

**2024**

# **RIGHTS OF NATURE AND EUROPEAN UNION LAW: *Paths of dialogue***

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Study coordinated by Nathalie HERVE-FOURNEREAU,  
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**Summary for decision makers**



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# FOREWORD

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**MARIE TOUSSAINT**

Member of the European Parliament (Greens/EFA)

For a long time, we considered our human destiny to be completely independent of the destiny of the Earth we inhabit. Today, a completely different reality is becoming undeniable. Nature is dying. Around a million animal and plant species are threatened, and with them entire ecosystems that are endangered, damaged and destroyed... It's also becoming clear that there can be no protection of human health without protection of the living world. To protect ourselves, we must first and urgently protect the ecosystems that make up our common home, the Earth; of which we are a part.

For the 2019–2024 European mandate, the European Union's "Green Deal" was designed to equip us to face the climate and environmental crisis. We have certainly made significant progress: from the revision of the European directive on environmental crime (laying the foundations for the recognition of ecocide in EU law) to the (timid) raising of the EU's climate objectives, or the introduction of a due diligence for European companies, albeit largely stripped of its original ambitions. For the first time, the European Parliament also called for the world's forests to be recognized as a natural commons. But there are still far too many things to do: the EU has yet to make a firm commitment to a complete phase-out of fossil fuels. The law on the restoration of nature, which was supposed to be THE major text to protect European ecosystems, has been undermined by the alliance of the right and the liberals against ecology. European policies remain confined to a restorative approach based on compensation for environmental damage (we destroy, then repair on the margins), rather than an ecosystemic and preventive approach. Worse still, these policies sink deeper and deeper into the commodification of living things and their increasing financialization: to protect nature, we need to put a price on it, make it a market value like any other, and subject it too to the laws of the market.

Against this, we, ecologists, are defending another approach: recognition of the intrinsic value of nature and its rights. We want to bring about a real paradigm shift: from a utilitarian approach to nature to the recognition of its intrinsic value, from the multiplication of permits to harm and destroy nature to the recognition of the right of ecosystems to be protected, to regenerate at their natural pace and not to be polluted... By embarking on this path, the European Union would be taking part in a global movement

that stretches from Latin America to Asia, via Africa. A movement that has already begun to take root throughout Europe in recent years: recognition of the legal personality of the Mar Menor in Spain, declaration of the rights of the Tavignanu in Corsica and the Salines in Martinique, recognition of the rights of nature in the Environmental Code of the Loyalty Islands in New Caledonia...

There are still many battles to be fought before the rights of nature are recognized throughout the EU: Europe-wide harmonisation of access to justice in environmental matters, enabling any citizen to take legal action to defend the voice of ecosystems directly; the creation of genuine environmental civil liability, particularly in the case of diffuse pollution; the possibility for victims to obtain compensation for direct or indirect damage; the establishment of real protection mechanisms and action tools for environmental defenders... All these developments are both environmental and social justice measures: they guarantee the right and ability of everyone to live in a healthy environment (and we know how much the poorest are the first to be exposed to environmental pollution and destruction of all kinds), to be able to breathe, drink and eat without endangering their health, and to obtain justice when this is not the case.

This study by Nathalie Hervé Fournereau analyses the various projects that need to be undertaken to better protect and preserve ecosystems, based on existing texts, innovative legislative proposals and radical structural changes aimed at revising the architecture of priorities on a European scale. Some of these proposals are already being negotiated within the European institutions, while others could be launched in the coming years, such as the adoption of a framework directive on biodiversity and nature, or a reform of primary law to recognize the intrinsic value of nature and its rights at the heart of the European treaties. There's a lot to do, but we have stamina!

**Marie Toussaint**

Green Member of the European Parliament

# INTRODUCTION

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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<sup>1</sup> to the Biodiversity Strategy 2030<sup>2</sup>, 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"*<sup>3</sup>.  
*"Wild flora species and wild animal species and populations are part of the common heritage of humankind"*<sup>4</sup>. *"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"*<sup>5</sup>. *"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"*<sup>6</sup>. *"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"*<sup>7</sup>.

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. 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<sup>8</sup>. These semantic alliances reflect the powerful obstacles to the transformation of production and consumption patterns.

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

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

Anthropocene, Bruno LATOUR invites us to reflect: “*Where will we land?*”<sup>9</sup>. 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.

As the “*discreet servant of the established order*”<sup>10</sup> but also as an “*instrument of profound change*”<sup>11</sup>, the law contains undeniable “*creative*”<sup>12</sup> and “*imaginative forces*”<sup>13</sup> 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*”<sup>14</sup>.

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*”<sup>15</sup>. 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*”<sup>16</sup>, “*Bringing nature back into our lives*”<sup>17</sup>, “*Do no harm*”<sup>18</sup>, “*Leave no one behind*”<sup>19</sup>, the oaths are multiplying all the time. From the “*right to destroy*”<sup>20</sup> to the right to live and the rights of nature<sup>21</sup>, is an axiological shift taking place that will lead to new ecocentric visions? Is a new ‘*oikonomical*’ order<sup>22</sup> 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

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9 B. LATOUR, *Où atterrir ? Comment s’orienter en politique*, Ed. La découverte, 2017, 160 p.

10 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.

11 *Ibid.*

12 J. RIPERT, *Les forces créatrices du droit*, LGDJ, 2d edition, 1995, 431 p.

13 M. DELMAS-MARTY, *Les forces imaginantes du droit*, Tome 1 Le relatif et l’universel, Seuil 2004, 439 p.

14 *Ibid.*

15 J. CARBONNIER, *Essais sur les lois*, Répertoire du notariat de Frénois, 1979, 298 p.

16 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.

17 EU Biodiversity Strategy 2030, 2020, *mentioned*

18 COM (2019) 640 final, Communication from the Commission on the Green Deal for Europe

19 *Ibid.* Sustainable Development Goals (SDGs) of the UN 2030 Agenda.

20 M.REMOND-GOUILLOUD, *Du droit de détruire-essai sur le droit de l’environnement*, Ed. PUF, 1989, 300 p.

21 S. VANUXEM, *Des choses de la nature et de leurs droits*, Ed. Quae 2020, 115 p.

22 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.

in the Ecuadorian Constitution in 2008<sup>23</sup>. Echoing the International Mother Earth Day associated with the UN programme “*Living in harmony with nature*”<sup>24</sup>, 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”<sup>25</sup>. The result of a popular legislative initiative<sup>26</sup>, the recent Spanish law 19/2022 of 30/9/2022 recognises the legal personality of the Mar Menor lagoon and its basin<sup>27</sup>. Examined by the Congress of Deputies under the emergency procedure<sup>28</sup>, this law illustrates the determination of the promoters of the rights of nature to challenge the legislator on the insufficiency of existing legal mechanisms<sup>29</sup>.

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<sup>30</sup>. The publication of the study “*Towards an EU Charter of the Fundamental Rights of Nature*”<sup>31</sup> (2020) commissioned by the EESC and that on “*Can Nature get it Right? Rights on Nature in the European Context*”<sup>32</sup> (2021) commissioned by the EP’s Legal Affairs Committee reflects the topicality of the debates.

The study “Rights of nature and European Law”, coordinated by Nathalie HERVE-FOURNE-REAU, CNRS Research Director, and commissioned by MEP Marie Toussaint and the Greens/EFA Group in the European Parliament, questions the added value of recognizing the rights of nature in the light of a critical analysis of EU law. It is available in full [here](#).<sup>33</sup>

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23 In particular Chapter 7 on the rights of nature. <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>

24 First report of the Secretary-general on Harmony with Nature (A/65/314), 2009. <http://www.harmonywithnatureun.org>

25 D R. BOYD, *Rights of Nature, a legal revolution that could save the world*, ECW Press 2017, 312 p.

26 Genesis of the process: Boletín Oficial de Las Cortes Generales, Congreso de los diputados, nº208-1, 3/12/2021, proposición de Ley para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca. This ILP was brought by María 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>

27 Boletín oficial del Estado, nº237, 3/10/2022, p 135131.

28 [https://www.congreso.es/en/notas-de-prensa?p\\_p\\_id=notasaprensa&p\\_p\\_lifecycle=0&p\\_p\\_state=normal&p\\_p\\_mode=view&notasaprensa\\_mvcPath=detalle&notasaprensa\\_notaid=41829](https://www.congreso.es/en/notas-de-prensa?p_p_id=notasaprensa&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&notasaprensa_mvcPath=detalle&notasaprensa_notaid=41829)

29 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 recuperación y protección del Mar Menor.)

30 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>).

31 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)

32 Study requested by the JURI Committee, Policy Department for citizens’ rights and constitutional affairs, PE 689.328, 3/2021.

33 <https://www.marietoussaint.eu/actualites/rights-of-nature-eu>



# SUMMARY OF THE STUDY

In the course of the study, several scenarios were discussed to identify the paths that could be taken in the short, medium and long term to move towards recognition of the rights of nature in EU law.

If the *status quo* scenario was considered the no-go scenario (**part A**) The scenario of action for enhanced nature protection and a rethought legal relationship between humans and natural entities is urgently needed. This scenario is based on 5 essential pillars, which serve as the foundation for 12 key recommendations (**part 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<sup>34</sup>.

*“One day we will be told, you knew all this, what did you do?” (François Mitterrand, 1992)<sup>35</sup> “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” (Jacques Chirac, 2002).<sup>36</sup>*

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<sup>37</sup>?

34 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).

35 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>

36 Statement by J. CHIRAC on the critical situation of the global environment and France's proposals for sustainable development, Johannesburg, 2/9/2002. <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>

37 Cf. sentence in the above-mentioned statement by J. CHIRAC: “Our house is burning and we are looking elsewhere”.

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 the environmental crisis 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. 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.** 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.**

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. We recently witnessed it with the negotiations on regulation (UE) 2022/2577 on accelerating the deployment of renewable energies (2022) (amended by regulation (EU) 2024/223) which, in the name of urgency, temporarily derogates from the environmental obligations of the WFD and the Natural Habitats and Birds Directives and Directive 2011/92/EU (amended by regulation 2014/52/EU) on the environmental impact assessment of certain projects. Significant negative impacts on ecosystems, habitats and species, and infringements of the public’s procedural rights to information and participation, are expected.

**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. 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<sup>38</sup>. 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.

**Enhanced legal protection of nature therefore also requires questioning the conceptual foundations of existing law and building, if necessary, new and more ambitious legal**

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38 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.

**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.

### **SCENARIO N°1: 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. Others will soon be adopted following difficult negotiations and questionable compromises, such as the future regulation on nature restoration<sup>39</sup>. Similarly, the directive on the protection of the environment through criminal law, the directive on strategic lawsuits that distort public debate and the future directive on due diligence are all necessary elements to strengthen the protection of nature and its defenders.

### **SCENARIO N°2: 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.** In that context, 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<sup>40</sup>. 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 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. 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.

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.

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39 Awaiting Council vote following vote on 1st reading PE in February 2024

40 As a reminder, EESC opinion of 28/6/2019 on the discussion paper "Towards a sustainable Europe by 2030", *op. cit.*

### **SCENARIO N°3: 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 other 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*”. 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**<sup>41</sup>, 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. The future directive on due diligence is part of this objective.

Finally, the EU must reform its foreign investment policy<sup>42</sup> and step it up in order to ensure greater respect for treaty obligations concerning environmental and human rights, including those of indigenous peoples. The EP insists 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*”<sup>43</sup>. Generally speaking, there is still considerable room for progress in greening investment law.

### **SCENARIO N°4: 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 citizen and association initiatives are advocating for the recognition of the rights of nature and other aquatic ecosystems.

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. However, 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 to accelerate the deployment of renewable energy. In this

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41 As a reminder, the study of the EU's external policies could not be pursued in depth in this study

42 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).

43 EP resolution of 23/6/2022 on the future of the Union's international investment policy, OJEU 2023 C 32/96.

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 in the next months and years. 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. Yet, 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.

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.

### **SCENARIO N°5: Express recognition of the rights of nature in primary law and/or EU legislation**

As it stands, this sub-scenario of 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 complicates such paradigm shifts.

#### **Option 1: “Constitutional” recognition of the rights of nature**

The title of the study “*Towards an EU Charter of the Fundamental Rights of Nature*” by the EESC 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 addition, it would be important to amend the preamble of the Charter to recognise 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<sup>44</sup> benefiting from these rights. Such recognition should be accompanied by a strengthening of procedural rights (information, participation, access to justice).

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<sup>44</sup> 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*”.

### **Option 2: Jurisprudence-based recognition**

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. It is true that the CJEU has on several occasions ambitiously interpreted its founding case law that EU law "is also intended to generate rights"<sup>45</sup> for individuals. However, from the interpretation of obligations in favour of the recognition of objective and/or subjective rights conferred on individuals to the case law 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. Yet, the integration of the theory of the rights of nature into the litigation strategies of environmentalists can be a way to bring media attention and debate in the courts.

### **Option 3: A directive on the rights of nature**

The proposal for a directive on the rights of nature in the 2017 draft European Citizen Initiative<sup>46</sup> 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. Moreover, the choice of a directive has consequences for the extent to which rights can be invoked by individuals<sup>47</sup>. 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. Consequently, as primary law stands, the recognition of nature's rights via secondary legislation (directive and/or regulation) is highly uncertain.

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 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).

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45 Judgment of the Court of 5/2/1963, *Van Gend en Loos v Administratie der Belastingen*, 26/62, cited above.

46 Nature's Rights Draft EU Directive (Initiative Citoyenne Européenne) (2017), promue par l'ONG *Nature's Rights*.

47 As a reminder, the invocability of directives is restricted, unlike that of regulations.



# **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 in EU law**

To pursue the scenario of recognition of the rights of nature in EU law (scenario 5), 5 pillars of action emerge.

### **PILLAR 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<sup>48</sup>. Widespread recognition in EU law underpins the consecration of new categories (e.g. ecocide)<sup>49</sup>. 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<sup>50</sup>. 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.

### **PILLAR 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. Several European texts are already moving in this direction<sup>51</sup>. 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.

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***

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48 The place of this statement in the text (recital or articles) will play a role in the interpretation of the provisions.

49 Example of discussions on ecocide during the negotiation process for the proposal for a directive on the protection of the environment through criminal law. In its opinion of 25/10/2022 on this proposal, the EP Environment Committee introduces the expression intrinsic value of nature in amended recital 26, *supra*.

50 See in particular the reflections on the commons, including the natural commons, mentioned in this study.

51 See for example: COM (2022) 438 final, Communication on “Environmental Policy Review 2022: Enforcing environmental rules to save the environment”.

**in dubio pro natura<sup>52</sup> in the provisions of the TFEU.** 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 3: Adoption of an ambitious framework legislation on biodiversity and nature**

In particular, in order to meet the objectives of the new Kunming global biodiversity framework, adopted in Montreal in December 2022, the European Union must work towards **the adoption of a framework legislation on biodiversity.** 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...) 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<sup>53</sup>, this process of coherence should guarantee appropriate protection of ecosystems and species not exclusively because of their rarity, vulnerability or endangerment<sup>54</sup>.

To avoid reductionist, or anthropocentric, representations of nature protection, this framework legislation should:

- Prioritise the prevention of damage to biodiversity and the precautionary principle over the reductive approach of “zero net loss of biodiversity”;
- Rely on bio-cultural knowledge and a socio-ecosystemic understanding of how ecosystems function;
- 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.

### **PILLAR 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.** Today, there is still a lack of integration of environmental requirements into EU policies. The Green Deal does set 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. Great vigilance is required. In particular, the EP should act<sup>55</sup> to counter the risks of confusion or watering down of this oath and to ensure its practical realisation.

### **PILLAR 5: Substantial strengthening of the democratic representation of nature and its judicial protection**

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52 See Glossary.

53 WFD, Marine Directive 2008/56/EC, Regulation (EU) 2021/1119 on climate neutrality, Directive (EU) 2018/851 on waste

54 Criteria set out in Directive 92/43/EEC, *supra*.

55 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.



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 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 law 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.

- 1. Extending the tasks of existing public authorities by ensuring that appropriate human and financial resources are made available** (ex: strengthening the remit of the European Environmental Agency) and **changing the composition of the governance bodies of EU agencies**<sup>56</sup> (ex: rethinking the architecture of the European Economic and Social Committee, which would become the European Economic, Social and *Environmental* Committee, and include a new group representing the voice of nature).
- 2. Creating new independent authorities responsible for representing and/or defending the interests of nature** (ex: create an Environmental Ombudsman (or extend the powers of the European Ombudsman) and an environmental regulatory authority)
- 3. Ensuring the effective exercise of rights to information, public participation and broad access to justice.** 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.

**The study went on to show the need to strengthen effective jurisdictional protection of nature.** Several avenues of reform exist to achieve this. Guaranteed 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.

**On access to justice:** In the current state of EU and Member State law, the *actio popularis*<sup>57</sup> promoted by nature's rights advocates is not a solution that can be generalised. However, a new proposal for a directive that would guarantee wide access to justice at a non-prohibitive cost must be put back on the European agenda. This new directive would introduce a number of levers to strengthen access to justice:

- Widening the circle of claimants and targets of legal action. 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.
- Instituting an ambitious *Amicus curiae*<sup>58</sup> status '*in nomine natura*'. This would be a timely reform to be undertaken by amending the Statute of the CJEU and its Rules of Procedure.

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<sup>56</sup> 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.

<sup>57</sup> See glossary.

<sup>58</sup> See glossary.

**On the institution, consolidation and even expansion of the strategic powers of the judge:**

It is crucial to strengthen the administrative, civil and criminal sanctions provided for in EU environmental legislation or legislation with an environmental component. The future directive on due diligence provides for a civil liability regime which, despite its limitations, confirms the incursion of EU law into national civil liability regimes. Finally, establishing the crime of ecocide as an autonomous criminal offence would also be an emblematic leap forward.

**On the enforcement of legal decisions:** 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. They must be reinforced by:

- **The granting of injunctive powers to the CJEU against the European institutions.** Even if this comes up against a very uncertain reform of the treaties, 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.
- **The training of judges, prosecutors, police, other legal personnel and competent authorities in ecological complexity and environmental law, and the provision of sufficient financial, technical and technological resources.** In that context, extending the prerogatives of the European Public Prosecutor's Office to environmental offences of supranational scope is particularly recommended.
- **The effective enforcement of judicial decisions,** the sanctions to be applied in the event of non-compliance and the monitoring of the implementation of measures, in particular to repair ecological damage.

## 2. Twelve key recommendations

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.

### **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

### **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

### **Legislation - biodiversity framework pillar**

Recommendation 6: Adopt framework legislation on biodiversity and nature

Recommendation 7: Ensure biodiversity/nature coherence in environmental and EU policies

### **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

### **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

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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.

**Nathalie Hervé-Fournereau,**

CNRS research Director

# AFTERWARD

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**VANDANA SHIVA**

Ecofeminist activist

There are multiple reasons why enshrining Rights of Nature in law has become an ecological and ethical imperative in our times.

**First, Recognition of the Rights of Nature means overcoming the arrogance and violence of Anthropocentrism.** Anthropocentrism is the false assumption that humans are superior to our non-human relatives, who are mere objects and property to be manipulated for profits, or threats to human life that need to be exterminated. But we are not masters of the universe. The petty minded mechanistic and market paradigm has made us forget we are one Earth Family, interconnected through diversity. And since we are part of nature, Human Rights flow from the Rights of Nature. Recognising the Rights of Nature is also the foundation of human rights to food and water, to clean air and health.

**Second, law must reflect the emerging sciences of Living Systems.** Denying that the earth is living and has rights is based on an outmoded mechanistic view, which gives licences to exploit and violate nature. Law needs to evolve with the best of science. Emerging sciences of living systems and Earth Systems recognise that the earth is alive, a self organised, self regulating superorganism, and we are connected to other beings through symbiosis and mutuality. Scientists are now finding out that cooperation shapes evolution, not competition. From the molecules in a cell, to organisms, ecosystems and the planet as a whole, cooperation and mutuality is the organising principle of life.

**Third, recognising Nature's Rights is vital to address the multiple ecological emergencies that have become an existential threat to humans and other species.** We face an existential crisis as humanity and as a planetary civilisation. Indigenous people have been uprooted, displaced and exterminated over 500 years of colonialism. 2 million species are threatened with extinction, with 200 going extinct every day. Climate disasters are threatening lives across the South, impacting communities who do not live in fossil economies and have not contributed to climate change. The present path humanity is on is clearly non sustainable because it is destroying life on Earth, the very infrastructure of life.

The emergencies humans face in terms of hunger and thirst, disease and pandemics are rooted in these ecological crises and the crises of injustice, inequality, and inhumanity. Yet, even though these crises are interconnected, each is treated as unrelated to others.

As Einstein said, “We cannot solve our problems with the same thinking we used when we created them.” We need a new way of thinking and living so humans and other species can continue to live and thrive. We need to revisit the assumptions that shape our relationship with nature.

**Finally, recognising Rights of Nature is also central to undoing the violence against indigenous people.** Rights of Nature and Laws of Nature have been the foundation of all ancient cultures and indigenous communities. Mother Earth is Terra Madre, Gaia, Pachamama, Vasundhara.... Indigenous cultures have always organised themselves as members of the Earth community working in cooperation to maintain the infrastructure of life and wellbeing. 80% of the Biodiversity of the planet is on 20% of the land left with Indigenous people. They can be teachers and guides for humanity on how to make peace with the earth.

Moreover, Indigenous cultures are leading the movement to enshrine Rights of Nature in law. Ecuador rewrote her constitution to recognise the rights of nature. Bolivia took the initiative to draft the Declaration on the rights of Mother Earth. Europe can learn from indigenous cultures and Third World countries on writing laws that recognise the Rights of Mother Earth, the Rights of Nature.

**In conclusion, recognising the Rights of Nature shows us the path of how to avoid ecological collapse.** When human communities and societies recognise the Rights of Nature , rights of other cultures and diverse species, a new paradigm and new possibilities emerge and we can finally embrace the future with hope, peace, justice and sustainability.

### **Vandana Shiva**

Ecofeminist activist

# APPENDIX: GLOSSARY

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**1. In dubio pro Natura:** principle according to which, when several interests have to be weighed up, priority must be given to the protection and preservation of nature. In other words, doubt always benefits ecosystems and natural elements. This principle is echoed in the 2016 IUCN Global Statement on the Rule of Environmental Law:

*Principle 5 In dubio pro natura “In cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom.”<sup>59</sup>.*

**2. Bio-cultural rights:** collective rights with the specific aim of guaranteeing a given community’s interdependent relationship with its territory, resources, lifestyles and cultural and spiritual values<sup>60</sup>.

The concept of “bio-cultural rights” was founded by South African jurist and activist Kabir Bavikatte<sup>61</sup>. He defines bio-cultural rights as a “panel of rights” comprising (i) the right to land, territory and natural resources, (ii) the right to self-determination, i.e. the right of communities to autonomy and self-government, and (iii) the right to maintain their cultural identity, namely their values, cosmovisions, knowledge, know-how, traditions and languages.

**3. Actio popularis:** a procedural right granting legal standing to any natural or legal person in the name of nature, without having to prove any particular interest, such as being directly affected or having a “legitimate interest”. This right to take legal action in the name of nature, conferred on every citizen, already exists in some countries, such as Ecuador, Colombia and India.

**4. Amicus curiae:** external intervention by a natural or legal person in judicial or administrative proceedings, to provide additional elements for the handling of the case. This intervention, which literally means “friend of the court”, can take various forms, such as the presentation of a brief or testimony.

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59 [https://www.iucn.org/sites/default/files/2022-10/world\\_declaration\\_french\\_version.pdf](https://www.iucn.org/sites/default/files/2022-10/world_declaration_french_version.pdf)

60 Notre Affaire à Tous, Les droits de la nature, Vers un nouveau paradigme pour la protection du vivant (2022).

61 K.S. Bavikatte, Stewarding the Earth. Rethinking Property and the Emergence of Biocultural Rights (2014).









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