of this legal framework imposing a series of procedural guarantees common to Member States. This future directive is aimed at any natural or legal person and specifically at human rights defenders and unsurprisingly includes the environment as an issue of public interest.

The weaknesses of the current representation of nature's interests in these processes can be gauged from the weighing up of the components of the general interest, the strength of overriding public interest reasons and private economic interests. Irrespective of the assumption of recognition of nature's rights in EU law, the extent of the reforms to be undertaken is largely dependent on the willingness of Member States to engage in treaty revision and modification of existing institutional structures. Similarly, a strengthening of national obligations will have to be reconciled with the inescapable principle of procedural and institutional autonomy and the choice of decisions taken as close as possible to the citizens. These major issues of the representation of nature's interests in the decision-making process are continued by those relating to the defence of nature in the courts (**Ch. 3**).

[713] "*Environmental Rights Activism and Advocacy in Europe, issues, Threats, Opportunities"*, March 2021. https://www.coe.int/fr/web/commissioner/-/environmental-rights-activism-and-advocacy-in-europe-issues-threats-opportunities

[714] Directive (EU) 2019/1937 of the EP and of the Council of 23/10/2019 on the protection of persons who report violations of EU law, OJEU L 305/17 of 26/11/2019. Environmental protection is among the 10 areas concerned. The personal scope of the Directive covers persons working in the private or public sector but also whistleblowers whose employment relationship has not yet started and third parties who have a connection with whistleblowers and who are at risk of retaliation in a professional context.

[715] COM (2022) 177 final, Proposal for a Directive of the EP and of the Council on the protection of persons participating in the public debate against manifestly unfounded or abusive legal proceedings (strategic lawsuits distorting the public debate). Approval by the Council in March 2024 following the 1st EP reading

CHAPTER 3 - DEFENDING NATURE IN THE COURTS

The dissenting opinion of US Judge DOUGLAS in the 1972 Sierra Club case is rooted in the propositions of Christopher STONE as illustrated by this extract from his demonstration: "*The sole question is who has standing to be heard? Those who hike the Appalachian Trail into Sunfish Pond, New Jersey and camp or sleep there, or run the Allagash in Maine or climb the Guadalupes in West Texas or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life which it represents will stand before the court, the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological* community"[716].

Various authors will progressively support this procedural conception of the personification of nature in the light of a rethought procedural principle of equality of arms. In 2011, Marie-Angèle HERMITTE considers that '*the technical vision of the legal subject says nothing about the subject, apart from its capacity to sue*'[717] and concludes her reflection by stressing that '*without the attribution of the quality of legal subject to non-humans, it is not a real trial that is undertaken*'[718]. Depending on the singularities of the legal systems studied, the promoters of the rights of nature systematically identify the right to sue among the rights to be granted to nature.

The exercise of the fundamental right of access to justice inevitably requires an answer to the question already posed by Judge DOUGLAS: who will represent the defence of nature's interests in the courts and who will act as translator? Will the two functions be carried out by different actors to ensure that there is no risk of conflict or misappropriation of interests and rights? This translation of the interests of nature and natural entities is an issue that arises throughout the cycle of the legal norm and questions the role of scientists and the place of other knowledge.

In Europe, authors who are sceptical of, or even radically opposed to, the recognition of nature as a legal entity consider that improving existing procedural mechanisms and strengthening the role of environmental defence organisations are sufficient responses[719]. Without denying the existence of obstacles to access to justice, Jan DARPO stresses that there is little reason "*to abandon the current ENGO-oriented solution for access to justice in EU Law*"[720]. Moreover, to avoid any anachronistic comparison, it is important to remember that the standing of environmental organisations to bring legal action has evolved significantly since the Sierra Club case in the USA. Similarly, any mechanical transposition of solutions adopted in other legal systems is far from being an optimal solution, and may even prove counterproductive.

In line with the principles defended by the rights of nature movement, the draft ECI on the rights of nature recognises the fundamental right of nature to defend itself and to protect its rights in court. The study commissioned by the EESC "*Towards an EU Charter of the Fundamental Rights of Nature*" follows the same logic. Its authors deduce from the recognition of access to justice "*of all human subjects,*

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[716] Judge DOUGLAS, Dissenting opinion in Sierra Club v. Rogers C.B. Morton Secretary of the Interior, April 19, 1972, *in* Nature's constitutional Rights by W.O DOUGLAS & J. W. MEEKER, *The North American Review*, vol. 258, n°1, Spring 1973, 11-14.

[717] MA. HERMITTE, *La nature, sujet de droit ? Annales Histoire Sciences sociales*, 2011, *prec*.

[718] MA. HERMITTE, *La nature, sujet de droit ? préc*.

[719] G. MARTIN, *L'arbre peut-il être une victime?* in white paper " *Le droit prend-il vraiment en compte l'environnement* ", collège supérieur de Lyon, 2019, p 5-17. J. DARPO study "*Can Nature get it right*", 2021, op. *cit.*

[720] Study J. DARPO, *Rights on Nature in the European Context*, JURI Committee of the EP 2021, op. *cit.*

without distinction of interests" an "*unconditional" right allows Nature to become "part" of access to* justice"[721].

Regardless of whether or not rights of nature are recognised, the imperative of ensuring broad access to justice and effective judicial protection outweighs doctrinal differences (**A**). According to the EU Charter of Fundamental Rights, "*everyone whose rights and freedoms as guaranteed by the EU are violated has the right to an effective remedy before a court or tribunal*"[722] independent and impartial. Similarly, the extent of judges' powers and their training in ecological complexity is an indispensable component of strategies to strengthen the defence of nature in the courts (**B**). Finally, the effective enforcement of court decisions is a classic stumbling block that must be overcome (**C**). So what additional strength could the recognition of the legal personality of nature and/or nature's rights bring to the proposals for strengthening the existing legal framework already identified in numerous studies? Clearly, future legislations and court decisions in Europe attest to the dynamics of subtle but real legal developments and even transformations.

A- Ensuring broad access to justice and effective judicial protection

"For there to be a right, there must be a remedy"[723]. Article 9 of the Aarhus Convention sets out the requirements for access to an "*independent and impartial judicial body or authority established by law*" to ensure compliance with the three procedural rights recognised by the Convention.

The first paragraph of Article 9 concerns '*any person who considers that a request for information submitted by him (...) has been ignored, wrongfully refused, in whole or in part, or inadequately answered or that it has not been handled in accordance with the provisions*' of Article 4. Directive 2003/4/EC incorporates these treaty requirements for Member States, as does Regulation (EC) 1367/2006 for EU institutions and bodies.

Article 9§2 of the Convention provides for broad access to justice for members of the public concerned to challenge "*the substantive and procedural legality of any decision, act or omission*" in the context of Article 6 on public participation in decisions on permits for activities listed in the Annex. Directive 2003/35/EC transposes these obligations including by amending existing legislation on environmental impact assessment of certain public and private works projects and on integrated pollution prevention and control[724]. In contrast, Regulation (EC) 1367/2006 does not expressly provide for access to justice in relation to public participation in European plans and programmes relating to the environment; but it does provide for the right of certain persons[725] to bring an action before the CJEU in the context of the procedure for requesting an internal review of administrative acts or omissions of an EU institution or body.

Finally, Article 9§3 of the Convention provides that "*without prejudice to the review procedures"* of the two preceding paragraphs, *"members of the public (...) may institute administrative or judicial proceedings to challenge acts or omissions by private persons or public authorities which contravene provisions of national law relating to the environment*". Regulation (EC) 1367/2006, amended in 2021, meets this conventional requirement as regards the request for review. In contrast, the 2003 proposal for

[721] Study *Towards an EU Charter of the Fundamental Rights of Nature, 2021, op. cit.*
[722] Article 47 of the Charter.
[723] Opinion of Advocate General BOBEK in LB Stichting Varkens in Nood & al, C-826/18, ECLI:EU:C:2020:514.
[724] Directive 2003/35/EC of the EP and of the Council of 26/5/2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC, op. *cit.*
[725] As a reminder: NGOs meeting the conditions set out in the Regulation and from April 2023 a request for review supported by at least 4000 members of the public residing or established "*in at least 5 Member States and at least 250 members of the public from each of the Member States*" will be admissible (Article 11 Regulation 1767/2021 amending Regulation (EC) 1367/2006)

a directive on access to justice in environmental matters recognising the right of members of the public and qualified entities to bring legal proceedings[726] will be withdrawn by the Commission in 2014 in view of the persistent opposition of Member States[727]. Notwithstanding the absence of such a directive, the Court considers itself competent to interpret Article 9§3 on the grounds *that "a specific question which has not yet been the subject of EU legislation falls within the scope of Union law where that question is settled in agreements concluded by the EU and its Member States and concerns an area largely covered by it"*[728]. In this case C-240/09, the Court considers that the dispute does fall within the scope of EU law, in this case Directive 92/43/EEC "Natural Habitats". While it ruled out any direct effect of Article 9§3, it proceeded to interpret this article in conjunction with the requirement of effective judicial protection of EU rights. It concludes that an environmental association, as long as the national procedural conditions are met, has the right to challenge the granting of a derogation from the strict protection regime for the brown bear that may be contrary to the Natural Habitats Directive 92/43/EEC.

"No one can act on behalf of the environment itself"[729]. "*Neither water nor the fish that swim in it can act before courts and tribunals. Nor do trees have standing*"[730]. Seven years apart, Advocate General Eleanor SHARPSTON describes the situation in the EU legal system and in the majority of Member States. It is true that "*the environment has no voice*"[731] but she insists on "*the role of environmental organisations as representatives of the environment*"[732]. The designation of nature's representatives and the recognition of their standing before the courts is a cardinal pillar of the rights of nature school. The promoters of the rights of nature thus insist on the importance of recognising the right to act on behalf of nature to defend its rights independently of considerations linked to human interests. Three main elements of this pillar are systematically discussed and are clearly unique in EU law given the complexity of the jurisdictional system. The determination of the conditions of access to justice (**1**), the respect of procedural guarantees (**2**) and the obligations of the authorities concerning the effective protection of rights give rise to several proposals to improve or transform the existing legal framework. It is mainly in relation to the determination of the conditions of access to justice and the holders of the right of access that the differences between the advocates of nature's rights and other schools of thought are most salient, particularly in Europe.

1) Representing nature before the judge: *actio popularis* versus broad access to justice

The objective of '*broad access to justice*' influences the choice of conditions for the admissibility of appeals and applications to intervene in support of the conclusions of one of the parties to the proceedings. One of these conditions is the determination of the persons entitled to bring a case before the court to contribute to the respect of the legal protection of nature. Neither the Aarhus Convention nor EU law has so far opted for the recognition of the *actio popularis* to defend the interests of nature and/or natural entities on their behalf.

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[726] COM (2003) 624 final, Proposal for a Directive of the EP and of the Council on access to justice in environmental matters
[727] Withdrawn in 2014: OJEU 2014 C 153/3.
[728] Judgment of the Court of 8/3/2011, Lesoochrarske zoskupenie VLK v Ministerstvo zivotneho prostredia Slovenskey republiky, C- 240/09, Article 9 of the Aarhus Convention and Directive 92/43/EEC on natural habitats (derogations from the brown bear protection regime), ECLI:EU:C:2011:125 .
[729] Opinion of Advocate General E. SHARPSTON of 16/12/2010, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg-Trianel Kohlekraftwerk Lünen, C-115/09, ECLI:EU:C:2010:773
[730] Opinion of Advocate General E. SHARPSTON on 12/10/2017, Protec Natur-Arten und Landschaftsschutz Umweltorganisation, C-664/15, ECLI:EU:C:2017:760. See also her contribution "From "Do Trees have rights to wondering about ecocide: some legal reflections" in "*Envisioning our environmental future- Stockholm+50 and Beyond*" ed. BHARAT H. DESAI, IOS Press 2022, 272 p., 157-171.
[731] L. KRAMER, Rights of Nature and their implementation, *Journal for European Environmental Policy and Law*, 2020, 47-75.
[732] Opinion of Advocate General E. SHARPSTON on 12/10/2017, Protec Natur-Arten und Landschaftsschutz Umweltorganisation, C-664/15, *supra*.

Article 9§1 of the Aarhus Convention includes access to justice for all persons (right to information). On the other hand, Article 9§2 provides that only members of the public concerned may have access to the court under conditions that the Parties decide in accordance with their procedural systems. Thus, the members of the public concerned must have a "*sufficient interest to act"* or *"claim an infringement of a right*". It is up to the Parties to specify what constitutes a sufficient interest and an impairment of a right. Finally, Article 9§2 specifies that NGOs meeting the criteria set out in Article 5 are "*deemed*" to have a sufficient interest to act and to benefit from rights that could be infringed.

Similarly, Article 9§3 provides that each Party shall determine the criteria and procedural arrangements for "*members of the public" to challenge acts or omissions by private persons or public authorities*. The proposal for a directive on public access to justice in environmental matters (2003) provided that Member States shall ensure such access to members of the public who have a "*sufficient interest*" or "*assert an impairment of a right, where this is a sine qua non under the administrative procedural code*"[733]. It recognised the right of qualified entities defined as "*any association, organisation or grouping whose objective is the protection of the environment and which has been recognised in accordance with the procedure laid down in Article 9*"[734]. As such, the proposal identified criteria for the recognition of such qualified entities and Member States were to establish a procedure for the rapid recognition of such entities meeting the said criteria, or a case-by-case procedure or a prior recognition procedure[735]. Due to the failure of this proposal, the Commission reverted to the publication of a "*citizens' guide*" intended to facilitate the exercise of the right of access before national courts[736]. This guide, which has no binding legal value, is a very concise presentation for the information of the public, and it is questionable how widely it has been disseminated in the Member States and what its operational impact will be. In addition to the procedural differences between the Member States, the Commission also deplores the "*systemic shortcomings*" that hinder the public's access to justice and undermine the judicial protection of the rights conferred by EU environmental law[737]. However, under the TEU, Member States have a general obligation to establish "such *remedies as are necessary to ensure effective judicial protection in all areas covered by EU law*"[738].

As a Party to the Aarhus Convention, the EU must ensure compliance with Article 9 and not merely ensure that its Member States provide the necessary judicial framework to comply with their Community obligations. The limited access of natural and legal persons to the CJEU is a long-standing issue that has been widely commented on and criticised. Since its 1963 *Plaumann* judgment[739], the CJEU has not questioned its restrictive interpretation of Article 263§4 of the TFEU, despite the singularity of environmental disputes.

[733] COM (2003) 624 final, *prec*
[734] COM (2003) 624 final, *supra*. Article 2.
[735] COM (2003) 624 final, *supra*. Article 9 also provided that any rejected application for recognition could be appealed to a judge or an independent and impartial body established by law.
[736] OPOCE 2018. Guidance in line with Communication C(2017) 2616, 28/4/2017, on access to justice in environmental matters.
[737] COM (2019) 149 final, "*Environment Policy Implementation Review 2019: A Europe that protects its citizens and improves their quality of life*".
[738] Article 19 of the TEU Lisbon.
[739] CJEC judgment, 15/7/1963, Plaumann v. Commission, case 25/62, ECLI:EU:C:1963:17.

From the Greenpeace cases[740] to Carvalho[741], these cases illustrate the 27 years of annulment actions declared inadmissible by the CJEU[742]. Despite the relaxation of the conditions for admissibility of actions against regulatory acts[743], public access to the CJEU remains problematic. Following the examination of a complaint lodged by the NGO Client Earth, the review committee of the Aarhus Convention, a non-judicial body, concluded in March 2017 that the EU was not complying with Article 9§3 and 4 "as regards *access to justice for members of the public, since neither the Aarhus Regulation nor the case law of the Court of Justice of the European Union implements or complies with the obligations entered into under these two paragraphs*"[744]. As a reminder, at the Conference of the Parties in September 2017 the EU obtained the postponement of the adoption of the draft decision VI/8f based on the findings of the said review panel to the COP in October 2021. The EU committed itself to "*explore ways to comply with the Aarhus Convention in a manner consistent with the fundamental principles of the EU legal order and its system of judicial review*"[745]. Since the completion of a new study on the implementation of the Convention by the EU, the Commission has conceded the pitfalls of the European judicial system, even though it recalls the singularity of the system of remedies established by the European legal order "*integrated into the legal system of the Member States*"[746].

In 2021, the revision of the Aarhus Regulation aims to respond to the recommendations of the Convention's review committee. On the other hand, the revision of the TEU in favour of a broadening of public access to the Court of Justice of the European Union seems to be still far away. As regards access before national courts, a new proposal for a directive on public access is still not the option envisaged by the Commission, but rather the inclusion in the revised legislation of an express obligation on the part of the Member States to ensure such access before their courts. Furthermore, the CJEU continues to play a key role in structuring a common set of standards for all Member States. In 2020, among the measures to improve access to justice, the Commission focuses almost exclusively on the obligations of Member States, including their courts, to ensure effective judicial protection of rights and enforcement of EU environmental laws[747].

Although in 1997 the EESC envisaged improving access to justice in environmental matters[748] the *actio popularis* model before the administrative courts and the CJEU, this vision is not shared. The adoption of such a mechanism in EU law is still not on the agenda of the Commission, which stressed in 2003 that it was "*not in favour of such a provision (...) which is not expressly provided for by the Arhus Convention and is therefore a matter for the Member States*". As a reminder, the revised Aarhus Regulation of 2021 takes up this argument "*in order to avoid members of the public having an*

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[740] CJEC judgment of 2/4/1998, Greenpeace v Commission, C-321/95 P, ECLI:EU:C:1998:153. The Court confirms the interpretation of the court: Court order of 9/8/1995 Stichting Greenpeace Council v. Commission, T 585/93, ECLI:EU:T:1995:147

[741] Court order of 8/5/2019, A. Carvalho & al/PE and Council, T-330/08, ECLI:EU:T:2019:324. The Court confirms the interpretation and rejects the appeal: Court judgment of 25/3/2021, C-565/19 P, ECLI:EU:C:2021:252.

[742] E. BROSSET and E. TRUIHLE, *L'accès au juge dans le domaine de l'environnement, : le hiatus du droit de l'UE*, *Revue des Droits et Libertés Fondamentales,* 2018, chronique n°7. N. HERVE-FOURNEREAU, *De Greenpeace à Carvalho : 25 années de recours déclarés inadmissables par la CJUE : quelles dynamiques d'évolutions de la jurisprudence Plaumann pour répondre au comité d'examen de la Convention d'Aarhus d'ici 2021*, in " *Les dynamiques du contentieux climatique : usages et mobilisation du droit "*, dir. M. TORRE-SCHAUB et B. LORMETEAU, Ed. Mare & Martin, 2021, 462 p. 255-283.

[743] Article 263§4 of the TFEU Lisbon: "*Any natural or legal person may, under the conditions laid down in the first and second subparagraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures*.

[744] Conclusions and recommendations on communication ACCC/C/2008/32 (Part II), 17/3/2017, https://unece.org/env/pp/cc/accc.c.2008.32_european-union

[745] Council Decision (EU) 2017/1346 of 17/7/2017 on the position to be taken on behalf of the EU at the 6th session of the Parties to the Aarhus Convention on case ACCC/C/2008/32, OJEU 2017 L 186/15.

[746] CJEC, 15/7/1964, Flaminio COSTA v. ENEL, case 6/64, ECLI:EU:C:1964:66.

[747] Constant position: COM (2020) 643 final, Communication from the Commission "*Improving access to justice in environmental matters in the EU and its Member States*".

[748] EESC opinion on the Communication from the Commission on Implementing Community Environmental Law, OJ C 206/7, 1997.

unconditional right to request an internal review"[749]. Furthermore, any change to the Treaty to further relax the conditions for public access to the CJEU is not on the agenda. At the level of the Member States, *actio popularis* mechanisms exist (Portugal, Spain, Slovenia, Romania, Latvia) but remain few in number and of limited application[750].

The draft European Citizens' Initiative on the Rights of Nature (2017) argues for such a processual model in which "*any person acting individually or collectively, government or non-government organisation of the EU*" defends its rights on behalf of nature. The Spanish law on the Mar Menor lagoon recognises the right of any natural or legal person to defend this ecosystem and assert the rights of the lagoon before the courts on behalf of this natural entity, "as an *interested party*"[751]. These proposals are in line with the promoters of the rights of nature and the decisions taken in some legal systems outside the EU. It will be enlightening to assess the use of this right by the applicants and the interpretation of the judges to counter the risks of abuse and misuse of the right to *the* detriment of the lagoon and its basin[752].

The questionnaire "*Recognising the rights of nature in Europe*" organised by Marie TOUSSAINT MEP in 2021 includes a section dedicated to "*nature before the law*". While 70% of respondents believe that there are problems of access to justice in environmental matters, 45.48% consider that the recognition of nature's rights could improve access to justice, compared with 43.14% who conclude that there would be a significant improvement in access to justice in the event of such recognition. Of course, the results of this questionnaire must be assessed in the light of the respondents' profiles and their representativeness, but they reflect the state of questioning on the ways in which the recognition of nature's rights is translated into processes.

What avenues for improvement, evolution or even transformation of the conditions of access to justice should be considered to guarantee the defence of nature's rights in court? Should people be expressly empowered to act in court for or on behalf of nature and defend the interests of nature and/or the natural entities concerned? Should the existing system be improved, even if it means widening the circle of natural or legal persons entitled to take legal action if they can demonstrate a sufficient interest in taking action or the infringement of an individual or/and collective right? Similarly, should the said circle of persons whose interest in acting or whose rights have been infringed be presumed by the legislator be enlarged? Nearly 77% of respondents to the questionnaire "*Recognising the rights of nature in Europe*" were in favour of *actio popularis* and 61% in favour of no conditions being imposed for exercising this right of access to justice on behalf of nature. The role of "*citizens' associations, solidarity associations or other bodies representing citizens and local residents*" is also highlighted by 61% of respondents, with 58% in favour of environmental associations. Finally, more than 28% are in favour of empowering nature conservationists to take legal action. Access to the CJEU is not expressly questioned and it can be assumed that it is the national and infra-state levels that were therefore only targeted.

The choice of the *actio popularis* model, even in situations of urgency, ecological irreversibility or significant damage to the integrity of a Natura 2000 site, seems to be compromised in the current state of the positions of the EU institutions and the Member States. Already in 2010, Advocate General Eleanor SHARPSTON recognised that giving direct effect to Article 9§3 of the Aarhus Convention *"thus circumventing the Member States' ability to establish criteria for its implementation, would amount to establishing a system of popular action (actio popularis) by judicial means instead of following the*

[749] Regulation (EU) 2021/1767, recital 19, *supra*.
[750] A. ARAGAO & A. C CARVALHO, Taking access to justice seriously: diffuse interests and actio popularis. Why not? *Environmental Law Network International Review*, n°2/2017, 42-48. Z. MIKOSA, Evolution of procedural rights and legal standing in environmental matters in Latvia, *Baltic Yearbook of international Law* online, 2021, vol. 19, issue 1, 73-103. Study by J. DARPO, *Rights on Nature in the European Context*, JURI Committee of the EP 2021, op. *cit.*
[751] Art 6 of Law 19/2022, supra.
[752] Example of the defence of socio-economic interests in ambush by claimants claiming to act on behalf of the lagoon. These issues show the importance of "translating" the interests of nature and/or the natural entity and determining the expertise needed by the judge.

legislative route"[753]. It is then up to the Member States to assess whether they decide to promote this model to ensure the protection of nature and the respect of the rights conferred by EU law on any natural or legal person acting in their own interest or on behalf of nature.

The 2022 report on the outcome of the Citizens' Conference on the Future of Europe is silent on ways to reform public access to the CJEU[754]. Similarly, the EP's and Commission's calls for the convening of a Convention to revise the TEU do not include proposals for revising the provisions of the TFEU on this subject either[755]. Moreover, the CJEU is probably not yet ready to move away from its 1963 Plaumann case law. "*Hasn*'t *the time come?*"[756] already asked Advocate General JACOB in 2002 for a renewed interpretation of this case law, adapted to the particularities of environmental disputes.

However, it might be possible to play on four parameters of the admissibility of appeals outside the *actio popularis* model and taking into account an uncertain revision of the treaty or the Plaumann case law. These four elements correspond to four basic questions: What expansion of the circle of claimants is possible and under what conditions? (**a**) What broad interpretation of the concepts of interest, rights and infringement of rights? (**b**) What extension of the scope of decisions, acts and omissions subject to appeal? (**c**) and finally, what extension of the scope of persons targeted by legal proceedings in order to strengthen the defence of nature?

Finally, the procedure for submitting applications to intervene in support of "*all or part of the form of order sought by one of the parties*" before the CJEU would need to be reconsidered (**e**).

a) Expanding the circle of applicants: mixed prospects

The 2003 proposal for a directive on access to justice introduced the concept of qualified entities entitled to bring legal proceedings without having to demonstrate a sufficient interest or claim an infringement of a right. Qualified entities in the sense of "*any association, organisation or grouping whose objective is to protect the environment*" were to be subject to a national recognition procedure according to harmonised criteria. Such an extended model of access to justice has met with strong national opposition, forcing the Commission to reject the right to sue for groups without legal personality and for local and regional authorities. Since the failure of this draft directive, the Commission has been trying to disseminate in the legislation the model adopted in the directives on environmental impact assessment. As a reminder, this model enhances the role of environmental organisations which are deemed to have a sufficient interest to act and to benefit from rights that may be affected.

[753] Opinion of 15/7/2010, Lesoochrarske zoskupenie VLK v Ministerstvo zivotneho prostredia Slovenskey republiky, C- 240/09, ECLI:EU:C:2010:436

[754] Conference on the Future of Europe, report on the final outcome, May 2022, Opoce, 336 p. It is also important to remember that infringement proceedings are still reserved for the Commission and the Member States (proceedings between States are still very rare: prior referral to the Commission before referral to the Court, which issues a reasoned opinion within three months of the submission of contradictory observations by the States concerned by the dispute; the absence of such an opinion does not prevent referral to the Court - Article 259 of the TFEU).

[755] Commission Presidency State of the Union Address on 14/9/2022. EP resolution of 4/5/2022 on the follow-up to the conclusions of the Conference on the Future of Europe, P9_TA(2022)0141; it calls "*for a convention to be convened by triggering the treaty revision procedure provided for in Article 48 TEU*".

[756] In particular the interpretation of the individual person concerned: Conclusions of 21/3/2002, Union de Pequenos Agricultores v. Council, C-50/00 P, ECLI:EU:C:2002:197

The inclusion of a 'standard' provision on access to justice in several revised[757] or new[758] directives reflects the legislator's concern to strengthen Member States' obligations in this area. Paradoxically, despite a proposal to this effect, this is not the case for Directive (EU) 2020/2184 on the quality of water intended for human consumption. On the other hand, the future directive intended to replace Directive 2008/99/EC on the protection of the environment through criminal law includes the notion of the *public concerned*[759] including environmental NGOs fulfilling the "*proportionate conditions laid down by national law*" which are deemed to have an interest. The justification for this choice is interesting to note. In recital 26 of this proposal for a directive, it is stressed that "*nature cannot represent itself as a victim in criminal proceedings*", therefore, members of the public concerned "*should have the possibility to act on behalf of the environment, as a public good, within the limits of the legal framework of Member States*". The choice of words is not insignificant and expresses a perceptible conceptual evolution. Among the amendments presented in early December 2022 by the EP's Committee on Development is a new recital stating that "*nature can be considered as the victim of damage caused by environmental crime*"[760]. In December 2022, when approving the general guidelines on this proposal for a directive, the Justice and Home Affairs Council retained the European Commission's wording on this point[761]. The future directive contains this same expression in recital 57, while stressing that " *environmental criminal offences harm nature and society* " (recital 54).

More cautiously, the Environmental Liability Directive 2004/35 emphasises that environmental protection is a '*diffuse interest on behalf of which individuals do not always act or are not in a position to act'*[762] emphasising the essential contribution of NGOs. The directive specifies that the interest of NGOs, which work in favour of the environment and meet the requirements of national law, is deemed sufficient. As such, they are entitled to submit a request for action to the competent authorities, particularly in the event of an imminent threat of environmental damage (Art. 12). In this respect, they may also "*initiate proceedings before a court of law or any other independent and impartial public body in respect of the formal and substantive legality of decisions, acts or omissions of the competent authority under Directive* 2004/35/EC" (Art. 13)[763].

The European institutions remain reserved regarding a general widening of the circle of applicants, the easing of access conditions, or even the granting of an unconditional right to bring an action for environmental NGOs or other entities that would qualify as nature guardians/representatives. Of course, the significant progress of the reform of the internal review procedure introduced by the Aarhus Regulation (EU) 2021/1667 concerning the EU institutions and bodies[764] should not be overlooked. In addition, the conditions for empowerment of NGOs at EU level allow NGOs not exclusively working for environmental protection to act, but their primary declared objective must be to promote environmental protection. The circle of members of the public concerned or persons affected could also be widened,

[757] Article 6 of Directive 2003/4/EC of the EP and of the Council of 28/1/2003 on public access to environmental information, *supra*. Article 11 of Directive 2011/92/EU of the EP and of the Council of 13/12/2011 on the assessment of the effects of certain public and private projects on the environment, which repeals Directive 85/337/EEC, (revised in 2014), *prec.* Article 25 of Directive 2010/75/EU of the EP and of the Council of 24/11/2010 on industrial emissions, OJEU 2010 L 334/17; Article 23 of Directive 2012/18/EU of the EP and of the Council of 4/7/2012 on the control of major-accident hazards involving dangerous substances amending and subsequently repealing Council Directive 96/82/EC, OJEU 2012 L 197/1.

[758] Directive 2004/35/EC of the EP and of the Council of 21/4/2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJEU 2004 L 143/56.

[759] COM (2021) 851 final, Proposal for a Directive of the EP and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC. Article 2 "*public concerned" means persons affected or likely to be affected by the offences referred to in Articles 3 or 4. For the purposes of this definition, persons having a sufficient interest or claiming an impairment of a right, as well as non-governmental organisations promoting environmental protection and meeting any proportionate conditions under national law, shall be deemed to have an interest*.

[760] Opinion of the EP Development Committee of 7/12/2022, 2021/0422 (COD).

[761] Council meeting of 9/12/2022, 16171/22 of 16/12/2022, 2021/0422 (COD).

[762] Recital 25.

[763] With regard to the categories of persons referred to in Articles 12 and 123 of Directive 2004/35/EC, the Court in its judgment of 1/6/2017 (C-529/15, Folk) concludes that those provisions must be interpreted "*as precluding a provision of national law (...) which does not allow the holders of fishing rights to bring a claim for environmental damage*", ECLI:EU:C:2017:419

[764] As a reminder, the circle of persons entitled to make such a request has been widened and the scope of the administrative acts concerned has been extended.

and consideration could be given to recognising other persons as having a presumption of interest or infringement of their rights.

The future Due Diligence Directive (2022) introduces a complaints procedure that can be lodged with targeted companies *"in case of legitimate concerns about actual or potential adverse impacts*"[765] on human rights and the environment. Three categories of persons are identified: those "*affected or who have reasonable grounds to believe that they may be affected by an adverse impact*", trade unions and other workers' representatives "*representing those working in the value chain concerned*" and civil society organisations "*active in areas related to the value chain concerned*"[766]. However, the future directive does not provide for a privileged status for indigenous communities. Because of the legislative act retained[767], Member States will have to ensure the proper establishment and operation of this mechanism; the latter may not impede the right of any natural or legal person concerned claiming a legitimate interest[768] or of victims of damage to human rights and the environment to take legal action[769]. This text also confers on victims of damage to human rights and the environment the right to bring an action for damages and to claim compensation; in the event that the damage occurs in a third country, the Member States "*shall ensure that the liability provided for by the provisions of national law"* transposing this Article 22*, "shall be of a mandatory nature in cases where the law applicable to actions for compensation to this effect is not that of a Member State*"[770]. This dynamic of extra-territoriality of EU law should increase the pressure on large companies and their value chains responsible for major environmental damage in several regions of the world. It remains to be seen whether the proposed directive will not be significantly altered during the decision-making process. As things stand in the institutional negotiations, the amendments envisaged in the draft opinion of the Committee on the Environment, Public Health and Food Safety[771] ran counter to the discussions within the Council[772] and the various forms of resistance expressed by several national delegations[773].

Furthermore, it is up to those Member States that wish to do so to engage in bolder reforms to strengthen the defence of nature in the courts, even if in reality they express a certain reluctance to do so on the grounds of avoiding overloading their courts[774] or excessively slowing down the authorisation procedures for infrastructure projects.

The insertion of specific provisions on ecological damage in the French Civil Code opens up the action for compensation *to* "*any person with standing and interest in acting, such as the State, the French Biodiversity Office, local authorities and their groupings whose territory is concerned, as well as public establishments and associations approved or created for at least five years on the date the proceedings are instituted, whose purpose is the protection of nature and the defence of the environment*"[775]. However, several authors, such as Mathilde BOUTONNET, consider that these authorised persons "*do not*

[765] Article 9 of the Proposal for a Directive of the EP and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, COM (2022) 71 final.
[766] Article 9 of the proposal for a directive on the due diligence
[767] The proposal is based on Articles 50 (freedom of establishment) and 114 (internal market)of the TFEU; Article 50 does not provide for the possibility of adopting regulations but only directives.
[768] In this case, the right to appeal against the legality of decisions, acts or omissions of national supervisory authorities responsible for monitoring compliance with the obligations imposed on companies (Article 19 of the proposal for a Directive on due diligence).
[769] Art.22 on the regime of civil liability of companies for damages caused.
[770] COM (2022) 71 final, Article 22.
[771] Draft opinion of 13/9/2022, rapporteur Tiemo Wölken.
[772] General orientation on the text in the Permanent Representatives Committee on 30/11/2022, No. 15024/22.
[773] Declaration by Ireland on 1/12/2022 (abstains from the adoption of the general approach of the text), declaration by Germany on 30/11/2022 (among the conditions set: an exemption from liability in case of slight negligence of companies), declaration by Estonia on 1er /12/2022 (does not agree with the general approach in particular on the grounds of the lack of precision of the annex on human rights and the lack of clarity of the provisions on civil liability).
[774] Argument notably presented by Germany in Case C-115/09, Conclusions of Advocate General Eleanor SHARPSTON of 16/12/2010, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg-Trianel Kohlekraftwerk Lünen, *aforementioned*.
[775] Article 1248 of the Civil Code (Chapter III Compensation for ecological damage, introduced by Law 2016/1087 of 8/8/2016 for the reconquest of biodiversity, nature and landscapes.

act ad agendum"[776]. On the other hand, she considers that the environment "*remains a thing, but a particular thing: a victim-thing, which, without benefiting from a right to act, has incidentally been granted a right to reparation*!"[777]. Furthermore, she sees in the recognition of ecological damage a radical change that leads to "*thinking about 'rights to' under the prism of objects of law and not only subjects of law*"[778] echoing Sarah VANUXEM's approach to "*things of nature and their rights*"[779].

At EU level, the Commission's priority remains to ensure that national obligations regarding access to justice and judicial protection of rights conferred by EU law are respected[780]. In this respect, the CJEU plays a key role in the 'protective' interpretation of these rights to ensure broad access to justice in the Member States and in the 'close' support of their courts in their function as ordinary courts of EU law. The prospects for widening the circle of claimants under EU law exist but remain limited, offering Member States that so wish a margin for development, as in the case of the recent Spanish law concerning the Mar Menor lagoon[781].

b) The extensive jurisprudential interpretation of the concept of rights and infringement of a right for the benefit of NGOs

The extensive interpretation of the notion of "*rights likely to be infringed*" by case law confirms the privileged position granted to environmental NGOs meeting the statutory conditions. In 2010, Advocate General Eleanor SHARPSTON argued for a broad interpretation of this notion and took the example of a "*pristine site at a good distance from any habitation*"[782] exposed to significant impacts resulting from a public or private works project.

While the CJEU recognises that Member States may limit the rights whose infringement is invoked by an individual "*solely to public subjective rights*"[783], this cannot be the case for environmental NGOs. The Court insists that "*the concept of infringement of a right cannot depend on conditions which only other natural or legal persons could fulfil, such as (...) the condition of being a more or less close neighbour of an installation or of suffering (...) the effects of its operation*"[784]. It deduced from the interpretation of Article 10a§3 of Directive 85/337/EEC as amended in 2003[785] that the rights of an NGO, which may be infringed, '*must necessarily include rules of national law implementing Union environmental law, as well as rules of Union environmental law having direct effect*'[786]. In this case C-115/09, the CJEU thus concludes that Article 10a "*precludes legislation which does not recognise the possibility for a governmental organisation which works for the protection of the environment (...) to plead in court, in the context of an action against an authorisation for projects likely to have significant effects on the environment (...) the infringement of a rule"* of EU environmental law (in this case Article 6 of the

[776] M. BOUTONNET, *L'évolution des formes de préjudice : le cas du préjudice écologique*, *Les cahiers Portalis*, 2022/1, n°9, 19-26.
[777] *Ibid*.
[778] *Ibid*.
[779] Title of his book, *supra*.
[780] COM (2020) 643 final, Communication "*Improving access to justice in environmental matters in the EU and its Member States*".
[781] For the record: Article 6 of Law 19/2022 which refers to "*any natural or legal person*".
[782] Opinion of Advocate General E. SHARPSTON of 16/12/2010, C-115/09, op. *cit.*
[783] In this case, Directive 85/337/EEC stated that it was up to the Member States to determine what constitutes a sufficient interest to act or an infringement of a right. Judgment of the Court of 12 May 2011, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg-Trianel Kohlekraftwerk Lünen, C-115/09, ECLI:EU:C:2011:289.
[784] C-115/09, *supra*.
[785] For the record, Directive 2003/35/EC introduces this new Article 10a into Directive 85/337/EEC (codified by Directive 2011/92/EU).
[786] C-115/09, *supra*.

Habitats Directive) *"on the grounds that this rule protects only the interests of the community and not those of individuals"*[787].

This interpretation confirms the privileged status conferred on duly constituted environmental NGOs, which differs from that of natural persons; this leads Advocate General Eleanor SHARPSTON to "*apprehend* them *(...) as representatives"*[788] of the environment. More recently, the Court reiterated its interpretation based on Article 9§3 of the Aarhus Convention "*read in conjunction*" with Article 47 of the Charter of Fundamental Rights. In this case, it concludes that an environmental organisation, operating under national law, *"must be able to challenge before a court a decision to authorise a project which may be contrary to the obligation to prevent deterioration in the status of water bodies as imposed by Article 4"*[789] of the Water Framework Directive. Such interpretations confirm their role as guardians of Member States' compliance and enforcement of EU law.

More generally, in support of established case law, the CJEU recalls that "*natural or legal persons directly concerned by an infringement of the provisions of a directive must be able to require the competent authorities, if necessary by judicial process, to comply with the obligations in question*", and all the more so if they have direct effect[790]; therefore, in Case C-197/18, the Court concludes that those persons are entitled to require the competent national authorities '*to amend an existing action programme or to adopt additional or enhanced measures provided for in Article 5§5 of Directive 91/676/EEC for as long as the nitrate content in groundwater exceeds, or is likely to exceed in the absence of measures, 50 mg/l at a number of measuring points*'[791].

Each Member State is obliged to designate the competent courts and to determine the procedural arrangements for appeals; these "*must not be less favourable than those relating to similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by the Union legal order (principle of effectiveness)*"[792]. In addition, it is up to them to specify the conditions relating to NGOs for the exercise of their rights, including the right to take legal action. Without excluding the right of States to impose a minimum number of members to enable the association to exercise its rights, the CJEU has also specified that the legislation on environmental impact assessments of certain construction projects "does *not relate exclusively to operations of regional or national scope but also to smaller operations with which local associations are better able to concern themselves*"[793]. It concluded in 2009 that the threshold of 2,000 members imposed by Sweden in this case '*is likely to deprive local associations of any judicial remedy*'[794] in contradiction with Article 10a of the directive. The prospect of a framework directive on access to justice in environmental matters does not seem to be on the agenda; should we conclude from this that the Commission considers that the case law of the CJEU is sufficient in view of potential national resistance in the event of a new legislative proposal?

[787] C-115/09, *supra*. The Court agrees with the interpretation of its Advocate General that national legislation requiring NGOs to assert an infringement of an individual substantive right is incompatible.
[788] C-664/15, *supra*. Expression not used by the CJEU.
[789] C-664/15, *supra*.
[790] C-197/18, *supra*.
[791] C-197/18, *supra*. In this case, the applicants in the main proceedings were a public water supply undertaking, a municipality operating a fountain and a private individual owning a fountain.
[792] Established case law - C-115/09, *supra*.
[793] Judgment of the Court of 15/10/2009, Djurgården-Lilla Värtans Miljöskyddsförening, C-263/08, ECLI:EU:C:2009:631.
[794] Judgment of the Court of 15/10/2009, Djurgården-Lilla Värtans Miljöskyddsförening, C-263/08, *cited above*.

c) The progressive extension of the material scope of decisions, acts and omissions of the authorities subject to appeal

According to Article 9§2 of the Aarhus Convention, "*any decision, act or omission subject to the provisions of Article 6 and, if so provided for in national law and without prejudice to paragraph 3, (...) other relevant provisions of this Convention*". Article 9§3 also provides for the right to challenge "*acts or omissions by private persons or public authorities which contravene provisions of national law relating to the environment*".

As a reminder, since 2003 legislation on environmental impact assessment of certain public or private projects has expressly provided for the right of the public concerned to challenge decisions, acts or omissions of public authorities subject to the public participation procedure. To comply with the Aarhus Convention, other revised directives[795] include these same elements, as do new directives adopted since 2003[796]. Similarly, for directives that existed prior to the entry into force of the Convention and have not been revised, the interpretation of the public participation procedures provided for in these texts is based on a joint reading of Article 9§2 of the Convention and Article 47 of the EU Charter of Fundamental Rights[797].

Contrary to EU institutions and bodies, the revised Regulation 1367/2006 of 2021 covers administrative acts ("*non-legislative act (...) having legal and external effect*") and omissions (failure to adopt an administrative act) "*which may contravene environmental law*"[798]. This choice to restrict the scope to administrative acts already reflects the EU's desire not to go beyond the Convention's obligations. The Convention definition of public authority "*does not include bodies or institutions acting in a judicial or legislative capacity*" (Article 2) and the Convention simply invites legislative authorities "*to apply*" its principles (recital). On the other hand, the EU chooses a restrictive interpretation of the notion of "*any act*" (Article 9§2) or "*acts*" (Article 9§3) not defined in the Convention and provides for exclusions when the Community institution or body acts in the capacity of an "*administrative control body*", the list of which is not exhaustive.

As a reminder, the Convention's Review Committee concluded in April 2021 that the lack of administrative or judicial procedures available to the public to challenge the Commission's state aid decisions was not in line with Article 9§3 and §4[799].

NGOs have not failed to challenge the refusals of requests for review before the CJEU, in particular with regard to the interpretation of the criterion of "*having a legally binding and external effect*" (Regulation 2006/1367, replaced by "*legal and external effect*" by the revised Regulation in 2021) or that of "*individual scope*" (Regulation 2006/1367, criterion which disappears with the revised Regulation in 2021) of the administrative act. In 2012, the EU Court concluded that Article 9§3 Aarhus "*cannot be interpreted as referring solely to individual measures"*[800] and annulled the Commission's decision. However, the CJEU considers that the Court of First Instance erred in law by "*holding that Article 9§3 of the Aarhus Convention could be relied upon for the purposes of assessing the legality of Article 10§1 of Regulation 1367/2006*" and confirms the absence of direct effect of this treaty provision. On three occasions, the Court annulled the decisions of EU institutions and bodies refusing requests for review[801].

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[795] Directive 2010/75/EU of the EP and of the Council of 24/11/2010 on industrial emissions (recast, Directive 96/61/EC IPPC had been amended in this sense with Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, *supra*.

[796] Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, op. *cit.*

[797] For example, the Water Framework Directive 2000/60/EC or Directive 1992/43/EEC, *mentioned above*.

[798] Regulation (EU) 2021/1767, Article 2 g) and h), *supra*.

[799] ACCC/C/2015/128, conclusions and recommendations of the review panel on 17/3/2021; and the EU obtaining a postponement of the adoption of the draft decision VII.8f on this case to the next COP in 2025 while committing to assess options to comply with the said panel's conclusions.

[800] judgment of the General Court of 14/6/2012, Stichting Natuur en Milieu, T-338/08, pesticide residues, ECLI:EU:T:2012:300

[801] judgment of the General Court of 14 June 2012, Stichting Natuur en Milieu, T-338/08, *cited above*. judgment of the General Court of 14/6/2012, Vereniging Milieudefensie, T-396/09, Directive 2008/50/EC on ambient air quality and derogation granted to

Its first two judgments were annulled by the Court[802]. With regard to the appeals of the Commission and the European Investment Bank (EIB) against the third judgment of the Court of First Instance, Advocate General J. KOKOTT concluded in mid-December 2022 that they should be dismissed by the Court[803]. The interpretation of the concept of an administrative act "*having binding and external legal effect*" and of a measure "*of individual scope*" is at the centre of this case concerning a deliberation of the EIB's Board of Directors approving the proposal to finance a biomass power plant project in Curtis (Spain).

In the revised Aarhus Regulation of 2021, which removes the restriction "*individual measure*" to cover administrative acts ("*any non-legislative act*"), the legislator refers to the case law interpretation of the concept of an act having external effects in the sense of an act intended to produce legal effects regarding third parties. As stated above, notwithstanding this extension of the material scope of administrative acts and omissions, the regulation does not call into question the exclusions provided for, in particular the Commission's decisions on competition matters. It remains to be seen how the case law will develop with regard to the substantive examination of requests for review of the strengthening of the legal protection of nature and the environment.

In addition to these procedures concerning the EU institutions and bodies, EU environmental legislation offers a relatively broad scope of action against the acts and omissions of the authorities of the Member States; from procedures for the assessment of plans, programmes and public or private works projects to requests for action to be taken by the competent public authorities in the event of imminent threat or occurrence of environmental damage. On the other hand, it must be noted that these procedures are almost exclusively aimed at public authorities. More recently, however, EU law has made greater inroads into the judicial procedures of the Member States. Thus, in the proposal for a directive on the protection of the environment through criminal law (2021, to be adopted in 2024), the Commission inserts a specific provision conferring the right on members of the public concerned to participate "*in proceedings concerning the offences referred to (...) for example as a civil party*"[804]. On the other hand, the Council clearly expresses the resistance of the Member States[805] on the grounds that "*this Directive should not require Member States to introduce specific procedural rights for members of the public concerned*"[806]. In this case, it rewrites the provision proposed by the Commission. Thus "*persons affected by the offences referred to in Articles 3 and 4*" and *environmental* NGOs "*meeting the requirements of national law (...) shall have appropriate procedural rights (...) where such procedural rights for the public concerned exist in the Member State in the context of proceedings relating to criminal offences*"[807], such as the right to bring civil actions.

Similarly, the Commission's proposal for a Directive on the due diligence (2022, to be adopted in 2024) provides for the establishment by States of a civil liability regime for companies concerned which fail to comply with the obligations laid down, leading to damage resulting from negative impacts on human

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the Netherlands, ECLI:EU:T:2012:301. judgment of the General Court of 27/1/2021, ClientEarth/BEI, T-9/19, financing of a biomass power plant in Galicia, ECLI:EU:T:2021:42

[802] judgment of the Court of 13/1/2015, Council of the EU, EP and Commission/ Vereniging Milieudefensie, C-401/12 P to C-403/12 P, appeal against T-396/09, ECLI:EU:C:2015:4. judgment of the Court of 13/1/2015, Council and Commission v Stichting Natuur en Milieu, C-404/12 P and C-405/12 P, appeal against T-338/08, ECLI:EU:C:2015:5

[803] Appeal EIB v ClientEarth, C-212/21 P and Commission v ClientEarth, C-223/21 P. Opinion of the Advocate General delivered on 15/12/2022, ECLI:EU:C:2022:1003.

[804] COM (2021) 851 final, Proposal for a Directive of the EP and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, Article 14 "*Rights of the public concerned to participate in proceedings*". Political agreement between the Council and the EP on 16/11/2023: Council vote pending following the EP vote at first reading in February 2024.

[805] See in particular the declarations of some Member States presented to the EU Council: e.g. Estonia's declaration on 7/12/2022, Finland's and Bulgaria's declaration on 8/12/2022, which emphasise the different legal traditions of the Member States in the criminal field.

[806] Recital 27a introduced by the EU Council at its meeting on 9/12/2022. The general approach on the proposed directive will serve as a negotiating mandate with the EP. Interinstitutional file 2021/0422 (COD), 16/12/2022, General Secretariat of the Council.

[807] *Ibid*. Article 15 "*Rights of the public concerned to participate in the procedure*".

rights and the environment[808]. During its examination by the Committee of Representatives within the Council in november 2022, Article 22 on civil liability is substantially amended on the grounds of "*avoiding unreasonable interference with the civil liability law systems of the Member States*"[809].

These two future directives raise the question of extending the scope of those subject to legal action to strengthen the defence of nature.

d) The necessary extension of the scope of defendants

According to Article 9§3 of the Aarhus Convention, each Party shall ensure that "*members of the public* (...) *may initiate administrative or judicial proceedings to challenge acts or omissions by private persons or public authorities which contravene provisions of national law relating to the environment*". The proposed Access to Justice Directive (2003, which was withdrawn in 2014) left it to the Member States to define such criteria for possible actions against private persons. In this case, the Commission justified this choice by considering that "*provisions on private persons would impinge on the fundamental provisions of Member States' systems*"[810]. However, this distinction was not foreseen in the Commission's first working document. *In the end*, this choice finally made by the Commission after consultations with stakeholders was criticised by NGOs, as was the exclusion of criminal proceedings. This caution on the part of the EU institutions was also illustrated during the long process of drafting Directive 2004/35/EC on environmental liability. Aware of the blockages[811] likely to interrupt any possibility of agreement, the Commission revised downwards its ambition to establish a common framework combining a civil liability regime and an administrative police mechanism. Thus, Directive 2004/35/EC "*does not confer any right to compensation following environmental damage or an imminent threat of such damage*"[812].

Directive 2008/99/EC on the protection of the environment through criminal law is a first development in that it requires Member States to provide for a system of criminal liability of legal persons for the offences referred to "*committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person*"[813]. In its opinion on the proposed revision of this directive, the EP Committee on Development insisted on the need to consider the cross-border nature of environmental crime and its impact on developing countries; it amends Article 12 to require each Member State to establish its jurisdiction over offences committed in a Member State or in a third country by its nationals or habitual residents but also over offences committed for the benefit of a legal person established in its territory[814]. In its general guidelines on the proposal, the *Justice and Home Affairs* Council however retains the Commission's wording leaving it to the State to inform the Commission of "*its decision to extend its jurisdiction over one or more of the offences (...) committed outside its territory*" in certain situations such as the creation of "*a serious risk for the environment on its territory*"[815]. In view of the first statements of some Member States in

[808] COM (2022) 71 final, Proposal for a Directive of the EP and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937. In the process of being adopted in 2024: Approval by the Council in March 2024 following the EP's[1st] reading.
[809] Council Permanent Representatives Committee, 30/11/2022, General approach on the proposal for a Directive on due diligence, 15024/1/22. Estonia states that it will not agree with the general approach proposed by the Permanent Representatives Committee and suggests "*deleting or at least further clarifying the provisions on civil liability* "1/12/2022
[810] COM (2003) 624 final, op. *cit.*
[811] G. WINTER, J.H. JANS, R. MACRORY and K. KRÄMER, Weighing up the EC environmental liability directive, *Journal of Environmental Law,* vol.20, n°2, 2008, 163-191.
[812] Art. 3.3 of Directive 2004/35/EC, *supra*.
[813] Article 6 of Directive 2008/99/EC of the EP and of the Council of 19/11/2008 on the protection of the environment through criminal law, OJEU 2008 L 328/28.
[814] Opinion of the EP Committee on Development of 7/12/2022, 2021/0422 (COD), Rapporteur C. ROOSE. Amendment to Article 12.
[815] General Secretariat of the Council, 16/12/2022, general orientation, 16171/22, 2021/0422 (COD).

december 2022[816], the risk of not accepting these amendments was high. In this case, the future directive stipulates that when Member States suspect environmental criminal offences of a cross-border nature, they must comply with European rules on cross-border cooperation and mutual legal assistance (article 20).

Finally, the future Directive on Due Diligence includes provisions on civil liability, particularly for adverse environmental impacts. It is presented as "*complementary to the Environmental Liability Directive*"[817]. In this case, the Commission insists on the high risks of distortions of competition in the internal market resulting from the increasing divergences between national regimes for enforcing corporate liability. The need to "*ensure a level playing field*" between the undertakings covered by the proposal is clearly emphasised. However, the civil liability regime proposed by the Commission leaves several loopholes open on the grounds of limiting "*the risk of excessive litigation*"[818]. In its draft opinion in September 2022, the EP's Committee on the Environment, Public Health and Food Safety proposed adding an obligation for Member States to ensure "*that natural or legal persons acting in the public interest, including trade unions and civil society organisations, may bring representative actions and act as plaintiffs before their courts on behalf of victims of actual or potential adverse impacts*"[819]. This future directive[820] is combined with the acceleration of the process of legal change in corporate social responsibility towards mandatory due diligence regimes.

These current developments in EU law are currently taking place outside any process of recognition of the legal personality of nature and/or rights of nature. Awareness of the very high socio-economic risks of ecological emergencies is playing a catalytic role, as is the active mobilisation of environmental and human rights defenders. Several of these legislative dynamics are supported by the promoters of the rights of nature.

It is true that the recognition of the *actio popularis* seems to be compromised for the time being in EU law. It is up to the Member States to decide whether they want to go down this road to strengthen nature conservation. The cardinal role of NGOs is confirmed even if the prospect of relaxing the strict conditions for public access to the CJEU in legality litigation is not on the cards. The recognition of nature guardians to represent nature in court, however, questions the European model if *actio popularis* is excluded from the tracks in the near future in EU law. In addition to the role of NGOs, the enlargement of the public concerned, including the designation of new persons entitled to defend nature before national judges, seems to be the most operational path in the state of EU law.

e) Applications to intervene before the CJEU: the requirement of an ambitious *Amicus curiae* status "*in nomine natura"*

Subject to certain conditions, natural or legal persons have the right to intervene in cases before the CJEU in support of "*all or part of the form of order sought by one of the parties*"[821]. Apart from the need to demonstrate an interest in the resolution of the dispute, such applications to intervene may not concern disputes between Member States, between EU institutions or between Member States and those institutions[822]. Unlike the Member States and the EU institutions, EU bodies and organisations

[816] Estonia, Finland, Bulgaria December 2022, aforementioned). These declarations of these States converge in order to leave a "*certain flexibility*" and to respect the singularities and penal traditions of each Member State.
[817] COM (2022) 71 final, Proposal for a Directive of the EP and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937 - presentation of the proposal
[818] *Ibid*.
[819] Draft opinion 2022/051 (COD) of 13/9/2022, rapporteur: T. WÖLKEN.
[820] Awaiting Council vote following EP first reading vote in February 2024
[821] Article 129 of the consolidated version of the Rules of Procedure of the CJEU of 25/9/2012, 4th part.
[822] Article 40 of the Statute of the CJEU

must have an interest in the resolution of the dispute in order to intervene[823]. Neither the Statute of the Court nor its Rules of Procedure expressly provide for an *Amicus curiae* model allowing for the expression and/or representation of absent or forgotten interests.

However, the dynamics of judicial openness "*to the friends of the Court*" are unfolding in several other national and international jurisdictions[824]. They offer judges access to knowledge that can shed light on their understanding of the facts and reinforce the useful effect of their interpretations. Environmental and/or human rights associations have seized the opportunity of these gateways to the judicial arena.

This jurisdictional democratisation is very well received by the promoters of the rights of nature. The promoters of the draft ECI on the rights of nature include a provision dedicated to the *amicus curiae* mechanism in their proposal for a directive. Without specifying whether all national courts and the CJEU are concerned, Article 10 provides that "*in any proceedings involving an aspect of Nature within the meaning of this Directive, the Court may appoint a legally qualified person as Amicus curiae to present arguments regarding the implications of the proceedings for Nature*"[825].

However, apart from the presentation of evidence by witnesses or expertise as part of the investigative measures[826] or the right of the institutions and the Member States to present their observations[827], this mechanism of intervention ancillary to the main dispute remains far from an ambitious status of *Amicus curiae.* The very term Amicus curiae is not used or customary and the definition of the notion of interest to intervene remains restrictive*.*

The Court specifies that this notion of interest "with *regard to the very subject matter of the dispute*"[828], is understood "*as a direct and present interest reserved for the conclusions themselves and not as an interest in relation to the pleas and arguments raised"*[829]*.* It verifies whether the "*applicant in intervention is directly affected by the contested act and whether his interest in the outcome of the dispute is certain*"[830], in other words whether the solution of the dispute "*is such as to modify the legal position of the applicant in intervention*"[831].

With regard to applications to intervene submitted by NGOs, the Court systematically recalls that the requirement of a direct and present interest in the resolution of the dispute "*implies either that their field of action coincides with the region and sector concerned by the proceedings before the court, or, where they have wider fields of action, that they are actively involved in protection programmes or studies concerning the region or sector concerned, the viability of which might be jeopardised by the adoption of the contested measure*"[832]. In a case brought in 2010 by the Autonomous Community of Galicia seeking the annulment of a Commission decision concerning Spanish state aid for the production of electricity from indigenous coal, the application to intervene by Client Earth, Stichting Greenpeace

[823] Article 40 of the Statute of the CJEU. In Case C-176/03, the EESC was not able to benefit from this conditional right to intervene on the grounds that the Statute of the Court in 2005 referred only to the institutions benefiting from this right to intervene and not to the bodies exercising an advisory function before the Court (Order of the President of the Court of 17/3/2004, C-176/03, application by the EESC to intervene rejected, ECLI:EU:C:2004:158.

[824] These jurisdictional openings are supported by international organisations such as UNESCO: see for example its guide for *Amicus curiae* interventions in freedom of expression cases, 2021, 18 p. L. BURGORGUE-LARSEN, *Les interventions éclairées devant la Cour européenne des droits de l'Homme ou le rôle stratégique des Amici curiae* in Mélanges J.P COSTA, " *La conscience des droits "*, Ed. Dalloz 2011, 710 p.

[825] Recital 57 (of the ECI draft guideline) thus mentions "*where there is no representative to speak for nature, the court should be able to appoint a legally qualified person as Amicus curiae to present arguments regarding the implications of the proceedings for nature*".

[826] Articles 66 and 70 of the Rules of Procedure of the CJEU and Articles 25 and 26 of the Statute of the CJEU.

[827] For example, in the context of participation in the preliminary ruling procedure, Article 96 of the Rules of Procedure.

[828] Order of the President of the Court of 7/6/2019, Mellifera eV & al./Commission, C-784/18 P, (glyphosate) ECLI:EU:C:2019:479.

[829] Order of the President of the Court of 1/10/2019, Federal Republic of Germany v Commission, C-177/19 P, (Regulation (EU) 2016/646 on emissions from passenger cars) ECLI:EU:C:2019:837.

[830] Order of the President of the Court in C-177/19 P, *cited above*.

[831] Order of the President of the Court in C-177/19 P, *cited above*.

[832] Order of the General Court of 6/11/2012, Comunidad Autonoma de Galicia v. Commission, T-520/10, Spanish State aid "production of electrical energy from indigenous coal" ECLI:EU:T:2012:581.

Council and WWF EPO was rejected by the Court, unlike that of Greenpeace España. In this case, the Court considers that their applications to intervene do not show that they "*are actively involved in protection programmes and studies concerning Spanish coal-fired electricity production whose viability would be compromised by the contested decision*". It concludes that their "*spontaneous submission of observations during the preliminary examination procedure*" of the Spanish State aid scheme "*cannot suffice to establish their interest in the solution of the present dispute*"[833]. It also rejects their broad interpretation of Article 9§3 of the Aarhus Convention, which, according to the NGOs, confers on them, by virtue of their object alone, the right to intervene; in the present case, the Court considers that such an interpretation "*would amount to disregarding the condition of justification of an interest in the resolution of the dispute provided for by Article 40 of the Statute of the Court in order to distinguish the conditions for intervention by States and institutions from other persons*"[834].

With regard to EU bodies and organisations, such as agencies, the Court emphasises their institutional specificity, accepting that they have a direct and present interest in the resolution of a dispute if the process of adopting the EU act in question provides for their participation, such as the provision of assessments or the adoption of opinions. The European Chemicals Agency has thus been allowed to intervene in disputes between institutions, for example in case C-144/21, in which the EP requested the partial annulment of a Commission decision authorising certain uses of chromium trioxide[835].

Finally, as parties to a main proceedings before a national court, it is also possible to submit observations to the Court of Justice for a preliminary ruling[836]; this was the case for the association Global Action in the interest of Animals in cases C-336/19 and C-426/16 concerning the ritual slaughter of animals[837].

Furthermore, in competition law, a kind of *Amicus curiae* procedure has been established by Regulation 1/2003[838] and Regulation (EU) 2015/1589[839] allowing national courts to request the opinion of the European Commission. The Commission may also submit observations spontaneously if the national courts have given their prior consent[840]. Such a procedure, justified in the name of the highly technical nature of the subject and the Commission's "*duty to defend the public interest*"[841], could be applied to the environmental field. Admittedly, competition policy is distinguished by the nature of the competences exercised by the EU and the cardinal role of the Commission, but is the environmental field not so complex as to justify such procedures extended to 'representatives' of the interests of nature?

In the context of the common commercial policy, similar attention is being paid to this issue, and the European Commission has already participated as an *Amicus curiae* to express the EU's interest in certain arbitration procedures, subject to the prior agreement of the parties. Similarly, with regard to the opening of negotiations on a Convention establishing a multilateral tribunal for the settlement of investment disputes, the EESC considers it essential to provide for the authorisation of *Amicus curiae*

[833] Order of the General Court of 6/11/2012, Castelnou Energia SL v Commission, T-57/11, Spanish State aid "*production of electricity from indigenous coal*" ECLI:EU:T:2012:580
[834] Order of the General Court of 6/11/2012, Comunidad Autonoma de Galicia v Commission, T-520/10, *cited above*.
[835] Order of the Court of First Instance of 17/9/2021, EP v Commission, C-144/21, Standing to intervene in proceedings, ECLI:EU:C:2021:757
[836] Article 96: Participation in the preliminary ruling procedure, consolidated version of the Rules of Procedure of the CJEU of 25/9/2012
[837] C-336/19 and C-426/16, *cited above*.
[838] Council Regulation (EC) 1/2003 of 16/12/2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJEU 2003 L 1/1. Notice on the cooperation between the Commission and the national courts in the application of Articles 81 and 82 of the EC Treaty, OJEU 2004 C 101/54.
[839] Council Regulation (EU) 2015/1589 of 13/7/2015 laying down detailed rules for the application of Article 108 of the TFEU, OJEU 2015 L 248/9. Commission Notice on the enforcement of State aid rules by national courts, OJEU 2021 C 305/1.
[840] Commission Report on Competition Policy 2021, SWD (2022) 188 final.
[841] Recital of Regulation (EU) 2015/1589, *supra*.

briefs submitted by local populations, workers and trade unions and other associations working to protect the environment[842].

Several avenues of improvement are therefore conceivable in the light of existing procedures to strengthen the representation of nature in court, including by persons not party to the dispute. Similarly, extending the EEA's tasks in the decision-making process would make it possible to justify its direct and current interest in the solution of disputes brought before the Court.

Thus, the expansion of the possibilities of access to justice is necessary in view of the current ecological and societal situation. Like the developments in ecological damage regimes, '*the plurality of claimants (...) is essential*'[843] and '*reflects the diversity and transversality of the interests covered*'[844]. Climate litigation is a trend that will be followed by future litigation for the preservation of biodiversity[845]. Finally, the construction of a European procedural base conferring the right to challenge corporate acts and/or omissions in court should open up new prospects for the defence of environmental rights and human rights, which are closely intertwined. Such developments justify all the more the effective respect of procedural guarantees governing access to justice and the reinforced protection of nature and environment defenders (2).

2) The crucial effectiveness of procedural safeguards and the protection of nature defenders

The establishment of remedies to ensure judicial protection of rights conferred by EU law is necessarily accompanied by effective procedural guarantees. According to Article 47 of the EU Charter of Fundamental Rights, "*everyone is entitled to a fair and public hearing within a reasonable time*". Echoing the Aarhus Convention, a number of environmental laws provide that national court proceedings must be "*fair, equitable and not prohibitively expensive*"[846].

The promoters of the draft ECI on the Rights of Nature incorporate these requirements in their proposal for a directive; they provide that in principle "*no costs shall accrue to any person, organisation or government agency when initiating proceedings to protect the Rights of the Nature*" except in the event that they fail to "*establish on the balance of probabilities that there exists a prima facie case pursuant to the provisions of this directive*". Spanish Law 19/2022 on Mar Menor follows this logic; it provides that the person initiating the legal action on behalf of Nature "*who wins the case is entitled to recover the full*

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[842] EESC Opinion on the Recommendation for a Council Decision authorising the opening of negotiations on a Convention establishing a Multilateral Tribunal for Settlement of Investment Disputes, OJEU 2019 C 110/145.

[843] M-P. CAMPROUX-DUFFRENE, *Le préjudice écologique et sa réparabilité en droit civil français de la responsabilité ou les premiers pas dans un sentier mener à un changement des rapports Homme-Nature*, *RJE* 2021/3, Vol. 46, 457-474.

[844] *Ibid*.

[845] An example is the appeal for State responsibility filed on 10 January 2002 before the Paris Administrative Court by several associations (*Notre affaire à tous, Pollinis, Biodiversité sous nos pieds, Association nationale pour la protection des eaux et rivières truites-ombres-saumons, Association pour la protection des animaux sauvages et du patrimoine naturel*). The petition highlights the shortcomings in the assessment and authorisation procedures for plant protection products and their impact on biodiversity. https://justicepourlevivant.org/admin/wp-content/uploads/2023/01/justice-pour-le-vivant-memoire-en-replique.pdf. Ruling of the TA de Paris on 29/6/2023, n°2200534/4-1 : injunction to the Prime Minister and the relevant ministers *to "take all appropriate measures to repair the ecological damage and prevent further damage by restoring consistency between the rate of reduction in the use of plant protection products and the trajectory set out in the Ecophyto plans and by taking all appropriate measures to restore and protect groundwater against the effects of plant protection products and in particular against the risks of pollution* " by 30/6/2024 at the latest.

[846] Directive 2003/35/EC of the EP and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, *supra*.

costs of the litigation undertaken, including lawyers' fees, (...) costs of proceedings and the injunction guarantee"[847].

In his study on the rights of nature in the European context, Jan DARPO recalls the obstacles to access to the courts in the Member States. He points out that "*litigation costs are one of the main reasons why the public concerned in Europe rarely take direct action in court against operators of activities hazardous to the environment*". In its 2020 Communication on access to justice[848], the Commission again deplores the fact that environmental NGOs in several Member States still face prohibitive costs and asks them to remedy these situations.

Referred to by national courts[849], the CJEU states that the assessment of "*prohibitive*" cannot "*be a matter for national law alone*", having regard to Article 47 of the Charter of Fundamental Rights and the need to ensure broad access to justice in environmental matters. Notwithstanding the lack of direct effect of this non-prohibitive cost rule[850], the Court concludes that "*the cost of proceedings must neither exceed the financial capacity of the person concerned nor appear in any event to be objectively unreasonable*"[851], with the risk of preventing persons "from *instituting or pursuing legal proceedings on account of the financial burden which might result*"[852]. With a view to ensuring a uniform interpretation of the concept of non-prohibitive cost, the Court sets out the elements which may assist the courts in their analysis[853]. In Case C-260/11, the CJEU thus considers that European legislation, "*correctly aligned*"[854] with the Aarhus Convention, does not prohibit national courts from making an order for costs of a reasonable amount covering "*all the financial costs occasioned by participation in the legal proceedings*"[855].

Several complaints to the Aarhus Convention Review Committee relate to the prohibitive costs of access to justice[856]. Such obstacles can only hinder broad access to justice and the effectiveness of *actio popularis* procedures.

In addition to this thorny issue of cost, information on access to remedies[857] and legal aid are essential elements in "*leaving no one behind*"[858] and ensuring a degree of equality of arms. Each party to the Aarhus Convention is required to disseminate this information and to set up assistance schemes to

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[847] Art. 6 of the Act (supra). Free translation of "*La persona que ejercite dicha acción y que vea estimada su pretensión tendrá derecho a recuperar todo el coste del litigio emprendido, incluidos, entre otros, los honorarios de abogados, procuradores, peritos y testigos, y estará eximido de las costas procesales y de las fianzas en materia de medidas cautelares*.

[848] COM (2020) 643 final, Communication "*Improving access to justice in environmental matters in the EU and its Member States*".

[849] Court judgment of 11/4/2013, The Queen, D. Edwards and L. Pallikaropoulos (UK), C-260/11, ECLI:EU:C:2013:221; judgment of the Court of 13/2/2014, Commission v. United Kingdom and Northern Ireland, C-530/11, ECLI:EU:C:2014:67; judgment of the Court of 16/7/2009, Commission v. Ireland, C-427/07, ECLI:EU:C:2009:457; judgment of the Court of 15/3/2018, North East Pylon Pressure Campaign, C-470/16, ECLI:EU:C:2018:185

[850] On Article 10a of Directive 85/337/EEC as amended by Directive 2003/35/EC: judgment of the Court of 17/10/2018, Volkmar Klohn, C-167/17, ECLI:EU:C:2018:833; judgment of the Court of 15/3/2018, North East Pylon Pressure Campaign, C-470/16, *supra*.

[851] judgment of the Court of 11/4/2013, The Queen, D. Edwards and L. Pallikaropoulos (UK), C-260/11, *supra*. judgment of the General Court of 15/12/2016, TestBio Tech v Commission, T-177/13, GMO Soybeans, ECLI:EU:T:2016:736.

[852] judgment of the Court of 11/4/2013, The Queen, D. Edwards and L. Pallikaropoulos (UK), C-260/11, *aforementioned*, Judgment of the Court of 17/10/2018, Volkmar Klohn (Referral Supreme Court Ireland), C-167/17, Directive 85/337/EEC as amended EIE, ECLI:EU:C:2018:833

[853] judgment of the Court of 11/4/2013, The Queen, D. Edwards and L. Pallikaropoulos (UK), C-260/11, *prec*: '*It may take into account the situation of the parties, the reasonable prospects of success of the claimant, the seriousness of what is at stake for the claimant and for the protection of the environment, the complexity of the applicable law and procedure, the recklessness of the action at its various stages and the existence of a national system of legal aid or of a system of protection in respect of costs*.

[854] judgment of the Court of 11/4/2013, The Queen, D. Edwards and L. Pallikaropoulos (UK), C-260/11, *cited above*.

[855] judgment of the Court of 11/4/2013, The Queen, D. Edwards and L. Pallikaropoulos (UK), C-260/11, *cited above*.

[856] J. EBBESSON, *L'accès à la justice en matière d'environnement en droit international : pourquoi et comment ?* in " *Le Droit d'accès à la justice en matière d'environnement* ", J. BETAILLE (dir), Presses Université Toulouse Capitole, 2016, 389 p. 63-75

[857] Example of the factsheets on access to justice in the environmental field (Member State by Member State): https://e-justice.europa.eu/300/FR/access_to_justice_in_environmental_matters. See also the Citizens' Guide to Access to Justice in Environmental Matters, European Commission, 2018, *above*.

[858] Green Deal for Europe, op. *cit*.

overcome barriers to access to justice[859]. These requirements are reflected in EU environmental legislation, including the so-called Aarhus Regulation.

The effectiveness of these procedural safeguards is all the more important as the very worrying phenomenon of "*strategic lawsuits that distort public debate*" is also spreading in Europe[860]. Environmental organisations (EOs)[861] are one of the targets of these abusive legal proceedings used mainly by large companies to intimidate or censor freedom of expression and the right to participate in public debate. If the rights of nature and the representatives entitled to defend it are to be recognised, a common legal framework for the protection of whistleblowers and environmentalists is essential. The Aarhus Convention already provided that those exercising their rights should not be "in *any way penalised, persecuted or harassed for their action*"[862]. Faced with the increase in such threats, the parties to the Aarhus Convention[863] and the European institutions have recently become aware of the extent and seriousness of these attacks on the rule of law.

Directive (EU) 2019/1937 reflects the importance of protecting persons who report violations of EU law, in particular in the environmental field[864]. More recently, echoing this directive, the future directive on the protection of the environment through criminal law introduces a specific provision for the protection of persons reporting environmental offences or assisting in the investigation[865]. Several amendments tabled by the EP committees aimed at strengthening the proposed provisions. In its opinion of December 2022, the EP Committee on Development amended the material scope of Article 8 on aggravating circumstances by including offences that have "*caused death or serious injury to human rights or environmental defenders, journalists, members of NGOs or persons reporting criminal offences (...)*[866].

Similarly, the future Directive on due diligence provides for the protection of persons who report violations of the obligations under Directive (EU) 2019/1937[867]. Finally, in April 2022, the Commission proposed a directive on the protection of persons participating in public debate against manifestly unfounded or abusive legal proceedings and will also present a recommendation on the protection of journalists and human rights defenders, including environmental defenders[868]. In addition to journalists and associations, a variety of actors are confronted with the multiplication of these procedures that violate fundamental freedoms and other forms of intimidation, including outside the EU. Defined as "*legal proceedings aimed at public debate which are wholly or partly unfounded and whose main purpose is to prevent, restrict or penalise public debate*"[869], abusive legal proceedings which distort public debate only concern "*matters of a civil or commercial nature with a cross-border impact*"[870].

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[859] These legal aid schemes exist in the Member States and at the level of the CJEU (Article 115 et seq. of the Rules of Procedure of the CJEU).

[860] Strategic Lawsuit Against Public Participation. These lawsuits target journalists, associations but also academics in their research activities.

[861] Greenpeace and the Sherpa association have in particular been targeted by these attacks launched by major European groups. The companies are claiming exorbitant amounts in damages and are not hesitating to exhaust all the legal means at their disposal. Following a series of lawsuits since 2013 against Greenpeace brought by a forestry group, the Northern District of California ordered this company to reimburse the defendants nearly 816,000 dollars in 2020 to cover legal fees and costs (case 1:17-cv-02842-JST).

[862] Art. 3.8.

[863] Information note on the situation regarding environmental defenders in Parties to the Aarhus Convention from 2017 to date. July 2020, AC/WGP-24/Inf.16.

[864] Directive (EU) 2019/1937 of the EP and of the Council of 23/10/2019 on the protection of persons who report violations of EU law, OJEU L 305 of 26/11/2019 p 17. Environmental protection is among the 10 areas concerned.

[865] Article 14 of the future directive.

[866] *Prec*.

[867] COM (2022) 71 final, Proposal for a Directive of the EP and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937. Approval by the Council in March 2024 following the EP's[1st] reading

[868] COM (2022) 177 final, Proposal for a Directive of the EP and of the Council on the protection of persons participating in the public debate against manifestly unfounded or abusive legal proceedings (strategic lawsuits distorting the public debate).

[869] COM (2022) 177 final, Proposal for a Directive of the EP and of the Council on the protection of persons participating in the public debate against manifestly unfounded or abusive legal proceedings (strategic lawsuits distorting the public debate). Approval of the March 2024 Council following the EP's[1st] reading.

[870] However, this proposal does not cover "*fiscal, customs or administrative matters or the liability of the State for acts or omissions in the exercise of State authority"*.

The protection of these defenders transcends borders and the Commission is committed to mobilising the European mechanism for human rights defenders in the framework of the EU's external relations[871]. The European Parliament proposed to introduce in article 2 the concepts of "*human rights defenders*" and "*environment-related human rights*"[872] in the proposed regulation on products associated with deforestation; furthermore, it added to the criteria for assessing the risks of non-compliance with due diligence obligations, "*the violation of the rights of indigenous peoples (...) as well as any violence against and to defenders of human rights and environmental rights*"[873]. However, Regulation (EU) 2023/1115 limits itself to mentioning in recital 7 the role of defenders of human rights linked to the environment without defining them. Similarly, Article 10 on risk assessment does not explicitly include the violation of human rights and environmental rights among the criteria.

This awareness of the importance of guaranteeing the protection of these defenders is also illustrated by the adoption in October 2021 by the Parties to the Aarhus Convention of a decision VII/9 on a rapid reaction mechanism to deal with cases falling under Article 3§8 concerning the protection of persons exercising their right. Michel FORST has been elected Special Rapporteur for Environmental Defenders[874] by the Parties to the Convention in June 2022.

Paradoxically, the proposal for a directive on the rights of nature supported by the supporters of the citizens' initiative in 2017 does not include any provisions on the protection of nature's rights defenders. Similarly, the study commissioned by the EESC on the rights of nature (2020) merely refers to UN guidelines and strategies on the subject.

The imperative of strengthening access to justice and the effective protection of rights and defenders of nature is combined with the need to ensure that the powers of judges and their training are adequate to the ecological complexity (**B**).

[871] COM (2022) 814 final, Communication on "*Stepping up the fight against environmental crime*".
[872] Report A9-0219/2022 of 25/7/2022 on the proposal for a regulation of the EP and of the Council on the placing on the market in the Union and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) 995/2010 (COM (2021) 706) The proposed definition of environmental human rights defenders is "*persons and groups of persons who, in a personal or professional capacity and in a peaceful manner, seek to protect and promote fundamental rights relating to the environment, including water, air, land, flora and fauna*". (Amendment: Article 2 point 28 c - new).
[873] Report PE A9-0219/2002 of 25/7/2022 on the proposal for a directive, Article 10 §2 point e)
[874] https://unece.org/env/pp/aarhus-convention/environmental-defenders. The Special Rapporteur on environmental defenders can be contacted at Aarhus-EnvDefenders@un.org

B - The adequacy of the powers of judges and their training to the ecological complexity

"The Colombian and Indian examples show that judges alone cannot decide on an ecological policy: they have neither the power nor the means to do so"[875]. In support of the analysis of court decisions in Ecuador, India and Colombia, Pierre Brunet concludes that "*the emergence of a transnational model of the rights of nature (...) cannot therefore be satisfied with judicial activism*"[876]. It is true that the judicial activism[877] of environmental NGOs is an essential lever in the dynamics of legal transformation. Similarly, several rulings express this awareness of the ecological emergency, leading judges to adopt bold interpretations of the law.

"Where the precision of the text ends, the power of the judge begins (...) who cannot, without denial of justice, hide behind the imprecision of treaties to refuse to state the law (...)"[878]. The imperative functions of stating the law (*Juridictio)* and imposing its solution on the parties (*Imperium)* in compliance with the procedural and substantive rules offer the judge a range of possibilities to guide the behaviour of the subjects of law and to influence the efficiency and effectiveness of legal standards. The fundamental contribution of the CJEU to the process of Community integration has been widely emphasised. In the name of the effectiveness of EU law and useful effect, its voluntarism, even its activism, has been widely discussed. In the environmental field, the Court deploys a subtle balancing act between caution, boldness but also sometimes a questionable legal conservatism. Such nuances in the art of judging and dialogue between judges express the limits of jurisdictional competences and their grey areas in the respect of the separation of powers[879].

The privileged place given to the figure of the judge in the theory of the rights of nature is explained by the genesis of this movement and the emblematic decisions of Colombian (2016) and Indian (2017) judges. The strategy of disseminating the discourse on the rights of nature, including in the arguments of applicants before judges in Europe, is part of this dynamic of judicial activism. As the '*solution that the judge gives to the dispute is not imposed by his own authority, but because of a discourse that leads him to it*'[880], this discourse is constructed at the crossroads of the different dialogues and arguments expressed within its walls.

The solution chosen by the judge also depends on the adequacy of his powers and his understanding of the complexity of nature and its interrelations with human activities. This major problem is regularly debated by legal doctrine and environmental NGOs. The possibilities for extending the powers of the judge proposed by the promoters of the rights of nature do not present any real singularities compared to the solutions envisaged by other schools of thought. It will therefore not be appropriate here to draw up an exhaustive list of the improvements proposed or gradually implemented in the procedural law of the Member States.

Three types of powers of the judge will be questioned with regard to the strengthening of the defence of nature and its interests in the courts (**1**). From the outset, the national courts and the Court of Justice of the European Union are different, despite the fact that there is a common procedural basis for "*ensuring*

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[875] P. BRUNET, *L'écologie des juges*. The legal personality of natural entities (New Zealand, India, Colombia), *prec*.

[876] *Ibid*.

[877] A. BERTHIER, *Le pari de l'activisme judiciaire, atouts et limites d'une juriste d'ONG*, in Mélanges F. OST " *A quoi sert le droit de l'environnement - Réalité et spécificité de son apport au droit et à la société* ", D. MISONNE (dir). 2019, Ed. Bruylant, 390 p, 77-106.

[878] R. LECOURT, "*Le juge devant le marché commun*", *Institut universitaire des Hautes Études Internationales*, Geneva, 1970, 69 p.

[879] G. CANIVET, Activisme judiciaire et prudence interprétative, in "*La création du droit par le juge*", *Archives de Philosophie du droit*, 2006, vol. 50, 7-32.

[880] JM. SAUVE, Vice-President of the French Council of State at the Cérémonie des Mélanges Bruno Genevois, 16/12/2008, https://www.conseil-etat.fr/actualites/discours-et-interventions/ceremonie-de-remise-des-melanges-en-l-honneur-du-president-bruno-genevois-le-dialogue-des-juges

effective judicial protection in the areas covered by EU law"[881]. On the other hand, all the courts share the urgent need for training and the adaptation of the judicial organisation to the complexity of environmental issues (**2**).

1) Sanctions, injunctions, responsibilities: three strategic powers of the judge to be reinforced

The powers of sanctions (**a**), injunctions (**b**) and powers to compensate for ecological damage (**c)** are strategic powers. All schools of thought agree that these powers need to be strengthened, or even reexamined, in order to respond to the ecological emergency and the effective protection of nature and natural entities.

a) "*The penalties thus provided for are effective, proportionate and dissuasive*" [882]

Effective, proportionate and dissuasive: the formula is well known. It is now almost systematically incorporated into EU environmental legislation. It is up to the Member States to determine the sanctions for violations of EU law. In the absence of specific provisions on sanctions in environmental legislation[883], the CJEU has regularly recalled that Member States have the obligation to "*ensure the scope and effectiveness of Community law*" in accordance with the principle of loyal cooperation. Furthermore, the Court states that Member States must "*ensure that breaches of Community law are penalised under substantive and procedural conditions which are analogous to those applicable to breaches of national law of a similar nature and importance and which, in any event, make the penalty proportionate and dissuasive*"[884].

In the course of its case law, the CJEU has clarified the notion of proportionate sanction, which implies taking into account the nature and gravity of the infringement but also the necessary factual and legal circumstances[885].

Taking note of the divergent sanction regimes in the Member States, or even the inadequacy or absence of certain types of sanctions, the EU legislator has progressively strengthened the framework for Member States' discretion in determining sanctions[886], in particular by taking cautious steps in the criminal field. However, the wording of the provisions on sanctions is not completely standardised and varies between directives and regulations. By way of illustration, Regulation (EU) 1143/2014 on invasive alien species expressly lists examples of sanctions (fines, seizure of species, suspension or withdrawal of permits)[887].

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[881] Article 19 of the TEU Lisbon.
[882] For example, Directive 2010/75/EU of the EP and of the Council of 24/11/2010 on industrial emissions, supra. Art 79. Text under revision: COM (2022) 156 final. EP legislative resolution on 12/3/2024 on this proposal.
[883] E.g. Directive 92/43/EEC on natural habitats, Directive 2004/35/EC on environmental liability, *above*.
[884] CJEC judgment of 12/9/1996, Sandro Gallotti & al, C-58/95 & al, (preliminary reference Italian court), Directive 91/156/EEC on waste, ECLI:EU:C:1996:323.
[885] judgment of the Court of 26/11/2015, SC Total Waste recycling, C-487/14, Budapest Administrative Court, Regulation (EC) 1013/2006, ECLI:EU:C:2015:780.
[886] For example, Member States must inform the Commission of the sanctions regime determined and the measures taken, as well as any future changes: EP and Council Directive (EU) 2020/2184 of 16/12/2020 on the quality of water intended for human consumption, OJEU 2020 L 435/1. The inadequacy of national sanctions (or the divergence of regimes between states) is also deplored in other policies affecting ecosystems: see European Court of Auditors Special Report 20/2022: "*Combating illegal fishing: EU action relies on well-established control systems but suffers from the heterogeneity of controls and sanctions in the Member States"*.
[887] Regulation (EU) 1143/2014 of the EP and of the Council of 22/10/2014 on the prevention and management of the introduction and spread of invasive alien species, OJEU 2014 L 317/35.

The issue of sanctions is one of the main subjects covered by the current third review of the implementation of environmental policy under the aegis of the Commission[888]. The role of the national judge in assessing the appropriateness of the choice of sanctions according to the degree of seriousness, or even irreversibility, of the environmental damage is therefore decisive.

The future EU legislations therefore mark a further step in framing the procedural autonomy of Member States in establishing and implementing sanction regimes. The future Directive on due diligence provides for national supervisory authorities to have the power to impose administrative sanctions coupled with the power to impose financial penalties based on the company's turnover. However, the provisions on the nature and appropriateness of such sanctions leave room for problematic interpretations[889]. The proposed establishment of a European network of supervisory authorities should, on the other hand, strengthen coordination and the sharing of best practices, particularly with regard to penalties.

In its report on the application of Directive 2008/99/EC, the Commission highlights the weakness of criminal sanctions for serious breaches of European legislation and the many shortcomings in the implementation of this directive at '*all levels of the law enforcement chain*'[890]. It notes that "*environmental crime is not given the necessary priority, is not effectively investigated and is not detected, prosecuted and punished as it should be*". Similarly, it deplores the inadequacy of administrative sanctions to counter serious violations of the law and other forms of crime, particularly against individuals, such as the Romanian forest guards murdered in 2019 while investigating illegal timber harvesting[891].

In a 2022 Communication, the EU aims to step up the fight against environmental crime[892]. In addition to the obligation for Member States to establish a strategy to combat criminal offences, the future directive (proposed in 2021) to replace Directive 2008/99 enriches the existing legal framework. Among the new provisions is the consideration of aggravating circumstances, in particular when the offence causes "*destruction or substantial irreversible or lasting damage to an ecosystem*"[893], "*including in cases comparable to ecocide*"[894].

It is true that the proposal for a directive presented by the Commission does not include a definition of the concept of ecocide. It only specifies that the Member States must provide for limitation periods "*allowing for investigation, prosecution, judgment and judicial arbitration (…) to take place for a sufficiently long period after these criminal offences have been committed*"[895]. However, the same year as the proposal for a directive, the EP had asked the Commission to assess the relevance of the qualification of ecocide in EU law and in the framework of European diplomacy[896]. The Commission undertook to follow "*closely*" the international discussions on the definition of ecocide, while recalling that the EU is not a party to the Rome Statute of the International Criminal Court[897].

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[888] COM (2022) 438 final, Communication from the Commission on the "*2022 Environment Policy Review: Enforcing Environmental Rules to Save the Environment*".
[889] Article 20 of the Proposal for a Directive of the EP and of the Council on due diligence, COM (2022) 71 final.
[890] COM (2021) 851 final, Proposal for a Directive of the EP and of the Council on the protection of the environment through criminal law; SWD (2020) 259 final, Commission staff working document, Evaluation of the Directive 2008/99/EC.
[891] https://www.francetvinfo.fr/economie/transports/trafic/video-en-europe-des-gardes-forestiers-assassines-pour-avoir-tente-de-proteger-les-forets_3694507.html
[892] COM (2022) 814 final, Communication on stepping up the fight against environmental crime.
[893] COM (2021) 851 final, Article 8.
[894] COM (2021) 851 final, recital 16.
[895] COM (2021) 851 final.
[896] EP resolution of 20/5/2021 on "*Corporate liability for environmental damage*", OJEU 2022 C 15/186
[897] COM (2022) 814 final, Communication from the Commission on "*stepping up the fight against environmental crime*".

Negotiations on the proposed directive (2021) began in 2022 and showed the willingness of several MEPs to include the concept of ecocide, based on the definition of the independent expert group of June 2021[898]. Among the amendments proposed in June 2022, the crime of ecocide is recognised as a "*separate criminal offence*"[899] and is defined as "*unlawful or wanton acts committed in the knowledge that there is a substantial likelihood that such acts will cause serious and widespread or long-term damage to the environment*"[900]. Similarly, an amendment to Article 11 proposes that there should be no limitation period for offences "*comparable to or qualified as ecocide and offences affecting an ecosystem established as a legal entity*"[901]. However, the term legal entity is not defined but refers to the theory of the rights of nature. The example of the Mar Menor lagoon is cited in the justification for this amendment[902]. In its opinion of October 2022, the EP's Committee on the Environment supports this amendment of the absence of a limitation period "*for crimes comparable to an offence of ecocide or fulfilling the conditions of an offence of ecocide and crimes affecting an ecosystem established as a legal entity*"[903].

From April to October 2022, the draft opinions of several parliamentary committees[904] confirmed this choice to establish a crime of ecocide to "*prevent and prosecute the most serious transnational environmental crimes whether committed in the EU or in third countries*" but also to require Member States to provide for the universal jurisdiction of their courts[905]. In its opinion of December 2022, the EP's Committee on Development thus introduces an Article 3a on the concept of ecocide as a serious criminal offence, which is defined as "*unlawful or arbitrary acts committed with knowledge of the real likelihood that such acts will cause widespread or long-term serious damage to the environment*"[906]. It also amends this provision on aggravating circumstances by broadening its material scope[907]. The current reform of the Belgian criminal code recognising the crime of ecocide supports the authors of these amendments[908]. However, given the state of discussions within the Council in December 2022, the insertion of an explicit provision on ecocide is not retained in the general orientation of the text. The political agreement between the Council and the EP on 16/11/2023 confirms this position, while providing for a "qualified offences clause" in the sense of offences committed intentionally causing "the *destruction, widespread and substantial irreversible degradation or lasting, widespread and substantial deterioration of an ecosystem of considerable size or high environmental value or of a natural habitat within a protected site or of the quality of the air, the quality of the soil or the quality of the water*[909]". For Marie-Toussaint MEP, the constituent elements of this type of offence are based on the definition of ecocide supported by the International Group of Jurists on Ecocide[910].

The future directive (awaiting the Council vote following the first reading EP vote in February 2024) does not include such a definition and does not depart from an anthropocentric view of environmental crime,

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[898] https://www.stop-ecocide.fr/definition-legale: "*Unlawful or arbitrary acts committed with knowledge of the real likelihood that such acts will cause serious, widespread or long-term damage to the environment*". This definition is proposed in an amendment 171 of MEPs suggesting to introduce a new recital 13a, amendment 180 of Marie Toussaint and others inserting a recital 16a.
[899] Amendment 177 concerning recital 16, in draft opinion S. PIETIKÄINEN, 2021/0422 of 13/6/2022.
[900] Amendment 163 introducing a point 1a in Article 2§1, in draft opinion V. GHEORGHE, 2021/0422 of 16/9/2022, idem amendment 411 by M. TOUSSAINT & al, in draft opinion S. PIETIKÄINEN, 2021/0422 of 13/6/2022. Other amendments provide for ecocide offences to be punishable by a maximum term of imprisonment of at least 15 years (Amendment 135, in draft opinion Caroline ROOSE, 2021/0422 of 9/9/2022.
[901] Amendment 550 concerning Article 11§1, in draft opinion S. PIETIKÄINEN, 2021/0422 of 13/6/2022.
[902] Amendment 187 concerning recital 19, in draft opinion S. PIETIKÄINEN, 2021/0422 of 13/6/2022.
[903] Opinion of the Committee on the Environment, Public Health and Food Safety of 25/10/2022, rapporteur S. PIETIKÄINEN.
[904] Committee on Environment, Public Health and Food Safety on 27/4/2022, Committee on Development on 13/7/2022, Committee on Civil Liberties, Justice and Home Affairs on 4/10/2022.
[905] Proposed amendment 595 to Article 12§2a new, in draft opinion S. PIETIKÄINEN, 2021/0422 of 13/6/2022
[906] Opinion of the EP Committee on Development of 7/12/2022, *above*. Opinion of the Committee on the Environment, Public Health and Food Safety of 25/10/2022: amendment of Article 2: ecocide "*unlawful or arbitrary acts committed with knowledge of the substantial likelihood that such acts will cause serious, widespread or long-term damage to the environment*".
[907] Opinion of the EP Committee on Development of 7/12/2022, op. *cit.* For example: serious impacts on the human rights of the population or local communities of a developing country, vulnerable groups...future generations (...).
[908] Prec.
[909] Council press release of 16/11/2023.
[910] Euractiv, 17/11/2023.

reflecting the Commission's findings that '*nature cannot represent itself as a victim*'[911]. It is based on the definition of victim in Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime. This choice has the merit of ensuring a certain legislative coherence, but its appropriateness to the singularity of environmental crime remains open to discussion. Thus, according to this Directive 2012/29/EU, the concept of victim covers: "*any natural person who has suffered harm, including physical, mental or emotional injury or material loss, directly caused by a criminal offence; - the family members of a person whose death is the direct result of a criminal offence and who have suffered harm as a result of that person's death*"[912]. In its draft opinion on the proposed directive in July 2022, the parliamentary committee on development suggested extending this notion to "*collective victims*" (local communities, groups) to future generations, but also to ecosystems[913]. It reiterated this interpretation in its opinion of December 2022, considering that "*nature can be considered as the victim of damage caused by environmental crime*"[914] without including it in the definition of the notion of victim; a notion that it extended to future generations. Even if not all of these amendments will be retained, they testify to a process of change in the representation of nature and temporalities in the hierarchy of values and legal interests.

These forthcoming legislative developments will necessarily influence the power of judges to impose sanctions and the appropriate determination of the sanctions to be imposed on the natural and legal persons responsible (b).

b) The power of injunction in the hands of national courts to ensure the effectiveness of EU law

"Therefore, *is it not a misunderstanding of the nature of things to dissociate annulment from its consequences? To annul the act, but to refuse to say what must necessarily follow from this annulment, is this not the same as the judge stopping halfway, without going to the end of his task?*"[915] the French jurist Jean RIVERO asked himself in 1962.

Article 9§4 of the Aarhus Convention states that each Party shall ensure "*adequate and effective remedies, including injunctive relief where appropriate*". In Europe, since the Urgenda case in the Netherlands, several courts have used their power to issue injunctions against public authorities in the field of climate change, air pollution and, more recently, the protection of Natura 2000 areas[916]. Thus, in France in its judgment of 12/7/2017, the Council of State "*enjoins the Prime Minister and the Minister responsible for the environment to take all necessary measures*"[917] to draw up and implement an air quality plan in accordance with Directive 2008/50/EC in the areas concerned within "*the shortest possible time and transmit it to the European Commission before 31 March 2018*"[918]. Similarly, in the Grande-Synthe case, the Council of State enjoins "*the Prime Minister to take all useful measures to curb the curve of greenhouse gas emissions produced on national territory in order to ensure its compatibility with the reduction objectives*"[919] in accordance with Regulation (EU) 2018/842 and the Energy Code before 31 March 2022.

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[911] COM (2021) 851 final, recital 26.
[912] Directive 2012/29/EU of the EP and of the Council of 25/10/2012 establishing minimum standards on the rights, support and protection of crime victims and replacing Council Framework Decision 2001/220/JHA, OJEU 2012 L 315/57.
[913] Draft opinion of 13/7/2022, 2021/0422, rapporteur C. ROOSE.
[914] Opinion of the EP Development Committee of 7/12/2022, 2021/0422 (COD).
[915] J. RIVERO, *Le Huron au Palais-Royal ou réflexions naïves sur le recours pour excès de pouvoir*, *Dalloz*, 1962, chronicle 39,
[916] CE of 15/11/2021, FNE/Minister of Ecological Transition & al, n°437613. The judge enjoined the said ministers to adopt regulatory measures providing for the supervision or even prohibition of the use of pesticides in Natura areas within 6 months of notification.
[917] CE of 12/7/2017, *Association Les Amis de la Terre France*, n°394254.
[918] *Ibid.*
[919] CE of 1/7/2021, *Commune de Grande-Synthe* & M B, n°427301.

However, the CJEU is not empowered to issue injunctions to the European institutions, bodies and agencies[920] in the context of litigation on the legality and non-contractual liability of the EU. In the Carvalho case, in addition to requesting the partial annulment of Directive (EU) 2018/410 and Regulation (EU) 2018/841, the applicants will nevertheless seek recognition of the EU's non-contractual liability by requesting that the European legislator be ordered to adopt measures "*requiring a reduction in greenhouse gas emissions of at least 50-60% by 2030 compared with their 1990 level*"[921]. Both the European Parliament and the Council will point out that the CJEU does not have the power to issue such injunctions; as the application submitted is inadmissible, the Court will not have the opportunity to point out its lack of jurisdiction in this area.

Pending a highly uncertain reform of the CJEU giving it injunctive power, the Court plays a major role in ensuring compliance with EU environmental legislation by Member States and their courts. Several of its decisions have resonated with rulings by national courts against contrary action by public authorities. For example, in its action against France for non-compliance with Directive 2008/50/EC, the Commission refers to the Council of State's judgment of 12/7/2017 concluding that Community obligations had been breached in 16 areas of the territory. In this case, the CJEU finds the breach, in particular because of the systematic and persistent exceeding of the annual limit value for nitrogen dioxide since January 2010 in 12 agglomerations and air quality zones[922].

Once again, the contribution of the national courts is crucial, as is the strengthening of judicial cooperation, including where this is required with the CJEC. It remains to be seen how the Court of Justice of the European Communities will respond to the preliminary questions submitted by the German Landgericht Erfurt, which are closely based on the theory of rights of nature[923]. On the other hand, it seems highly unlikely that a national court would use its power of injunction to require the legislator to recognise the legal personality of nature or its rights; such a scenario would overstep the limits of its function as a judge in a democratic society or at least risk undermining its authority in view of the current controversies on the issue in several Member States.

c) Liability and ecological damage: the imperative reform of Directive 2004/35

The European contribution to the complex construction of a liability system for damage to nature is clear but still unfinished. As early as 1977, the Commission proposed to study the appropriateness of a civil liability regime to ensure compensation for environmental damage caused by certain industrial activities[924]. Its white paper on environmental liability (2000)[925] met with hostility from the companies most exposed to environmental risks. While its green paper on remedying environmental damage (1993) envisaged the use of civil liability and other remedial mechanisms[926], Directive 2004/35/EC establishing a special administrative police regime only concerns certain environmental

[920] judgment of the General Court of 27/9/2018, Mellifera eV & al, T-12/17, (approval of the active substance Glyphosate) ECLI:EU:T:2018:616. judgment of the Court of First Instance of 4/11/2021, Stichting comité N 65 Ondergronds Helvoirt, T5/21-, (directive 2008/50 ambient air quality), ECLI:EU:T:2021:813. Order of the Court of 24/11/2016, Juozas Edvardas Petraitis, C137/16 -P, ECLI:EU:C:2016:904.

[921] Order of the General Court of 8/5/2019, T-330/18, A. Carvalho v Parliament and Council, ECLI:EU:T:2019:324. The Court rejects the applicants' appeal: judgment of the Court of 25/3/2021, A. Carvalho v Parliament and Council, C-565/19, ECLI:EU:C:2021:252 - The applicants sought compensation for the damage suffered in the form of an injunction; for the judge, their action for compensation seeks the same result as their application for annulment, since the applicants do not satisfy the conditions of admissibility of the action for annulment, their application for compensation is also inadmissible

[922] judgment of the Court of 24/10/2019, Commission v France, C-636/18, ECLI:EU:C:2019:900.

[923] Cases C-388/21 and C-506/21, *cited above*. For the record, one of the questions: "*Does Union law, and in particular the principle of effectiveness and the fundamental rights of Union law such as the principles and rights of nature, impose a right to compensation based on the civil liability of the vehicle manufacturer where that manufacturer has been at fault (negligently or intentionally) in placing on the market a vehicle equipped with a disabling device prohibited under Article 5§2 of Regulation (EC) No 715/2007?*" Cases removed from the Court Register in February and March 2024

[924] Second Community Environment Action Programme 1977, op. *cit.*

[925] COM (2000) 66 final.

[926] COM (1993) 47 final. For environmental damage "*not covered by the application of the principles of civil liability*".

damage and excludes damage to property and persons. The ambitions of this text are greatly atrophied and several authors have emphasised its conceptual ambiguities and inadequacies[927]. These disappointments are all the greater because hopes in this legislation were high due to the inadequacy of national liability regimes in the face of the specific nature of environmental damage[928]. Yet, as imperfect as it may be, this directive constitutes a first major step in the recognition of an autonomous environmental liability; it introduces new notions such as ecological services and functions, imminent threat of damage and obligations of prevention and repair on the part of the operator. It imposes reparation in kind to the exclusion of any pecuniary compensation. Moreover, the definition of services differs from the anthropocentric conception of the Millennium Ecosystem Assessment of 2005, by including the "*functions provided by a natural resource for the benefit of another natural resource*"[929] and not only the benefits for humans.

Admittedly, its scope is restricted (excluding air and biodiversity outside Natura 2000), and the limits placed on the liability of operators are debatable[930]. The anthropocentric bias towards soil damage is evident, although this is explained by the absence of legislation on soil protection[931]. The initial proposal for an environmental liability regime combining civil liability and administrative police quickly met with resistance from the Member States, which emphasised the singularity of their legal systems. Moreover, the exclusion of non-serious environmental damage[932] is criticised, as is the margin of interpretation left to the Member States concerning the assessment of the seriousness of the damage and the causal link. Finally, the directive excludes any right to financial compensation following damage or an imminent threat of damage. However, although it is the operator's responsibility to financially bear the actions of prevention and repair of environmental damage in kind in accordance with the polluter pays principle, several relaxations are provided for at the risk of thwarting the choice of "*reasonable repair*" options[933].

A compromise text par excellence[934], the directive provided that the Commission should submit to the European legislator a report on the modifications concerning the enlargement of the scope of damage and possible proposals on a system of compulsory financial security. Although in 2000 the Commission recognised that the "*fundamental elements of a liability system must be covered by a financial guarantee*"[935], the obligation to impose a financial guarantee was therefore not included in the proposed directive. Following an inter-institutional compromise between the EP[936], supported by the advisory bodies[937], and the Commission in partial agreement with the Council[938], the directive merely prescribes

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[927] G. VINEY and B. DUBUISSON (eds) " *Les responsabilités environnementales dans l'espace européen : point de vue franco-belge*", Ed. Bruylant 2006, 910 p. A. VAN LANG, *Réflexions désenchantées sur quelques aspects récents de la responsabilité environnementale*, *in "Pour un droit commun de l'environnement" Mélanges en l'honneur de M. PRIEUR*, Dalloz, 2007, 1740 p., p. 1671-1696. G. WINTER, J.H. JANS, R. MACRORY and K. KRÄMER, Weighing up the EC environmental liability directive, *Journal of Environmental Law* 2008, 20 (2), p. 163-191, N. HERVE-FOURNEREAU, *L'Union européenne et la responsabilité environnementale : Illustration topique d'un enchevêtrement complexe des compétences communautaires et nationales* in *Responsabilité environnementale, prévention, imputation, réparation*, C. CANS (dir.), Ed. Dalloz, 2009, 421 p., p 263-294.

[928] As early as 1976, G. MARTIN underlined "*the unsuitability of civil liability law to pollution phenomena*" (*Responsabilité civile pour faits de pollution en droit de l'environnement*, law thesis, University of Nice, 1976). G. MARTIN (ed.) *Le dommage écologique en droit interne, communautaire et comparé*, Ed. Economica, 1992, 254 p. Report by P. BRUN on the foundations of environmental liabilities *in Les responsabilités environnementales dans l'espace européen : point de vue franco-belge,* G. VINEY et B. DUBUISSON (eds.), Ed. Bruylant-LGDJ, 2006, 910 p.

[929] Article 2 of Directive 2004/35/EC.

[930] Concerning damage to protected species and habitats (Natura), the Directive specifies that the operator of professional activities other than those listed in Annex 3 will only be held liable if he has committed a fault or negligence.

[931] As a reminder, the proposal for a Soil Directive (COM (2006) 232 final), withdrawn by the Commission in 2014, failed.

[932] In the sense of seriously affecting the conservation status of protected species and habitats (Natura 2000), the status of water bodies (WFD) and "*risk of serious negative impact on human health*" (damage to soil).

[933] Annex II Remedying environmental damage of Directive 2004/35/EC.

[934] This study refers to the numerous analyses and criticisms of this directive.

[935] COM (2000) 66 final, white paper on environmental liability.

[936] In its report (A5-145/2003) on the proposed directive, the Environment Committee demands compulsory insurance, while the Industry Committee opposes it. In its legislative resolution (1re reading), the EP provides that "*Member States shall ensure that operators take out insurance or other forms of appropriate financial guarantees*", OJEU 2004 C 67 E/85.

[937] Opinion of 12/7/2000 on the white paper, *supra*. In its opinion on the proposal for a directive in 2002 (*supra*), it noted that the absence of an insurance obligation "*may weaken the effectiveness of the proposal*".

[938] France defended an incentive regime (Report of the National Assembly, No. 973 of 19/6/2008), op. *cit.* Senate Report, No. 348

the adoption of measures by the Member States to "*encourage the development of (...) financial collateral instruments and markets, including financial mechanisms covering insolvency*". However, in 2010, the Commission concluded that it did not have sufficient evidence to propose an EU-wide mandatory guarantee scheme due to the lack of practical implementation of the Directive in Member States[939]. It deplores significant delays and discrepancies in transposition and implementation[940]. The second report of 2016 confirms this disparate application according to the Member States, with the number of cases varying from 1 to 95 per year, of which only 20% concern biodiversity. The Commission acknowledges that the directive "*has made a modest contribution to improving the level of environmental protection*"[941]. Calls for the revision of this directive are multiplying and in 2017 the European Parliament identified ways to improve the text[942]. Pending the finalisation in 2023 of the quality review process of Directive 2004/35/EC[943], the publication of the Commission's guidelines on the concept of environmental damage aims to clarify several misunderstandings and implementation difficulties[944].

The diagnoses on the imperfections of Directive 2004/35 are therefore widely shared, regardless of the school of thought. Nevertheless, notwithstanding the limitations, this legislation has played a role in the evolution of national regimes on civil liability for environmental damage. Furthermore, as with all legislation based on EU environmental policy, states have the right to maintain or adopt stronger legislation and to extend the scope of the Directive to other damage such as protected species and habitats beyond the Natura 2000 regime[945].

The French example illustrates this dynamic with the recognition of ecological damage from the Erika case law[946] to the 2016/1087 law on biodiversity[947]. Thus in 2012 the Court of Cassation qualified ecological damage as "*autonomous objective damage*" in the sense of "*any non-negligible damage to the natural environment (...) which has no repercussions on a particular human interest but affects a legitimate collective interest*"[948]. This ecological damage is now defined by the Civil Code as "*constituting a non-negligible damage to the elements or functions of ecosystems or to the collective benefits derived by man from the environment*"[949]. The prejudice is therefore much broader than the damage caused to the environment, it does not need to be serious but only non-negligible and all the elements of the ecosystems are targeted without them being the subject of a specific protection law[950]. If reparation '*is carried out primarily in kind*', in the event of '*de jure or de facto impossibility or inadequacy of reparation measures*', Article 1249 of this code provides that the judge 'shall *order the person responsible to pay damages and interest allocated to the reparation of the environment*'.

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of 21/5/2008 [rapporteur J. BIZET] on the draft law on environmental liability.

[939] COM (2010) 581 final, Report from the Commission pursuant to Article 14§2 of Directive 2004/35/EC.

[940] Several Member States will be subject to infringement proceedings before the CJEU. Similarly, the Court will be asked by various national courts to interpret the Directive.

[941] COM (2016) 204 final, Report from the Commission on the implementation of Directive 2004/35/EC.

[942] EP resolution of 26/10/2017 on the application of Directive 2004/35, OJEU 2018 C 346/184.

[943] Launch of the process in November 2021 with public consultation from May to August 2022: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13251-Environmental-Liability-Directive-evaluation-_en

[944] Communication 2021 from the Commission on guidelines for a common understanding of the term environmental damage as defined in Article 2 of Directive 2004/35/EC, op. *cit.*

[945] According to the Commission's second report on the implementation of the Directive: half of the Member States have done so applying the Directive to all protected species and habitats in the Member States: Belgium, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Portugal, Sweden, UK. COM (2016) 204 final.

[946] Decision of 25/9/2012 of the Court of Cassation, Criminal Division, SA Total et al. n°3439. It confirms the interpretation of the Paris Court of Appeal of 30/3/2010 (n°08/02278) by recognising the autonomy of this ecological damage.

[947] M. BOUTONNET, "*Responsabilité civile environnementale*", Ed. Dalloz, 2020, 156 p. M-P. CAMPROUX-DUFFRENE, *Le préjudice écologique et sa réparabilité en droit civil français de la responsabilité ou les premiers pas dans un sentier mener à un changement des rapports Homme-Nature*, *RJE* 2021/3, vol.46, 457-474. M. BOUTONNET, *Quel avenir pour le régime de réparation du préjudice écologique ? in Revue Justice et actualités*, n° *Justice pénale environnementale*, June 2021, 139-144

[948] In its decision of 25/9/2012, the Court of Cassation recognises the autonomy of this objective ecological prejudice in relation to the personal and subjective prejudices of associations and local authorities.

[949] Article 1247 of the Civil Code: issued from article 4 of the law 2016/1087 of 8/8/2016 for the reconquest of biodiversity, nature and landscapes. (JORF n°184 of 9/9/2016).

[950] E. THIEBOLD & M-P. CAMPROUX-DUFFRENE, *La preuve du préjudice écologique et de sa réparabilité*, *in Revue Justice et actualités*, n° *Justice pénale environnementale*, June 2021, 128-138,

In their report on "*legal paradigm shifts for a renewed environmental law*" (2021), Marie-Pierre CAMPROUX-DUFFRENE and Véronique JAWORSKI suggest drawing inspiration from this French system to "*introduce civil liability at European level*"[951]. Following the example of other authors, J. DARPO recommends the revision of Directive 2004/35/EC in order to broaden its scope and complete the compensation arrangements. He also raises the question of establishing a fund for the restoration of nature[952]. These recommendations are shared by the defenders of nature's rights, who point out that the scope of Directive 2004/35/EC is too restrictive and also call for a reversal of the burden of proof[953]. On this last point, companies were strongly opposed during the drafting process of the directive to any reversal or reduction of the burden of proof of damage.

The process of Directive 2008/99/EC and the necessary revision of Directive 2004/35/EC are opportunities to strengthen the protection of nature, including its defenders.

The determination of reparation measures in kind is a decisive and complex step in terms of scientific and economic evaluation and the degree of uncertainty. The example of the conviction of individuals for illegal underwater fishing in the Calanques National Park (a public institution) in France demonstrates this. In 2020, the Marseilles Criminal Court sentenced them to pay the national park, as a civil party, the sum of 350 060 euros for ecological damage; but in June 2021, the Aix en Provence Court of Appeal reduced this sum to 52 068 euros[954]. The appeal brought by the Calanques National Park against this judgment before the Court of Cassation was however rejected on 4 October 2022[955].

The quality of remedial measures and their monitoring over time by competent entities is another essential element in the implementation of environmental liability regimes.

Finally, the financing of compensation and the problem of identifying the perpetrators and solvency of those responsible for damage caused to nature are other stumbling blocks to be overcome. Directive 2004/35/EC provides for the possibility for the Commission to present proposals for "*a harmonised system of compulsory financial guarantees*" in the light of the results of a report on the effectiveness of the directive. However, in 2016, the Commission acknowledged the persistence of difficulties in implementing the Directive in relation to "*large-scale accidents and the insolvency of liable economic operators*"[956], but did not envisage the introduction of a mandatory system of financial guarantees. Faced with this *status quo*, the EP nevertheless calls on the Commission to propose such a system, along the lines of compulsory environmental liability insurance; it also suggests that the Commission study the establishment of a European fund in the event of default by the financial markets and to cover "large-scale *accidents*" in the event that the person or persons responsible for the damage cannot be identified[957].

The quality assessment of Directive 2004/35/EC and the revision that will be necessary to undertake are essential, including with a view to the creation of a fund dedicated to the prevention and repair of damage.

The issue of the financing and use of damages was particularly relevant during the negotiations on the future directive on the protection of the environment through criminal law (replacing Directive 2008/99/EC). As it stands, the text includes a specific provision on screening, identification, freezing and

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[951] M-P. CAMPROUX-DUFFRENE and V. JAWORSKI, *Des changements de paradigme juridique pour un droit de l'environnement rénové*, report to the Green Group in the European Parliament, May 2021, 58 p.
[952] See also the study by MG. FAURE, *Environmental Liability of Companies*, requested by the JURI committee of the European Parliament, 2020, 151 p.
[953] *Towards an EU Charter of the Fundamental Rights of Nature, supra.*
[954] Court of Appeal of Aix en Provence of 29/6/2021, n°20/01931. In another decision (CA Besançon of 23/2/2021, n°19/01375), the Court ordered a farmer, under penalty, to replant hedges that he had uprooted even though they constituted natural habitats for protected animal species and to restore the natural state of the meadows by late mowing of the plots that he had converted into crops or, failing that, of equivalent plots nearby.
[955] Court of Cassation of 4/10/2022, criminal chamber, appeal n°21-85.290.
[956] COM (2016) 204, *supra*.
[957] EP resolution of 26/10/2017 on the implementation of the Environmental Liability Directive, *supra*.

confiscation of instruments and proceeds from the commission of or contribution to the commission of offences (article 10). It refers to Directive 2014/42/EU on the freezing and confiscation of instrumentalities and the proceeds of crime in the EU[958] which until now did not include Directive 2008/99/EU in its scope. A recent proposal for a directive aims to strengthen the legal framework constituted by this Directive 2014/42/EU by extending it to environmental crime, including trafficking in plant species and essences and ship-source pollution[959].

According to Directive 2014/42/EU, it is foreseen that Member States have the possibility to sell or transfer frozen and confiscated assets and to use them "for *public interest or social purposes*" (Art. 10), a provision which is not challenged in the future directive on asset recovery and confiscation[960]. In April 2022, the EP's Environment Committee thus suggested amending the future directive intends to replace Directive 2008/99/EU by providing for the possibility for Member States to use confiscated assets *'where appropriate*' to '*make good the damage but also to cover the costs of managing, housing and caring for confiscated live animals or to allocate the proceeds of confiscated wildlife to public entities for education and conservation purposes*'[961]. In October 2022, the Committee on Civil Liberties, Justice and Home Affairs also proposed that Member States should set up a national fund for victim compensation and environmental restoration[962].

The extent of the funding and the choice of the authority managing the funds, as well as the evaluation of the spatio-temporal effectiveness of the restoration measures, are therefore essential. In its 2019 activity report, the Calanques National Park stated that the sums obtained as a result of legal action "*will be directly allocated to protection and management actions aimed at restoring the marine environment and in particular the no-take zones*"[963]. This right of appropriation demonstrates the importance for national parks, as public institutions, to be empowered to defend in court the interests of the nature they protect and to obtain compensation in the event of ecological damage.

These questions again transcend the different schools of thought and several proposals of the promoters of the rights of nature overlap with those defended by other authors. In the proposal for a directive on the rights of nature presented by the promoters of the ECI project, it is envisaged that the court will appoint a "*trustee*" responsible for using the damages to restore the natural entity that has suffered damage. It is also proposed to provide for "*alternative sentencing mechanisms*" to ensure restoration without further specification. Clearly, these processes of revising European directives are opportunities to "move the lines" in favour of strengthening the legal protection of nature's interests and its defenders. Recent legislative developments in Member States such as Belgium and France[964] should also be a source of inspiration.

The organisation of courts and the training of judges are also essential to ensure that ecological complexity is properly understood and appreciated (**2**).

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[958] CHEEK 2014 L 127/39.

[959] COM (2022) 245 final, Proposal for a Directive of the EP and of the Council on the recovery and confiscation of assets, it would replace Directive 2014/42/EU and Framework Decisions 2001/500/JHA, 2005/212/JHA, Decision 2007/845/JHA and Joint Action 98/699/JHA. Proposal still under discussion (in particular within the Council on 9/6/2023, ST 10347 2023 INIT); April 2024: https://data.consilium.europa.eu/doc/document/PE-3-2024-INIT/fr/pdf

[960] COM (2022) 245 final, op. *cit.*

[961] Draft opinion of 27/4/2022, n°2021/442, Rapporteur for opinion S.SPIETIKÄINEN

[962] Draft opinion of 4/10/2022, n°2021/442, Rapporteur for opinion <Depute>SS.BRICMONT BRICMONT</Depute>

[963] http://www.calanques-parcnational.fr/fr/publications-et-documents?field_document_category_tid=41&title=

[964] For the record. As a reminder: example of the law 2021/1104 of 22/8/2021 on combating climate change and strengthening resilience, which introduces new criminal offences into the environmental code: the offence of endangering the environment (art. 173-3-1 of the said code), the general offence of polluting the environment and, finally, a new offence with the confusing title of 'ecocide' for the most serious offences (L 231-3). See also the law of 24/12/2020 on the European public prosecutor's office, environmental justice and specialised criminal justice (JORF n°312 of 26/12/2020) which provides for the possibility for the public prosecutor's office to propose, as an alternative method of resolving conflicts, a judicial agreement in the public interest in environmental matters to the perpetrator of the offence (consisting of payment of a fine of up to 30% of the company's average turnover, compensation for the damage, regularisation of the situation under the supervision of the competent ministry), art. 41-1-3 Code of Criminal Procedure. The first 7 applications of this system raise reservations about its dissuasive and effective effect in terms of repairing ecological damage.

2) From judicial organisation and training of judges to ecological complexity

Whatever their school of thought, the authors share the same diagnosis: the urgent need to train judges, to adapt the judicial organisation and to deploy appropriate means to grasp and respond to the complexity of ecological systems and their interactions with our societies.

Since its 2008 Communication on the implementation of Community environmental law[965], the Commission has regularly insisted on the essential training of national judges. To this end, it has established cooperation with networks of judges and prosecutors, such as the European Forum of Judges for the Environment, created in 2004[966]. Since then, funding for training programmes[967] has been aimed at strengthening the effectiveness of environmental legislation and the judicial protection of EU rights[968]. More cautiously, some directives and regulations provide for Member States to support the training of judges while ensuring that the independence of the judiciary and the organisational diversity of national judicial systems are not prejudiced[969]. On the other hand, when evaluating the implementation of EU legislation, the EU institutions and advisory bodies stress the need to ensure the training of national authorities, including their courts.

The future directive to replace the Environmental Protection Directive with criminal law includes a specific provision on regular and specialised training for judges, prosecutors, police and other judicial staff and authorities involved in proceedings and investigations. The proposal also specifies that Member States shall "*ensure*" that their competent authorities have "*sufficient qualified personnel*" (article 17) to detect, investigate, prosecute and try environmental offences. Member States will also have to "*ensure*" that sufficient financial, technical and technological resources are made available to them[970]. In their proposed amendments, the European Parliament's Development & Environment Committees supplemented the training requirements for transnational offences, cybercrime and financial crime[971] (not included in the future directive).

The requirement for environmental training of judges to be provided by Member States (*"shall ensure*") is also found in the proposed directive on the rights of nature envisaged by the sponsors of the 2017 European Citizens' Initiative[972].

The same observations are made at Member State level. The French report "*Une justice pour l'environnement*" (2019) calls for "*massive investment*" in the initial and ongoing training of players, including judges, with a view to creating "*a common culture (...) of legal protection of the environment*"[973].

These training requirements for the courts can be explained both by the legal technicality and the extra-legal complexity of environmental matters.

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[965] COM (2008) 773 final.

[966] This forum was created on the initiative of G. CANIVET (who presided over the French Court of Cassation), A. POSTIGLIONE (Italian Court of Cassation), L. LAVRYSEN (Belgian Constitutional Court) and Lord CARNWATH (Royal Courts of Justice UK). https://www.eufje.org.

[967] Various projects have been carried out or are underway, notably in the framework of the LIFE programme: Project "*Access to justice, education and awareness of legal professionals*" coordinated by Client Earth and Justice & Environment (2017-2020); Training Project "*Cooperation with national judges in the field of environmental Law*" coordinated by ERA (2020-2023). https://www.era.int/upload/dokumente/24432.pdf

[968] C (2017) 2616 final, Communication on access to justice in environmental matters.

[969] Example of Directive 2012/29/EC of the EP and of the Council of 25/10/2012 establishing minimum standards on the rights, support and protection of victims of crime, (Article 25 on training of practitioners including judges and prosecutors), OJEU 2012 L 315/57.

[970] Article 16 of the proposed Directive COM (2021) 851 final.

[971] Opinions of the Development Committee of 7/12/2022 and of the Environment Committee (...) of 25/10/2022, mentioned above.

[972] Article 11 "*Due to the complexity and inter-relatedness of environmental issues, Member States shall ensure that all judicial officers receive adequate training in environmental issues*".

[973] Ministry of Ecological Transition and Solidarity and Ministry of Justice, "*Une justice pour l'environnement*", *mission d'évaluation des relations entre justice et environnement*, October 2019, 99 p.

This training in environmental law, extended to include an understanding of ecological and socio-ecological complexity, is combined with the possibility for judges to call on experts. Like any other court, the CJEU may "*entrust an expert opinion to any person, body, office, committee or organ of its choice*"[974]. In addition, judicial cooperation via preliminary rulings makes it possible to disseminate a harmonised understanding and interpretation of EU environmental legislation. Although litigation for failure to fulfil obligations remains a major component of environmental litigation, there has been a steady increase in references for preliminary rulings, particularly concerning Directive 2004/35, the WFD and the directives making up the Natura 2000 network[975].

The environmental training of future and current justice actors, as well as the training of European and national public authorities, is therefore essential. The many delays and gaps that have accumulated due to lack of time, resources or simply political prioritisation are particularly worrying. These observations are not recent and the French example is far from unique. In 2006, Senator Fabienne Keller deplored the significant lack of training and "*European culture" in the implementation of* Community environmental law[976]. Does the French government's announcement in June 2022 to launch a major training plan for civil servants on the environment and its integration into public policy[977] finally herald a real change, echoing the report "*Teaching the ecological transition in higher education*" by Jean Jouzel and Luc Abadie (2020)[978]?

These training needs resonate with the issue of the specialisation of environmental courts. One of the IUCN's motions (2016) encourages the authorities to do so, including by setting up dedicated environmental courts. The positions of the promoters of the rights of nature converge with those defended by other authors in favour of these movements for the specialisation of jurisdictions. The promoters of the ECI project on the rights of nature (2017) recommend that Member States establish "*specialist environmental courts or tribunals to deal with cases specifically relating to the Rights of Nature*".

Because of the principle of institutional and procedural autonomy, such an organisational choice is left to the Member States. Several of them are engaging in these specialisation approaches[979]. Such dynamics require the dissemination of knowledge on the environment and the training of judges in environmental law, regardless of jurisdiction. In France, Law 2020/1675 on the European Public Prosecutor's Office, environmental justice and criminal justice establishes regional judicial centres specialising in environmental offences[980]. It provides, within the jurisdiction of the 37 courts of appeal, for a judicial

[974] Article 25 of the Statute of the CJEU.
[975] Over the last five years, more than 50% of Natura 2000 cases have been referred for preliminary rulings; the proportion of references for preliminary rulings has also increased over the last five years in the case of water policy (almost one third of cases) and Directive 2004/35 has given rise to almost 70% of references for preliminary rulings.
[976] Author of several reports: Information report on the budgetary issues related to Community environmental law, n°342 of 10/5/2006. Information report on the follow-up of infringement proceedings in the field of environment, n°402 of 18/6/2008, Information report on the application of Community environmental law, n°20 of 12/10/2021.
[977] Press release from the Prime Minister on 29/6/2022 at the presentation of the 2022 annual report of the High Council for the Climate. The multi-year training plan will be based in particular on the mobilisation of the schools of the senior civil service. To be launched in October 2022: 25,000 managers in the State civil service should benefit from this training by 2024 and then this training will be provided to 12,000 managers in the territorial civil service and 4,000 managers in the hospital civil service by 2027 (https://www.transformation.gouv.fr/ministre/actualite/lancement-du-premier-plan-de-formation-des-agents-publics-la-transition). The President of the National Assembly proposes to promote "*awareness-raising*" of MPs on the environment. A first "*express awareness-raising*" in June 2022 for a quarter of the new assembly, a first cycle on climate issues only brought together about thirty MNAs out of the 115 registered (as a reminder 577 MNAs) in October 2022.
[978] Report of the working group submitted on 8/7/2020 to the Minister of Higher Education, 17 p. The question of training on these subjects obviously goes beyond the training of future civil servants; the training of future managers and employees of private companies is essential.
[979] COM (2022) 438 final, Communication on *"Environment Policy Implementation Review*", op. *cit.* The Commission cites examples of initiatives in Sweden, Finland, Denmark, Ireland and Belgium, including that of the Mons Court of Appeal, which created an environmental chamber in 2022. UNEP, *Environmental Courts and Tribunals, A guide for policymakers*, 2021, 142 p.
[980] JORF n°312 of 26/12/2020.

tribunal specially designated to hear certain civil environmental disputes, including actions relating to ecological damage[981].

The successive reforms of the architecture of the CJEU have not followed a logic of institutionalised specialisation for settling environmental disputes. Such a choice is not specific to environmental matters. On the other hand, a certain more subtle specialisation has emerged in the distribution of disputes among the Advocates General of the Court[982]. As a '*critical watchdog*'[983], certain advocates-general have gradually entered the environmental field[984] and play a role of informed scouting in the exercise of their mission at the Court. Their scientific background and 'ecological awareness' are reflected in their reasoning and the interpretation of legislation that they suggest to the Court. They can also disseminate and infuse this knowledge into other cases, promoting a singular integration of environmental requirements into EU policies.

Finally, the recent introduction of the European Public Prosecutor's Office may provide new opportunities to support the ongoing legislative reform processes. The draft Treaty establishing a European Constitution already provided for the establishment of such a body to "*combat offences against the financial interests of the EU*"[985]. It also envisaged the possible extension of the powers of this prosecutor's office to "the *fight against serious crime with a cross-border dimension*"[986]. The Treaty of Lisbon takes up this perspective and reiterates the possibility for the European Council, acting unanimously, to extend the powers of this independent body[987]. Based on one of the adoption procedures (enhanced cooperation) introduced by the TFEU[988], Regulation (EU) 2017/1939 establishes the European Public Prosecutor's Office to "*investigate, prosecute and bring to trial the perpetrators of, and accomplices to, criminal offences against the financial interests of the EU*"[989] of more than EUR 10 000 for fraud involving EU funds or cross-border VAT fraud of more than EUR 10 million. It thus "prosecutes cases *before the competent courts of the Member States until the case has been finally disposed of*". Structured at a central level[990] and decentralised, it relies in particular on Deputy European Public Prosecutors acting on its behalf in the Member States concerned[991]. Since the adoption of the regulation, 6 other Member States[992] have joined the 16 Member States that initiated enhanced cooperation. One month before its entry into operation in June 2021, the EP calls on the Commission "to *examine the possibility of extending the mandate of the European Public Prosecutor's Office, once it is fully established and operational, to environmental crime*"[993]. The investigations carried out by the European Anti-Fraud Office are sources of information for the Prosecution Service. In the latest report on

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[981] Decree 2021/1305 of 7/10/2021 amending the list of regional centres specialising in environmental offences set out in Articles D 47-5-1 of the Code of Criminal Procedure and D. 211-10-4-1 of the Code of Judicial Organisation, JORF n°235 of 8/10/2021.
[982] Allocation under the responsibility of the First Advocate General.
[983] L. CLEMENT-WILZ, "*La fonction de l'avocat général près de la Cour de Justice*", Ed.Bruylant, 2011, 1098 p. Expression used in his book to describe the Advocate General.
[984] Like Advocate General J. KOKOTT, author of 118 conclusions in the environmental field (in particular concerning Natura) from 2004 to 2022. Between 2018 and 2022, out of the 68 conclusions concerning environmental cases: two Advocates General dealt with 50% of the cases: 23 for J. KOKOTT and 11 for H. SAUGMANDSGAARDØE.
[985] CHEEK 2004 C 310.
[986] CHEEK 2004 C 310.
[987] Article 86 of the TFEU.
[988] In the absence of unanimity in the Council, "*a group of at least 9 Member States may request that the draft regulation be referred to the European Council. In this case, the procedure in the Council is suspended. After discussion and in the event of consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption. Within the same period, in the event of disagreement and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft concerned, they shall inform the EP, the Council and the Commission accordingly*. In this case, the Commission presented a proposal for a Regulation establishing a European Public Prosecutor's Office in 2013 (COM (2013) 534 final) on which the Council failed to agree for three years.
[989] Regulation, October 2019, Laura CODRUTA KÖVESI is appointed as the first Head of the European Public Prosecutor's Office for a non-renewable 7-year term.
[990] The Council appointed 20 European Public Prosecutors for a non-renewable term of 6 years on the basis of 3 candidates presented by each Member State. Council Implementing Decision (EU) 2020/117 of 27/7/2020 appointing the European Prosecutors of the European Public Prosecutor's Office, OJEU 2020 L 244/18.
[991] Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, Spain.
[992] Austria, Italy, Malta, Netherlands, Latvia, Estonia.
[993] EP resolution of 20/5/2021 on corporate liability for environmental damage, OJEU 2021 C 15/186.

the protection of the EU's financial interests[994], the Commission highlights the emergence of new fraudulent activities linked to the ecological transition and waste management which the office has investigated. In a recent report by the French Public Prosecutor's Office on the criminal handling of environmental litigation, the members of the working group support the extension of the prerogatives of the European Public Prosecutor's Office to environmental offences of supranational scope and scale[995]. Pending the extension of the powers of the European Public Prosecutor's Office, the consideration of the environmental component of offences against financial interests is a first step in the construction of a "*European environmental public order*[996]".

C - Guaranteeing the execution of legal decisions

"Justice without force is powerless; force without justice is tyrannical"[997]. The authority of the figure of the judge, combined with the authority of his judgments, is a promise of '*change for the future*'[998]. However, the real, even idealised, normative force of case law comes up against numerous obstacles, despite the right to the enforcement of court decisions[999] within a reasonable time. The absence of enforcement, or the late or incomplete enforcement of legal decisions, accentuates the risks of aggravation, or even irreversible destruction of the ecosystems and natural entities concerned.

The perpetrators of offences and violations of the law are well aware of the existence of this sword of Damocles and do not hesitate to abuse it. The use of mechanisms to counter such breaches of the rule of law is necessary, not to mention the excessive temporality of the procedures, notwithstanding the emergency measures that are not always adapted to the singularity of ecological damage.

Several studies question the effectiveness of judicial decisions in countries where nature rights are recognised by judges or by the constituent and/or legislative power[1000]. They conclude that they are respected and have a random impact on improving the protection of the natural entity benefiting from the rights.

In their proposal for a directive on the rights of nature, the promoters of the draft ECI provide that Member States shall ensure the provision of "*enforcement tools and remedies that can carry out the court or tribunal's decision and provide measurable outcomes for preventing or remedying harm*"[1001].

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[994] COM (2022) 482 final, 33rd annual report on the protection of the EU's financial interests and the fight against fraud, 2021.

[995] The extension of the competence of the European Public Prosecutor's Office to environmental offences is recommendation no. 9 of this report. Presentation of the report of the working group chaired by the Public Prosecutor at the Court of Cassation F. Molins on 7/12/2022. https://www.courdecassation.fr/files/files/Parquet%20général/Rapport_PG_envir.pdf

[996] F. BAAB, European Public Prosecutor, Interview " *We need to create a European green public prosecutor's office* ", 6/6/2022, Les Surligneurs, https://www.lessurligneurs.eu/frederic-baab-procureur-europeen-il-faut-creer-un-parquet-vert-europeen/

[997] B. PASCAL, Pensées, Ed. P. Sellier, 2000, 736 p.

[998] F. TULKENS, *L'exécution et les effets des arrêts de la CEDH. Le rôle du judiciaire, in CEDH, Dialogue entre juges, Conseil de l'Europe, Strasbourg 2006*, quoted by E. LAMBERT ABDELGAWAD, *L'exécution des décisions des juridictions européennes* (CJCE et CEDH), *AFDI*, vol.52, 2006 p 677-724.

[999] Notably recognised by the ECHR; Hornsby/Greece judgment of 19/3/1997, application 18357/91: for the Court, the execution of a judgment is thus an integral part of the trial within the meaning of Article 6§1 of the Convention. In the environmental field: see in particular the ECHR Okyay/Turkey judgment of 12/7/2005, application no. 36220/97: according to the Court, failure to comply with court decisions suspending the operation of three thermal power stations is tantamount to "*circumventing*" the said decisions, which "*undermines the rule of law*", or the Bursa Barosu Baskanligi/Turkey judgment of 19/6/2018, application no. 25680/05: failure to enforce court decisions concerning the cancellation of the authorisation for a Cargill starch plant.

[1000]The authors cite, for example, the unsuccessful implementation of the Colombian Constitutional Court's ruling on the Atrato River due to the state of corruption in the region, which is confronted with numerous illegal extraction activities. L. KRÄMER, Rights of Nature and their implementation, *Journal for European Environmental Policy & Law*, 2020, *supra*. Study by J. DARPO, *Can Nature get it Right? Rights on Nature in the European Context, op. cit. M. GUIM*, Where Nature's Rights go Wrong, *Virginia Law & Economics* 2021, vol. 107, issue 7, 1347-1420. C.M. KAUFFMAN & P. L MARTIN, Can rights of Nature make development more sustainable? Why some Ecuadorian lawsuits succeed and others fail? *World Development*, Vol. 92, 2017, 130-142.

[1001] 2017, supra.

Different mechanisms exist in the Member States to ensure the enforcement of court decisions. Depending on their judicial systems, judges have the possibility to set financial penalties to ensure the enforcement of their decisions. Basic questions thus arise concerning the persons entitled or appointed to monitor the enforcement of judgments[1002], the determination of financial penalties and their allocation. Jan DARPO cites the example of the appointment by the Italian administrative judge of a "*commissario ad acta*" responsible for the enforcement of court decisions[1003] which could inspire the other Member States. He also suggests introducing into European legislation the obligation of the competent national authorities to "*report back to the national courts in cases on review*"[1004].

Admittedly, the Aarhus Convention does not expressly mention the enforcement of judgments in Article 9; nevertheless, without undermining the procedural autonomy of the Member States, the EU legislator could enrich the provision on access to justice in future legislation on this point. Furthermore, in accordance with the principle of loyal cooperation, Member States must "*ensure fulfilment of the obligations arising out of the Treaties or resulting from acts of the institutions of the Union*"[1005]. It is up to them to choose the procedures that comply with the principles of equivalence and effectiveness governing access to justice under EU law.

In the event of a persistent refusal by a Member State authority to comply with a court decision concerning compliance with EU law (e.g. Directive 2008/50/EC on ambient air quality), the CJEU has clarified that EU law "does *not empower*" a national court to "*impose coercive measures against persons holding an office in the exercise of public authority*" in the absence of a legal basis in national law. It insists that any such coercion provided for in national law must be "*sufficiently accessible, foreseeable in its application and insofar as the limitation which would be imposed on the right to liberty (Article 6 of the Charter) (...)"* and respect *"the conditions laid down (...) in Article 52§1 of the Charter of Fundamental Rights*"[1006].

More recently, national courts have taken the measure of the ecological emergency by using their power to impose financial penalties to counter the possible non-enforcement of their decision. For example, in France, in July 2020, the Council of State imposed a substantial fine (at a rate of 10 million euros per six-month period) on the State "*if it does not justify having, within six months of notification of this decision, executed the decision of the Council of State of 12 July 2017*"[1007] concerning compliance with Directive 2008/50/EC on ambient air quality[1008]. By its decision of 4/8/2021 the Council of State proceeded to the provisional liquidation of the penalty payment for the period from January 2021 to July 2021 condemning the State to pay 10 million euros divided between the associations and various agencies "*having sufficient autonomy with regard to the State and whose missions are related to the subject matter of the litigation*"[1009]. In view of the measures presented by the government, the Supreme

[1002] In some rulings recognising rights to nature (such as rivers), in addition to the appointment by the judge of guardians, their involvement is foreseen with a management committee to monitor the execution of the ruling (Tribunal Superior Medellin, 2019/076 of 17/6/2019, Cauca River); in other cases, an ombudsman is responsible for monitoring compliance with the judge's ruling (example of the rulings concerning the Ganges and Yamuni Rivers). L.D SANCHEZ TORRES, A-G CASTANO, M-A GANDINI, G. ALMARIO, MV MONTERO & MV VERGARA, Commission for the Upper Cauca River Basin-Recovery, collaborative governance for sustainability and water security, *Frontiers Water*, 14/4/2022, Sec. Water and Human Systems.

[1003] The administrative court may appoint an individual "*Commissario ad acta*", within the competent authority or outside the administration, who will be answerable to the court for the execution of the order.

[1004] Study J. DARPO, *Can Nature get it Right? Rights on Nature in the European Context, op. cit.*

[1005] Art. 4 TEU.

[1006] Judgment of the Court of 19/12/2019, Deutsche Umwelthilfe eV v Freitstaat Bayern, C-752/18, ECLI:EU:C:2019:1114.

[1007] judgment of the Council of State of 10/7/2020, n°428409, Association les Amis de la terre & al. ECLI:FR:CEASS:2020:428409.20200710.

[1008] As a reminder, in its decision n°394254 of 12/7/2017, the Council of State had enjoined the Prime Minister and Minister for the Environment to take the necessary measures for the elaboration of the air plans within the shortest possible time and to transmit it to the European Commission before 31 March 2018.

[1009] judgment of 4/8/2021, n°428409, ECLI:FR:CECHR :2021:428409.20210804. 100,000 euros to the association *Les Amis de la Terre France*, 3.3 million euros to the ADEME (agency for the environment and energy management), 2.5 million euros to the CEREMA (centre for study and expertise on risks, the environment, mobility and planning), 2 million to the ANSES (national agency for food, environmental and occupational health safety), 1 million euros to the INERIS (national institute for the industrial environment and risks), 350,000 euros to Air Parif and Atmo Auvergne Rhône-Alpes each and 200,000 euros to Atmo Occitanie and Atmo Sud each

Court considered that they will not allow "to consider that they will be of a nature to put an end to the still observed exceedances or to consolidate the situation of non-exceedance" of the concentration rates of nitrogen dioxide[1010] for the zones of Aix Marseille, Lyon, Paris, Grenoble and Toulouse. On 17/10/2022, the Court therefore ordered the State to pay 20 million euros in respect of the fine imposed in July 2020 for the period from July 2021 to July 2022. Once again, the distribution of this penalty payment is for the benefit of the association Friends of the Earth and mainly for public agencies and approved air quality monitoring associations in the areas concerned[1011].

Since the Maastricht Treaty, the Court of Justice of the EU has also had the power to impose financial penalties on national authorities that fail to comply with EU law. Originally set up to deal with non-compliance with judgments for failure to fulfil obligations, this special judicial procedure has been extended since the Lisbon TEU to situations where "*the Member State has failed to fulfil its obligation to communicate measures transposing a directive*" (...)"[1012].

It is settled case law that the enforcement of a judgment for failure to fulfil obligations must be "*commenced immediately*" and completed "within *the shortest possible time*"[1013]. Since its 1996 Communication[1014], the Commission has determined the financial penalty, which it proposes to the Court, according to three criteria: the seriousness of the infringement, its duration and the need to ensure that the penalty has a dissuasive effect in order to prevent repeat offences. In accordance with the principle of proportionality, account is taken of the specific circumstances of the case and its ability to pay[1015]. Its assessment of the seriousness of the infringement is based on the importance of the legal rules which are the subject of the infringement and the consequences of the infringement for general and particular interests. Without being bound by these guidelines[1016], the Court has a "*broad discretion*"[1017] when examining the case on a case-by-case basis. It thus takes into consideration the existence of aggravating circumstances[1018], the conduct of the State or its loyalty during the pre-litigation procedure[1019], but also the progress made to justify a degressivity of the sanction[1020]. Not surprisingly, the first recourse to this procedure is in the environmental field. In this case, Greece was condemned in

[1010] judgment of 4/8/2021, no. 428409, aforementioned.
[1011] judgment of 17/10/2022, n°428409, ECLI:FR:CECHR:2022:428409.20221017. 50,000 euros to the association *Les Amis de la terre*, 5.95 million euros to ADEME, 5 million euros to CEREMA, 4 million euros to ANSES, 2 million euros to INERIS, 1 million euros to Air Parif and Atmo Auvergne Rhône-Alpes each, 500,000 euros to Atmo Occitanie and Atmo Sud each.
[1012] Article 260 of the TFEU.
[1013] Constant case law since the Court's judgment of 4/7/2000, Commission v Hellenic Republic, C 387/97, Waste Directives, ECLI:EU:C:2000:356.
[1014] Communication on the implementation of Article 171 of the Treaty, OJEC 1996 C 242/6.
[1015] Since 1997, the Commission has constructed a calculation methodology based on the gross domestic product of the Member States and the institutional weight of the Member States (number of representatives in the EP). See the latest update of the data used for the calculation of the sanctions by the Commission (OJEU 2022 C74/2). 328/16: take into account the arguments of the Hellenic Republic that its GDP decreased by 25.5% between the year 2010 and the year 2016.
[1016] judgment of the Court of 31/5/2018, Commission v Italy, C 251/17, Directive 91/271/EEC concerning urban waste water treatment, ECLI:EU:C:2018:358.
[1017] judgment of the Court of 25/7/2018, Commission v Spain, C-205/17, Directive 91/271/EEC urban waste water, ECLI:EU:C:2018:606.
[1018] judgment of the Court of 2/12/2014, Commission v Italy, C196/13-, Waste and Landfill Directives, "*existence of a practice of a general and persistent nature tends to reinforce the seriousness of the infringement*", ECLI:EU:C:2014:2407. judgment of the Court of 12/11/2019, Commission v Ireland, C- 261/18, Directive 85/337/EEC, '*the Member State has not acted in accordance with its duty of loyal cooperation (...) which constitutes an aggravating circumstance*' ECLI:EU:C:2019:95. For the Commission, the lack of loyal cooperation by Member States is also an "*aggravating circumstance*" (Communication on the implementation of Article 228 TEC, SEC (2005) 1658). Similarly, considerable delays in the full implementation of the first infringement judgment constitute aggravating circumstances (23 years delay: Court judgment of 31/5/2018, Commission v Italy, C 251/17, (waste water) prec; 18 years delay: Court judgment of 25/7/2018, Commission v Spain, C-205/17 (waste water). Depending on the circumstances of the case, the Court considered that a period of 6 years was considerable: Court judgment of 7/9/2016, C584/14-, (waste directives) ECLI:EU:C:2016:636.
[1019] Consideration is given to slight improvements (Case C584/14-, *supra*,), cooperation of the State during the pre-litigation procedure (Court judgment of 4/7/2018, Commission/Slovak Republic, C-626/16, Waste directives, ECLI:EU:C:2018:525), efforts of the State to fulfil Community obligations (Court judgment of 27/2/2020, Commission/Hellenic Republic, C 298/19, Directive 91/676/EEC protection of waters against pollution caused by nitrates from agricultural sources. ECLI:EU:C:2020:133.)
[1020] judgment of the Court of 25/7/2018, Commission v Spain, C-205/17, *cited above*.

July 2020 for non-compliance with a 1992 judgment of failure to fulfil obligations concerning the disposal of waste in the Chania region[1021]. From the outset, the Court emphasised that failure to comply with the obligation to dispose of waste must *"by the very nature of that obligation (...) in relation to other obligations, be regarded as particularly serious*"[1022]. In all the environmental cases brought before it, the Court confirms that "*failure to comply with a judgment of the Court is of such a nature as to be detrimental to the environment and to endanger human health (...) is of particular gravity*"[1023]. It insists on the transversal and fundamental character of the objective of environmental protection, qualified as an essential objective of the EU[1024].

As with any breach of Community obligations, the Member State "*may not plead internal difficulties to justify*" non-compliance with a judgment for failure to fulfil obligations[1025]. While the Treaty provides for the "*payment of a lump sum or penalty payment*", the CJEU chooses to combine the two types of penalty in the light of the circumstances of the case and the type of infringement committed[1026]. Thus, almost systematically in environmental cases, the financial penalty consists of a periodic penalty payment determined "*according to the degree of persuasion necessary*"[1027] to bring the infringement to an end and a lump sum based "*essentially on an assessment of the consequences of the failure of the Member State concerned to fulfil its obligations on private and public interests*"[1028]. Account is also taken of "*the urgency with which the Member State concerned must comply with its obligations*"[1029]. The consideration of "*serious or irreparable damage to human health or the environment*" is expressly mentioned in the method for calculating financial penalties (gravity and duration coefficients)[1030] even though the purpose of the procedure is not to "*obtain compensation for the damage and harm suffered by the victims of the infringement*"[1031]. Environmental cases represent a major component of all cases dealt with by this "*enforcement route*"[1032]. Water and waste directives are the most targeted; however,

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[1021] judgment of the Court of 4/7/2000, Commission v Hellenic Republic, C 387/97, ECLI:EU:C:2000:356, penalty payment of EUR 20 000 per day of delay in implementing the measures necessary to comply with the judgment of the Commission v Greece from the date of delivery of the present judgment.

[1022] *Ibid*.

[1023] judgment of the Court of 9/12/2008, C-121/07, Commission v France, Directive 2001/18/EC GMOs, ECLI:EU:C:2008:695. judgment of the Court of 27/2/2020, Commission v Hellenic Republic, C-298/19, Directive 91/676/EEC Protection of waters against pollution caused by nitrates from agricultural sources. ECLI:EU:C:2020:133. judgment of the Court of 22/2/2018, Commission v Hellenic Republic, C-328/16, Directive 91/271/EEC concerning urban waste-water treatment, "*The absence or inadequacy of, inter alia, urban waste-water treatment systems is liable to harm the environment and must be regarded as particularly serious*", ECLI:EU:C:2018:98 judgment of the Court of 12/11/2019, Commission v Ireland, C- 261/18, Directive 85/337/EEC, ECLI:EU:C:2019:95

[1024] judgment of the Court of 12/11/2019, Commission v Ireland, C- 261/18, Directive 85/337/EEC, ECLI:EU:C:2019:*95*- judgment of the Court of 27/2/2020, Commission v Hellenic Republic, C 298/19

[1025] judgment of the Court of 27/2/2020, Commission v Hellenic Republic, C-298/19, Directive 91/676/EEC Protection of waters against pollution caused by nitrates from agricultural sources. ECLI:EU:C:2020:133. judgment of the Court of 31/5/2018, Commission v Italy, C-251/17, Directive 91/271/EEC concerning urban waste water treatment, ECLI:EU:C:2018:358.

[1026] Since the Court's judgment of 12/7/2005, Commission v France, C-304/02, minimum mesh size of fishing nets, penalty payment and lump sum of EUR 20 million, ECLI:EU:C:2005:444. Of the 19 environmental cases, 15 involve a penalty payment and lump sum. The highest lump sum decided by the Court since the use of this procedure was in the environmental field: 40 million (judgment of the Court of 2/12/2014, Commission v Italy, C196/13-, Waste and Landfill Directives, ECLI:EU:C:2014:2407).

[1027] judgment of the Court of 17/10/2013, Commission v Belgium, C-533/11, Directive 91/271/EEC on urban waste water, ECLI:EU:C:2013:659. The Court recalls that the imposition of a penalty payment is justified, in principle, only insofar as the failure to comply with a previous judgment continues until the Court examines the facts. judgment of the Court of 31/5/2018, Commission v Italy, C 251/17, Directive 91/271/EEC Urban Waste Water, ECLI:EU:C:2018:358.

[1028] judgment of the Court of 27/2/2020, Commission v Hellenic Republic, C-298/19, *op. cit.*

[1029] judgment of the Court of 25/7/2018, Commission v Spain, C-205/17, Directive 91/271/EEC urban waste water, ECLI:EU:C:2018:606.

[1030] Commission, Method for calculating the periodic penalty payment under Article 171 of the Treaty, OJ C 63/2, 1997. Communication on the implementation of Article 228 TEC, SEC (2005) 1658: the same severity coefficient applies for both types of financial penalties. Of the 19 cases analysed, the highest severity coefficient calculated by the Commission was 11 on a scale of 20 (Court judgment of 31/5/2018, Commission v Italy, C 251/17, Directive 91/271/EEC concerning urban waste water treatment, *cited above*).

[1031] Communication on the implementation of Article 228 TEC, SEC (2005) 1658. Communication on the implementation of Article 171 of the EC Treaty, OJEC 1196 C-242/6.

[1032] i.e. 19 environmental cases referenced (all for non-execution of a judgment of failure to fulfil obligations) out of the 25 cases in other areas (including 4 for failure to communicate measures transposing a directive)

there are no cases so far concerning the enforcement of infringement judgments relating to Natura 2000 legislation.

Paradoxically, no in-depth examination of the use of this procedure and its impact on the improvement of the situation in the sanctioned Member State has yet been carried out[1033]. Admittedly, the low number of judgments, the threat of recourse to this procedure and the litigation prevention strategy coordinated by the Commission confirm the "last resort" nature of this enforcement method. However, a SWOT (Strengths, Weaknesses, Opportunities and Threats) analysis of this procedure would be appropriate in order to consider avenues of reform, particularly with regard to the determination of penalties[1034], their allocation and the effective enforcement of the judgment imposing a financial penalty on the State and the recovery of penalties[1035]. Article 260 of the TFEU does not specify the allocation or use of financial penalties. Like the fines imposed by the Commission for the implementation of competition rules, the penalty payments and lump sums fixed by the Court of Justice are allocated to the EU's own resources account[1036]. It is true that this "*enforcement procedure*" is not a procedure for compensating for environmental damage; however, this allocation raises questions at another level, that of the *ultimate* use of financial sanctions by the EU[1037]. Under its 2014-2020 multiannual financial framework, the EU committed itself to devoting at least 20% of its budget to climate action and wishes to increase this share to 30% for the period 2021-2027. However, a report by the Court of Auditors contradicts the Commission's satisfaction with the success of this objective. In this case, the auditors consider that the Commission's declaration of climate expenditure was *"unreliable*" and deduce that only "*13% of the 2014-2020 budget"* was used for these actions. They also raise doubts about the methodology used, which affects the reliability of the declarations, including for the period 2021-2027[1038].

Beyond recourse to Article 260 of the TFEU, the control of the execution of the CJEU's infringement judgments remains under the responsibility of the Commission and therefore depends on the exercise of its discretionary power, notwithstanding the complaints it may receive, petitions addressed to the Parliament and complaints to the European Ombudsman. Consequently, any action for failure to act by individuals against the Commission on the general ground that it has refrained from initiating infringement proceedings is inadmissible[1039]. Given the current institutional balance, it would probably

[1033] The 2016 study on assessing the benefits delivered through the enforcement of EU environmental legislation devotes little development to this procedure. European Commission, Directorate-General for Environment, *Study to assess the benefits delivered through the enforcement of EU environmental legislation: final report*, 2016, Opoce, https://data.europa.eu/doi/10.2779/043074

[1034] In this case, the choice of severity (scale of 1 to 20) and duration (scale of 1 to 3) coefficients according to the nature of the environmental damage.

[1035] Portugal and France have challenged the Commission's decisions on the recovery of financial penalties imposed by the Court. judgment of the General Court of 19/11/2011, France v. Commission, T-139/06, application for annulment of Commission Decision C (2006) 659 requesting payment of the periodic penalty payments due pursuant to the judgment of the Court of 12/7/2005 (C-304/02, minimum mesh size of fishing nets, action dismissed by the Court which considers that the Commission is bound by the judgment of the Court and has no jurisdiction to reduce the amount of the fixed penalty payment decided by the Court. ECLI:EU:T:2011:605; and Judgment of the General Court of 29/3/2011, Portuguese Republic v. Commission, T 33/09, application for annulment of Commission Decision C (2008) 7419 of 25/11/2008 requesting payment of the periodic penalty payments due pursuant to the judgment of the Court of Justice of 10/1/2008, C-70/06, (public contracts), ECLI:EU:T:2011:127

[1036] Final adoption (EU, Euratom) 2022/182 of the general budget of the EU for the financial year 2022: for the financial year 2021: EUR 60 714 472 and EUR 149 404 071 for the financial year 2020. CHEEK 2022 L 45/1.

[1037] This includes the Member States, most of which have made provision in advance for a budget line related to the risk of financial sanctions.

[1038] Court of Auditors, Special Report '*Climate expenditure in the EU budget 2014-2020. A reality below the published figures*', 2022/9.

[1039] Constant case law. Order of the Court of 6/9/2022, C-195/22 P, Plataforma de Trabajador@s Temporales del Ayuntamiento de Zaragoza, (social policy) ECLI:EU:T:2022:36: the Court recalls the conditions of the action for failure to act by individuals: "*The action for failure to act may be brought not only against failure to adopt an act producing binding legal effects of such a nature as to affect the interests of the applicant, by bringing about a marked change in his legal position, but also against failure to adopt a preparatory act, if it constitutes the necessary precondition for the conduct of a procedure intended to lead to an act producing binding legal effects.*" Ditto for an action for annulment against the Commission's refusal to bring an action for failure

be premature in the short term to consider expanding the number of persons entitled to bring an action for failure to fulfil obligations during the forthcoming negotiations on a revision of the TEU. On the other hand, upstream of the litigation procedures, increased participation by stakeholders[1040] and EU authorities such as the EEA or the European Ombudsman[1041] in the examination of the implementation of legislation not only by the Member States[1042] but also by the European authorities.

Finally, the enforcement of CJEU decisions can also be seen in the light of the indispensable contribution of national courts to ensuring compliance with EU legislation more generally. For example, the French administrative courts have recognised the responsibility of the State, in particular for failure to comply with national environmental legislation transposing European directives[1043]. In addition, the CJEU has established the obligation of Member States "*to make good damage caused to individuals by breaches of Union law for which they are responsible*"[1044] subject to compliance with specific conditions, including where "*the breach in question arises from a court adjudicating at last instance*"[1045]. In relation to the directive on the assessment of the environmental effects of certain construction projects, the Court has, however, made it clear that '*the fact that an environmental impact assessment has been omitted in breach of the requirements of that directive does not, in principle, confer a right of action in itself, under Union law and without prejudice to less restrictive rules of national law on State liability, a right of an individual to compensation for purely pecuniary damage caused by the depreciation in the value of his property as a result of the environmental impact of that project*"; while concluding that "it is *for the national court to ascertain whether the requirements of Union law applicable to the right to compensation, in particular the existence of a direct causal link between the* alleged *infringement* and the damage suffered, are satisfied"[1046]. The Francovich jurisprudence shows its limits here with regard to its anthropocentric and individual focus on compensation for damage caused by individuals unless it is reformulated in terms of the essential purpose that governs it: to ensure the judicial protection of rights conferred by EU law and the implementation of EU law. Therefore, excluding members of the "public concerned" and environmental damage would be highly questionable. As far as the case law of the CJEU and the preliminary questions of national courts are concerned, this issue remains in the shadow of the reasoning.

The imperatives of preventing litigation and ensuring the effective implementation of the judgments of the CJEU and national courts therefore make it necessary to identify the various margins for progress combining a fair mix of sanctions and demanding support measures[1047].

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to fulfil obligations: Order of the Court of 24/11/2016, Juozas Edvardas Petraitis v Commission, C-137/16 P, ECLI:EU:C:2016:904.

[1040] In its 2017 opinion on the review process of the implementation of EU environmental policy, the EESC recommends a stronger involvement of civil society organisations and offers to act as a facilitator to contribute to this dialogue. CHEEK 2017 C 345/114.

[1041] As a reminder, the Ombudsman's function is limited to situations of maladministration by the EU institutions and bodies.

[1042] Process launched by the Commission since 2016: COM (2016) 316 final, Communication of 27/5/2016, "*Delivering the benefits of EU environmental policies through regular review of their implementation*". COM (2017) 63 final, "*The EU Environment Policy Implementation Review: Common challenges and how to combine our efforts to deliver better results*". The Communication is accompanied by 28 summary reports for each State highlighting challenges, progress and existing good practice. The review process is part of a bi-annual cycle.

[1043] Examples in the field of legislation (including EU directives) on water, classified installations, air pollution.

[1044] CJEC judgment of 19/11/1991 Francovich and others, C-6/90 and C-9/90, (social policy), ECLI:EU:C:1991:428. In order to do so, three conditions must be met: the rule of EU law infringed is intended to confer rights on the individuals affected, the infringement of that rule must be sufficiently well-founded and there must be a direct causal link between the infringement and the damage suffered by the individuals.

[1045] judgment of the Court of 30/9/2003, Köbler, C-224/01, (free movement of workers), ECLI:EU:C:2003:513

[1046] judgment of the Court of 14/3/2013, Jutta Leth, C-420/11 (reference to the Austrian court), Directive 85/337/EEC EIA, ECLI:EU:C:2013:166

[1047] N. BOBBIO, "*De la structure à la fonction, nouveaux essais de théorie du droit",* Ed. Dalloz 2012, 186 p, (the author has developed the idea of the promotional function of law and the use of "*positive*" sanctions). At the EU level, the Commission is encouraging this approach of accompanying Member States in the implementation of EU environmental law, in particular since the launch of its review mechanism on this subject. COM (2016) 316 final, op. *cit.*

In the light of a critical analysis of EU law and the theory of nature's rights, these three thematic chapters have identified various ways of strengthening nature protection. From the *status quo* to a full recognition of nature's rights in EU law, it is now important to outline several scenarios and policy recommendations (**Ch. 4**).

CHAPTER 4 - SCENARIOS AND RECOMMENDATIONS

Several scenarios were discussed with the team members to identify the paths that could be taken in the short, medium and long term. Two categories of scenarios can be distinguished **(A).** The *status quo* scenario was considered the no-go scenario. The scenario of action for enhanced nature protection and a rethought legal relationship between humans and natural entities is therefore urgently needed. It must be based on 5 pillars that are essential to ensure a real qualitative leap. These serve as the basis for 12 key recommendations **(B)**.

A - From status quo to action: an obvious choice

1) The *status quo* scenario: a no-go scenario

The scale and severity of ecological emergencies intertwined with social emergencies demonstrate that the *business-as-usual* scenario is unjustifiable. The *Doughnut Economics Action Lab*'s 2022 report is clear. None of the 140 countries surveyed live in a space of ecological security and social justice[1048].

"One day we will be told, you knew all this, what did you do?[1049] *"We cannot say that we did not know. Let's make sure that the 21st century is not the century in which humanity commits a crime against life*"[1050]. From 1992 to 2002, the speeches of two French presidents at the Earth Summits tragically resonate twenty years later with the declarations of the UN Secretary General at the Climate and Biodiversity COPs. However, have those in charge not continued to look the other way[1051]? Are they not still paying careless, even casual, attention to the scientific warnings that have been voiced for so many years? Is the acceleration of phenomena getting out of hand? Similarly, the growing echo of transnational social movements in favour of alternatives to the dominant socio-economic models reveals a deep crisis of mistrust of decision-makers. From the NGO "Extinction Rebellion" to the mobilisations of the emerging collective "Scientists in Rebellion", civil disobedience is justified as one of the modes of action needed to challenge inaction and denial. Regardless of their counterproductive effects on public opinion, the recent attacks on masterpieces in several European museums show the exacerbation of feelings of anger and eco-anxiety. More classically, the climate and biodiversity litigation reflects the determination of the plaintiffs to hold decision-makers accountable through the use of legal weapons. The explosive combination of crises, war and emergencies of all kinds amplifies the risks of societal tipping points at different scales on the planet.

The dynamics and attractiveness of the rights of nature movement also reflect these demands for change and argue for harmonious legal relationships with natural entities. The *status quo* scenario is also proving to be an impossible one for the proponents of rights of nature.

In addition to the imperative need to respect existing environmental law, the effectiveness of nature protection remains an issue in the light of scientific assessments. Criticisms of the law converge on the same diagnosis, regardless of the legal school of thought: the *status quo* is not a viable scenario. In

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[1048] A-L. FANNING, D. W. O'NEILL, J. HICKEL, N. ROUX & al, The social shortfall and ecological overshoot of nations, *Nature Sustainability*, 5, 26-36 (2022).

[1049] Speech by F. MITTERRAND on the global mobilisation for the environment and development and its contribution to the emergence of a new international order based on solidarity, Rio, 13/6/1992. https://www.vie-publique.fr/discours/208343-discours-de-m-francois-mitterrand-president-de-la-republique-sur-la-m

[1050] Statement by J. CHIRAC on the critical situation of the global environment and France's proposals for sustainable development, Johannesburg, 2/9/2022. https://www.elysee.fr/jacques-chirac/2002/09/02/declaration-de-m-jacques-chirac-president-de-la-republique-sur-la-situation-critique-de-lenvironnement-planetaire-et-les-propositions-de-la-france-pour-un-developpement-durable-johannesburg-le-2-septembre-2002

[1051] Cf. sentence in the above-mentioned statement by J. CHIRAC: "*Our house is burning and we are looking elsewhere*".

addition to the ecological threats it entails, such a scenario presents a very high degree of multidimensional insecurity for the rule of law and democracy.

Moreover, this *status quo* scenario may open the way for processes of regression in the legal protection of the environment. Such a risk is far from hypothetical. The imperatives of socio-economic transition and urgency are likely to provide an anchor for such processes. Strong vigilance is therefore required, even if these measures are described as temporary to accompany but also accelerate transitions. This is a complex paradox. The regulation (UE) 2022/2577 establishing a framework for accelerating the deployment of renewable energies is consistent with the objective of carbon neutrality. It is also presented as one of the levers to counter Russia's use of energy "as a *weapon of war*"[1052]. The Commission considers that *"temporary but immediate measures (...)* are needed *to achieve some of its objectives more quickly*". The choice of a regulation aims to respond to this temporality. Similarly, it insists on its character as a "*temporary emergency measure*"[1053] of one year's duration which could be extended, as demonstrated by amending regulation (EU) 2024/223. Furthermore, this Council Regulation is based on Article 122 of the TFEU, which provides for the adoption of measures to deal with "*serious difficulties*" in the "*supply of certain products*" such as energy. The simplification and acceleration of licensing procedures is the main thrust of the proposal. To this end, the Commission considers that renewable energy projects are presumed to be in *the* "*overriding public interest and in the interest of public health and safety*"[1054]. This recognition allows for the justification of derogations from the WFD's prevention of deterioration obligations but also from the general obligations of the Natural Habitats and Birds Directives and Directive 2011/92/EU (2014/52/EU). Significant negative impacts on ecosystems, habitats and species and infringements of the procedural rights to information and public participation will therefore not be hypothetical. The choice not to exclude Natura 2000 protected areas from the scope of application raises questions about the importance attached to this protected nature. Is it also a way of limiting the risks of social protest in these areas to the vigilance of associations? In the name of urgency, the drafting of the proposed regulation (now adopted[1055] did not give rise to consultations with stakeholders, nor to an impact assessment; yet this text suspends the principles, rights and obligations at the heart of several directives. This makes it all the more clear why the proposed regulation on nature restoration is essential. Consequently, if the *status quo* scenario is to be avoided, it is imperative to act to strengthen the legal protection of nature, including against the risks of regression (**2**).

2) The action scenario for enhanced nature protection: an imperative

Compliance with existing law is paramount and the EU should promote the development of legal indicators of the effectiveness of its environmental legislation[1056]. However, it will not be possible to deal with the multiple pitfalls and acceleration of the degradation and destruction of nature if the economic matrix of EU policies persists. It is true that the interpretative dynamics of environmental law are a lever that should not be neglected. However, they will not be sufficient. Moreover, the voluntarism of the courts is fragile in time and intrinsic to the function of judges[1057].

[1052] COM (2022) 591 final, Proposal for a Council Regulation for a framework for accelerating the deployment of renewable energy.
[1053] COM (2022) 591 final
[1054] COM (2022) 591 final
[1055] Council Regulation (EU) 2022/2577 of 22/12/2022 establishing a framework for accelerating the deployment of renewable energy, OJEU L 335/36. Amended by Regulation (EU) 2024/223, OJEU 2024/223.
[1056] The studies carried out under the aegis of Michel PRIEUR form a basis for discussion: *Mesurer l'effectivité du droit de l'environnement, des indicateurs juridiques au service du développement durable*, (M. PRIEUR, C BASTIN, A. MEKOUAR, Ed. Peter Lang, 2021, 268 p. *Les indicateurs juridiques, outils d'évaluation de l'effectivité du droit de l'environnement, Institut de la Francophonie pour le développement durable*, 2018, 188 p.
[1057] Reversals of the case law of the CJEU may occur (even if they are rare), and the legislator may also amend existing legislation as interpreted by the judge. Finally, one should not forget the limits of the judge's competence and the principle of the separation of powers.

Enhanced legal protection of nature therefore also requires questioning the conceptual foundations of existing law and building, if necessary, new and more ambitious legal frameworks. In this perspective, the challenge of this action scenario lies in the place and role to be given to the theory of the rights of nature in EU law.

This scenario is divided into five sub-scenarios with different degrees of probability, allowing a multi-year political and legal strategy to be built. Some of these sub-scenarios may be combined or linked according to a timeframe that it is up to the authorities to programme. From this point of view, it is specified what place the EU could give to the theory of the rights of nature in these trajectories of evolution, or even transformation of the law and the European socio-economic matrix.

The first scenario aims to strengthen the legal protection of nature without explicitly recognising its rights (**1**). The second scenario is satisfied with a mere political and symbolic recognition of nature's rights by the EU (**2**). The third promotes the recognition of nature's rights in the EU's external relations (**3**). The fourth scenario relies on the law of Member States that may recognise the rights of nature (**4**). Finally, the last scenario envisages an express recognition of the legal personality of nature and/or nature's rights in EU law (**5**).

a) Strengthening the legal protection of nature without explicit recognition of its rights

This sub-scenario of the action does not foresee the recognition of the legal personality of nature and/or its rights. Various political and legal factors discussed in this study show the high probability of this scenario under the current state of EU law.

Several legislative revision processes attest to the EU's declared choice to strengthen nature protection and its integration into its other policies. Under the impetus of the Green Deal and the thematic strategies (biodiversity, zero pollution, forests, etc.), various texts have already been adopted. The revision of the directive on the protection of the environment through criminal law and the proposed regulation on nature restoration should enrich the existing legal framework. Similarly, the forthcoming quality review of the Environmental Liability Directive could lead to its amendment, which should be strongly supported. Legislative proposals on due diligence or on strategic lawsuits that distort public debate are all necessary elements to strengthen the protection of nature and its defenders. Great care must also be taken to ensure that environmental protection is not undermined in the weighing of interests and rights. The discussions on the determination of the personal and material scope of the proposed directive on the due diligence[1058] demonstrated this. Similarly, the accelerated deployment of renewable energies[1059] requires a democratic debate, including on the consequences of the presumption of overriding public interest for other activities and investments that would also qualify as sustainable.

b) A simple political and symbolic recognition

This sub-scenario of action envisages a simple political and symbolic recognition of the rights of nature in EU law. The recent Spanish law on the Mar Menor lagoon could help the EU to take into account the conceptual transformations taking place in the Member States and at international level. The EP and the EESC are gradually supporting this process in several resolutions, reports and opinions[1060]. Their request for studies on the rights of nature shows their political interest in building their persuasive strategy. As far as the Commission's communications are concerned, the issue of the rights of nature has

[1058] In particular regarding the application to the financial sector. See the opinions of the parliamentary committees and the discussions in the Council, *op. cit.*
[1059] Op. *cit.*
[1060] As a reminder, EESC opinion of 28/6/2019 on the discussion paper "Towards a sustainable Europe by 2030", op. *cit.*

remained in the shadows. There have been some semantic developments, such as the term 'environmental stewards', but these lack stability and precision. The new global framework on biodiversity (2022) recognises the diversity of value systems, including the rights of nature and Mother Earth, "*as integral to its successful implementation*". The adoption of a joint EP, Council and Commission political declaration on the European implementation of this global framework could anchor the recognition of this pluralism of values and representations of nature in EU law. An inter-institutional declaration would give meaning to the European ambition to "*bring nature back into our lives*" in the spirit of "*living in harmony with nature*". Furthermore, it would offer a visibility and political discussion of the theory of the rights of nature but also of the natural commons, constituting a kind of acculturation phase that is essential before considering a recognition of the rights of nature by the EU and its Member States. Members of the European Parliament are gradually adopting this strategic approach, including in the legislative process. For example, the Parliamentary Committee on Development is inserting a new recital in the future directive on the protection of the environment through criminal law. Several examples of recognition of nature's rights abroad and the recent Spanish law on the Mar Menor lagoon are cited here. Cautiously, it is stated that "*the Union could take into account these legal frameworks (...) as well as the ongoing reform processes in the Union, and provide sound legislation that would incorporate a long-term vision* (...)[1061]. This conditional prefigures a further step, which would be to disseminate the term 'rights of nature' in non-binding discourses and documents. Notwithstanding its political tone, this sub-scenario requires agreement on the meaning of the concept of 'rights' and the identification of the beneficiaries of these rights as well as the persons entitled to represent and defend nature and/or natural entities. Hence the importance of pursuing open and transparent debates along the lines of the conferences already organised by the EP and why not in the form of European citizens' conferences.

c) Respect for the rights of nature and indigenous rights in the EU's external relations

At the Biodiversity and Climate COPs in 2022, the EU reaffirmed its ambition to play a leadership role. Target 19 of the new global framework on biodiversity again aims to increase financial resources, in particular for developing countries. This target identifies among the actions "*strengthening the role of collective actions, including those of indigenous peoples and local communities, actions focused on Mother Earth (...)*". These "*Mother Earth-centred*" actions express "*the ecocentric and rights-based approach to implement actions aimed at establishing harmonious and complementary relationships between people and nature, promoting the continuity of all living beings and their communities, and ensuring the non-commodification of the environmental functions of Mother Earth*". This new global framework reaffirms "*the important roles and contributions of indigenous peoples and local communities as custodians of biodiversity".* Echoing the 2007 UN Declaration on the Rights of Indigenous Peoples[1062], it is stated that this new global framework "shall *not be interpreted as diminishing or extinguishing the rights that indigenous peoples have now or may acquire in the future*". Notwithstanding the non-binding nature of this framework and the 2007 UN Declaration, the EU is committed to ensuring respect for their rights and associated value systems.

This sub-scenario of action is thus about taking account of this pluralism in the EU's external relations[1063], and not exclusively with third countries where indigenous rights and the rights of nature are recognised in their legal systems. In addition to complying with their treaty obligations, the EU and its Member States need to substantially strengthen the regulation of their economic exchanges and corporate behaviour in markets that undermine nature, environmental and indigenous rights. In its Communication on "*Strengthening Trade Partnerships*" (2022), the Commission explains that "*the EU's values-based approach (...) seeks broader commitments from trading countries*"[1064] to promote sustainability and "*fair*

[1061] Opinion of the EP Committee on Development of 7/12/2022, op. *cit.* Recital 26a.
[1062] UN Declaration on the Rights of Indigenous Peoples adopted by the General Assembly on 13/9/2007, A/RES/61/295.
[1063] As a reminder, the study of the EU's external policies could not be pursued in depth in this study
[1064] COM (2022) 409 final.

and green economic growth". It also emphasises "*full respect for the Union's values and priorities*"[1065] and "*promoting and advancing the Union's sustainability agenda with third countries*" in line with the Green Deal and the SDGs. While recalling "*the right of countries to legislate*" to achieve their "*legitimate environmental and labour objectives*"[1066], the Commission identifies 6 priorities to better integrate sustainability into trade agreements. Among these priorities, strengthening the role of civil society and improving the monitoring of the implementation of the agreement, including the use of trade sanctions, are key. The Commission also states that the assessment of "*the impact of trade liberalisation on biodiversity will play an important role*" as part of the pre-negotiation impact assessments, but without further details. Furthermore, it does not mention the plural representations of nature and sustainability or even the contribution of the common trade policy to the protection of indigenous peoples' rights. However, the future agreement between the EU and New Zealand, for which negotiations were concluded in June 2022, reflects a certain evolution in the EU's trade approach[1067]. The agreement includes several provisions on Maori rights in relation to New Zealand's obligations under the 1840 Treaty of Waitangi. Chapter 20 "*Maori Trade and economic cooperation*" contains several definitions expressing their world view "*based on a holistic approach to life*" and their understanding of well-being in the sense of "*the balance and interconnection of many factors necessary for individuals and groups to feel truly well and to flourish*"[1068].

In addition to trade agreements, the current negotiation of autonomous instruments to regulate trade and the behaviour of EU and third country companies[1069] must be another way of respecting the plurality of values and rights of indigenous peoples. In several of its amendments to the proposal for a regulation *"on the placing on the market in the Union and the export of certain commodities and products associated with deforestation and forest degradation*", the EP insisted on respecting the rights of indigenous peoples "who are *often (...) the first victims of deforestation*"[1070] but does not mention the rights of nature[1071].

Finally, the EU is committed to "*mobilising international investors (...) to "play a leading role in building a financial system that supports sustainable global growth*"[1072]. The reform of its foreign investment policy[1073] must be stepped up to ensure greater respect for treaty obligations concerning environmental and human rights, including those of indigenous peoples. The EP insisted on the need to ensure coherence with the Green Deal by supporting sustainable investments, including outside the EU. It suggests excluding "*investments in fossil fuels or any other activities that seriously undermine the environment and human rights from treaty protection*"[1074]. It also calls for ensuring the participation of

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[1065] This resonates with Article 3§5 of the TEU which states that "*in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens (...) contribute to peace, security and the sustainable development of the planet (...)*".

[1066] COM (2022) 409 final. The Economic Partnership and/or Free Trade Agreements include these formulations.

[1067] Clearly the Maori provisions are relevant to New Zealand law. To a lesser extent, the Comprehensive Economic and Trade Agreement between Canada and the EU and its Member States (2016, OJEU 2017 L 11/23) contains a requirement to respect the "*existing aboriginal and treaty rights of the aboriginal peoples of Canada under section 35 of the Constitution Act, 1982*" but without a dedicated chapter as in the agreement with New Zealand.

[1068] Free translation of the agreement at the end of the negotiations in June 2022: Free Trade Agreement between the European Union and New Zealand, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement_en

[1069] Example of the proposed Directive on Due Diligence, *supra*. The scope also covers companies from third countries that operate "*significantly in the EU*" with regard to their net turnover (either more than 150,000,000 euros or more than 40,000 euros but not more than 50,000,000 euros in the EU provided that at least 50% of the worldwide net turnover was achieved in one or more sectors such as textiles, agriculture, forestry, fisheries and the exploitation of mineral resources (Article 2).

[1070] EP resolution of 17/2/2022 on human rights and democracy in the world and the European Union's policy on the matter, OJEU 2022 C 342/191.

[1071] Amendments adopted on 13/9/2022 concerning respect for the rights of indigenous peoples such as the right to free, prior and informed consent P9_TA(2022)0311. This text has now been adopted: Regulation (EU) 2023/1115.

[1072] Green Deal for Europe, op. *cit*.

[1073] As a reminder, the EU has exclusive competence in the area of common commercial policy, which since the Lisbon Treaty includes the regulation of foreign direct investment (Article 207 of the TFEU). For other categories of investment, the EU has a shared competence (Opinion 2/15 of the Court of 17/5/2015, ECLI:EU:C:2017:376).

[1074] EP resolution of 23/6/2022 on the future of the Union's international investment policy, OJEU 2023 C 32/96.

"*vulnerable local communities and...indigenous peoples affected by extractive or logging activities, in the negotiation and implementation*" of international investment agreements. There is much room for progress in greening investment law. Similarly, while the recent conclusion of the first agreement on the facilitation of sustainable investment with Angola[1075] may augur a change of logic, it also calls for great vigilance with regard to sustainability criteria and effective respect for environmental conventions and human rights, including the rights of the San and Himba peoples[1076].

This sub-scenario for action on respect for value pluralism, including the rights of nature, and indigenous rights in the EU's external relations is essential but has several translation and effectiveness pitfalls that need to be urgently overcome.

d) Recognition of the rights of nature by the Member States in accordance with EU law

This sub-scenario of the recognition of nature's rights by Member States has already started to materialise. The environmental code of the Loyalty Islands of New Caledonia and more recently the Spanish law concerning the Mar Menor lagoon and its basin illustrate this. In several Member States, a variety of citizens' and associations' initiatives advocate the recognition of the rights of nature and other aquatic ecosystems. From the point of view of subsidiarity, the States are legitimate to commit themselves to the recognition of the rights of nature. It could thus be considered that "*the objectives of the proposed action*" (recognising the rights of nature) will be achieved "*sufficiently (...) at the central, regional and local levels*"[1077]. Moreover, given the sensitivity of the current debates on the personalisation of nature, a process of recognition by the EU would come up against national resistance, particularly from the point of view of the subsidiarity principle.

Furthermore, Member States have the right to provide for enhanced protection measures in relation to EU environmental legislation and could in this context recognise the legal personality of nature and rights of nature and/or natural entities. It is up to them to ensure the compatibility of such measures with EU law and to notify them to the Commission in accordance with the environmental provisions of the TFEU. On the other hand, the situation can be tricky if EU legislation is based on the provisions on the free movement of goods or on Article 122 of the TFEU, as is the case with the regulation (UE) 2022/2577 to accelerate the deployment of renewable energy. In this case, could or would Spain, on behalf of the Mar Menor lagoon and its basin, consider refusing any energy installation from renewable sources in the territory of this natural entity? The regulation does not give any details. It will be instructive to assess the added value of the implementation of this Mar Menor law, which does not include a precise timetable or quantified objectives. Its Article 7 prescribes several obligations for the authorities, most of which resonate with those provided for in European legislation (WFD, Habitats, EIA)[1078]. Given the specific governance of the lagoon, it will be very enlightening to evaluate its "strength"

[1075] Commission press release of 18/11/2022, draft EU-Angola sustainable investment facilitation agreement. Chapter 5 on investment and sustainable development requires the parties to respect ILO conventions ratified by Angola and EU Member States, as well as multilateral environmental agreements including the Paris Climate Agreement and the Conventions on Biodiversity and International Trade in Endangered Species (CITES). The parties *shall* also promote corporate social responsibility and due diligence. https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a17ccfe1-ce36-428f-bc7f-76bcb902c36a/details?download=true

[1076] According to the NGO Transparency International, the country is exposed to significant corruption despite an improvement in the situation since 2017 (https://www.transparency.org/fr/news/cpi-2022-sub-saharan-africa-corruption-compounding-multiple-crises). Angola does not recognise the concept of indigenous peoples https://gitpa.org/web/Z%202015%20ANGOLA%20.pdf

[1077] Art. 5 of the TEU.

[1078] Article 7 (extracts and free translation): "*develop public policies and actions of prevention, early warning and precaution to prevent the extinction of the lagoon's biodiversity and the alteration of the cycles and processes that guarantee the balance of its ecosystem; promote education and awareness campaigns on the damage affecting the lagoon and the benefits it provides to society; carry out periodic studies on the state of the lagoon and a risk map; immediately limit activities that could lead to the extinction of species, the destruction of ecosystems and/or the permanent alteration of natural cycles; prohibit or restrict the*

in terms of the existing power games and its articulation with the authorities of the hydrographic district and those competent in the field of agriculture and urban planning. Finally, in the logic of broad access to justice, the analysis of the effective exercise of the right of any person to defend the natural entity in the name of the lagoon before the judge and/or the administration will also make it possible to measure the degree of legal rupture promised by the protagonists of the law. Certainly, given the current ecological state of the lagoon and its basin, it must be emphasised that this emblematic law will not immediately suffice to turn the situation around; nor will it be able to bring about the transitions and socio-ecological transformations of the Murcia region on its own.

On the other hand, this law, imperfect as it may be, could be a Trojan horse for enforcing compliance with existing legislation and the adoption of strengthened national measures as provided for in EU environmental law. There is a significant degree of probability that this law will inspire other Member States and further stimulate citizens' initiatives for the rights of nature or the natural commons. This will also depend on the ecological and democratic results achieved by the implementation of the Spanish law.

The role of the EU in this sub-scenario of action should not be limited to a mere observer or guardian of compliance with its law. The EU institutions should therefore strengthen their support for the organisation of meetings, experience sharing and research projects on these social and environmental transformations in the Member States. The processes of recognition of nature's rights and/or experiments in the Member States constitute a basis on which the EU can build to strengthen the legal protection of nature.

e) Express recognition of the rights of nature in primary law and/or EU legislation

As it stands, this sub-scenario of express recognition of the rights of nature in primary law and/or legislation has a low degree of probability. It requires the anchoring of a time-bound strategy with steps of acculturation of the theory of the rights of nature.

Agreement on the notion of rights (fundamental or not, objective/subjective or both) is necessary to determine their legal basis and scope in terms of invocability and judicial review. Moreover, the singularity of the EU legal system and its intrinsic incompleteness which complicates such paradigm shifts should not be underestimated.

The title of the study "*Towards an EU Charter of the Fundamental Rights of Nature*" attests to a "*fundamental*" conception of the rights of nature inspired by that of human rights. The instrument (the Charter) and the concept (fundamental rights) express this choice to give the rights of nature a "constitutional" fundamentality. Beyond the consensus that needs to be built to achieve such recognition, there are many pitfalls in view of the intensity of the current debates. The explicit recognition of a fundamental right to the environment in the Charter, combined with major improvements in legislation, could be a springboard for the consecration of the rights of nature. In the perspective of a revision of the TEU, the explicit recognition of such a fundamental right to the environment (objective and subjective in nature[1079]) in the EU Charter of Fundamental Rights would already be a substantial qualitative leap. One of the strategic issues will be the delimitation of the personal and material scope of this unique fundamental right, which could be interpreted in an eco-centric way. In addition, it would be important to amend the preamble of the Charter to recognise

introduction of organisms and organic and inorganic materials that could permanently alter the biological heritage of the lagoon".

[1079] As a reminder, "objective" rights in the sense of rules that apply to natural and/or legal persons governing their behaviour and aiming to guarantee public order in society. These rights are imposed on public authorities in the form of obligations to take measures to ensure their protection and exercise. Subjective rights in the sense of prerogatives granted by objective law to a legal subject who can assert them before the public authorities in case of infringement.

the intrinsic value of nature, the inseparable nature of the relationship of present and future generations with nature and to widen the circle of natural and legal persons[1080] benefiting from these rights. Such recognition should be accompanied by a strengthening of procedural rights (information, participation, access to justice).

The judicial recognition of nature's rights based on the interpretation of Article 37 of the Charter or environmental principles remains very hypothetical in the short term. Admittedly, the CJEU has on several occasions chosen voluntarist interpretations to guarantee the useful effect of legislation in the light of a combined reading of the provisions of the Charter and the Aarhus Convention. Despite the silence or imprecision of texts, it has deduced from the interpretation of general obligations incumbent on national authorities rights of participation and access to justice for the public, in particular associations, to ensure compliance with these nature protection obligations. More broadly, such interpretations are rooted in its founding case law that EU law "*is also intended to generate rights"*[1081] for individuals and that *"vigilance by individuals interested in safeguarding their rights leads to effective control*"[1082]. From the interpretation of obligations in favour of the recognition of objective and/or subjective rights conferred on individuals to the praetorian recognition of rights to nature, doubt persists in the absence of explicit signals in primary or secondary law on which the Court could rely and enrich its reasoning. The challenge to the CJEU could also come from the national courts, which would invoke the rights of nature in their request for interpretation of EU law. The CJEU has not yet ruled on the two references for a preliminary ruling submitted by the German court in August 2021 on this subject. It is to be imagined that the CJEU will provide a useful interpretation to the court without mobilising the reference to the rights of nature which is absent from the legislation and primary law. The integration of the theory of the rights of nature into the litigation strategies of environmentalists is thus one of the ways of mediatisation and debate in the courts.

The proposal for a directive on the rights of nature in the draft European Citizen Initiative is presented as another basis for recognition in EU law. Serious doubts remain as to the validity of a sub-constitutional enshrinement of fundamental rights of nature and/or natural entities as mere objects of law without being anchored in primary law. Based on the environmental provisions of the Treaty, this proposal for a directive only quotes Article 13 of the TFEU on animal welfare in its recitals without any reference to the Charter of Fundamental Rights. Moreover, the choice of a directive has consequences for the extent to which rights can be invoked by individuals[1083]. If the legal personality of nature is recognised, it is not specified which category of legal person (one can assume a legal person) or its type (private or public law). Finally, only the attribution of substantive and procedural rights is provided for, which confirms a conception excluding duties and responsibilities, unlike examples of rights of nature and/or natural entities in some third countries. The lack of clarification of these characteristics is a source of divergent interpretations and legal uncertainty, and *ultimately* undermines the recognition of the direct effect of the directive's provisions. Consequently, as primary law stands, the recognition of nature's rights via secondary legislation (directive and/or regulation) is highly uncertain. One option, albeit uncertain, would be to enshrine nature's rights in legislation on the basis of a very bold interpretation of the fundamental rights guaranteed by the Charter and/or fundamental rights "*as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States*" (Art. 6 of the TEU). However, the anthropocentric spirit and letter of the Charter could constitute a serious obstacle to such extensive interpretations for the benefit of natural entities.

The scenario of full recognition of legal rights of nature in EU law does not appear to be a path that can be taken in a short time. A pragmatic and decisive strategy based on 5 pillars is needed to build the

[1080] As a reminder, the anthropocentric approach of the Charter: in the preamble, it is specified that the Charter "*places the person at the heart of its action*" and that the "*enjoyment of rights entails responsibilities and duties with regard to others, the human community and future generations*".
[1081] Judgment of the Court of 5/2/1963, Van Gend en Loos v Administratie der Belastingen, 26/62, cited above.
[1082] *Ibid*.
[1083] As a reminder, the invocability of directives is restricted, unlike that of regulations.

conditions for enhanced nature protection, including in the perspective of the recognition of nature rights. These 5 pillars allow us to identify 12 key recommendations (**B)**.

B - The 5 pillars of the action scenario underpinning 12 key recommendations

The action scenario for enhanced nature protection must be anchored on 5 pillars that are essential to ensure a real qualitative leap (**1**). These 5 pillars are the basis for 12 key recommendations (**2**).

1) The 5 pillars: the basis of the action scenario for enhanced nature protection

This 5-pillar foundation relates to the 5 sub-scenarios for action presented above. Thus, in the event of recognition of nature rights in EU law, these 5 pillars are indispensable for building a strategy for enhanced nature protection.

PILLAR N°1: Recognition of the intrinsic value of nature in primary and secondary law

Far from being symbolic, this explicit recognition of the intrinsic value of nature should impose more balanced interpretations of the weighing of interests and rights beyond a short-term or even emergency temporality[1084]. Widespread recognition in EU law underpins the consecration of new categories (e.g. ecocide)[1085]. It leads to a rethinking of the qualifications of commodity and/or market good, however particular they may be, in order to develop legal statuses adjusted to the singularity of natural entities and to the complexity of our relations with nature[1086]. Although the Lisbon Treaty provides that the EU and the Member States "shall pay *full regard to the welfare requirements of animals as sentient beings*" (Article 13), environmental policy is not explicitly mentioned. However, as a reminder, in a recent judgment on the method of hunting with birdlime, the Court constructs its demonstration in the light of this article[1087]. Such an interpretation suggests that the welfare of wild animals should be taken into account, including in the case of capture and/or slaughter[1088]. These perspectives invite us to draw a wider circle of non-human sentient beings. More broadly, they question the appropriate qualification to be attributed to natural entities. Similarly, they question the coexistence of the different statuses that the law confers on them (specific market goods, sentient beings, natural resources, ecosystem services, heritage (...)) or could grant them (legal entity, natural commons (...)). Meetings along the lines of the conference on the future of Europe would help to rethink the legal representations of nature and the relationship between man and nature. The studies on the rights of nature (EESC, EP) and the natural commons (EP) offer elements conducive to such debates.

[1084] The place of this statement in the text (recital or articles) will play a role in the interpretation of the provisions.
[1085] Example of current discussions on ecocide. In its opinion of 25/10/2022 on the proposal for a directive on protection by criminal law, the EP's Committee on the Environment introduces the term intrinsic value of nature in amended recital 26, *supra*. Reminder: Waiting for the Council's vote following the EP's vote in favour at first reading in February 2024.
[1086] See in particular the reflections on the commons, including the natural commons, mentioned in this study.
[1087] judgment of the Court of 17/3/2021, One Voice & LPO, C-900/19, *cited above*.
[1088] This raises the question of the notion of well-being and the scope of the animal species concerned: protected species, invasive alien species (...)?

PILLAR N°2: The recognition of a right to the environment and the principles of non-regression, *in dubio pro natura* and ecological solidarity

Explicit recognition of a right to a "*safe, clean, healthy and sustainable* environment" in the EU Charter of Fundamental Rights is needed to give a substantial anchor to the procedural rights of information, participation and access to justice. The revision of the Treaties under the ordinary procedure[1089] would be an opportunity to enrich the environmental provisions of primary law. The consecration of an individual and collective right to the environment for present and future generations would constitute this qualitative leap in line with current international dynamics (UN & ECHR). In 2021, in a resolution, the EP called for the right to the environment and the right to nature for all human beings to be enshrined[1090]. Similarly, the Commission states that "*future generations have a right to a healthy environment and it is our duty to shape our socio-economic model in a way that respects the limits of our planet*"[1091]. In a recital, the 8th Environmental Action Programme (2022) states that "*progress towards the recognition of the right to a clean, healthy and sustainable environment (...) is an enabling condition for the achievement*" of the priority objectives. However, only the international level is explicitly mentioned in Article 3 as a stage for action to achieve this condition; whereas a parliamentary amendment aimed at the recognition of a right to an environment in the Charter of Fundamental Rights. The outcome of the discussions on the recognition of a right to the environment by the Council of Europe may also inspire the revision process of the EU Charter of Fundamental Rights and the case law of the CJEU. The recognition of a right to the environment in the Charter will have to identify in a broad way the beneficiaries and addressees of the duties and obligations of due diligence beyond the public authorities[1092]. The effectiveness of this right and its added value for nature protection will have to be based on full invocability and extensive judicial review.

Similarly, it would be important to take advantage of the treaty revision process under the ordinary procedure to enshrine the principles of non-regression, ecological solidarity and *in dubio pro natura in the* provisions of the TFEU. The praetorian interpretation of the obligations to prevent the deterioration of the state of bodies of water and to guarantee a favourable conservation status of natural habitats and Natura 2000 species underpins the recognition of a general principle of non-regression that is consubstantial with the enshrinement of a right to the environment in the Charter. Without neglecting the difficulties of constitutional recognition of such a principle, which resonates with the 'do *no harm*' injunction of the Green Deal, the enshrinement of a *pro natura principle* in primary law is likely to arouse even greater resistance. A process of gradual recognition of a principle *in dubio pro natura* via secondary legislation would otherwise be preferable.

PILLAR N°3: The need for ambitious framework legislation on biodiversity and nature

Adopted in December 2022, the new Kunming Global Biodiversity Framework and its vision of "*living in harmony with nature by 2050*" identifies 23 global targets to reduce threats and meet people's needs. By 2030, at least 30% of degraded ecosystem areas should be restored and at least 30% of areas of particular importance for biodiversity should be "*conserved and managed through ecologically representative protected area systems*"[1093]. While the proposed Nature Restoration Regulation is part of this strategy, the lack of framework legislation on biodiversity calls into question the EU's ambition to

[1089] Article 48 of the TEU.
[1090] EP Resolution of 6/11/2021 on the role of development policy in addressing biodiversity loss in developing countries in the context of achieving the 2030 Agenda for Sustainable Development, OJEU 2022 C 132/2. EP Resolution of 9/6/2021 on the EU Biodiversity Strategy 2030, OJEU 2022 C 67/25.
[1091] COM (2022) 438 final, Communication on the *2022 Environment Policy Review: Enforcing Environmental Rules to Save the Environment*.
[1092] Example of the French Constitutional Charter on the Environment: Article 2 "*Every person has the duty to take part in the preservation and improvement of the environment*", or the Portuguese Constitution of 1976: Article 66 on the right to an environment: "*every person (...) has the duty to defend it*".
[1093] https://www.cbd.int/doc/c/0bde/b7c0/00c058bbfd77574515f170bd/cop-15-l-25-fr.pdf (draft decision available).

"*enable transformative change*"[1094] to halt and reverse biodiversity loss. Based on an ecosystem approach, such framework legislation should impose binding targets for preventing deterioration and improving ecological integrity and the proper functioning of ecosystems. This framework legislation would thus provide a conceptual (intrinsic value, global limits, resilience, ecosystem approach (...) and principled (non-regression, *in dubio pro natura, ecological solidarity* (...)) basis that would be common to pre-existing legislation or legislation under negotiation. Following the example of the existing framework legislation[1095], this process of coherence should guarantee appropriate protection of ecosystems and species not exclusively because of their rarity, vulnerability or endangerment[1096].

However, it is important that this proposal for framework legislation should not be an opportunity to weaken the legal regime of Natura 2000 in the name of imperative reasons of major public interest. Similarly, the reductive approach of zero net loss of biodiversity must not overshadow the priority given to preventing damage to biodiversity and respecting the precautionary principle. Bio-cultural knowledge and knowledge from landscape ecology, for example, must form the scientific basis of this proposal, which is based on a socio-ecosystemic understanding of how ecosystems function. Finally, this framework legislation should provide for connections between existing environmental legislation in an integrated approach to prevent and/or manage the risks of conflicts of objectives, particularly environmental ones. These points of vigilance need to be taken into account in order to counter reductionist representations and random protection according to human interests and a misuse of the derogations that could be introduced into the text.

PILLAR N°4: The further integration of environmental requirements into EU policies remains a major obligation.

EU environmental law alone cannot bear the responsibility for the paradigm shift that is needed. Despite the obligation set out in Article 11 of the TFEU and Article 37 of the Charter of Fundamental Rights, there is still a lack of integration of environmental requirements into EU policies. Moreover, there is an ambivalent shift between this integration principle and the objective of integrating "*sustainability into all policies*"[1097] stated by the Green Deal. The 8th environmental action programme even favours this '*think sustainability first*' approach at the risk of undermining the spirit and scope of the integration principle. The wording of Article 37 of the Charter of Fundamental Rights supports these ambiguities by directing the integration of a high level of environmental protection and the improvement of its quality into EU policies '*in accordance with the principle of sustainable development*'[1098]. Again, it all depends on the choice of the concept of sustainable development. The Cardiff process (1998)[1099] laid the foundations for a strategy of environmental integration into EU policies, but this strategy has remained incomplete, overshadowed by unclear sustainable development strategies and better regulation programmes. However, greater respect for the principle of integration is essential to help achieve the objectives of environmental policy and to ensure that the intrinsic value of nature is taken into account. The Green Deal sets out a series of measures to green European policies, investments and budget to ensure a green transition. It solemnly states an oath: *"do no harm*", but without specifying how it relates to environmental principles. Only the Commission's commitment to improve its guidelines for better regulation and the explanatory memorandum for its proposals are mentioned[1100]. However, this oath is

[1094] COM (2020) 380 final, EU Biodiversity Strategy 2030, op. *cit.*
[1095] WFD, Marine Directive 2008/56/EC, Regulation (EU) 2021/1119 on climate neutrality, Directive (EU) 2018/851 on waste
[1096] Criteria set out in Directive 92/43/EEC, *supra*.
[1097] COM (2019) 640 final, *op. cit.* "*Mainstreaming sustainability in all EU policies*".
[1098] And not "*in particular in order to promote sustainable development*" as provided for in Article 11 of the TFEU.
[1099] COM (2004) 394 final, Working document "*Integration of environmental considerations into other policies - a stocktaking of the Cardiff process*".
[1100] COM (2020) 37 final, Better Regulation, Policy Making, Implementation and Enforcement of EU Law: "*all initiatives will respect a green oath to do no harm*".

quickly disseminated in several texts, including environmental policy[1101], under the expression "do *no harm principle*" translated as "do *not cause significant harm*"[1102]. This qualification and the injunction to respect it, whatever the policy, makes it all the more necessary to clarify its content, place and scope in the tree of environmental principles[1103]. Determining whether it is "significant" is an immediate question, as is the nature of the complementarity between this principled oath and the obligations laid down in the directives on environmental impact assessment and strategic environmental assessments[1104]. In the absence of a regulation to mirror these directives for EU institutions, bodies and agencies, can the strengthening of the Commission's impact assessment tools and/or technical guidance[1105] be sufficient to ensure that high nature protection requirements are integrated into EU policies and financial instruments in a way that respects the procedural rights of the public? Similarly, the choice of sustainability criteria, such as those set out in Regulation 2020/852 on sustainable investment[1106], raises questions about the relative weight of environmental interests in the balance of rights and interests. Great vigilance is required. In particular, the EP should act[1107] to counter the risks of confusion or watering down of an oath in the plural[1108]; and not leave only NGOs and members of the public entitled to exercise their right to request a review under the Aarhus Regulation (EU) as amended by Regulation (EU) 2021/1767.

PILLAR N°5 : Substantial strengthening of the democratic representation of nature and its judicial protection

The study has shown the need to strengthen the representation of nature in the EU decision-making process. In view of the decentralised nature of EU environmental policy, this requirement must also be reflected at Member State level in the designation of competent authorities and the allocation of their tasks. The scope of the reforms to be carried out will be determined by the 5 sub-scenarios of the action. Several options have been envisaged and may be combined according to political timeframes and the urgency to act. Similarly, a reform of the institutional architecture and the organisation of powers depends on the willingness of the States and the European institutions. The hypothesis of a revision of the EU treaties could be an opportunity to strengthen the representation of nature in the decision-making process, but also its jurisdictional protection. This path will not be without its pitfalls and resistance, and other less ambitious avenues of reform via secondary legislation must be considered. Three avenues of reform have been identified and can be combined to improve the representation of nature in the European decision-making process.

[1101] Regulation (EU) 2021/783 of the EP and of the Council of 29/4/2021 laying down a programme for environment and climate action (LIFE), OJEU 2021 L 172/53. *Actions under the LIFE programme should respect the "do no harm" principle.*

[1102] COM (2021) 219 final, Communication "*Better Regulation: Joining forces for better lawmaking*".

[1103] In its proposal for a recast of the Directive on ambient air quality and cleaner air for Europe, the Commission sets out this "do no harm" principle alongside the integration principle and the polluter pays principle. COM (2022) 542 final. Ditto in its biodiversity strategy (COM (2020) 380 final.

[1104] For example, in the joint communication on *the Global Gateway Strategy* on clean and resilient infrastructure development, the Commission states that projects will "respect the Green Deal for Europe's pledge to do no harm and ensure the use of environmental impact assessments and strategic environmental assessments". JOINT (2021) 30 final.

[1105] Example of the Commission Communication on technical guidance on the application of the principle of no material injury under the Recovery and Resilience Facility Regulation, OJEU 2021 C 58/1.

[1106] PLAY 2020 L 198/13. Article 3 Criteria for environmental sustainability of economic activities including: "*contribute substantially to one or more environmental objectives, do not cause significant harm to any of the environmental objectives"* (of which there are 6: climate change mitigation, adaptation to climate change, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control, protection and restoration of biodiversity and ecosystems.

[1107] All along the normative cycle, including at the litigation level. In its resolution of 15/1/2020 on the Green Deal for Europe, the EP recalls the importance of environmental principles "*alongside the principle of '*do no harm' (...)" *in full respect of the principle of policy coherence*. CHEEK 2021 C 270/2.

[1108] In the 8th report on cohesion: "*Cohesion in Europe 2050*", the Commission refers to a "*do no harm*" principle, i.e. that no action should hinder the convergence process or contribute to regional disparities, should be developed and integrated into the decision-making process", COM (2022) 34 final. Another example of the plural form of this oath: COM (2021) 219 final, "*EU Humanitarian Action: New Challenges, Same Principles"*: "*The EU will remain committed to the principle of doing no harm to affected populations and the environment*".

The first option is to extend the tasks of existing public authorities by ensuring that appropriate human and financial resources are made available. The proposals envisaged include strengthening the remit of the EEA and involving it in decision-making (from impact assessments to the CJEU). Once the activities of this decentralised agency have been evaluated (2017-2021), a revision of Regulation 2009/401/EC would be a first step towards establishing an advisory opinion procedure upstream of the decision-making process.

The increased representation of nature's interests should also be reflected in changes to the composition of the governance bodies of EU agencies[1109]. These developments should be reflected at Member State level in the establishment of governance structures by the competent authorities responsible for implementing EU environmental legislation. Representation of nature's interests could also be achieved through a new architecture of the EESC, which would become the European Economic, Social and Environmental Committee. Currently composed of representatives of employers' organisations, employees' organisations and other representative civil society actors, a 4th group representing the voice of nature, along the lines of the French model, could provide a distinct visibility from the other three groups if an amendment to Article 300 of the TFEU is promoted.

A second avenue concerns the creation of new independent authorities responsible for representing and/or defending the interests of nature. The idea of creating an environmental ombudsman is spreading among states, based on the model of a defender of rights and freedoms (as in France[1110]) or an ombudsman for future generations. Similarly, the institution of an environmental regulatory authority as part of the greening of economic and financial law is envisaged by several authors. In view of the institutional autonomy of the Member States, EU environmental legislation provides little detail on the nature of the competent authorities designated by the States, except in the context of the directives on environmental impact assessment. These provisions, as interpreted by the CJEU, could constitute a common base to be developed in future legislation or to be revised in order to strengthen the representativeness of nature's "interests".

At EU level, strengthening the prerogatives of the European Ombudsman is preferable to creating a European Environmental Ombudsman whose mission would be identical to that of the current Ombudswoman. The creation of a European Environmental Ombudsman whose powers would be extended to monitoring the effectiveness of the law, including in the Member States, would encroach on the competence of the Commission as the Treaties currently stand. Similarly, the establishment of a European regulatory authority to guarantee a rigorous ecological framework for economic and financial law would require a rethink of the EU's competitive matrix and the 'democratisation' of this policy away from the codecision procedure. Such reforms present significant uncertainties depending on the degree of acceptance of the Member States and the institutions to revise the treaties. Finally, as with any creation of new independent authorities, an over-complexification of the institutional architecture would be counterproductive for nature protection, as would the establishment of authorities without sufficient powers and means. However, the *status quo* is not the solution, but rather a subtle mix of reforms of existing agencies and bodies and the creation of new administrative authorities empowered to represent nature's interests. Similarly, there is a need to improve coordination between the decentralised European agencies, but also with the executive agencies[1111] to strengthen the integration of nature's

[1109] One could also think of the governance of the European Investment Bank, or even the European Central Bank (ECB), even if one guesses at the strong resistance given the high sensitivity of monetary issues for the ECB.
[1110] As a reminder: constitutional bill to create an environmental defender, n°608/2022.
[1111] Entities set up for a fixed period of time to implement several programmes under the aegis of the Commission. Example of the European Climate, Infrastructure and Environment Executive Agency to carry out tasks related to the implementation of EU programmes in the fields of transport infrastructure, energy, research and innovation in the areas of climate, energy and mobility, environment, nature and biodiversity, transition to low carbon technologies and maritime affairs and fisheries (Commission Decision of 12/2/2021 delegating to this executive agency for a period ending on 31/12/2028 (C/2021/947 final)

interests in their activities. Networking, especially of national enforcement authorities, is part of this logic and experience sharing.

The third way to strengthen nature's representation in decision-making is to ensure the effective exercise of rights to information, public participation and broad access to justice.

When revising and/or adopting directives and/or regulations, the introduction of requirements for enhanced representation of the public, in particular of EDOs, in governance bodies appointed by Member States would counterbalance the current imbalance between ecological interests and private and public socio-economic interests. Increasing the representativeness of nature's interests in the bodies must be accompanied by a substantial improvement in the procedures of the decision-making processes. At EU level, the 2021 revision of the so-called Aarhus Regulation (EC) 1367/2006 is an interesting step forward, as it expands the circle of persons entitled to submit a request for internal review from 29/4/2023. Notwithstanding the *in concreto* assessment of this enlargement, it will be necessary to further amend the text in order to restrict the scope of exclusions, some of which are questionable from the point of view of their conformity with the Aarhus Convention[1112].

This dynamic of extending the personal and material scope of the right to participate should be reflected in the various environmental assessment, authorisation and planning procedures imposed on the Member States. One way forward would be to grant the privileged status enjoyed by environmental associations to other members of the public concerned and/or to 'instituted' groups that are guardians of nature or a natural entity. Clearly, these democratising developments require prerequisites of training and guarantees of information, assistance and accessibility. They also require the establishment of a robust legal framework to protect environmentalists against any risk of reprisals. EU Directive 2019/1937 on whistleblowers and the future 2022 Strategic lawsuits against public participation (SLAPPs)[1113] are the first steps.

This strengthening of public participation and private 'representatives' of nature should also be combined with the systematic involvement of independent environmental authorities whose resources should be greatly increased. Finally, the enhanced representation of nature in the European decision-making process requires determining the extent to which the EU and its Member States are prepared to reform the institutional architecture and the distribution of powers and responsibilities. Strengthening and expanding the EEA's tasks must be part of this process, as must the internal reorganisation of the governance of the EU institutions and bodies.

Effective judicial protection of nature requires ensuring that existing rights and procedures are respected. Several avenues of reform exist. Access to justice, the powers of the judge, including his or her training in ecological complexity, and the enforcement of court decisions are three essential pillars.

A first pillar of action is therefore improving access to justice. In the current state of EU and Member State law, *the actio popularis* promoted by nature's rights advocates is not a solution that can be generalised. Of course, it is essential to assess the effectiveness of broad access to justice at a non-prohibitive cost at Member State and EU level and to draw the consequences, particularly in terms of sanctions. The failure of the proposal for a directive on access to justice has resulted in the inclusion of a 'standard' provision on public access to national courts in several revised and/or new laws. Nevertheless, a new proposal for a directive remains relevant and should be put back on the European agenda.

[1112] For the record, conclusions of the Convention's Review Committee (ACCC/C/2015/128 on the Commission's state aid decisions) and the EU's request to postpone the parties' decision on this issue until October 2021.
[1113] Council approval in March 2024 following the[1st] reading of the EP.

This study has identified four policy levers that could be used to strengthen access to justice, such as widening the circle of claimants and targets of legal action. The prospect of a reversal of the Plaumann jurisprudence in the case of 'environmental' cases is still very uncertain. Similarly, a revision of the TFEU to relax the conditions for public access to the CJEU in the context of legality review, in this case against legislative acts, remains very uncertain. The requirement to show that the person is "*directly and individually*" concerned by such acts is inappropriate in the majority of environmental cases where rights, individual and collective interests and the general interest are intertwined. However, it is important that the EU meets its commitments under the Aarhus Convention. The development of the case law of the CJEU depends largely on the determination of the Member States and the EU to undertake the necessary constitutional reforms.

Finally, applications to intervene before the CJEU are another way for nature to express itself in court. The institution of an ambitious *Amicus curiae* status '*in nomine natura*' would be a timely reform to be undertaken by amending the Statute of the CJEU and its Rules of Procedure.

The second pillar of enhanced judicial protection of nature aims at the institution, consolidation and even expansion of three strategic powers of the judge that have been analysed in this study. Its sanctioning power is closely linked to the type of administrative, civil and criminal sanctions provided for in EU environmental legislation or legislation with an environmental component. The quality assessment (2023) of Directive 2004/35/EC on environmental liability will be decisive in supporting its revision (e.g. extension of its material scope, establishment of a fund for the prevention and repair of damage, institution of a civil liability regime (...)). Similarly, the future directive on the due diligence provides for a civil liability regime, which despite its limitations, confirms the incursion of EU law into national civil liability regimes. The institution of the crime of ecocide as an autonomous criminal offence in the proposed directive (2021) to replace Directive 2008/99/EC would have constituted an emblematic qualifying leap if the Council agreed to reverse the general direction of the text adopted in December 2022. The inclusion of a "qualified infringement" clause in the text following the agreement of the Council and the EP in November 2023 is an undeniable step forward (Article 3)[1114].

Finally, the judge's powers of injunction and the scope of his control, particularly in the case of infringements of fundamental rights, are another lever for strengthening nature protection. The granting of injunctive powers to the CJEU against the European institutions (beyond the obligation to comply with its decision) comes up against a very uncertain reform of the treaties. On the other hand, in support of its case law, several national courts no longer hesitate to use their power of injunction to ensure compliance with EU environmental legislation. The contribution of national courts is therefore crucial, as is the strengthening of judicial cooperation and the training of judges in ecological complexity and environmental law.

In this respect, the future directive on the protection of the environment through criminal law should inspire future legislative revisions and/or the adoption of new texts; in this case, it requires Member States to ensure that judges, prosecutors, police, other judicial staff and competent authorities are trained and provided with sufficient financial, technical and technological resources. Notwithstanding the establishment of courts and/or judicial divisions dedicated to environmental cases in several Member States, it does not seem appropriate to transpose these initiatives to the CJEU. On the other hand, extending the prerogatives of the European Public Prosecutor's Office to environmental offences of supranational scope and scale is in line with the logic of building a "*European environmental public order*".

The third pillar of enhanced judicial protection of nature concerns the effective enforcement of judicial decisions, the sanctions to be applied in the event of non-compliance and the monitoring of the

[1114] *Article 3.3 a) destruction of an ecosystem of considerable size or environmental value or of a habitat within a protected site, or widespread and substantial damage that is either irreversible or permanent to such an ecosystem or habitat, or b) widespread and substantial damage that is either irreversible or permanent to the quality of air, soil or water.*

implementation of measures, in particular to repair ecological damage. It is true that the CJEU has the power to impose financial penalties on national authorities that fail to comply with its judgments on infringements. However, an in-depth analysis of the impact of this means of enforcement on the improvement of the situation in the sanctioned Member State should be carried out in order to consider possible reforms (determination of financial penalties, their allocation and effective enforcement of the judgment and recovery of penalties). The same study should be carried out on the use of financial penalties imposed by national courts and the reality of their impact on nature protection. The right mix of sanctions and demanding accompanying measures[1115] is once again required.

[1115] E.g. Country-by-country review of the implementation of EU environmental policy, implemented by the Commission since 2016.

2) Twelve key recommendations

Regardless of the choice of one of the action sub-scenarios or their combination, 12 key recommendations can be derived from the 5 pillars of a strategy for enhanced nature protection. These recommendations can be used as a basis for the future recognition of nature rights in EU law. Paradigm shifts require substantial reforms from the outset.

o Values, categories & legal status pillar

Recommendation 1 Recognise the intrinsic value of nature in primary and secondary legislation

Recommendation 2 Systematise the ecosystem approach based on bio-cultural knowledge and scientific knowledge

Recommendation 3 Establish new legal categories such as ecocide and rethink the status of natural entities, including statutory interactions

o Rights & principles pillar

Recommendation 4 Recognise an individual and collective right to the environment in the EU Charter of Fundamental Rights

Recommendation 5 Enshrine the principles of non-regression and ecological solidarity in primary law

o Legislation - biodiversity framework pillar

Recommendation 6 Adopt framework legislation on biodiversity and nature

Recommendation 7 Ensure biodiversity/nature coherence in environmental and EU policies

o Integration of environmental requirements and socio-economic and environmental impact assessment pillar

Recommendation 8 Strengthen the integration of environmental requirements and respect for the pluralism of values, including the rights of nature

Recommendation 9 Strengthen the environmental expertise of impact assessments, experiment with the *in dubio pro natura* principle and green the proportionality principle

o Democratic representation, judicial protection & effectiveness pillar

Recommendation 10 Broaden the democratic representation of nature in decision-making processes and establish/strengthen the missions of independent authorities that are the 'guardians' of its interests

Recommendation 11 Ensure robust protection for conservationists and a strong corporate accountability regime

Recommendation 12 Strengthen judicial protection of nature, including before the CJEU, systematise the monitoring of court decisions and develop legal indicators of effectiveness

EPILOGUE

The theory of the rights of nature invites us to rethink the conceptual basis of the legal protection of the environment. Admittedly, it raises a number of questions about its real added value and legal controversies that could prevent the recognition of the rights of nature in EU law in the near future. However, this theory also reflects deep concerns and expectations for change and transformation in the face of the extent of damage to nature and the alteration of the planet's habitability. The rights of nature, the common heritage of humanity, the natural commons, this plurality of legal representations converge towards the need to rethink our relationship and interdependence with nature. On the eve of the next European elections, such an existential perspective is inescapable. The two-act play "*Une nature hors du commun*" by Delphine MISONNE offers a beautiful expression of the reflections in which the present study wishes to take place.

> ***"The Earth, in anger***
>
> *I, the Earth, am suffocating, clogging up and becoming unbearable! I have trouble regulating the course of my fluids, the thickness of my ice, the acidity of my marine entrails. My forehead and cheeks burn. And my vegetal coat which is pierced on all sides! (....)*
>
> ***The tree,***
>
> *(...) First I was the wood reserve. Then I became the green lung. Then the biodiversity reservoir. Then - admire the degree of conceptualisation! - the pool of genetic resources. And now - appreciate the reversal of perspective - I am the carbon sink. It's my way of giving back - hesitantly - ecosystem services. That's it, it's like he says. Ecosystemic. It's comical. And even economic (...).*
>
> ***Anthropos, concerned***
>
> *Everything is confirmed. Even worse. "That can be sustained far into the future", that's what was prescribed to me. I must find the passage, the transit, the connection. The hyperloop. Anything, but I must avoid this wall*"[1116].

Rennes, Janvier 2023.

[1116] D. MISONNE, *Une Nature Hors du Commun*, in *"Le droit malgré tout. Hommage à François OST"*, Y. CARTUYVELS, A. BAILLEUX, D. BERNARD, H. DUMONT, I. HACHEZ, D. MISONNE (dir), *Presses de l'Université Saint- Louis*, Brussels 2018, 956 p., p.709-733

ANNEXES

ANNEX I **TABLES OF INITIATIVES IN EUROPE**

ANNEX II **TABLES OF SCIENTIFIC QUESTIONING**

ANNEX III **STATE OF THE ART CLASSIFICATION AND COMMENTARY**

ANNEX I - TABLES OF INITIATIVES IN EUROPE[1117]

I- EXAMPLES OF NATURE RIGHTS INITIATIVES IN EU MEMBER STATES

FRANCE

	Tavignano River Corsica	**River Tet** Pyrénées-Orientales	**Parliament of the Loire**
Launch date	2021 (July)	2021 (November)	2019
Nature of the act or actions	**Declaration of the Rights of the Tavignanu River**[1118]	**Bill of Rights Tet River** [1119]	**Arts & Science and Culture Project Parliament of the Loire** (2019-2023)[1120]
Scale	Local River of 88 km, second river of Corsica	Local Coastal river of 115 km, first river of northern Catalonia	Local
Project bearers	Local association Tavignanu Vivu joined by the associations *Terre de Liens* Corsica and UMANI with the support of the national association *Notre Affaire à Tous*	Local Association *Association En commun 66* National Association: Our Business	POLAU (*Pôle Arts & Urbanisme*, resource and project structure created in 2007). 2019 : Loire Parliament project at the crossroads of art, science and the rights of nature.
Broadcast channels	Petition to encourage local authorities to support the declaration in their deliberations and other decisions	Objective to raise awareness among local residents and elected officials & to integrate the content of the declaration into urban planning documents	A series of meetings, public hearings of researchers and others, film and publications (...)
Rights of Nature	-Exist, live and flow -Respect its natural cycles -Fulfil its essential ecological functions -Not be polluted -Feed and be fed by aquifers in a sustainable manner - Maintaining its indigenous biodiversity -Regeneration & restoration -Be a party to legal proceedings	-Exist, live and flow -Respect its natural cycles -Fulfil its essential ecological functions -Not be polluted -Feed and be fed by aquifers in a sustainable manner -Maintaining its biodiversity -Regeneration & restoration -Be a party to legal proceedings	The project is constructed as a "*constituent process for the creation of a parliament for the Loire where the fauna, flora and the various tangible and intangible components would be represented*".
Proposed legal personality	Yes	Yes	Yes

[1117] Tables produced in 2022 when the study is finalised and submitted in January 2023.
[1118] https://www.tavignanuvivu.com
[1119] https://encommun66.org/droitsdelatet/
[1120] https://polau.org/incubations/demarche-du-parlement-de-loire/ Book "*Le fleuve qui voulait écrire, les auditions du Parlement de Loire*", narrative created by Camille De Toledo, Manuela Ed. *Les liens qui libèrent*, 2021, 384 p.

	A "*living and indivisible entity from its source to its mouth delimited by its watershed*".	A "*living and indivisible entity from its source to its mouth delimited by its watershed*".	The project aims at "*the first legal recognition of a non-human entity in Europe*".
Representative of the entity	Custodian system Terms not specified in the declaration	Custodian system Terms not specified in the declaration	The establishment of a Parliament of the Loire
Sources of inspiration	Universal Declaration of the Rights of Rivers (Earth Law Center)	Universal Declaration of the Rights of Rivers (Earth Law Center) and the Rights of Nature and Aquatic Ecosystems movement	Parliament of things by Bruno LATOUR & examples of Recognition of rights to rivers (Wanganui, Ganges and other aquatic ecosystems).
Support from public authorities	**City of Bastia**[1121] : deliberation of 10/11/2021 : " *supports the declaration* " and " *recognizes the river as a living and indivisible entity from its source to its mouth, delimited by its watershed and having a legal personality* " **Assembly of Corsica**[1122] : motion n°21/241 adopting a motion concerning the recognition of the rights of the Tavignanu river of 17/12/2021 : " *supports the declaration of the rights of the Tavignanu river of 29/7/2021* (...) *recognises the river as a living and indivisible entity (...) endowed with legal personality* ".		

FRANCE

	Tree Rights Declaration	**The Seine is not for sale**	**Loyalty Islands New Caledonia** *"certain elements of Nature".*
Launch date	2019	2018	2016
Nature of the act or actions	Statement	Various mobilisations including a manifesto for the Seine Valley[1123]	Environment Code Article L 110-3
Scale	National	Local	Local

[1121] https://www.bastia.corsica/wp-content/uploads/2022/04/20211110-delib-cm-bastia.pdf
[1122] https://www.isula.corsica/assemblea/downloads/Deliberations-AC-2021_t21952.html
[1123] https://www.laseinenestpasavendre.com

Project bearers	National association A.R.B.R.E.S, created in 1994 with the aim of protecting remarkable trees	Local association (*La Seine n'est pas à vendre*) created in 2018	The Loyalty Islands Province
Broadcast channels	Declaration proclaimed at a colloquium at the National Assembly on 5 April 2019 organised by the association	Press articles, mobilisations, 'Living Seine' workshops and a manifesto for a charter.	Legislative part of the Environment Code L 110-3
Rights of Nature	- *right to the air and underground space needed to grow* - *the right to respect for its physical, aerial and underground integrity* - *the right to develop and reproduce from birth to natural death, whether a tree in the city or in the countryside*".	The association asks that the projects respect a series of 7 principles, including : - *Consider the river ecosystem as a common inalienable heritage, taking into account the river, its setting, its banks and their continuity, the built environment and the quays... (...)".*	No specification of the content of the rights. The code only mentions *"rights that are specific to them".*
Proposed legal personality	Yes *"The tree is a sentient living being (...) that cannot be reduced to a mere object.* *"must be considered as a subject of law, including in relation to the rules governing human property*".	Not mentioned in their manifesto Seine described as an "*inalienable living entity*	Yes
Representative of the entity	Question not addressed	Not specified	Not specified
Sources of inspiration			Conception of life and social organisation of Kanak society "*Unitary principle of life*" described as "*founding principle of Kanak society*".
Support from the authorities	During the examination of the law on the fight against climate change, an amendment n°3016/2021[1124] proposes to insert in the environment code an article L 350-4 "*The tree is a sentient being...has the right to respect for its physical integrity above and below ground, necessary to achieve its full growth and flourish. ...Trees deemed remarkable by man (...) are assimilated to the common bio-cultural heritage and*	In response to the association's protests against land pressures on the Seine, the city of Paris organised workshops in 2019 and development projects were abandoned.	For the time being, no concrete implementation of Article L 110-3 of the Code

[1124] https://www.assemblee-nationale.fr/dyn/15/amendements/3995/AN/3016.pdf

	acquire a higher status committing man to protect them as natural monuments". The said amendment will be rejected. Several municipalities have been supporting the tree rights declaration since 2020.		

SPAIN -SWEDEN -THE NETHERLANDS

Public authorities

	Mar Menor Lagoon Spain Law 19/2022[1125]	**Swedish Constitution Proposal for recognition of rights of nature** [1126]	**Wadden Sea, Netherlands** Motion of the municipal councils
Launch date	2020-2022	2019	2018 & 2019
Nature of the act	**Popular Legislative Initiative (PLI)** **Law 19/2022** of 30 September on the recognition of the legal personality of the Mar Menor lagoon and its basin	**Proposal of an amendment** to revise the constitution Proposal rejected by Parliament in 2021 [1127]	Motion by municipal councils on the recognition of the legal personality of the Dutch part of the Wadden Sea
Scale	Local	National	Local
Project bearers	**ILP** among the carriers and spokespersons: Maria Teresa VICENTE GIMENEZ, Director of the Chair of Human Rights and Nature of the University of Murcia **National law**: examination under urgent procedure	**Rebecka LEMOINE, Member of the Green Party Swedish Parliament**	Municipality of Dongeradeel, then municipality of Noardeast-Fryslân (merger of the municipality of Dongeradeel with two other
Broadcast channels	**ILP** presented to the Congress of Deputies (the mandatory threshold of 500,000 signatures exceeded: 615,000 obtained). Citizen mobilisation and study of the legal clinic of the University of Murcia	Parliament	Via the municipalities following the government's announcement to create a Wadden Sea Authority to increase the powers of this authority
Rights of Nature	*-Protection, conservation, maintenance and restoration*	Chapter 2 Fundamental rights and freedoms: proposed addition of	A separate and independent identity for the Wadden Sea

[1125] Boletin official del Estado, n°237, 3/10/2022, p 135131
[1126] Motion 2019/20: 3306, https://data.riksdagen.se/fil/AC0D8601-DD86-4B86-889B-C77E4F11BBDA
[1127] Rejection in committee: https://riksdagen.se/sv/dokument-lagar/arende/betankande/fri--och-rattigheter-mm_H801KU23/html, to be confirmed by Parliament in April 2021: https://data.riksdagen.se/fil/504A1300-3DD1-43D8-BF4D-9AFE935EE2B9

	-Existing as an ecosystem and evolving naturally (natural order/biological law) *-Legal action: any natural or legal person has the right to defend the Mar Menor ecosystem (...) legal action will be taken on behalf of the ecosystem*".	Article 26: *Nature, including ecosystems, natural communities and species, are guaranteed the following rights and freedoms:* *-to exist, to flourish, to regenerate, to develop* *-restoration, recovery and conservation* *-perform its natural functions* *-assert or defend its rights through legal action* *It is made clear in the proposal that it should not be interpreted as imposing obligations or responsibilities on nature	- An integral part of the Dutch legal system
Proposed legal personality	yes	Not mentioned	Yes Legal entity - inspired by the Watershap statute to establish a Natureship status for the Wadden Sea
Representative of the entity	- Guardianship: legal representative, consisting of: -representative Committee (7 citizens out of 13 members) - monitoring commission, composed of the lagoon keepers - scientific committee	Any Swedish citizen can assert or defend the rights of nature *the burden of proof to demonstrate the absence of infringement of rights lies with the perpetrator of the activity that may lead to an infringement of those rights	Representation by the Wadden Sea Authority
Sources of inspiration	Universal Declaration of the Rights of Rivers and foreign examples of rights recognition		
Support from public authorities	Yes Law adopted on 30/9/2022		

Other initiatives in the Member States

	North Sea Embassy, Netherlands	Lake Vattërn **Sweden** [1128]
Launch date	2018	2019
Nature of the act	North Sea Parliament policy experiment	Lake Vattërn Bill of Rights
Scale	Local	Local - Natura 2000 area and national water protection area

[1128] http://files.harmonywithnatureun.org/uploads/upload984.pdf

Carriers	Parliament of Things	Earth Rights conference on the Rights of Nature, May 2019, Sweden.
Broadcast channels	3 phases of the project : - Listen (2018-2021): collection of various scientific accounts of the North Sea - Talk (2021-2026): creating a representation of North Sea collectives - Negotiate (2026-2030): negotiation phase between the North Sea collectives and the authorities	Media
Rights of Nature		*"Irrevocable rights":* *-Exist, flourish, regenerate, evolve naturally* *-Restoration, recovery and preservation* *-Fulfilling its natural functions*
Proposed legal personality	Yes	Not mentioned
Representative of the entity		The declaration distinguishes between the rights of the lake and the duties of human beings: - the rights of the lake Every human being is obliged to respect the lake and live in harmony with it - society is responsible for restoring the integrity and health of the lake in the event of damage caused by violations of the lake's rights.
Sources of inspiration	In particular, the Parliament of Things by Bruno Latour	
Support from local authorities		

II- EXAMPLES OF INITIATIVES IN OTHER NON-EU MEMBER STATES

UK & NORTHERN IRELAND - SWITZERLAND/FRANCE

	Rights of Nature Derry City District and Strabane[1129] and Fermanagh District and Omagh [1130] **Northern Ireland UK**	**Rodden Meadow & Frome River** Frome District - **UK**	***Appel du Rhône*, Switzerland and France**
Launch date	2021	2020	2018
Nature of the act	**Motions from District Councils** on the Rights of Nature with a view to the possible adoption of a	Draft Bye-law on River Frome Nature Rights	Invitation to sign the *Appel du Rhône* [1131]

[1129] https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/6112cf6ac3617a75b347a6ce/1628622698300/Derry+City+and+Strabane+District+Council+Motion+June+2021.pdf
[1130] https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/6112cf859cbe52318da6020b/1628622725651/Fermanagh+and+Omagh+District+Council+Motion+Approved+July+2021.pdf
[1131] www.appeldurhone.org

	Declaration on the Rights of Nature		
Scale	Local	Local	Cross-border
Carriers	District Councillors	Independent members of the Frome district	Local Association (ID-Eau) Switzerland
Broadcast channels	In the motion, the District Council proposes a collective reflection on the rights of nature and their possible integration into local planning documents June and December 2021 Discussion workshops to draft a declaration on the rights of nature The NGO Friends of the Earth is contributing to the reflection.	In addition to the district project, the Friends of the Frome River have mobilised and adopted the Frome River Strategy 2020-2030[1132].	Invitation to sign the *Appel du Rhône*. People's Assembly of the Rhône in August 2021 in Arles. Workshops to live the *Appel du Rhône*. The Water Parliament project of the Lyon Urban School, which has been part of the *Appel du Rhône* since September 2021. (...)
Rights of Nature	Among the rights considered in the workshops: the right of life to self-sufficiency and the right of certain ecosystems to evolve and develop	The River Frome : *- access to a sustainable supply of clean and unpolluted water.* *- exist, have a natural flow and sufficient sustainable recharge to protect the habitat of flora and fauna,* *- maintain the functionality of the water cycle,* *- flourishing and prosperity,* *- right to environmental protection,* *- right to fast and efficient restoration* Grassland: to *exist, to thrive, to regenerate and evolve, to be restored, to provide and protect a thriving habitat for flora and fauna* *-The river and the meadow have a duty of care* *-Anyone living in the parish can enforce and defend these rights to protect* nature	- To *exist, to be preserved, to regenerate, to evolve* *- Maintaining its environment and biodiversity*
Proposed legal personality	Not at this stage of reflection	Yes	Yes Recognise the legal personality of the river, from

[1132] https://www.frometowncouncil.gov.uk/wp-content/uploads/2020/05/Frome-River-Strategy-2020-FInal-web.pdf

			its glacier in Switzerland to its delta in France
Representative of the entity	Not at this stage of reflection	The Frome River Council and Friends are the guardians of the interests of the river and the Meadow	It is mentioned that "to sign the *Appel du Rhône* is to identify oneself as a guardian of the river". No other details.
Sources of inspiration			Foreign examples of legislative and judicial recognition of river rights
Support from public authorities	The competence of the districts does not allow them to adopt a binding text on these issues.	In 2020, the government rejected this proposal on the grounds that the district initiative would duplicate existing environmental regulations	The city and the metropolis of Lyon signed the *Appel du Rhône* in September 2021 In November 2021, the elected green members of the City of Geneva adopted a motion to invite the city to sign the *Appel du Rhône*.

III- INITIATIVE NGO GARN Europe

	European Tribunal for the Protection of Aquatic Ecosystems [1133]
Launch date	2021
Nature of the act/initiative	Association initiative Moot Court
Scale	European/local case studies *Mer de Glace (Mont Blanc massif glacier)* Gold mining in French Guiana[1134] , Lake Vattërn, the rivers of the Balkans, the red mud of Marseille
Project Bearer	GARN Europe
Broadcast channels	Media Aquatic Ecosystems Rights Campaign[1135]
Rights of Nature	*The right to exist, the right to regenerate, the right to maintain their natural cycles, the right to restoration, the right to water, the right to be free from contamination, the right to unhindered movement, the right to a natural habitat, the right to health (...)*
Proposed legal personality	/
Representative of the entity	/
Sources of inspiration	
Support from local authorities	

[1133] https://www.rightsofnaturetribunal.org/tribunals/europe-tribunal-2021/

[1134] White Paper for the Rights of the Rivers and Peoples of Guyana, Wild Legal, https://www.wildlegal.eu/post/synthese-livre-blanc-pour-les-droits-des-fleuves-et-des-peuples-de-guyane

[1135] https://notreaffaireatous.org/wp-content/uploads/2020/02/Tribunal-UICN-Full-EN-DEF-2.pdf?utm_source=sendinblue&utm_campaign=2020__La_lutte_pour_la_justice_climatique_continue_grce__vous_!&utm_medium=email

IV-INITIATIVES AT EU LEVEL

EUROPEAN PARLIAMENT

	Conference *Nature's rights: the Missing Piece of the* Puzzle	**European elections** For a European environmental treaty - Europe Ecology	**Lecture series** *Towards a European recognition of the rights of nature*
Date	2017	2019	2020-2021
Nature of the act/ actions	**Conference**	**Manifesto** of the Europe Ecologie list	**Conferences**
Carriers	EP and Nature's rights	Europe Ecology Party	Member of Parliament Marie TOUSSAINT - Green Party
Broadcast channels	Media & networks	Media & networks	Media & networks
Rights of nature	Discussions presented by the speakers	Title 2 Rights of Nature of the European Environmental Treaty: "*The earth and all living beings (...) as well as the natural commons possess the intrinsic rights :* *-to live and exist,* *- respect,* *-The regeneration and continuity of their life cycles and processes without human disturbance,* *-to maintain their identity and integrity,* *-to water, to fresh air,* *-to their full health, the right to be free from contamination, pollution and toxic or radioactive waste,* *-not to be genetically modified or transformed in a way that harms their integrity or vital functioning,* *-to full and prompt redress for violations of rights resulting from human activities,* *- welfare and not to be subjected to torture or cruel treatment by human beings,* *- to be defended in court*	List of conferences Opening conference: Valérie Cabanes, Ewa Kulis, Achille Mbembe, Nathalie Hervé-Fournereau, Conference The rights of Nature: an extension of Human Rights: David Boyd, Sefan Mikaelsson, Valentijn Punt, Tish O'Dell, Ngozi Unuigbe Conference A legal status for ecosystem: Felipe Calderont Valencia, Jessica Den Outer, Laurent Fonbaustier, Kaarel Relve, Conference Nature's Voice How to represent Nature in democratic debates: Loire Parliament (POLAU initiative), Maria Lucia Cruz Correira, Graham Smith
Proposed legal personality	/	Not specified	
Representative of the entity	/	Legal representatives and mechanisms for EU residents to bring cases to court	
Sources of inspiration	Rights of Nature Movement	Rights of nature movement and examples of recognition in the law of several states	

Support from the authorities	Organiser	Marie TOUSSAINT MEP mandate 2019-2024	

EUROPEAN PARLIAMENT

	European consultation Recognising the rights of nature in Europe	**Study** *Rights on Nature in the European Context*	**This study Rights of Nature & EU Law**
Date	2021 (September-October)	2021(March)	2022
Nature of the act or actions	**Questionnaire**	*Legal study*	*Legal study*
Scale	European	European	European
Carrier/ sponsor	MEP Marie TOUSSAINT - Green Party In partnership with cap collectif	Department for Citizens' Rights and Constitutional Affairs at the request of the EP JURI Committee - Marie TOUSSAINT Author of the study: Jan DARPO (Uppsala University, Chair of the Task force on access to justice under the Aarhus Convention 2008-2021)	MEP Marie TOUSSAINT - Green Party Author of the study: Nathalie HERVÉ-FOURNEREAU, CNRS Research Director, Institut de l'Ouest Droit et Europe (UMR 6262 CNRS) of the University of Rennes 1 (coordinator), Nina SALAÜN, study engineer.
Broadcast channels	Media-Social networks 369 participants (mostly France, then Belgium, Italy, Spain), UK. 64% of the 299 complete responses analysed by the organiser: consider that the recognition of the rights of nature would allow an ecosystem to protect it	PE	PE
Rights of nature	Among the rights proposed, in order of preference expressed by the participants -Right to regenerate, right not to be polluted, right to life, specific rights related to the local context, to play a role in natural processes, right to political representation, right to prosper, right to a habitat. Among the ecosystems identified in order of priority: aquatic ecosystems, oceans, wetlands, mountains	The study is a critical analysis of the rights of nature from a human rights perspective (focus on the Aarhus Convention): added value, operationality, benefits in relation to the human right to a healthy environment **Does not propose recognition of the rights of nature** - A series of recommendations	

		advocated by the environmental law community, including the rights of nature movement: new principles in the TEU (non-regression...), reform of the Natura Directive (e.g., the (...)	
Proposed legal personality	Not mentioned	No	
Representative of the entity	Among the participants' responses, as a priority to ensure the role of gatekeepers -Environmental NGOs, -Scientists, -Citizens' associations, -Local community representatives, -Lawyers, -Youth, -Artists Almost 70% of the participants consider that access to justice presents many obstacles.	Strengthening existing law and its implementation Recommendations shared by several environmental lawyers: strengthening access to justice, role of NGOs, environmental ombudsman (...).	
Sources of inspiration	Rights of Nature Movement	The author calls himself a "*traditional legal scholar*": "*I must admit that I was a bit puzzled when asked to do this study. Why appoint a traditional legal scholar to analyse a concept which is totally new, even ground-breaking*"?	
Support from the authorities	Organiser		

EESC

	Opinion on climate justice	**Opinion on Towards a sustainable Europe 2030**	**Study *Towards an EU Charter of the Fundamental Rights of Nature***
Date	2017	2019	2019-2020
Nature of the act or actions	Own initiative notice Proposed debate on a *European Climate Charter of Rights*	Notice Repeated call for *recognition of the rights of nature (legal act of reception not specified)*	Study Proposal for a *Charter of Fundamental Rights of Nature* Several channels are envisaged: integration in the TEU/inter-institutional declaration, binding or non-binding value
Scale	European	European	European
Project bearer/	EESC	EESC	EESC

sponsor	LOHAN Cillian, Rapporteur	LOHAN Cillian & SCHMIDT Peter, Rapporteurs	Authors: Universities of Salento & Siena & Nature's Rights (including Mumta ITO)
Broadcast channels	EESC	EESC	EESC - Sustainable Development Observatory
Rights of nature	Not specified	Not specified	Promotion of the recognition of the rights of nature in the EU legal order through a Charter. Substantive and procedural rights : - to life, to exist, to regenerate its life cycles and evolutionary processes, to be respected and not to compromise its genetic viability, to diversity, to clean water and air, to be free of contamination, to health, to restoration - right to defend oneself, to participate in decision-making processes Obligations on states and individuals are set out to ensure respect for the rights of nature *The study considers a series of modifications or recognition of new principles and devices to strengthen the legal protection of nature. The authors take up several elements advocated by the environmental law community: non-regression, resilience, in dubio pro natura, holistic/ecosystemic approach, reversal of the burden of proof, ombudsman, broadening access to justice and the Aarhus Convention (...)
Legal personality	Not specified	Not specified	Yes
Representative of the entity	Not specified	Not specified	Yes
Sources of inspiration	Rights of Nature Movement -	Rights of Nature Movement - UN Harmony with Nature	Nature's Rights Movement

Referral to the CJEU

	Preliminary reference	Preliminary reference
Date	2021 filed with the CJEU	2021 filed with the CJEU
Nature of the act or actions	Litigation C-506/21	Litigation C-388/21
Scale	European	European
Project bearer/ sponsor	TGI- Landgericht Erfurt	TGI- Landgericht Erfurt

Broadcast channels		
Rights of nature	TGI interpretation of the EU Charter of Fundamental Rights by analogy: right to life, right to regeneration, right to integrity, access to justice	Interpretation by the TGI of the EU Charter of Fundamental Rights by analogy: rights of nature such as: right to integrity
Proposed legal personality	Interpretation of the TGI: nature *or ecosystems, subjects of law - open/broad concept of person*	Interpretation of the TGI: the "*broad notion of person (...) also includes nature or individual ecosystems*".
Representative of the entity	Not specified	idem
Sources of inspiration	Nature's Rights Movement	idem
Support from the authorities		

European Citizens' Initiative Project

	European Citizens' Initiative Project on the Rights of Nature
Date	2017 not yet filed
Nature of the act or actions	ECI - proposal for a directive on the rights of nature
Scale	European
Project bearer/ sponsor	Names of citizens not specified - support Mumta ITO Nature's Rights
Broadcast channels	
Rights of nature	Recognition of substantive and procedural fundamental rights (non-exhaustive list) -to *life and existence* *-maintain the integrity of natural cycles and life processes and conditions for regeneration* *-to housing* *-to natural evolution and the preservation of the diversity of life* *-the preservation of the functionality of the water cycle (quantity and quality)* *- fast and efficient restoration* *-the right to defence, protection and enforcement of these rights* *Rights of nature: a necessary condition for the right of every person to a healthy environment Recognition of duties of care and protection: all natural persons, governments and legal entities have a legal duty of care towards nature
Proposed legal personality	Nature "*has legal personality*"
Representative of the entity	-Any natural person (individually/collectively), government or NGO in the EU: acting on behalf of nature or defending a right of nature -In the absence of a representative: appointment of a person qualified as Amicus curiae by the court to represent the interests of nature -Appointment of an Ombudsman for the Rights of Nature by the Member States Ecological governance that integrates the rights of nature at all levels of decision-making and action
Sources of inspiration	Nature's Rights Movement

Support from the authorities	Project presented at the conference organised by the EP and the NGO in 2017

EUROPEAN NGOs

	European Campaign for the Rights of Aquatic Ecosystems[1136] & European Court in Defence of Aquatic Ecosystems	Conference Rights of Nature and youth participation [1137]
Date	2021 (January to May 2021)	2022
Nature of the act or actions	Campaign & Moot Court & creation of European platform of associations on the subject	Conference in the framework of the EU Green Track Campaign [1138]
Scale	European - Case studies: *Mer de Glace* (Mont Blanc glacier)/French State & Total, Maroni River in French Guiana/French State[1139] , Lake Vättern/Swedish State et al, Balkan rivers/Serbian State, Marseille red mud/French State & Alteo Gardanne	European
Carrier/ sponsor	Global Alliance for the Rights of Nature - Hub Europe President of the Court: Cormac Cullinan Call for case studies[1140] launched by the European network of the World Alliance for the Rights of Nature	Earth Advocacy Young
Broadcast channels	Media - Aquatic Ecosystem Rights Campaign[1141]	Media
Rights of nature	*The right to exist, the right to regenerate, the right to maintain their natural cycles, the right to restoration, the right to water, the right to be free from contamination, the right to unhindered movement, the right to a natural habitat, the right to health (...)*	/
Proposed legal personality	/	/
Representative of the entity	/	/
Sources of inspiration	Rights of Nature Movement - GARN	Earth Jurisprudence
Support from authorities or participation in the initiative	For each case submitted to this moot court, the entities considered responsible (public authorities or companies) were invited to participate (refusal or lack of response in return). For the Balkan Rivers case: Marie TOUSSAINT participated as a political expert alongside the other witnesses and case bearers.	Green Track Campaign initiated by the European Commission

[1136] https://www.rightsofnaturetribunal.org/tribunals/europe-tribunal-2021/, including the European Tribunal for the Protection of Aquatic Ecosystems, the regional chamber of the International Rights of nature Tribunal created by GARN
[1137] https://europa.eu/youth/year-of-youth/activities/1117_en
[1138] https://on-the-green-track.campaign.europa.eu/initiative_en
[1139] White Paper for the Rights of the Rivers and Peoples of Guyana, Wild Legal, https://www.wildlegal.eu/post/synthese-livre-blanc-pour-les-droits-des-fleuves-et-des-peuples-de-guyane
[1140] The associations carrying the case studies presented and selected during this call: Boues rouges (ZEA association), Guyane Fleuve Maroni (Wild legal & Maiouri Nature Guyane, organisation of the indigenous nations of Guyana, Association of mercury victims), *Mer de Glace* (Mountain Wilderness & Our common concern), Balkan Rivers (Earth Law Center, Earth Thrive and Prav (d) za reke Kopaonik i Srbije) Lake Vättern (rights of Nature Network Sweden).
[1141] https://notreaffaireatous.org/wp-content/uploads/2020/02/Tribunal-UICN-Full-EN-DEF-2.pdf?utm_source=sendinblue&utm_campaign=2020__La_lutte_pour_la_justice_climatique_continue_grce__vous_!&utm_medium=email

ANNEX II - TABLES OF SCIENTIFIC QUESTIONING

A series of scientific questions were identified during the team meetings[1142]. Cross-cutting questions are accompanied by questions specific to the three key themes of the order from the European Parliament's Green group.

CROSS-CUTTING ISSUES

THE CONCEPT OF NATURE UNDER EU SUBSTANTIVE LAW	
1	How is the concept of nature understood in EU environmental law? What values and approaches are promoted in substantive environmental law: anthropocentric / eco-centric / systemic? What material and spatio-temporal frameworks? What developments? What are the limits and potentialities? What is the relationship with international law and the rights of Member States? How is it linked to international trade law (*Lex mercatoria*)?
2	What is the process of integrating the concept of nature into the substantive law of the EU (apart from the basis of environmental policy) and what are the modalities of legal translation? Which approaches are promoted? What material and spatio-temporal frameworks? What developments? What is the relationship with international law and the law of the Member States? How does it relate to international trade law (*Lex mercatoria*)?
3	Nature, natural elements, natural entities, natural commons, environment, ecosystem services, green infrastructure (...): what are the tensions and synergies between these concepts in EU law?
4	Does the CJEU take up the concept of nature and how? What are the arguments of the parties? What methods and sources of interpretation are used?
5	Same question for Member States' courts?
6	What legal regime for hybrid concepts of "nature"? (e.g. non-spontaneous nature, nature transformed by humans, restored nature, genetically modified nature, improved nature...)

EU COMPETENCES, NATIONAL DYNAMICS AND RECOGNITION OF RIGHTS	
1	What legal basis is there for the recognition of the rights of nature in EU law?

[1142] Team members : Nina SALAÜN, Research Engineer, Alexandra ARAGAO Professor of Law, University of Coimbra Portugal, Thierry DAUPS, Senior Lecturer HDR in Law, University of Rennes 2 (UMR IODE CNRS), Florian FAVREAU, Doctor of Law, Assistant Professor at the Normandy School of Management, Daniel GADBIN, Professor of Law Emeritus, University of Rennes (UMR IODE CNRS), Marion LEMOINE, CNRS Research Fellow, University of Rennes (UMR IODE CNRS), Claire MALWE, Senior Lecturer, University of Rennes (UMR IODE CNRS), Adélie POMADE, Senior Lecturer HDR in Law at the University of Western Brittany (UMR AMURE CNRS-IFREMER).

2	What dynamics in the Member States could be conducive to the recognition of the rights of nature? What synergies with the implementation of EU law or in European decision-making processes?
3	What could be the frameworks for the exercise of European competence to promote a process of recognition of the rights of nature? And in the international arena / internal EU actions?
4	What interpretations of the principle of subsidiarity would be conducive to a recognition of the rights of nature?
5	What jurisprudential interpretations would be available concerning the EU's competences and their exercise?
6	What are the possible justifications for the need to recognise rights to nature? The effectiveness of jurisdictional protection? The effectiveness of non-jurisdictional protection? Social justice as a desirable indirect result of more effective environmental protection? Legal pluralism (indigenous rights in northern Europe)? Extending the right of participation of civil society associations representing nature's interests?

QUESTIONS SPECIFIC TO THE THREE ANGLES OF THE STUDY

RIGHTS OF NATURE & HUMAN RIGHTS	
1	Rights of nature, vital needs-essential needs of nature, interests of nature: what definition, clarification and articulation? Nature/natural entities, object vs. nature/natural entities, legal subject/legal personality: what could be the EU's positions and what legal translation could be envisaged? What are the situations in the Member States and in the EU's third country partners?
2	What definition, beneficiaries and scope of nature's rights? Among the rights of nature enshrined in other legal systems are the right to exist, to live and to thrive: are there provisions in EU law that guarantee or promote such vital imperatives?
3	Could the Charter of Fundamental Rights be the basis for a broad interpretation that recognises the rights of nature? - under the fundamental rights explicitly recognised by the Charter? - under Article 37? - under the other 'core' provisions? - under the general provisions? Could the explicit recognition of a right to the environment in EU law be a crucible for nature's rights and/or a springboard for the recognition of nature's rights? If the rights of nature are recognised in the legal systems of the Member States or in the case law of the ECHR, what could be the repercussions in EU law?
4	How can the human rights enshrined in EU law be reconciled with a possible recognition of specific rights to nature? How can these human rights, the right to the environment (not yet expressly enshrined in EU law) and the prospect of recognising the rights of nature be linked?

5	How can human responsibility towards nature be strengthened? The French Charter of the Environment enshrines the duty of every person to take part in the preservation and improvement of the environment (Article 2). Can such a statement be transposed as an obligation for everyone in EU law and what justiciability can be envisaged? Can the recognition of the rights of nature and the attribution of legal personality to nature and/or some of its elements underpin and strengthen respect for nature protection?
6	Rights of nature and natural commons: How does the EU position itself between these two movements that have led to various proposals at European level (Charter of the Rights of Nature // Charter of the Natural Commons)? What tensions & synergies?
7	What contribution does the recognition of the human right to a healthy environment (https://news.un.org/fr/story/2021/10/1105902) make to the rights of nature?

DECISION MAKING, PUBLIC PARTICIPATION AND REPRESENTATION	
1	What is the most likely / desirable way of recognising nature's rights in EU law? (revision of the treaties, adoption of a charter on the Rights of Nature, adoption of a framework legislative act (e.g. a framework directive on biodiversity...), adoption of a simple political declaration, case law interpretation...)
2	What role could Member States play in creating the momentum to enshrine the rights of nature in EU law?
3	How could nature and its representation be integrated into the EU decision-making process and institutions? Among nature's representatives & guardians of its rights: public authorities, designated legal entities, NGOs, other stakeholders, any individual ...: what scenarios & what procedural changes and institutional innovations? Should a representation of nature embodied in an EU institution (e.g. a nature ombudsman) be considered?
4	How to integrate the rights of nature into the substantive law of the EU: example of the EU's external relations (example of third country partners where the rights of nature have been recognised) example of CSR and reform of extra-financial information...
5	What reconciliation of rights and interests? How should the general interest be interpreted in the light of nature's rights? How should the principle of proportionality be assessed?
6	What role for European Citizens' Initiatives (https://ec.europa.eu/info/about-european-commission/get-involved/european-citizens-initiative_fr)?

ACCESS TO JUSTICE	
1	Are applicants invoking the concept of rights of nature before the European courts? In support of what grounds and arguments (contextual, supplementary, etc.) and in what type of dispute (legality, preliminary ruling, etc.)? Do NGOs use this argument in their applications to the CJEU? Are the Advocates-General 'sensitive' to this rights of nature movement?

2	To ensure nature's representation before the court: what reforms to access before the EU court are needed? Can the revision of the Aarhus Regulation offer a sufficient perspective to strengthen the role of NGOs in the context of the internal review application and the defence of nature? Can the concept of the rights of nature promote a strengthening of judicial review? How to overcome the status quo regarding the Plaumann case law on the eve of the next COP Aarhus in September 2021 (cf. ClientEarth case & Aarhus Compliance Committee)?
3	Do claimants mobilise the concept of rights of nature before their national courts, in particular with regard to compliance with EU environmental law? What are the examples at national court level concerning the implementation of EU law? Are courts sensitive to these arguments? Is actio popularis a likely scenario as in Portugal? When exercising this right, do Portuguese citizens mobilise the argument of the rights of nature and the need to act in the name of these rights? Or in the name of everyone's right to a healthy environment?
4	Ditto on the case law of the ECHD - what interactions and inspirations are likely to occur between the European courts? Ditto between jurisdictions from different European, American, African and Asian legal orders & systems...?
5	Depending on the type of process of recognition of nature's rights in EU law, which jurisprudential interpretations are possible? What role can the EU Court and its Advocates General play? What are the impacts on the interpretation of the duty to state reasons, the respect of the high level of environmental protection, the principle of reasonable reconciliation of interests (...).
6	What revisions should be made to the directive on the protection of the environment through criminal law? The same applies to Directive 2004/35 on environmental liability and compensation for environmental damage in the event of the recognition of rights of nature.
7	How does this relate to the concept of ecocide?
8	To what extent can the concept of the law of nature be used in Investment Court System cases (for disputes between foreign investors and host states, especially in the area of natural resource exploitation)? How is nature represented in these procedures? More generally, does the protection of foreign investors' rights, and in particular the recognition by the arbitrator of the validity of freezing clauses in extractive contracts or, more broadly, in state contracts, not radically limit the scope of a possible recognition of the rights of nature?

ANNEX III - STATE OF THE ART CLASSIFICATION AND COMMENTARY

Refer to the dedicated document

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Translated from French by Sandie Crayne.
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THE GREENS/EFA in the European Parliament