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## Rights of nature as an alternative or a complement to existing environmental protection

### Prawa do przyrody jako alternatywa lub uzupełnienie istniejącej ochrony przyrody

JULIÁN SUÁREZ

University College Cork, School of Law  
ORCID: 0000-0002-7087-5772, [julian.suarez@umail.ucc.ie](mailto:julian.suarez@umail.ucc.ie)

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**Abstract:** One of the most refined expressions of rights-based approaches to environmental protection, rights of nature have come a long way since the early 2000s. They have developed into full-fledged governance structures that could either improve or potentially replace duty-based existing environmental protection within domestic jurisdictions. However, even though they advance sustainable development values, both eco-theological and local participative governance strands of rights of nature have encountered shortcomings; several of them particularly related with the scope of protection derived from their explicit content. From a legal analysis perspective, a predominantly doctrinal and comparative approach can contribute to shedding light on rights of nature legal potency. Preliminary conclusions would show that from a legal analysis under this approach comprising four European domestic rights of nature legal frameworks, a bundle of indicators can be extracted to determine whether a certain rights of nature provision could be discarded as capable of enhancing or even substituting existing environmental protection.

**Keywords:** rights of nature, rights-based approach, effectiveness, eco-theological rights, local participative governance

**Abstrakt:** Jedno z najbardziej wyrafinowanych wyrażení podejścia do ochrony środowiska, oparte go na prawach, tj. prawa do przyrody, przebyło długą drogę od wczesnych lat 2000.

Zdążyło się w tym okresie przekształcić w pełnowymiarowe struktury rządowe, które mogą albo poprawić, albo potencjalnie zastąpić ochronę środowiska, polegającą na obowiązku, jaki jest nakładany w ramach narodowych systemów prawnych. Jednakże pomimo postępu, jaki dokonuje się za sprawą wartości zrównoważonego rozwoju, zarówno ekoteologiczność, jak i aspekt praw do przyrody posiadają pewne niedoskonałości; niektóre z nich są szczególnie powiązane ze swoją jednoznacznie określoną zawartością oraz zakresem ochrony. Z perspektywy prawnej dominujące podejście doktrynalne oraz porównawcze w analizie prawnej może przyczynić się do rzucenia światła na skuteczność prawa do przyrody. Wstępne wnioski mają za cel wykazanie, że z punktu widzenia analizy prawnej odnoszącej się do tego podejścia, które skupia cztery europejskie krajowe prawnicze ujęcia praw do przyrody, można wyodrębnić pakiet wskaźników, które określają, czy jest zasadne porzucenie idei zapewnienia praw do przyrody jako zdolnej polepszyć, a nawet zastąpić istniejącą ochronę przyrody.

**Słowa kluczowe:** prawa do przyrody, podejście oparte na prawach, skuteczność, prawa ekoteologiczne, rządy partycypacji regionalnej

## 1. Framing rights of nature within rights-based approaches to nature protection

Rights-based environmental protection has gained wide-spread notoriety over the last twenty years. It has become clear that the effectiveness of human rights is also pivotal to environmental protection. Notions such as the Anthropocene are deeply rooted within public discourse and popular culture, not out of mere casualty (Autin and Holbrook 2012: 61). Human agency is responsible for historic environmental degradation and for its unintended consequences, to society itself and to bio-physical cycles, natural entities and non-living natural elements (Crutzen and Soermer 2000: 17; Brondizio et al 2016: 316; Dalby 2015: 33–51; Rocktröm et al 2009: 32). Thus, the symbiotic relationship between the enjoyment of human rights and a healthy environment – wherein a healthy environment is a precondition for such enjoyment – comes full circle when the social and economic consequences of environmental degradation are taken into account in law and policy-making. A human rights-based approach to environmental protection is thus grounded on the notion of sustainable development (United Nations Environmental Program 2022: 18–20). Yet sustainable development comprises at its core competing narratives of economic growth and environmental conservation. In any case, it seeks to address the effects of inequality in development, discriminatory practices and unjust distribution of power if environmental protection wishes to contribute to curbing the impending socio-environmental crisis.

In jurisdictions wherein fundamental rights have been entrenched in constitutional or legal provisions, the expansion or the enhancement of environmental

protection using rights-based approaches cannot be avoided by policy and law-makers. Human rights continue to represent a reasonable benchmark for ensuring a life of dignity and well-being for all. However, human rights have low effectiveness – due mostly to weak and inefficient enforcement mechanisms. Respect for human rights has of late persistently deteriorated whilst the number of countries ratifying human rights treaties continues to grow (Bogdanova 2022: 164, 200, 202 and 222). Despite these shortcomings, there remains the belief that human rights can provide for legal protection from interference with human dignity under the new circumstances and new political commitments arising from the devastating consequences of human agency on the environment (Hassan 2023: 13). Human rights – and with them, mankind itself – are thus at the centre of rights-based environmental protection (United Nations Environmental Program 2022: 18-20). So the focus of rights-based approaches is decidedly ‘anthropocentric’, regardless of whether environmental protection’s focus shifts from limiting environmental degradation in the quest to economic growth, to nature-as-a-subject conservation, resource management and restoration governance (Kotzé and Villavicencio Calzadilla 2017: 407–411).

## **2. The influence of the apparent ‘ecocentric’ vs. ‘anthropocentric’ divide in environmental protection in rights-based environmental protection such as rights of nature**

The alleged paradigm-changing character of this focus shift has always been put into question. Several scholars have pointed out that ‘ecocentric’ environmental protection – although not steadily and in a fragmented way – has been put in place even before nature-focused manifestations had found expression in law (Kotzé and Kim 2019: 4–5). In international environmental law, since the 1972 Stockholm Declaration, instruments have taken a turn towards an ‘ecocentric’ approach, albeit for the sake of humankind. In Europe, the EU Birds, Habitats and Water Framework Directives, now under the context of the Lisbon Treaty to the TFEU and the EU Charter of Fundamental Rights, are particularly an example of regulation directed to improving environmental quality as a law and policy objective. In the US, wildlife protection legislation, natural park and wildlife refuge laws, and the public trust doctrine have derived obligations to halt and reverse resource depletion, biodiversity loss and environmental degradation (Houck 2017: 1–50; Massip 2020: 1; Daly 2016: 183200). So environmental protection for nature’s intrinsic value, and beyond what is useful or necessary to humans, has already been present in different intensity and with different success within existing governance framework.

Furthermore, ‘ecocentric’ or ecosystem approaches – whether rights-based or not – are not completely divorced from anthropocentric considerations. Scholars were already documenting that this approach was being progressively embraced by international environmental law twenty years ago. Ecocentric articulations introduce a reconstruction and re-imagination of nature, where ecosystems are conceived as wholes, with human and non-human participants alike are bound by systemic and relational dynamics. For De Lucia, this new reality of nature would have the effect on environmental law of expanding legal subjectivities to non-human entities (De Lucia 2013: 174–176). However, these approaches remain instrumental to achieving sustainable development. The notion of sustainable development itself suggests that environmental protection would move along the gradient of a line that has ecological integrity and resource use as poles. For example, in De Lucia’s view, instruments such as the UN 1992 Convention on Biological Diversity depict nature as “a set of discrete services, which can be then assigned a monetary value in order to – allegedly – enhance their visibility and increase their protection.” Or, in the case of the OSPAR Convention, they can also determine that the goal of environmental law is to achieve or maintain ecosystem’s health and integrity, that is, the provision of these ecosystem services to a certain exploitation threshold (De Lucia 2015: 111–113).

This would render tangential the debate between ‘anthropocentrism’ and ‘ecocentrism’ as the foundation of environmental protection. Scholarship has outlined that ecocentric approaches in environmental protection cannot overcome translating those legal subjectivities into the liberal notions of legal personhood, rights and standing. Tănăsescu, for example, at a more philosophical level, mentions that ecocentrism, however transformationally it is presented, is still a ‘centrism’. This centrism simply shifts the focus from humankind to nature, but that “repeats exactly the same opposition [between nature’s intrinsic value and resource use] that is foundational for modernist ways of thinking,” ostensibly dualist, moralist and universalist (Tănăsescu 2022: 31, 153). For Macpherson and Clavijo Ospina, the usefulness of the ‘anthropocentric/ecocentric divide’ is put into question regarding placed-based and relational environmental governance stemming from rights-based approaches. Such approaches, although inspired in legal and cultural pluralism, are the result of ‘accommodation’ and ‘mediation’ processes, into Western liberal utilitarian legislation, of interests in nature and guardianship relationships existing in indigenous people’s customs and laws (Macpherson and Clavijo Ospina 2015: 283–293).

That said, regardless of claims of rights-based environmental protection being ‘less anthropocentric’, ‘ecocentric’ or even ‘biocentric’, this type of approach has enormous potential for enhancing environmental protection. Although

decidedly ‘anthropocentric’ – as much as the allegedly ‘ecocentric’ articulations of other approaches – the rights-based approach to environmental protection reconciles considerations of nature’s intrinsic value and of nature as a purveyor of material and physical benefits for humans (Dancer 2021: 21–41). The additional layer provided for environmental protection by this approach would then balance the three dimensions of sustainable development, evoking a global aspiration “to life on earth and a local environment free from unacceptable degradation” (Cullet 1995: 25–40). These considerations certainly mark a new phase in environmental protection and make up for further socio-environmental justice. From a strictly legal perspective, rights-based environmental protection would therefore: (i) directly address impacts of environmental degradation on human or constitutional rights of individuals; (ii) secure higher standards of environmental quality by imposing on States justiciable environmental protection duties, and (iii) promote environmental rule of law (Odote 2020: 381–414).

### **3. Rights of nature, pinnacle of rights-based approaches to environmental protection?**

Rights of nature are, of course, part of rights-based approaches to environmental protection. Rights-based approaches to environmental protection also include the right to a healthy environment (Knox 2020: 79–95), the ‘right to a stable climate’ (May and Daly 2021: 39–64), bio-cultural rights (T-622/16, COCCt 2016: 5.11-5.18; Sajeva 2021: 85–100), the inter-generational principle (Venn 2019: 717–718) and procedural environmental rights – public participation in environmental decision, access to environmental information, access to environmental justice, and protection of environmental defenders (Pereira Calumby and Johannsdottir 2021: 53–73). Rights of nature would seem to allow to bypass or circumvent (at least theoretically) some of the hurdles other right-based approaches have experienced in their implementation.

For example, the recognition of the right to a healthy environment has certainly changed public awareness about environmental protection. Its recently achieved breakthrough within the UN legal system and other international treaties could be a catalyst for change (UN Human Rights Council 2021; UN General Assembly 2022). However, it has also been known for its many shortcomings. At a domestic level, it has been understood as a ‘claims-right’, which, unlike liberty rights, requires that a clear and unconditional positive obligation should be placed upon third parties towards the right holder. That obligation usually falls upon the State or corporations. But this entails the need for enacting further ‘implementation laws’ to properly integrate the right into national laws and procedures (Aguila 2021).

There is difficulty as well in defining the scope of the right to a healthy environment. Several conflicts arise when it is confronted with other fundamental rights. Courts all over the world have found it excessively difficult also to grant any specific content to the right and to the notion of ‘environment’ itself in legal challenges to environmental decisions (Friends of the Irish Environment CLG v Government of Ireland & Ors, IESC 2020: 8.11-8.17; Coyne & Anor v An Bord Pleanála & Ors, IEHC 2023: 293–294). Moreover, since the right is mostly inserted within the framework of human rights owed to individuals, remedies for its breaching demand a proof of direct and personal injury of the plaintiff – a condition that leads, inevitably, to the hazardous issue of legal standing (Aguila 2021).

On the contrary, substantive rights of nature, such as the right of ecosystems and other living non-human entities to exist, flourish or to be restored – would not encounter such difficulties. Although, like in the case of ‘claims-rights’, these rights would need no enactment of any implementation legislation if the clear and unconditional positive obligation placed upon the rights-holder is entrenched in a constitutional provision as a fundamental right, with the same binding force of those already recognised in favour of human persons (Macpherson, Borchgrevink, Ranjan and Vallejo Piedrahíta 2021: 441–443). Rights of nature clearly establish a universal obligation that makes every legal person a rights-bearer towards nature.

In addition, the hurdle of defining the scope of the rights of nature would not be of concern. The dimension of the duty to maintain the ecological integrity or to fulfil ecological favourable condition or biodiversity thresholds of nature – in general or of a particular ecosystem – would be determined by the best available science. This specific content of rights of nature would make them cognisable by courts. Finally, since rights of nature protect nature’s intrinsic value, and this value is of public interest, then the defence of these rights would not be restricted by any ‘sufficient interest’ or absence of *ius tertii* claims requirements.<sup>1</sup> Unlike breach of environmental rights<sup>2</sup>, access to courts to uphold substantive rights of nature would be

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<sup>1</sup> ‘Sufficient interest’ and ‘absence of *ius tertii* arguments’ are the requirements in Irish law to prove legal standing in a claim for breach of constitutional rights. They imply that applicants claiming breach of constitutional rights must show that a challenged decision directly and adversely affected the personal interests of the applicant. Cahill v Sutton, IESC 1980: 3; Mohan v Ireland, IESC 2019: 10–11.

<sup>2</sup> Even though access to environmental justice to uphold environmental individual and collective interests has improved in many jurisdictions, by means of relaxation of legal standing requirements or enlarging its personal scope, the rule is still that the plaintiff must show to courts that they were personally and directly affected by environmental decisions or by environmental harm. For instance, in France, according to s. 142-1 of the Environmental Code, only authorised e-NGOs by the government can challenge planning or environmental decisions in judicial review if they prove the link between

guaranteed to any person that can bring a serious claim to uphold these substantive prerogatives in case of climate change, biodiversity loss or environmental degradation.

#### **4. The reflection of competing interests regarding environmental protection on the content of rights of nature: the rights of nature strands**

Obviously, this depiction of rights of nature as strictly claims-rights is not fully accurate. There are in fact two dominant strands of rights of nature. These are known as the ‘eco-theological’ strand, on the one hand, and the local participative governance strand – also known as the ‘legal personhood’ model, on the other hand (Tănăsescu 2022: 47–94; Kauffman and Martin 2021: 59–77).

##### **4.1. The eco-theological strand of rights of nature**

Under the ‘eco-theological’ strand, rights of nature are built upon a fiction. Like companies or incorporated bodies, ‘Nature’ as an abstract and universal entity or a particular ecosystem, with intrinsic legal value, is formed by law into a separate legal personality or is given right-holder entity status. Therefore, the natural legal person/right-holder entity can be further endowed with substantive rights adequate to protect its bio-chemical and physical cycles, non-living elements and biodiversity. These substantive rights are meant to create duties of environmental protection and environmental harm redress upon the State or other individuals and incorporated bodies. Since direct and personal injury is experimented by the legal person itself in breach of its own substantial rights, Nature can stand in court to uphold them.<sup>3</sup> Legislation or case law usually appoints guardians or stewards to

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the challenged measure and their objects clause, and the correspondence between the geographical reach of harmful effects for the environment with the e-NGO’s own authorisation geographical scope. Furthermore, as per s. 1248 of the French Civil Code (as amended), if an e-NGO wishes to seek relief against direct or indirect harm to the collective interest they defend (the so-called *préjudice écologique*) they still need to be authorised and fulfil standing requirements (*qualité et intérêt à agir*).

<sup>3</sup> Ecuador and Colombia, for example, have accepted that RoN can be invoked directly by any person, either because there are express constitutional provisions allowing it (Article 71 of the Ecuatorian Constitution) or because they are in connection with human and environmental rights, and/or are invoked by vulnerable populations that deserve reinforced constitutional protection (T-622/16, COCCt 2016: 3.2). Both of these countries have entrenched constitutional writs to protect constitutional rights directly, with the possibility to bypass any standing, provided that there is sufficient evidence of a breach of a constitutional right. In Ecuador, wider protection has been afforded to rights of nature, because the Constitutional Court has accepted that they have direct applicability and that their respect



the natural legal entity to exercise Nature's procedural rights. In turn, these stewards can obtain professional legal representation for the natural legal entity in litigious matters<sup>4</sup> (Tănăsescu 2020: 429–453; Kotzé and Villavicencio Calzadilla 2018: 397–424). Some rights of nature legal declarations have appointed environmental NGOs and public institutions as stewards of natural legal entities, under certain criteria, such as geographical proximity or their environmental objects clause. Others have opted for setting out broad standing for Nature by way of environmental popular actions. These actions permit any legal or physical person to stand in court to uphold Nature's substantial rights (Villavicencio Calzadilla and Kotzé 2023: 61–67; Schimöller 2020: 570–592).

Since 2008, around thirty-one States have adopted some form of rights of nature. Most of these States conceived their rights of nature legislation around the 'eco-theological' model strand. Flagship examples are Ecuador, Bolivia, several US townships, and Panama.<sup>5</sup> Rights of nature in these countries have been adopted by constitutional or statutory provisions and local resolutions, and further modulated by case-law (Kauffman and Martin 2021: 80–116, 163–176; Kotzé and Calzadilla 2017: 422–425). It is a conception of rights of nature rooted in natural law (Warren 2006: 13; Matthews 2019: 5, 8–9). Eco-theological rights of nature seek to reconcile Christian theology with ecology. Under this perspective, Nature is guided by unity, totality, and interrelatedness. Furthermore, Nature is personalised as female – Mother Nature, Gaia or Pachamama – and is thought of as nurturing and caring, as a place of perpetual creation of life and abundance of resources. Environmental law should reflect these personal qualities of Nature and value Nature for its own sake. So what environmental law does by endowing Nature rights is simply recognizing its pre-existing moral value (Tănăsescu 2022: 24–31, 62–69).

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is a duty of all citizens and public authorities as well (1149-19-JP/20, ECCCT 2021: 35–39). The recent Panamanian case decided by the country's Supreme Court did not deal with the subject because it was a constitutional challenge under ordinary standing requirements (*Sevillano Callejas v Panama*, Panamanian Supreme Court 2023: 72–73).

<sup>4</sup> For instance, Articles 71 to 74 of the Ecuadorian Constitution 2008; Articles 7, 8 and 10 of Bolivian Law 71/2010; Articles 4(1), (5) and (6), 5, 9(1), and 11 of Bolivian Law 300/2012; Articles 1, 3, 5, 6, and 10 to 14 of Panamanian Law 287/2022.

<sup>5</sup> At the time of finishing this draft, the Panamanian Supreme Court recognised that the ecological or objective dimension of the right to a healthy environment had been elevated to the status of State obligation, when Law 287/2022 granted nature rights-holder status. Under that statute, the State had the duty to enact policy to ensure nature's superior interest based on its intrinsic value. This allowed the Court to declare the invalidity of a mining concession contract entered into by the State through a law, due to the absence of strong environmental harm prevention measures required to comply with that duty. *Sevillano Callejas v Panama*, Panamanian Supreme Court 2023: 215–218.



Eco-theology reflects on the substantive rights granted to Nature. These are the right to exist, to be preserved and to be restored.<sup>6</sup> Philosophically speaking, these rights bear significant similarity to fundamental or human rights such as the right to life, the right to liberty, or the right to property. The right to exist is defined as the duty to respect the ecological law or natural order that allows an ecosystem to thrive. The right to be preserved has been established as the duty to engage in actions to maintain and regenerate Nature's life cycles, structure, functions and evolutionary processes. And the right to be restored has been characterised as the duty to adopt measures to mitigate or eliminate harmful environmental consequences where ecosystem service degradation occurs (Soro Mateo and Álvarez Carreño 2022: 168–172). Legislation and case law have consequently designated Governments at all levels, individuals and corporations as duty-bearers.

#### 4.2. The local participative governance strand of rights of nature

In opposition to the 'eco-theological' strand of rights of nature, there is the 'local participative governance' strand. This strand has had less wide reception than the eco-theological strand of rights of nature. Nevertheless, it has also influenced several hybrid manifestations of the latter.<sup>7</sup> It was originally conceived in New Zealand as a component of the reparations owed by the Governments to the first nations' peoples for land inequity, colonialism, and historic social exclusion, but not for environmental protection (Macpherson 2023: 401–402). It is an attempt to integrate legal pluralism into Western law. Indigenous peoples' *cosmovisions* of guardianship of a particular ecosystem are thereby reconciled with a State's ownership and management of natural resources to "overcome contentious issues of ownership" (Kauffman and Martin 2021: 76). In this case, a particular ecosystem – and not Nature as totality – is incorporated into a legal person in accordance with private or public law legal personality typologies, or under a *sui generis* legal personality typology altogether (Kauffman and Martin 2021: 59–76). Similar proposals have been adopted in Australia and put forward in The Netherlands, but lacking the level of complexity of the Kiwi model.<sup>8</sup> The choice of a particular legal entity typology depends on the legal context of a given jurisdiction. For instance,

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<sup>6</sup> An archaetypical example of the definition of these substantive rights of nature can be found in Article 2 of Spanish Law 19/2022, on the recognition of the legal personhood of the Mar Menor lagoon and its basin.

<sup>7</sup> Which will be discussed *infra*.

<sup>8</sup> Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017; Resolution No. 2019/Z235986 (12 July 2019) of the Noardeast-Fryslân Municipality Council regarding the Dutch Wadden Sea.

in some cases, natural legal entities have been incorporated as entities under a mixed regime, e.g. the Whanganui River in New Zealand.<sup>9</sup> In other cases, local propositions have sought to incorporate local ecosystems as public law legal entities, e.g. such as the *waterschap* in Dutch administrative law in the proposal for rights of nature to the Wadden Sea (Lambooy, Van Soest and Breemer 2022: 51–65).

The local participative governance strand of rights of nature also endows particular ecosystems with ‘rights’. Nevertheless, these ‘rights’ are in fact powers conferred to the natural legal entity to guarantee its environmental governance and respect of its biocultural diversity. Natural legal entities, under the local participative governance strand, can thus *inter alia* manage and protect ecosystem services, issue environmental licenses, enforce and monitor existing environmental law, arbitrate differences between nature conservation goals and existing property rights over resources, and issue sanctions for breach of existing environmental regulations (Lambooy, Van Soest and Breemer 2022: 51–65). Moreover, these powers include the possibility of ethnic and local communities depending on such ecosystems to directly and publicly participate in their environmental governance. This enhanced public participation has adopted different forms. For example, communities have actively participated in the design and adoption of strategic and action plans. They have had a seat at committees in charge of advising environmental management authorities, and of advocating protection and improvement of the natural legal entity’s ecological condition (Macpherson, Borchgrevink, Ranjan and Vallejo Piedrahíta 2021: 459–460).

It is important to bear in mind that the Te Urewera Forest and the Whanganui River local participative governance models have been granted actual rights, specifically “all the rights, powers, duties, and liabilities of a legal person.”<sup>10</sup> This provision implies that, in principle, the full logic of legal personhood applies to these natural legal entities. Consequently, natural legal entities will be able to enter into contracts, initiate court proceedings for recovering debts, and hire personnel for its representative or advisory bodies. Under this consideration, they can also perform landowner functions for land vested in the natural legal entity,<sup>11</sup> or even have ownership interests in their own natural resources, such as water (O’Donnell 2021: 9–12). But they will also be held in civil liability for breach of the duty of care to perform those powers and duties with reasonable diligence, although that

<sup>9</sup> Section 17 of Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

<sup>10</sup> Section 14(1) of Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

<sup>11</sup> Section 19(1)(d) of Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

responsibility will be taken by their representatives on their behalf and in their name.<sup>12</sup>

One feature of the local participative governance strand is the creation of an intricate governance structure of the natural legal entity. For example, in the case of the Whanganui River, it introduces powers, duties, and responsibilities for the natural legal entity and its representatives, and intends to put in practice an “integrated watershed management strategy, to ensure the environmental social, cultural, and economic health and well-being of Te Awa Tupua [the river legal person]” (Kauffman and Martin 2019: 272). This complicated structure involves a great deal of stakeholders with interests in the river at all levels: representatives of Maori communities, national and local governments, recreational users and environmental defence groups (Kauffman and Martin 2019: 272). Legal scholars have highlighted too that the legal person of the river itself is another stakeholder of that environmental management scheme, since it is a member of the integrated watershed management body through its representatives (O’Donnell 2021: 11–12).

### 4.3. Hybrid models of rights of nature

Finally, some other countries have adopted hybrid models of rights of nature. Amongst countries that have done so are Colombia, India, Bangladesh, Spain, and the French New Caledonia Overseas Territory.<sup>13</sup> These models cherry-pick the features of both dominant rights of nature strands that, in the view of law- and policy-makers, would fit best with the country’s own socio-economic context and legal system. Hybrid models have the particularity of having been created by case-law or by statute, and being conceived only for particular ecosystems. Most of these hybrid rights of nature models enshrine ‘eco-theological’ substantive rights for certain biomes, and ascribe nature stewardship to governmental agencies and e-NGOs or re-arrange and/or create institutional bodies for the environmental governance of those ecosystems (Tănăsescu 2022: 97–120). Some add the possibility of broader standing for nature by means of an *actio popularis* besides granting stewards standing to represent the particular ecosystems before the courts.<sup>14</sup> Others integrate advi-

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<sup>12</sup> According to section 21(2) of Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, except for certain exclusions, Te Pou Tupua – the river’s legal guardian – is responsible for the liabilities of the legal person of the river – Te Awa Tupua.

<sup>13</sup> For a comparative study with four selected European domestic rights of nature frameworks, including the Spanish and the French New Caledonian hybrid rights of nature laws, see Suárez 2023: 90–107.

<sup>14</sup> Article 6 of Spanish Law 19/2022.

sory boards composed of scientists, e-NGOs or scientific institutional bodies, who will provide the stewards with technical guidance and monitoring, as well as data on the ecological state of the site, risks or threats to its integrity and adequate restoration measures.<sup>15</sup>

The scope of such substantive rights and the complexity of the environmental governance arrangements vary in intensity. As is the case with the two dominant strands of rights of nature, hybrid rights of nature models develop within the country's own legal system and socio-economic context. For instance, the Colombian Constitutional Court recognised rights of nature and right-holder status to the Atrato River, as it also recognised biocultural rights to the riverside indigenous peoples and Black communities. Within Colombia's 'Ecological Constitution' legal context, protection of environmental rights and imposition of duties of environmental protection is provided for. The Court also ordered the national Government to exercise legal guardianship of the river, and the authorities from all levels, alongside international research organisations, to come up with a water decontamination plan (T-622/16, COCCt 2016: 5.3, 5.10, 5.17, 9.32 and 10.2). But in Colombia, the State has failed to curb illegal mining and subsequent environmental degradation in historically neglected regions (Macpherson, Borchgrevink, Ranjan and Vallejo Piedrahíta 2021: 452).

In India, the High Court of Uttarakhand recognised rights of nature to the Ganges River and subsequently, to the glaciers in which the Ganges and Yamuna rivers originate. The court recognised legal personhood and substantive rights in favour of those ecosystem, and gave government officials standing under the *parens patriae* doctrine,<sup>16</sup> advancing the religious significance of those ecosystems as sacred for Hindus (Salim v State of Uttarakhand & Ors, UttHC 2014: 11, 17–20). However, national and local governments had been notoriously negligent in fulfilling environmental protection duties and previous court orders under existing environmental legislation towards the river (Jolly and Roshan Menon 2021: 1–26). It should be noted that the Indian Supreme Court stayed this decision at the State government's request, so the enforcement of the decision is halted until the appeal is decided (Salim v State of Uttarakhand & Ors, INSC 2017: 1).

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<sup>15</sup> Article 3(4) of Spanish Law 19/2022; T-622/16, COCCt 2016: 10.2.1.

<sup>16</sup> The *parens patriae* doctrine is a legal principle that allows States to "protect the well-being of their citizens when no one citizen has standing to sue and thus cannot remedy the problem" (Moscati Hawks 1988: 186–187). The doctrine has been applied in several common law jurisdictions, including India and the US. In India, given the duties in Articles 38, 39 and 39A of its Constitution, "the *parens patriae* theory is the obligation of the State to protect and take into custody the rights and privileges of its citizens for discharging its obligations" (Charan Lal Sahu v India, INSC 1989: 3.2).

## 5. Praise and critique of all the rights of nature strands

Scholars have signalled that these features of dominant strands of rights of nature can either weaken or strengthen environmental protection. Eco-theological procedural rights of nature have been praised for proposing broader standing for nature, be it by appointing public authorities and e-NGOs as stewards of nature, or in the form of environmental popular actions. The possibility for any citizen to uphold environmental protection duties in the public interest offers a wider access to environmental justice than existing environmental protection, such as the Aarhus Convention in the European context (Vicente Giménez and Salazar Ortuño 2022: 33–35). The substantive rights of nature of the eco-theological strand have introduced principles and values related to social, intergenerational and environmental justice into legal systems with more or less pronounced deficits in environmental protection (Villavicencio Calzadilla and Kotzé 2023: 56–61).

Moreover, the local participative governance strand of rights of nature has contributed to revalorise the biocultural diversity of ethnic communities, by legally recognising the importance of traditional livelihoods and ways of life, cultural, aesthetic and spiritual values of the environment, and ancestral ownership of lands and natural resources. This strand has in particular improved public participation of ethnic and local communities in environmental management, policy and decision-making (Gilbert 2023: 671–692). Several ecosystems, e.g. the Yarra-Birrarung River in Australia,<sup>17</sup> are managed by councils or boards which count amongst its members different kinds of stakeholders, e.g. first nation's representatives, government officials, civil society and e-NGO representatives, business and industry union representatives, and environmental defenders.

However, critics of the eco-theological strand of rights of nature have pointed out that its characterisation of Nature is not compatible evidence-based scientific information about the functioning of the Earth systems, and does not provide for reasonable thresholds of environmental quality or baseline restoration (Tănăsescu 2022: 49–51, 63–65). They have also highlighted that these natural law-based prerogatives of Nature have incorporated similar environmental protection duties to those already in place but now in the language of rights. For instance, if the right to exist implies the duty to respect an ecosystem's natural order or ecological law, it refers to the duty to preserve its biological integrity. This would make it impossible or extremely difficult to differentiate such a right from similar obligations to achieve a certain desirable ecological

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<sup>17</sup> Section 49(1) of the Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017.

quality, such as the EU Water Framework Directive<sup>18</sup> or to restore a population of protected species to a satisfactory threshold, such as the EU Birds Directive.<sup>19</sup> Therefore, these new ‘rights’ would be brought into legal systems without any consideration given to the fact that they could overlap, be redundant or enter into conflict with existing environmental protection (Bétaille 2019: 57–59; Soro Mateo and Álvarez Carreño 2022: 160–172).

Regarding the local participative governance strand of rights of nature, there have been concerns about the significant financial allocations, human resources, institutional co-ordination, and policing efforts that such an overly ambitious environmental governance would require. This might result challenging in those contexts where States have poor institutional reach or a tendency to tolerate institutional apathy in attaining environmental protection objectives (Krämer 2020: 67–69). Other issues have been raised about the lack of agency of particular ecosystems regarding ‘property rights’ over their own natural resources. Scholars have pointed out that, despite particular ecosystems being endowed with recognition of their legal personality under this type of rights of nature strand, legislation has failed to grant ownership to that legal person to its own fresh water or to quality water to sustain biodiversity and bio-physical cycles (O’Donnell 2021: 10–11; Wesche 2021: 49–68).

A common critique to both types of strands of rights of nature is that they add more environmental protection duties without considering their coherent integration into existing environmental governance framework. The example set out above about the so-called ‘right to exist’ demonstrates a particular situation of redundancy of protections, which might create issues about interpretation and application of both sets of legislation. This conflict is also extended to other entitlements, such as property rights, State ownership of natural resources or economic development values. The same argument could be put forward for the local participative governance strand, which in most cases creates *sui generis* governance arrangements which risk being incompatible with other environmental protection duties already in place (Soro Mateo and Álvarez Carreño 2022: 187–192).

Another objection to the rights of nature legal declarations is their entrenchment without a coherent and comprehensive reform of other substantial and procedural associated legislations. To accommodate environmental popular

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<sup>18</sup> For instance, Article 4(1)(a)(i) of Directive 2000/60/EC regarding prevention of deterioration of the status of all bodies of surface water, considered certain conditions.

<sup>19</sup> For example, Article 2 of Directive 79/409/EEC (as amended by Directive 2009/147/EC) regarding maintaining the population of species of natural occurring birds at “a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements.”

actions, for instance, law reform of rules applicable to civil, criminal and judicial review proceedings is required to incorporate judicial claims in the public interest and adequate cost protection rules (Pérez de los Cobos Hernández 2023; Soro Mateo and Álvarez Carreño 2022: 181–186). And last but not least, neither strand of rights of nature addresses lack of enforcement. The latter has been singled out in international and national contexts as detrimental to environmental rule of law, and thus, to environmental law's role in curbing environmental degradation; especially after the COVID-19 pandemic (Bétaille 2019: 59–63; United Nations Environment Programme 2023: 38–44).

## **6. Assessment of the rights of nature legal potency: methodology or madness?**

Nevertheless, pointing out the advantages and inconveniences of adopting rights of nature laws in a particular jurisdiction is not enough to determine whether they are an alternative or a complement to the environmental protection. Such an appraisal requires a legal analysis on the potency of rights of nature laws.<sup>20</sup> That is, an estimation of the capacity or potential of rights of nature provisions, extracted from interpretation of their explicit content, to ensure adequate environmental protection in coherence with existing environmental law, either by directly enhancing it or by prompting its repeal. Some of the elements required for this kind of assessment have already been outlined by scholars in their own approaches when addressing the legal analysis of the two dominant strands of rights of nature laws and their hybrid models.

### **6.1. Predominantly socio-legal and predominantly doctrinal approaches to legal analysis of rights of nature laws**

So what are the legal analysis approaches employed by researchers to come to these conclusions about rights of nature and its two dominant strands? Rights of nature scholarship has adopted different legal approaches, which focus on different aspects of legislation and case-law, but also on the political, social, cultural, and historical contexts and ongoing processes particular to each ju-

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<sup>20</sup> The original term used in this research project to refer to the capacity or potential of rights of nature laws' explicit content to ensure adequate environmental protection was *effectiveness*. However, this term might lead to confusion, as 'effectiveness' suggests an appraisal of compliance and enforcement of norms, which would go over and beyond the scope of the research project. Compliance and enforcement of norms is of course the subject of empirical socio-legal research, that can measure by direct methods how norms operate and what effects they have.



risdiction. These can be classified in two different types of approaches, even though they all have in common a comparative law component, and different levels of interdisciplinary influences in the research tools employed.

### 6.1.1. Predominantly social-legal approaches

The first type of approach would be predominantly socio-legal. In this type of rights of nature analysis, researchers are interested in the genealogy of the rights of nature movement, or in the ways it has expanded to other countries as the extrapolation of foreign legal rules or as a result of intense lobbying of international environmental advocacy networks. These subjects reflect a choice of study from an ‘external’ perspective of legal phenomena. That choice implies engaging in interdisciplinary exploration that embraces methods of social sciences to undertake research about rights of nature norms as a social entity, rather than research in rights of nature themselves (McCrudden 2006: 636–637; Chynoweth 2008, 30–31).

A very good example of this field is the research conducted by Kauffman and Martin. These authors are mainly interested in the political, historical, social and cultural factors that shape how rights of nature legal manifestations are “framed, contested and expressed institutionally.” By comparatively analysing scope and strength of the two strands of rights of nature, and taking into account their origins and local contexts, they wish to highlight how rights of nature norms are constructed and institutionalised differently. On the one hand, scope refers to the definition of nature as a rights-bearer and which substantive rights are granted to it. On the other hand, strength deals with the type of rule enacting rights of nature and the authority to represent nature (Kauffman and Martin 2021: 59–77).

Another particularly pertinent example is the research conducted by Tănăsescu. In this author’s view, rights of nature should be engaged with from a critical perspective. This insightful endeavour delves into the historical and philosophical origins of these rights, examining their multiple meanings and exploring possible effective practical outcomes to their implementation. What this critical interdisciplinary approach about rights of nature law wishes to achieve, is to advance a political frame as the most useful to understand rights of nature, and to think about their good or bad implementation as a question of political power. Therefore, this goal can only be obtained by looking directly at how rights of nature laws are drafted, how the political process leading up to their enactment unravelled, and how they are not primarily about the environment at all “but about creating new relations through which environmental concerns may be differently expressed” (Tănăsescu 2022: 17).

### 6.1.2. Predominantly doctrinal approaches

The second type of approach would be predominantly doctrinal. This type of approach to rights of nature would furnish an internal viewpoint of their legal manifestations. It focuses on the sources thrown up by the legal process of adopting rights of nature – primarily constitutional provisions, statute, case-law, statutory instruments, and local resolutions. A predominantly doctrinal approach seeks to analyse principle, rules, and values of rights of nature, where there is an attempt to render these norms intelligible, but also to show the multiple possible readings and contradictions of that rights-based environmental governance framework (McCrudden 2006: 633–635). The concern of this type of analysis is the formulation of systematic formulations of rights of nature law in particular contexts, in order to “clarify ambiguities within rules, place them in a logical and coherent structure and describe their relationship to other rules” (Chynoweth 2008: 29).

Several scholars have attempted to apply the predominantly doctrinal analysis of rights of nature norms. One of the best examples is that offered by Wilk et al. These authors note a lacuna in the effects of the integration of legal personhood of rivers with existing river basin governance approaches. Under a critical perspective, they explore that knowledge gap by observing whether granting rights to the Rhine River could transform decision-making processes concerning water quality, flooding and navigation in that water body and its basin. The example of the Rhine River was chosen as paradigmatic because of the high grade of institutionalisation of its environmental governance with defined duties and obligations for States and private persons, at all levels. To answer questions about what could granting rights to the Rhine River imply for its existing environmental governance, Wilk et al embarked on a contrast exercise between the current governance arrangement of that water body and what rights of nature would bring to the table in terms of institutions, stakeholder participation and duties in decision-making around the three aforementioned subjects (Wilk et al 2019: 684–697).

Another insightful specific analysis was carried out by O’Donnell. The author concentrates on different water bodies of five different countries around the world that have received substantive eco-theological rights, legal personhood or ‘living entity’ status – the Atrato River in Colombia, the Whanganui River in New Zealand, Martuwarra/Fitzroy and Birrarung/Yarra rivers in Australia, Tuareg and all rivers in Bangladesh, and Ganga and Yamuna rivers in India. After analysing the current (worrying) state of water quality, biodiversity and the impact of water supply to communities, cities and industries from each of these rivers, O’Donnell made an assessment of riverine extinction of each of these examples and the implications of the rivers’ novel legal subjectivity in

addressing that risk. The author found that all the studied rivers possess rights on law, but no rights to water. That is, despite having been granted substantive eco-theological rights or being endowed with participative environmental management arrangement, they do not hold ownership to their own most precious asset “flowing within their banks.” In some cases, like the Whanganui River in New Zealand, the rights of nature legislation “explicitly states that no existing rights to water are created of the affected ones.” These rights are usually held by other public or private persons. Consequently, the lack of rights to water of their own limits the rivers’ capacity to influence decision-making in their own waterway management. Therefore, despite rights of nature laws, “they all continue to lack the specific rights and powers they need to protect their existence as rivers” (O’Donnell 2021: 1–21).

A similar analysis, but at a more general level, was attempted by Bétaille. The author also adopted a critical perspective to undertake a predominantly doctrinal analysis, grounded in the European context, with a focus on three main aspects: the role of nature’s intrinsic value as a principle of existing environmental law (not unique to rights of nature law), integration of rights of nature with existing environmental governance frameworks, and enforcement, or lack of thereof, of existing environmental law and rights of nature. After confronting international environmental law instruments, EU environmental law and French environmental law with selected examples of rights of nature legal manifestations, Bétaille made the case for strengthening the enforcement of existing environmental governance arrangements. The author notes that modern environmental law have already incorporated some of the changes into environmental protection rights of nature, which its advocates portray as being paradigm-shifting (Bétaille 2019: 35–64).

Another noteworthy general analysis is that of Krämer. Krämer turns to the complex matter of implementation of rights of nature. By implementation, the author means “to what extent these decisions on rights of nature are actually enforced and applied.” However, he does not use quantitative nor qualitative methods to empirically assess that implementation. Instead, he resorts to primary and secondary sources to track down regulation instruments of rights of nature laws, case-law or ongoing conflicts involving rights-holding ecosystems. This author’s analysis also considers the legal context in which rights of nature laws are adopted, and examines the provisions establishing legal personhood or right-holding status, rights and duties associated with that personhood or status, and nature guardianship arrangements. Krämer also addresses the issue of how the courts have either applied or created rights of nature laws, and whether stable rules about the binding value, the hierarchy, and the scope of protection of rights of nature can be extracted from case-law (Krämer 2020: 47–75).

One final, very interesting analysis has been proposed by Elizabeth Macpherson et al. These authors address the constitutional relevance of the recognition of legal personhood of rivers and their endowment with rights in New Zealand, Colombia, and India. By focusing on the design and the content of rights of nature frameworks in their specific context – and not on their practical implementation in each of the countries it studies – the authors seek to evaluate the potency of rights of nature elevated to constitutional provisions in enabling real legal and practical change in comparison to dominant regulatory regimes. They have found that the efforts of riverine rights to go over and above these environmental frameworks have resulted in creative solutions that recognise pluralist perspectives, as a step towards river governance regimes reflecting bio-culturalism (Macpherson, Borchgrevink, Ranjan and Vallejo Piedrahíta 2021: 438–473).

However, Macpherson et al. conclude that the transformation potential of rights of nature is symbolic, since there is no profound rebalancing of power relations in river governance and that unintended complications could arise during their implementation, e.g. the presence of jurisdictional and technical issues with judgments, the maintenance of *status quo* regarding existing distribution of property rights and rights to water in a river, or the extended effect of a weak and absent State *vis-à-vis* orders to protect riverine rights. This does not mean, in any case, that these cases lose the profound impact they have had abroad in expanding legal subjectivity of natural entities, or that they would be hindered of having “broader public influence as a ‘model standard for legitimacy’” (Macpherson, Borchgrevink, Ranjan and Vallejo Piedrahíta 2021: 438–473).

## **6.2. A predominantly doctrinal approach to the legal analysis of rights of nature potency**

### **6.2.1. The approach in theory**

Consequently, the most satisfactory approach to analyse rights of nature potency is a predominantly doctrinal one. If rights of nature potency is the capacity or potential of the explicit content of rights of nature provisions to enhance or even replace existing environmental protection, then the normative question about how rights of nature can achieve their desired result can only be answered by a normative judgment (Van Houcke 2015: 1–35). With the adoption of an internal perspective, the possibility is open for (i) identifying binding and non-binding rights of nature norms, (ii) setting which principles, rules, and values about nature, the environment, and its conservation and res-

toration are contained in rights of nature provisions, and (iii) prospecting the substantive and procedural implications of rights of nature norms (McCrudden 2006: 633–634). To do so, concepts such as Hohfeldian claims-rights, ownership and property rights, environment, nature, legal personhood, standing, environmental governance, liability for environmental harm or environmental protection duties will be useful in providing normative explanations about the salient features of rights of nature potency (Taekema 2018: 1–17). This, by means of a theory that explains the legal factors that vary the intensity of that potency from high to low (Khaitan and Steel 2022: 1–58).

The proposed internal perspective will also be helpful to contrast rights of nature with other standards of evaluation that implicitly or explicitly are part of existing environmental law. These standards are also internal and external to existing environmental protection. Internal standards are *inter alia* environmental human rights, environmental principles — polluter pays principle, *in dubio pro natura*, precautionary principle, and the environmental rule of law. External standards are, for instance, socio-economic and inter-generational justice considerations. This explains why the approach is predominantly, and not exclusively, doctrinal. Legal analysis of rights of nature potency not only has a strong doctrinal and comparative element to it; it has a social sciences component as well. So a presentation of the historical, socio-economic, and legal settings in which rights of nature were adopted is also useful to explain why rights of nature laws have a certain explicit content and why this content makes for effective legislation or not (Taekema 2018: 6–12; Chynoweth 2008: 30).

Furthermore, to achieve an appraisal on the expected enhanced or paradigm-shifting effect of rights of nature norms regarding existing environmental protection, it will be important to work with ‘ideal types’. Ideal types can help the process of rendering intelligible the commonalities and the differences between rights of nature norms from one particular jurisdiction or from different jurisdictions. In that sense, ideal types are built from inductive reasoning. That is, from using a selected sample of rights of nature initiatives from different jurisdictions (Van Houcke 2015: 13–18).

Two ideal types are thus relevant for this endeavour: a working definition and working typologies of rights of nature. A working definition of rights of nature would consider the presence of four archetypical elements: ‘legal declaration’, ‘legal personhood’ or ‘rights-holder status’, ‘nature as a subject of principles, rules and values’ and ‘legal standing for nature’. This would allow evaluating all rights of nature laws according to the dominant and recessive character of each of these elements. On the other hand, the typologies are: Legal Declarations of Political Intent Regarding the Environment, Programmatic Environmental Standards, Public Interest Environmental Protection Rules, and Local Participative

Environmental Management Rules. These typologies range from environmental policy goals, values and principles to state and private individual obligations regarding environmental protection, and to fully institutional arrangements for local environmental management. It should be borne in mind that several of the typologies could be found in the same rights of nature legal declaration, even if it belongs predominantly to one strand or another, or if it is a hybrid model (Suárez 2023: 90–107).

### **6.2.2. The approach in action**

This combined doctrinal-comparative approach informs of a four-step method. This method implies the following: (i) legal sources sampling, (ii) extraction of environmental principles, values and rules present in rights of nature provisions or case law, (iii) inductive reasoning to build rights of nature ideal types, and finally, (iv) contrast of ideal types under the aforementioned ‘law-in-context’ approach and analysis (Paris 2016: 39–55; Van Houcke 2015: 16–18). To illustrate how the proposed methodology could be applied in practice, Table 1 showcases a schematic presentation of the results of an initial application of the approach and method to four selected European domestic law rights of nature frameworks. The selection comprises rights of nature laws from Spain, France, the Netherlands and Ireland. These results have already been published in their complete version (Suárez 2023: 90–107).

## **7. Preliminary conclusions**

A few preliminary conclusions can already be drawn from a legal analysis of rights of nature potency using the predominantly doctrinal approach. First, the method is useful for evidencing the extent of the overlap, redundancy and even conflict between rights of nature provisions and existing environmental protection norms. This is something that other general and particular, predominantly doctrinal legal analyses have already done with success, but in a fragmented fashion.

Second, the study of legal rules, principles, and values underlying rights of nature laws allows determining whether provisions contain clear, unconditional and automatic obligations of environmental protection, which require full compliance. Or whether they contain optimisation mandates requiring environmental protection to be realised to the greatest extent possible, or rather a set of aims and objectives that give meaning to environmental protection (Alexy 2000: 294–304; Toubes Muñiz 1997: 268–286; Atienza and Manero 1998: 120–140). The contribution of this type of legal analysis is to show findings on

Table 1. Results presentation of the application of the predominantly doctrinal approach for assessing rights of nature potency

Selected jurisdiction and type of norm	Socio-political and legal context	Legal source sampled and content of the provision	Dominant elements of the RoN definition	RoN typologies	Practical effects of RoN norms and interactions with existing principles, rules and values
<p>Spanish Law 19/2022 (30 September 2022) on the recognition of legal personhood to the Mar Menor and its basin (statute)</p>	<p>Non-compliance with environmental protection duties stemming from international, EU, and national law There has been tolerated slurry dumping from agro-industries by the authorities. Institutional apathy from Murcia authorities has been rampant. Heavy pressure from mining industries, urban development and tourism has been present at the lagoon for more than 30 years. There has been severe eutrophication of the Mar Menor and its basin, causing mass mortality of the lagoon's fauna and flora. The RoN law was the result of a public legislative process led by academics and e-NGOs with hundreds of thousands of signatures in support of the bill. The Spanish Constitution already protects the right to a healthy environment, and enshrines the polluter-pays principle, and there EU and national environmental law frameworks.</p>	<p>Article 1 (Legal personhood and geographic scope of protection) Article 2 (Eco-theological rights of the lagoon to exist, to be protected and to be restored) Article 3 (Institutional arrangements to monitor and enforce RoN) Article 5 (RoN as a parameter from judicial review of environmental decisions affecting the lagoon; civil, criminal, and environmental liability for non-compliance with RoN of the lagoon) Article 6 (Popular action to uphold the Mar Menor's substantive rights, cost protection rules)</p>	<p>Legal declaration Legal personhood Nature as a subject of principles, rules and values Legal standing for nature</p>	<p>Article 1: Legal Declaration of Political Intent Regarding the Environment (Recognition of nature's intrinsic value) Article 2: Public Interest Environmental Protection Rule (State obligations to protect nature and environmental tort rules) Article 3: Public Interest Environmental Protection Rule (Institutional framework rules for State obligation enforcement and enforcement monitoring) Article 5: Public Interest Environmental Protection Rule (State obligations to protect nature and environmental tort rules) Article 6: Public Interest Environmental Protection Rule (Environmental <i>actio popularis</i>)</p>	<p>Legal personhood is symbolic: the lagoon's legal person is not shoehorned in any <i>sui generis</i> nor existing private or public law legal person. Environmental protection duties rely on the steward's private law legal person. It is unclear how this protection will interact with the lagoons several statuses (Ramsar-protected marsh, SAC, natural park). Rights of the lagoon to exist, to be protected and to be restored mirror existing environmental protection duties (under Ramsar Covenant, Barcelona Convention for the Protection of the Mediterranean Sea, EU WFD, Nitrates, Environmental Liability, Birds and Habitats Directives and future EU Restoration Law; Article 45 of the Constitution; national law; Murcia regional law). Most of the environmental governance arrangements present in the RoN law were already present in Murcia Regional Law 3/2020 on the protection of the Mar Menor. The provision of RoN as a parameter for judicial review of environmental decisions regarding the lagoon is superfluous. Although an environmental <i>actio popularis</i> enhances environmental access to justice, its inclusion forwent a consideration about its coherent integration within existing procedural rules that might hinder its exercise.</p>



Table 1. contd.

Selected jurisdiction and type of norm	Socio-political and legal context	Legal source sampled and content of the provision	Dominant elements of the RoN definition	RoN typologies	Practical effects of RoN norms and interactions with existing principles, rules and values
Articles 110-1 to 110-3, 242-16 to 242-18, and 242-20 to 242-22 of the Environmental Code of the Loyalty Islands Province of the French New Caledonia Oversea Territory	New Caledonia enjoys an exceptional status as a <i>sui generis</i> overseas territory within French public law-based. Besides having autonomous and non-subsidary law-making powers, all of its provinces – North, South and Loyalty Islands – have exclusive law-making powers regarding environmental matters. But these <i>lois du pays</i> must respect the French Constitution and the French Environmental Charter. Loyalty Islands Province is required to strike a balance between the French continental legal system and the Kanak legal system and values. New Caledonia has a difficult socio-economic situation <i>vis-à-vis</i> other French departments: despite economic growth sustained by extractivism, there is social injustice, trafficking and illegal trade of protected species, and intense pressure from nickel mining on soils and water bodies.	Article 110-1 (Kanak culture elements as interpretation principles of provincial environmental legislation) Article 110-2 (Right to a healthy environment) Article 110-3 (Declaration of rights-holder status of natural elements under unitary life principle) Article 242-16 (Substantive fundamental rights for all natural right-holding entities on basis of unitary life principal and revalorisation of Kanak customs) Article 242-17 (Right-holding status of sea turtles and sharks, with possibility to expand recognition to other natural entities) Article 242-18 (Substantive fundamental rights of nature for sea turtles and sharks) Articles 242-20 to 242-22 (Stewardship system for natural elements endowed with substantive fundamental rights: spokespersons, decision-making powers, and administrative policing)	Legal declaration Rights-holder status Nature as a subject of principles, rules and values Legal standing for nature	Article 110-1: Programmatic Environmental Standard (Principles about nature's intrinsic value and relationships between human and non-human entities) Article 110-2: Public Interest Environmental Protection Rule (State obligations to protect nature) Article 110-3: Programmatic Environmental Standard & Public Interest Rule (Principles about relationships between human and non-human entities; State obligations to protect nature) Articles 242-16 to 242-18: Public Interest Environmental Protection Rule (State obligations to protect nature) Articles 242-20 to 242-22: Public Interest Environmental Protection Rule & Local Participative Environmental Management Rule (Institutional framework rules for State obligation enforcement and enforcement monitoring)	Even though the bill containing Articles 242-16 to 242-18 and 242-20 to 242-22 was drafted with support of members of academia, it lacked civil society participation. It is unclear how RoN could be enforced regarding litigation for issues arising in other provinces of New Caledonia but with effects in the Loyalty Islands, if the Environmental Code's scope of protection is restricted to that province only. Traditional practices of fishermen, other provisions in the provincial Environmental Code and further existing environmental legislation already provide for protection of sea turtles and sharks.

Table 1. contd.

Selected jurisdiction and type of norm	Socio-political and legal context	Legal source sampled and content of the provision	Dominant elements of the RoN definition	RoN typologies	Practical effects of RoN norms and interactions with existing principles, rules and values
<p>Resolution No. 2019/Z235986 (12 July 2019) of the Noardeast-Fryslân Municipality Council regarding the Dutch Wadden Sea</p>	<p>Despite the several protection statuses (SAC and SPA, UNE-SCO World Heritage Site) and environmental governance frameworks of the Dutch Wadden Sea (e.g. Trilateral Wadden Sea Cooperation Declaration), it has been severely harmed from increasing heavy pressure from climate change, agro-industrial pollution, invasive species, unsustainable fisheries, and industrial and harbour developments. The environmental governance framework in place to protect the Dutch Wadden Sea is considered to be very complex, fractured, and inefficient. Mark Rutte's final Government decided not to move forward with this RoN initiative, and a RoN motion at the Dutch House of Representatives was also defeated by a narrow majority of MPs. However, grassroots organisations and other civil society actors are still pushing for the water using a RoN perspective.</p> <p>A new motion to organise expert meetings to discuss RoN in favour of the Wadden Sea was recently passed by the Groningen and Friesland Provincial Councils.</p>	<p>Council resolution (plea for the recognition of the Wadden Sea as a private or public law legal person; plea for the creation of an Independent Management Authority (IMA) in charge of the waterbody's environmental governance; proposal for the endowment of powers and resources to IMA; proposal for broader participation of all stakeholders in environmental decision-making regarding the waterbody)</p>	<p>Legal declaration</p>	<p>Council resolution: Legal Declarations of Political Intent Regarding the Environment &amp; Local Participatory Environmental Management Rules (Recognition of nature's intrinsic value and the need of a rights-based approach to nature; rules about the establishment, function, and attributions of environmental management boards, including (i) Management plans, (ii) Authorisations, concessions and permits for certain activities affecting the environment, and (iii) Issuing bylaws); rules about creation, extinction or limitation of rights to land and other natural resources; rules about environmental offences, sanctions and proceedings; rules about interaction (a) of RoN with other applicable legislation to the legal entity, (b) of the entity's management board with other protection authorities)</p>	<p>Unlike other initiatives, this initiative seeks to grant specific powers to the Wadden Sea private or legal public person to issue regulations, develop integrated policy, assure enforcement, monitor results, have financial autonomy, decide on licensing, and play a role in decision-making, all of which would be exercised by the IMA. The IMA would actually enforce existing environmental protection duties owed to the Wadden Sea without creating any eco-theological substantive RoN.</p> <p>The proposal would also seek to streamline management and overcome existing efficiency hurdles in environmental governance of the Dutch Wadden Sea.</p> <p>However, the proposal requires to be enacted in statute to properly enter into force.</p>

Table 1. contd.

Selected jurisdiction and type of norm	Socio-political and legal context	Legal source sampled and content of the provision	Dominant elements of the RoN definition	RoN typologies	Practical effects of RoN norms and interactions with existing principles, rules and values
Irish city/council resolutions on RoN	<p>Grassroots movements in Northern Ireland and in the North of the Republic of Ireland have been pushing for RoN declarations at local level.</p> <p>These declarations have been advised by a global network of RoN advocates.</p> <p>The Irish Constitution has no provision whatsoever regarding environmental rights or State environmental protection duties.</p>	<p>City/council resolutions (Recognition of RoN as a global eco-centric movement and of need of rights-based approach to nature; 6–18-month timeframe set for collective understanding of RoN as a possible overarching value in local environmental management; participatory reporting duty to council regarding the embedding of RoN as an overarching value in environmental management strategic frameworks; acknowledgement of the important for Irish border councils of their obligations regarding transnational environmental impact assessments under the Espoo Convention)</p>	<p>Legal declaration</p>	<p>City/country resolutions: Legal Declarations of Political Intent Regarding the Environment (Recognition of (a) nature's intrinsic value, (b) the need of a rights-based approach to nature, (c) the importance of border/regional contexts and IEL obligations, and/or (d) the need for community education in RoN)</p>	<p>City/council RoN resolutions are non-prescriptive and do not constitute law. RoN could be embedded as key principles of local development plans as per s.10 PDA 2000.</p> <p>But the Planning &amp; Development Bill 2023 that is underway and the duty of 'material consistency' between local development plans and national and regional planning instruments might eliminate that possibility.</p>

the level in which a rights of nature norm is capable of achieving the desired environmental protection results.

And third, a legal analysis of rights of nature potency would also help to assess whether rights of nature laws have been integrated in a coherent manner. This is especially so regarding procedural rules, such as sufficient interest in legal standing, admissible grounds for judicial review or cost protection rules. Moreover, this analysis would contribute to ascertain whether there have been some standards set out for its harmonious interpretation with other competing constitutionally or legally-protected interests – notably, those dealing with national economic development, State ownership of natural resources, property rights or indigenous people’s rights.

This methodology has, of course, its limitations. It is, first and foremost, a desktop exercise. Therefore, it does not rely on first-hand empirical research, but on documented accounts by commentators and even journalists. Furthermore, although this method takes into consideration strong or weak implementation and enforcement of rights of nature laws as one of the factors related to their potency, it does not provide for a complete view of the phenomenon as an issue that affects the whole of environmental law and, particularly, environmental rule of law. More empirical data would be needed to reach evidence-based conclusions on lack of enforcement of rights of nature laws (Bétaille 2019: 62–63). It also shares the restraints of any comparative approach as to the availability of primary and secondary sources in English or in languages within reach of the research team (Van Houcke 2015: 3–4). Finally, it is a methodology that portrays a narrow socio-political and legal context and an arbitrarily-selected array of existing environmental principles, values and rules that could not paint a complete and dead-accurate picture of the interplay of rights of nature norms with other provisions within a legal system with all of its particularities. This is due to the fact that the research team cannot possibly offer more than an overview of these developments, thus rendering the legal analysis somewhat superficial in some aspects.

To sum up, to assess whether rights of nature laws, as rights-based approaches to the environmental protection, can be an alternative or a complement to environmental law, it is important to determine their level of potency. That level of potency can be appraised from the content of the rights of nature provision in itself and characterised in different intensity from low to high. The intensity is determined by the three aforementioned criteria of: (i) Overlap, redundancy or conflict of rights of nature laws with existing environmental law, (ii) Binding or non-binding character of principles, rules, and values in rights of nature laws, and (iii) Coherent integration or possibility of harmonious construction of rights of nature laws with other applicable substantive and

procedural norms to environmental protection. These criteria are by all means not final, and more criteria could be added as indirect evidence from which a low or a high level of potency may be inferred.

The results presented in Table 1 would show, at least after an inductive reading of these selected European samples, that rights of nature potency could be deemed low in the presence of any of the following four circumstances: first, where there are substantive eco-theological rights of nature mirroring existing environmental protection duties; second, where institutional governance arrangements are duplicated or new arrangements are added without any harmonious articulation regarding existing ones, adding more complexity to the environmental institutional governance structures already in place; third, where rights of nature laws consist mostly of non-binding or locally-binding only provisions about nature's intrinsic worth and the importance of rights-based approaches to nature, or even pleas for novel institutional governance arrangements; and fourth, where nature conservation or restoration duties or broad standing for nature have not been assorted with coherent reform of sectorial environmental protection frameworks, legal standing requirements, civil and judicial review proceedings, and cost protection rules.

### List of abbreviations

COCt	– Colombian Constitutional Court
CJEU	– Court of Justice of the European Union
ECCt	– Ecuadorian Constitutional Court
IEHC	– Irish High Court
IESC	– Irish Supreme Court
INSC	– Indian Supreme Court
RoN	– Rights of Nature
SAC	– Special Area of Conservation
SPA	– Special Protected Area
TFEU	– Treaty on the Functioning of the European Union
UttHC	– High Court of Uttarakhand
WFD	– Water Framework Directive

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