

Faculty of Law  
Academic Year 2016-17  
Exam Session [1]

**Rights of Nature: The Right Approach to Environmental  
Standing in the EU?**

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## I INTRODUCTION

The planet faces a growing crisis. Global climate change is rapidly advancing, thereby rising temperatures, melting poles and glaciers, raised sea levels, eroding soil and causing abnormal weather events. In addition to this, widespread air, water and ground pollution, deforestation and other soon irreparable destruction continue at critical levels. Millions of people are already being displaced from their homes. ‘The collapse of ecosystems and species, as well as the acceleration of climate change, are clear indications that a fundamental change in the relationship between humankind and the natural world is necessary’.<sup>1</sup> Due to the possession of power to dramatically alter ecosystems, it is clear that unless a drastic change occurs, mankind will push the planet to ecological collapse, to the detriment of all living beings.<sup>2</sup>

One of the biggest issues in environmental law is legal standing. Standing is the term for the entitlement and ability of a party to demonstrate to a court sufficient connection to action challenged to support that party's participation in the case.<sup>3</sup> This procedural dimension is often not given due accord in the drafting process and leads to an implementation failure of environmental law.<sup>4</sup> Particularly it is felt within the European Union (EU), in which standing for citizens in environmental matters is governed by a model known as access to justice. This means that citizens must be able to go to court to if public authorities do not respect the rights and fulfil the requirements created by environmental laws, to protect health and nature.<sup>5</sup> Yet standing for judicial review in the EU has for years remain severely restricted. Moreover, the Aarhus Regulation,<sup>6</sup> in theory, reflects some of the provisions of the Aarhus Convention.<sup>7</sup> However, under the Regulation, it has also proven difficult for an NGO to meet the required thresholds for administrative review in environmental matters. Despite some efforts, there remain fundamental flaws in the EU limiting access to justice.

Rights of nature bypasses the issue of standing.<sup>8</sup> This framework, which does not exist other than in literature in the EU, could solve the challenge of legal standing in the EU. Rights of nature is a tradition of legal and political scholarship that advocates legal standing for certain

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<sup>1</sup> Mari Margil, ‘Press Release: Colombia Constitutional Court Finds Atrato River Possesses Rights’ (4 May 2017) Community Environmental Legal Defense Fund <<https://celdf.org/>>.

<sup>2</sup> See Gerard Diamond, *Collapse: How Societies Choose to Fail or Succeed* (Viking Press, 2005).

<sup>3</sup> European Commission, *Communication from the Commission: Commission Notice on Access to Justice in Environmental Matters* (28 April 2017) <<http://ec.europa.eu/>> 18.

<sup>4</sup> Scott Fulton and Steve Wolfson, ‘Strengthening national environmental governance to promote sustainable development’ in Robert V Percival, Jolene Lin and William Piermattei (eds), *Global Environmental Law at a Crossroads* (Edward Elgar, 2014) 15.

<sup>5</sup> European Commission, *Access to Justice in Environmental Matters* (27 April 2016) <<http://ec.europa.eu/>>.

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

<sup>7</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) (‘Aarhus Convention’).

<sup>8</sup> Roderick Frazier Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press, 1989) 10.

natural objects in the environment, or the environment as a whole.<sup>9</sup> It acknowledges that nature's well-being, as a right holder itself, must be guaranteed as all of its life forms have 'the right to exist, persist, maintain and regenerate its vital cycles'.<sup>10</sup> Mankind thus have the legal authority and responsibility to enforce these rights on behalf of ecosystems. International bodies and nation-states have been extremely hesitant in granting rights to nature. However, in the past decade the concept has been gaining momentum. It has moved from a strictly theoretical concept to practical recognition and enforcement, particularly in countries with indigenous populations, who maintain deep spiritual connections with the earth and a culture that promotes balanced relationships with all life. Rights of nature represents a paradigm shift from the Western legal culture of consumerism, capitalism and predation of natural resources, to include philosophies from indigenous groups more respectful to nature.<sup>11</sup>

The paper begins by outlining recent case studies on rights of nature in Part 2, before demonstrating the ineffectiveness of the EU access to justice system in Part 3. This aligns with the growing recognition worldwide that environmental laws premised on regulating the use of nature, are and have been so far, unable to protect it sufficiently. However, enforceability of substantive laws is a core feature of effective environmental governance.<sup>12</sup> In Part 4, to address this problem, socio-legal or law reform research is undertaken by drawing from the recent case studies to analyse a rights of nature framework for the EU. In answering whether this framework will be overall beneficial to the goal of increasing nature preservation, there are two considerations. First, as an issue of focus in environmental and social justice, whether rights of nature is morally desirable. As a subset, a significant question is whether the presence of indigenous communities is a precondition to the framework. Secondly, whether such a framework is practically feasible. Ultimately it is determined that legal standing in environmental law should continue the path to developing rights to seek redress for natural objects.

## II TIMELINE OF MODERN RIGHTS OF NATURE

In recent years, rights of nature gained motion in moving from a mere theoretical concept to practical recognition. This part will outline a timeline of milestones for rights of nature in the United States, Ecuador and Bolivia over the past decade, as well as in recent months in New Zealand and India. These case studies will be considered further in depth in Part IV when considering their implications for a proposed framework in the EU. Not addressed is Argentina,

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<sup>9</sup> Christopher D Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' in David R Keller (ed), *Environmental Ethics: The Big Questions* (Wiley-Blackwell, 2010) 110, 111.

<sup>10</sup> Global Alliance for the Rights of Nature, *What is Rights of Nature?* (2017) <[therightsofnature.org/](http://therightsofnature.org/)>.

<sup>11</sup> See also, for example, the reflected in the recent movement from the use of treaty language from cultural property to cultural heritage, in order to account for non-State actors such as indigenous groups who do not see culture as a bundle of economic rights but rather spiritual relationships characterized by collective possession: *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972 compared to *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006)

<sup>12</sup> Fulton and Wolfson, above n 4, 15.

which has proposed a national regulation on rights of nature, Columbia, which has recognised the rights of a river, Brazil, with local laws in the process of being established, and Mexico, in which both local and state laws have been passed.<sup>13</sup>

### A *The United States*

Rights of nature was first embraced by US Supreme Court Justice William O Douglas in his famous dissent in *Sierra Club v Morton*. This case concerned the issue of standing under the *Administrative Procedure Act*,<sup>14</sup> a federal statute. Sierra Club, an environmental organisation, made a claim seeking to block the development of a ski resort at Mineral King Valley, located at Sequoia National Park in the Sierra Nevada Mountains. However, the Court rejected the suit because the organisation had not alleged any injury. Justice Douglas argued that ‘public concern for protecting nature’s ecological equilibrium’<sup>15</sup> should lead the conferral of legal personhood upon natural entities so that legitimate claims could be made by those entities for their own preservation:

The critical question of ‘standing’ would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated... in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers, and where injury is the subject of public outrage.<sup>16</sup>

Clearly, if the Mineral King Valley had been recognised as having rights itself, it would have been adversely affected and thus had the necessary standing to bring a claim.

In 2006, the local government of Tamaqua Borough in Schuylkill County, Pennsylvania, sought to ban waste corporations from dumping toxic sewage sludge and coal fly ash into abandoned mining pits on the edge of town. With the assistance of Community Environmental Legal Defense Fund (CELDF), it drafted and passed the world’s very first legally enforceable rights of nature. This law banned sludging as a violation of the rights of nature. In the US rights of nature provisions are being increasingly adopted at local levels, spurred by the desire to prevent activities with high environmental costs, such as oil and gas hydraulic well fracturing.<sup>17</sup> Currently more than three dozen communities in Pennsylvania, as well as California, New Hampshire, New Jersey, New Mexico, Maine, Maryland, Massachusetts, Ohio, Oregon, Vermont and Virginia, have now enacted similar rights of nature ordinances. Many others are in the process to securing the rights of nature to exist, regenerate, flourish and evolve, for example Wales in New York.<sup>18</sup> However, none of nature’s rights established in municipal ordinances have been tested in court.

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<sup>13</sup> Harmony with Nature United Nations, *Rights of Nature Law and Policy* (2017) <<http://www.harmonywithnatureun.org/>>.

<sup>14</sup> Pub.L. 79–404, 60 Stat 237.

<sup>15</sup> *Sierra Club v Morton*, 405 US 727 (1972).

<sup>16</sup> *Sierra Club v Morton*, 405 US 727 (1972).

<sup>17</sup> Better known as fracking.

<sup>18</sup> Harmony with Nature United Nations, *Rights of Nature Law and Policy* (2017) <<http://www.harmonywithnatureun.org/>>.

Many local laws have also since been invalidated due to inconsistencies with by state constitutions and statutes. For this reason, the local communities and other proponents for nature's rights are now instead pursuing enactment of these principles at a state level in the US.<sup>19</sup> Pennsylvania is one state that has already amended its constitution to recognise environmental rights.<sup>20</sup> However, the first proposed state constitutional amendment on the rights of nature was by way of initiative process, commenced in Colorado in January 2014.<sup>21</sup> The Right to Local Self-Government Amendment specifically included the right of counties and municipalities to pass laws establishing the rights of nature. While the state Supreme Court approved the amendment, also known as Initiative 40, for ballot petitioning, it did not qualify for the 8 November 2016 ballot as an initiated constitutional amendment. This was due to a deficiency in the number of signatures required.<sup>22</sup>

## B Ecuador

Approximately three quarters of nations worldwide have adopted constitutions that address environmental matters in some fashion, whether it be through committing to environmental stewardship or ensuring procedural environmental rights.<sup>23</sup> In 2008, Ecuador revolutionised the rights of nature by becoming the first nation in the world to constitutionally establish such rights. Nature is now endowed with rights under article 10 of the Ecuadorian Constitution.<sup>24</sup> Prior to this framework there were difficulties in that, like many other countries, an environmental suit could be filed only if a human could prove personal injury in connection to the environment. This paradigm legal shift now bypasses the issue of standing under Ecuadorian law. Ecuadorians can now file a claim on behalf of the ecosystem, without any connection to a direct human injury. This appears, on a *prima facie* view, that it could be significantly useful, especially to a country in which Texaco, later acquired by Chevron, discharged billions of gallons of oil into its territory over the period of more than 25 years, contaminating soil and water.<sup>25</sup> With the extraordinary number of species of fauna and flora, Ecuador is considered one of the most biodiverse countries in the world. The outstanding biodiversity in natural sites such as the Amazon and the Galapagos Islands, has been recognised through the World Heritage Convention.<sup>26</sup> Yet it is also a country known for the threats to natural areas by human presence. One of the major threats to these biologically rich areas is the construction of roads that give access to oil and mineral reserves located in the heart of the Ecuadorian Amazon.

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<sup>19</sup> Shannon Biggs, *The Rights of Nature: The Case for a Universal Declaration of the Rights of Mother Earth* (The Council of Canadians, Fundación Pachamama and Global Exchange, 2011).

<sup>20</sup> *Pennsylvania Constitution*, art 27.

<sup>21</sup> In Colorado, its citizens may initiate legislation as either a state statute or a constitutional amendment.

<sup>22</sup> Encyclopedia of American Politics, *Colorado Right to Local Self-Government Amendment* (2016) Ballotpedia <<https://ballotpedia.org/>>.

<sup>23</sup> See James R May and Erin Daly, 'Global Constitutional Environmental Rights' in Shawkat Alam, Jahid Hossain Bhuiyan, Tareq MR Chowdhury and Erika J Techera, *Routledge Handbook of International Environmental Law* (eds) (Routledge, 2013) 603.

<sup>24</sup> It states that 'Nature shall be the subject of those rights that the Constitution recognizes for it'.

<sup>25</sup> See *Chevron Corp v Donziger et al*, 2nd US Circuit Court of Appeals, No 14-0826.

<sup>26</sup> United Nations Educational, Scientific and Cultural Organization, *World Heritage Convention: Ecuador* (2017) <<http://en.unesco.org/>>.

The legal status of nature is further developed in Title II, “Rights”, Chapter 7, titled ‘Rights of nature’, through articles 71 to 74. Article 71 states that nature of Pachamama<sup>27</sup> ‘has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes’.<sup>28</sup> It goes on to state that all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.<sup>29</sup> Article 72 stipulates that ‘nature has the right to restoration’, particularly in the event of severe or permanent environmental impact.<sup>30</sup> Importantly, article 72 notes that restoration is separate from the obligations upon Ecuador, persons and other legal entities that are already required when compensating individuals or communities that depend on affected natural systems. In addition, Article 73 forbids the introduction of organisms or material that may alter the national genetic heritage. Thus it aims to prevent activities that cause species extinction, ecosystem destruction and alternation of natural cycles.<sup>31</sup> Finally, article 74 refers to the right of persons and communities to benefit from natural resources that enable them to enjoy the good way of living.<sup>32</sup> In Chapter 9, titled “Responsibilities”, article 83 states that respect for the rights of nature, amongst preserving a healthy environment and using natural resources sustainably, is one of the constitutional obligations of Ecuadorian citizens.<sup>33</sup> These additions seek to overcome the Western hegemonic pattern of relationship between society and nature, which strives to submit nature to human needs without any consideration of its intrinsic value.

Article 276, found in Title VI “Development Structure”, binds rights of nature to the constitutional economic model of Ecuador. It establishes the objectives of the legal development framework, within which it is mentioned that the recovery and preservation of nature to maintain a healthy and sustainable environment is one.<sup>34</sup> Article 395, found in Title VII “The Good Way of Living”, chapter 2 regarding biodiversity and natural resources, recognises various environmental principles. In particular, it includes a model of sustainable development aimed at preserving biodiversity and the capacity of ecosystems to regenerate, in order to meet the needs of present and future generations. It also signifies the intersection of nature with all sectors. For this reason, enforcement of environmental management, participation of affected persons and monitoring harmful activities is constitutionally required. In the event of doubt as to interpretation of these provisions, the most favourable interpretation to the protection of nature must prevail.<sup>35</sup>

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<sup>27</sup> Pachamama is a living being revered by the indigenous people of the Andes. It translates from Quechua language as Mother Earth. In the Andean spiritual world, this earth deity is placed at the centre of all life, where humans are considered equal to all other entities: Penny Dransart, ‘Pachamama: The Inka Earth Mother of the Long Sweeping Garment’ in Ruth Barnes and Joanne B Eicher, *Dress and Gender: Making and Meaning* (1992, Berg Publishers) 145-163.

<sup>28</sup> *Constitution of Ecuador*, art 71 (translated version available at <http://pdba.georgetown.edu/>).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Constitution of Ecuador*, art 72.

<sup>31</sup> *Constitution of Ecuador*, art 73.

<sup>32</sup> *Constitution of Ecuador*, art 74.

<sup>33</sup> *Constitution of Ecuador*, art 83(6).

<sup>34</sup> *Constitution of Ecuador*, art 276.

<sup>35</sup> *Constitution of Ecuador*, art 395.

However, under Ecuadorian law, the rights of nature are subject to principles of national development. In the very same chapter, under a different section, article 408 of the constitution stipulates that all natural resources are the inalienable property of the state. While these assets can only be produced in ‘strict compliance with the environmental principles set forth in the Constitution’,<sup>36</sup> previous article 407 notes that the President, with approval of the state, has the power to relax these regulations and exploit natural resources if it is deemed to be of national interest. While there remains the obligation to consult affected peoples,<sup>37</sup> there is no obligation to abide with the result of a consultation, even if it is detrimental. This obligation of means and not results is a gaping hole in the protection of the environment and people within it.<sup>38</sup> Moreover, there are issues with the ease in which the Constitution can be amended, with the new constitution being Ecuador’s twentieth since its independence in 1822. The rapid turnover rate dilutes the significance of each constitution, as well as indicating that the current version may not continue on past the current presidential term.<sup>39</sup>

### C Bolivia

Evo Morales, elected as Bolivian President in 2005, is Latin America's first indigenous head of state. Bolivia is feeling the threat of rising temperatures, with glaciers melting and extreme weather events including more frequent droughts and floods. Research has shown that temperatures have been steadily increasing for over half a century, with predictions of further rises by 2050.<sup>40</sup> This would turn much of Bolivia into a desert and leave it with a much smaller ice cap, leading to a crisis in the farming sector and shortages in water supplies, particularly in the cities of La Paz and El Alto.

In 2009, Bolivia underwent pro-environment and indigenous empowering constitutional reform to include new rights for citizens to be consulted on decisions that affect the environment.<sup>41</sup> Part of the rationale behind this was to improve environmental conditions through thwarting climate change and its causes, given it is directly in Bolivia’s interest to do so. Again, indigenous philosophies were instrumental in the construction of Bolivia’s new constitution. The preamble states that Bolivia is founded anew ‘with the strength of our Pachamama’, using the indigenous understanding of nature to shape the very creation of the revised political state.<sup>42</sup> Like in Ecuador, the Bolivian Constitution allows any person to legally defend environmental rights, which also resolves the issue of problematic standing.<sup>43</sup> Despite

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<sup>36</sup> *Constitution of Ecuador*, art 408.

<sup>37</sup> *Constitution of Ecuador*, art 45; art 57(7); art 398.

<sup>38</sup> Jordi Jaria I Manzano, ‘The rights of nature in Ecuador: an opportunity to reflect on society, law and environment’ in Robert V Percival, Jolene Lin and William Piermattei (eds), *Global Environmental Law at a Crossroads* (Edward Elgar, 2014), 54.

<sup>39</sup> Jose Luis Cordeiro, *Latin America: Constitution Crazy* (6 October 2008) Latin Business Chronicle <<http://www.latinbusinesschronicle.com/>>.

<sup>40</sup> Nick Buxton, Marisa Escobar, David Purkey, Nilo Lima, *Water scarcity, climate change and Bolivia: Planning for climate uncertainties* (2013) Stockholm Environment Institute <<https://www.sei-international.org/>>.

<sup>41</sup> *Constitution of Bolivia*, art 30(2)(10); art 30(2)(15) (translated version available at <https://www.constituteproject.org/>).

<sup>42</sup> *Constitution of Bolivia*, preamble.

<sup>43</sup> *Constitution of Bolivia*, art 34.

this, issues still remain. The formulation is mostly human oriented,<sup>44</sup> and much of the language utilised is aspirational.<sup>45</sup>

However, Bolivia was the next nation state to follow, passing the world's first laws granting nature equal rights to humans. Law 071, known as the Law of Mother Earth was passed by the Legislative Assembly in 2010 to recognise the rights of Mother Earth and the duties to ensure such rights. It defines Mother Earth as a 'dynamic living system comprising an indivisible community of all living systems and living organisms, interrelated, interdependent and complementary, which share a common destiny'.<sup>46</sup> It further defines living systems as 'complex and dynamic communities of plants, animals, microorganisms and other beings and their environment, where human communities and the rest of nature interact as a functional unit'<sup>47</sup> under the influence of various factors. The definition is more inclusive than the standard of an ecosystem. Rather than acknowledgement of only climatic and geological factors, it explicitly adds social, cultural and economic dimensions of human communities, for example 'production practices, Bolivian cultural diversity... the worldviews of nations',<sup>48</sup> as well as of all ethnic backgrounds within Bolivia.

Article 7 of the law specifies the rights to which Mother Earth is a titleholder. The most prominent is the right to life, being to maintain the integrity of living systems and capacities for regeneration. There are also the rights to diversity of life and to pure water and clean air, in order to preserve the functionality of the water cycle, preserve the quality of air and sustain other cycles and protect from pollution. It bestows upon Mother Earth the right to equilibrium, being freedom from interference that disturbs the balance of different components in an ecosystem, as well as restoration to heal from human activity. Finally, there is the explicit right of pollution free living, particularly from toxic wastes as a bi-product of human activities.<sup>49</sup> These rights are clearly intertwined with the ultimate goal that Mother Earth will ultimately be able to live healthily and continue reproduction of life in the future. The law also proclaims the creation of the Office of Mother Earth. In Spanish, the Defensoría de la Madre Tierra is counterpart to the human rights ombudsman office known as the Defensoría del Pueblo. However, the structuring intricacies and appointment of an ombudsman are left to future legislation.<sup>50</sup>

In late 2012, Law 300, an extension to the agenda of Law 071, was passed. The central objective of the law, titled the Framework Law of Mother Earth and Holistic Development for Living Well, is to 'establish holistic development in harmony and balance with Mother Earth to live well, guaranteeing the ability of the components and life systems of Mother Earth to

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<sup>44</sup> See for example *Constitution of Bolivia*, art 349, in which natural resources such as air, water, soil and forests are owned.

<sup>45</sup> See for example *Constitution of Bolivia*, art 342, which uses language such as promote.

<sup>46</sup> *Law 071: Law of the Rights of Mother Earth* (Bolivia), art 4 (translated version available at <http://www.worldfuturefund.org/>).

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, art 7.

<sup>50</sup> *Law 071: Law of the Rights of Mother Earth* (Bolivia), art 10.

regenerate, strengthening local and ancestral knowledge...'.<sup>51</sup> That is, it aims to link the concepts of the rights of Mother Earth, holistic development and living well. The concept of living well, or *vivir bien* is defined by Article 5.5 as 'a civilizational and cultural alternative to capitalism based on the indigenous worldview' that 'signifies living in complementarity, harmony and balance with Mother Earth and societies, in equality and solidarity and eliminating inequalities and forms of domination'. Further, article 23 elucidates the weight of biological and cultural diversity to the concept of living well.

The new law creates three new climate change mechanisms, one of which focuses on emission reductions from forestry,<sup>52</sup> and one from non-forestry sectors.<sup>53</sup> In addition, there is also the creation of a new set of climate change institutions such as the Plurinational Authority of Mother Earth (*Autoridad Plurinacional de la Madre Tierra*) as a part of the Ministry of Environment and Water. The role of the Plurinational Authority of Mother Earth is to design climate change policies and oversee the mechanisms.<sup>54</sup> To complement this institution, the Plurinational Fund for Mother Earth will obtain, administer and assign financial resources to the mechanisms.<sup>55</sup> The law makes it clear that all programmes related to greenhouse gas reduction must not involve the commodification of nature or carbon markets.<sup>56</sup> However the law also makes several references to promoting the agriculture, livestock, hydrocarbon and mining sectors. The distinction that the law makes between these is a fine one. That is, selling nature's goods is permitted, but selling nature's functions is not.<sup>57</sup>

#### D *The Universal Declaration of the Rights of Mother Earth*

President Morales of Bolivia also led the way for the international adoption of the Universal Declaration of the Rights of Mother Earth, which was drafted and endorsed at the 2010 World People's Conference on Climate Change in Cochabamba.<sup>58</sup> Similar Bolivia's domestic law, it begins by recognising 'that we are all part of Mother Earth, an indivisible, living community of interrelated and interdependent beings with a common destiny'.<sup>59</sup> It further introduces Mother Earth as the source from which all life stems, and that a capitalist system and other forms of depredation, exploitation, abuse and contamination puts this life, not an inanimate resource, at risk.<sup>60</sup> Article 1 establishes that all plants, animals, rivers and ecosystems that exist as a component of Mother Earth, as a subject of inalienable and inherent rights. Article 2 then

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<sup>51</sup> *Law 300: Framework Law of Mother Earth and Holistic Development for Living Well* (Bolivia), art 1 (translated version available at <http://thereddesk.org/>).

<sup>52</sup> *Ibid*, art 54.

<sup>53</sup> *Ibid*, art 55. See also art 56.

<sup>54</sup> *Ibid*, art 53.

<sup>55</sup> *Ibid*, art 57; art 4(2).

<sup>56</sup> *Ibid*, art 32.

<sup>57</sup> *Ibid*, art. 5(8) states describes funciones ambientales, or environmental functions. This refers to what are often called environmental services, a term that is avoided by Bolivia due to its connotation with the commodification of nature.

<sup>58</sup> Pablo Solon, *Letter dated 7 May 2010 from the Permanent Representative of the Plurinational State of Bolivia to the United Nations addressed to the Secretary-General*, 64<sup>th</sup> sess, UN Doc A/64/777 (7 May 2010) Annex II ('*Draft universal declaration of the rights of Mother Earth*').

<sup>59</sup> *Draft universal declaration of the rights of Mother Earth*, preamble.

<sup>60</sup> *Ibid*.

defines these rights, including the rights to life and existence, to be respected, regenerate and continue vital life processes free from human disruption, to maintain its identity and integrity, to water, clean air, integral health, to be free from pollution and restoration, amongst others. The Declaration also includes the right of *every* being to live free from cruel treatment by humans.<sup>61</sup>

The Declaration shows a global shift from not only recognising and defending human rights, but also the rights of other beings from which humans derive everything to live. Thus, the Declaration begins to pave the way towards rebalancing relationships between humans and natural entities. This can ultimately change the incompatibilities of current political, economic and legal establishments designed to rapidly exploit these entities for growth, rather than balance the interests of all beings to maintain the health of the whole community. It is these exploitative relationships that are unsustainable and have already disrupted, and in many cases irreparably damaged, natural cycles to such an extent that phenomena such as climate change now threaten the rights and wellbeing of not only humans but also other beings.<sup>62</sup>

### E *New Zealand*

Across the Pacific, rights of nature in New Zealand has taken a different approach to that of predecessor nations. Rather than constitutional insertion or the statutory creation of national laws, the rights of nature instead evolved by way of agreement between the government and indigenous tribes, before its transformation into legislation. New Zealand has bestowed legal personhood upon two entities: firstly, the Te Urewera area; and secondly, the Whanganui River. The colonial conquest of land from native peoples, upon which New Zealand is founded, resulted in irreparable spiritual and socio-economic losses. In both scenarios, the rights of nature settlements were symbolic to the process of government remediation and reparation efforts for this historical injustice.<sup>63</sup> It is interesting to note the change in dynamic in the motivation from previous states. Though all have overlapping factors, the USA's push for rights of nature is more human centric and the South American region a movement pushed for due to the philosophy of indigenous persons, the majority population. In New Zealand, while the result of rights of nature aligns with indigenous philosophies, making amends for human rights atrocities and other destructive consequences of colonisation is the more prominent and driving feature.

The Te Urewera area, a forested region and traditional territory of the Tuhoe people, was given the status of a national park over sixty years ago. After lengthy negotiations between the Tuhoe people and the government, 2012 saw the Tuhoe accept an apology, financial redress and the joint management of Te Urewera lands, which would be vested in a new legal identity by way of legislation. Central to the Tuhoe and government negotiations was the principle of mana

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<sup>61</sup> *Draft universal declaration of the rights of Mother Earth*, art 2(3).

<sup>62</sup> See also Cormac McCullinan, *Wild Law* (Chelsea Green Publishing, 2011).

<sup>63</sup> Catherine J Iorns Magallanes, 'Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand' (2015) 22 *Vertigo (Special Issue)*, [4]-[5].

motuhake, which can generally be described as self-determination.<sup>64</sup> In 2014, this culminated in the area ceasing to be a national park, instead replaced by a legal entity named Te Urewera. Under the *Te Urewera Act 2014* it has ‘all the rights, powers duties and liabilities of a legal person’.<sup>65</sup> At the same time, it declares the area ‘a place of spiritual value’,<sup>66</sup> acknowledging that it is the sacred homeland of the Tuhoe people. Importantly, it not only notes that it is integral to the culture and identity of the Tuhoe people, but that it is also of intrinsic value to all New Zealanders.

The former national park area is now managed by the new Te Urewera Board, which comprises joint Tuhoe and Crown government appointees.<sup>67</sup> The Board, as guardian, must ‘act on behalf of, and in the name of, Te Urewera’.<sup>68</sup> The agreement, in which the land is no longer property of either the Tuhoe or the government, but a legal entity in it itself, appears to be a compromised conclusion introduced to neutralize the Tuhoe peoples fight for ownership of the lands, against the government’s stubbornness in renouncing it. It is its own untamed natural presence in and of itself, with, as per native understanding, its own life force and identity.<sup>69</sup> Existing public access, use and visitor recreation of the park will be preserved. The intention of the changes is not to create a total ban on activities, but to alter the process of decision making to include the river’s needs and regulate more effectively. However, the difference is that now permits for activities such as hunting are now issued with the inclusion of Maori representatives.

In a similar process, the local Maori tribe, the Iwi, helped the Whanganui River and ancestral lands earn legal personification in 2017. Since the Treaty of Waitangi was signed in 1840,<sup>70</sup> the river has been subject to various extractive, navigability and water diversion works. As the Iwi’s identity is inseparable from the land, this was under great protest and numerous court challenges in seeking to protect it. When defending their claim to the manage the river as rightful guardian, it was underscored by the native saying ‘Ko au te awa, ko te awa ko au’. This phrase translates to ‘I am the river and the river is me’, reflecting native values of equal relations between nature and humans.<sup>71</sup> Formal negotiations with the government began in 2009, before an agreement for the resolution of these grievances was reached in 2012. It culminated in the Whanganui River Deed of Settlement, signed in 2014, before legislation was introduced in 2016.<sup>72</sup>

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<sup>64</sup> Te Rangimārie Williams, ‘Crown offer to settle the historical claims of Ngāi Tūhoe’ (2012) *Maori Law Review*.

<sup>65</sup> *Te Urewera Act 2014* (NZ) s 11(1).

<sup>66</sup> Tom Barraclough, ‘How far can the Te Awa Tupua (Whanganui River) Proposal be said to Reflect the Rights of Nature in New Zealand?’ (2013) *University of Otago LLB Disseration*.

<sup>67</sup> Jacinta Ruru, ‘Tūhoe-Crown settlement – Te Urewera Act 2014’ (2014) *Māori Law Review*, 16–21.

<sup>68</sup> *Te Urewera Act 2014* (NZ) s 17(a).

<sup>69</sup> Williams, above n 64.

<sup>70</sup> Signed by representatives of the British Crown and Māori chiefs. It resulted in the declaration of British sovereignty over New Zealand. However, there is conflict in the Maori interpretation of the Treaty, who believed they ceded to the Crown a right of governance in return for protection, without giving up their authority to manage their own affairs: Patricia Burns, *Fatal Success: A History of the New Zealand Company* (Heinemann Reed, 1989) 153.

<sup>71</sup> Magallanes, above n 63, [12].

<sup>72</sup> Anne Salmond, ‘Tears of Rangi: Water, power and people in New Zealand’ (2014) 4(3) *Journal of Ethnographic Theory*.

The finalised (*Whanganui River Claims Settlement*) Bill was passed by a vote of Parliament on 15 March 2017. With this passage, the river is the first water system in the world to be designated as a rights-bearing entity and labelled ‘an indivisible and living whole’, incorporating all physical and metaphysical elements.<sup>73</sup> The consequence of this aspect of the statute is that the river is no longer considered property. Instead it owns itself. The practical implications for management are extremely similar under both settlements. Like Te Urewara, the river is now co-governed. All future decisions regarding development in the area and the river’s interests are entrusted by a council of equal membership between the government and indigenous representation. By electing tribe advisors and incorporating their beliefs, knowledge and practices, it empowers the local Iwi.<sup>74</sup> The Act also provides for public consultation and genuine engagement. This new legislation creates a strong platform for the future protection of nature in New Zealand.

## F India

New Zealand was also of great influence in India. After CELDF efforts in partnership with other Indian-based NGOs, 20 March 2017 saw the High Court of Uttarakhand at Naintal, in the northern State of Uttarakhand, issue a ruling declaring that the River Ganga<sup>75</sup> and River Yumana are legal persons and should be treated as ‘living entities’.<sup>76</sup> The Whanganui decision of mere days before was cited within the judgment. The matter related to mining and other activities such as stone crushing along the banks of the Ganges. It was explained that the holy rivers, so central to the wellbeing of the Hindu Indian population, must be granted personhood ‘in order to preserve and conserve’<sup>77</sup> them. In exercising extraordinary jurisdiction vested within it, it ordered that certain people, including the Director of the Namami Gange Programme,<sup>78</sup> as well as the Chief Secretary and Advocate General of Uttarakhand, act as the legal parents of the rivers. These officers are bound to ‘uphold the status’ of the two rivers, as well as promote their ‘health and well being’.<sup>79</sup>

Less than 2 weeks later, the same court extended personhood status to the Gangotri and Yamunotri glaciers, as well as a great deal of the surrounding Himalayan nature. According to the Court, any injury or harm caused to these areas, is to be treated as it would to any human being. The judgment comes after India’s long battle to combat severe pollution from human sources, with the existence of the rivers in jeopardy. In addition, the glaciers, which are the

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<sup>73</sup> *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ), s 12.

<sup>74</sup> *Ibid*, s 32.

<sup>75</sup> Also known as the Ganges or Maa Ganga, translating to Mother Ganga.

<sup>76</sup> *Salim v State of Uttarakhand and others*, Writ Petition (PIL) No 126 of 2014 (20 March 2017), 11-12.

<sup>77</sup> *Ibid*.

<sup>78</sup> It has been reported however by the National Green Tribunal that previous efforts to clean the Ganga by the programme yielded zero results. It has also been amidst controversy for the constant changes in the mission director’s position: Nihar Gokhale, *Namami Gange project: mission director Rajat Bhargava removed from post* (3 September 2016) Catch News <<http://www.catchnews.com>>.

<sup>79</sup> *Salim v State of Uttarakhand and others*, Writ Petition (PIL) No 126 of 2014 (20 March 2017), 11-12.

primary source feeding the two rivers, have been receding at alarming rates.<sup>80</sup> The High Court of Uttarakhand, when granting legal rights in the ruling of March 30, 2017, stated that:

We, by invoking our parens patriae jurisdiction, declare glaciers including Gangotri & Yamunotri, rivers, streams, rivulets, lakes, air, meadows, dales, jungles, forests wetlands, grasslands, springs and waterfalls, juristic person having the status of a legal person, with all corresponding rights, duties and liabilities of a living person, in order to preserve and conserve them.<sup>81</sup>

Parens patriae is the guardianship of the state of the rights of entities that are unable to fight for their own rights.<sup>82</sup> Accordingly, the duties of parents of the river were also extended to the listed entities.

### III GAPS IN EU LAW

Ensuring strong substantive environmental standards is essential to conserve our planet. However, these are rendered meaningless if they are unable to be enforced through procedural mechanisms.<sup>83</sup> The essential role of procedural features for achieving environmental sustainability, including to favour private sector access to justice in environmental matters is reinforced in instruments such as the *The Future We Want*,<sup>84</sup> the Stockholm Declaration,<sup>85</sup> the Rio Declaration on Environment and Development,<sup>86</sup> And Agenda 21, which even promotes increased support to non-governmental organisations (NGOs) to enhance their role in implementation.<sup>87</sup> In Europe, various interest groups and individuals have attempted to bring legal claims against the EU as steward of the environment. However, often these efforts are thwarted at the outset by the most common barrier: a lack of standing to bring the suit in direct contradiction to such instruments.<sup>88</sup> This is because the threshold for standing has the effect on the human plaintiff bringing the legal action, rather than to nature, making a connection difficult to establish. Furthermore, while the right to life and respect for private and family life has in some cases encompassed environmental issues,<sup>89</sup> the European Court of Human Rights does not offer any reprieve from the EU's courts, making it clear that public interest litigation

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<sup>80</sup> Ajay K Naithani, H C Nainwal, K K Sati and C Prasad, 'Geomorphological evidences of retreat of the Gangotri glacier and its characteristics' (2001) 80(1) *Current Science*, 2001, 87, 87-94.

<sup>81</sup> *Miglani v State of Uttarakhand and others*, Writ Petition (PIL) No 140 of 2015 (30 March 2017), 64.

<sup>82</sup> *Ibid*, 42-59.

<sup>83</sup> Fulton and Wolfson, above n 4, 15.

<sup>84</sup> *Report of the United Nations Conference on Sustainable Development*, UN Doc A/CONF.216/16 (22 June 2012), Annex A/66/L.56, [44] ('*The Future We Want*').

<sup>85</sup> *Declaration of the United Nations Conference on the Human Environment*, UN DOC A/CONF.48/14/Rev.1 (5 June 1972), principle 10 ('*Stockholm Declaration*').

<sup>86</sup> *Rio Declaration of Environment and Development*, UN Doc A/CONF.151/26 (13 June 1992), principle 10.

<sup>87</sup> *Agenda 21: Programme of Action for Sustainable Development*, UN GAOR, 46<sup>th</sup> sess, Agenda Item 21, UN Doc A/Conf.151/26 (14 June 1992).

<sup>88</sup> Elizabeth Barrett Ristroph and Ilya Fedyaev, 'Obstacles to Environmental Litigation in Russia and the Potential for Private Actions' (2006) 29 *Environ* 221.

<sup>89</sup> *Öneryıldız v Turkey* (European Court of Human Rights, Grand Chamber, Application No 48939/99, 30 November 2004) [111]–[118]; *Lopez Ostra v Spain* (European Court of Human Rights, Chamber, Application No 16798/90, 9 December 1994) [58]; *Taşkın and others v Turkey* (European Court of Human Rights, Chamber, Application No 46117/99, 10 November 2004) [126].

is not envisaged.<sup>90</sup> This section will outline a brief history of standing under EU law that has led to this situation.

#### A *Standing procedures for judicial review and the Plaumann doctrine*

In the European Union, citizens can participate in environmental litigation in three ways. While the public authorities of a particular Member State and its courts have the main responsibility for the application of EU law, citizens can submit a complaint to the European Commission about any measure taken, the absence of a measure or certain conduct by a Member State incompatible with EU law. The European Commission can then decide to bring infringement proceedings against a Member State.<sup>91</sup> Given that this action is commenced either by detected failures of the Commission's own monitoring or in response to citizen complaints, many are initiated because of citizen complaints.<sup>92</sup> However, this is only relevant with regard to the authorities of a Member State. Any other conflicts between private entities must be resolved at domestic level.

National courts are not competent to decide on the validity of an act which was taken by an EU institution. However, individuals can indirectly access the Court of Justice of the European Union via a preliminary ruling through the national courts of Member States, if it is requested by the national judge.<sup>93</sup> It should concern the validity of acts of any of the institutions bodies, officers or agencies of the Union and the application of the measure into national law.<sup>94</sup> The national court is obliged to make a preliminary reference to the Court of Justice to give interpretations of EU law in national legislation where there is no further avenue for appeal.<sup>95</sup>

Individuals and associations can directly bring a claim against any EU institution before the General Court to either annul an act,<sup>96</sup> or for a failure to act.<sup>97</sup> However, this procedure is again confined by its inability to extend to private relations. Moreover, because individuals are considered non-privileged applicants, the condition is that they may only institute proceedings 'against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of *direct and individual concern* to the former'.<sup>98</sup> The iconic *Plaumann v Commission* case clarified this position. Direct concern

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<sup>90</sup> *Ilhan v Turkey* (European Court of Human Rights, Grand Chamber, Application No 22277/93, 27 June 2000) [52]–[53].

<sup>91</sup> *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) ('TFEU'), art 258.

<sup>92</sup> See J Mertens de Wilmars and I M Verougstraete, *Proceedings Against Member States for Failure to Fulfil their Obligations* (1970) 7 *Common Market Law Review* 385-406; Peter H Sand, 'Lessons Learned in Global Environmental Governance' (1991) 18(2) *Boston College Environmental Affairs Law Review* 213, 269-271.

<sup>93</sup> TFEU, art 267.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> TFEU, art 263.

<sup>97</sup> TFEU, art 265.

<sup>98</sup> TFEU, art 263(4). The same is required for TFEU, art 265.

is to directly affect the legal situation of the applicant with no discretion to the addressees of the measure.<sup>99</sup> As the individual concern:

persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in case of the persons addressee.<sup>100</sup>

This position was confirmed in a later case, holding that individuals or members of an NGO applicant must be affected by a contested measure in a special manner over and above a situation which is, or could in the future be, experienced by any other local residents or users in the area.<sup>101</sup> In that case, Greenpeace challenged a decision of the Commission to provide a financial grant to Spain to construct power stations in the Canary Islands. Supported by some residents of the Canary Islands, the decision was challenged on the grounds that no Environmental Impact Assessment had been conducted in accordance with EU law. However, as none of the applicants were considered to be individually concerned by the decision, the claim was ruled inadmissible. While the necessary remedies were still available in the national courts via a preliminary ruling, this was only against the legality of the permit given by Spanish authorities, which the Court of Justice said could only directly affect the applicant's rights, rather than against the financial assistance given by the EU. However, there are different rules nationally as to standing, so this provides no assurances.<sup>102</sup>

The Court's jurisprudence on standing for individuals has been consistently criticized as too restrictive. For example, in *Union de Pequeños Agricultores v Council*,<sup>103</sup> Advocate General Jacobs argued for the alternative interpretation of recognising individual concern as a measure having a 'substantial adverse effect' on a person's interest, to be able to have to an effective remedy. However, the Court of Justice was not prepared to relax this stance.<sup>104</sup>

## B Aarhus Convention effect on EU Law

The progressive Aarhus Convention, adopted by the EU in 2005, sets out procedural rights and duties upon signatory states. One set of authors even describes all other agreements for public participation as 'hortatory'.<sup>105</sup> It aims to improve access to justice in three distinct ways, with the relevant aspect for this paper's purposes found in article 9(3) of the Convention. This provision requires parties of the Convention to provide access to the public to administrative

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<sup>99</sup> *NTN Toyo Bearing v Council* (113/77) [1979] ECR, 1185; *Société pour l'exportation de sucre* (132/77) [1978] ECR, 1061; *TWD Textilwerke Deggendorf v Germany* (C-188/92) [1994] ECR, I-833.

<sup>100</sup> *Plaumann v Commission* (C-25/62) [1963] ECR, 95.

<sup>101</sup> *Stichting Greenpeace Council and Others v Commission* (C-321/95P) [1998] ECR, I-1651.

<sup>102</sup> *Ibid.*

<sup>103</sup> (C-50/00/P) [2002] ECR, I-6677.

<sup>104</sup> See *Danielsson a.o. v Commission* (T-219/95R) [1995] ECR, II-3051, where even the applicant's life is in danger does not make him individually concerned because it was a general interest that all residents may be affected in health by nuclear testing.

<sup>105</sup> James R May and Erin Daly, 'The Future We Want and constitutionally enshrined procedural rights in environmental matters' in Robert V Percival, Jolene Lin and William Piermattei (eds), *Global Environmental Law at a Crossroads* (Edward Elgar, 2014) 37.

or judicial procedures to challenge contraventions to procedures not respecting environmental law in general, whether acts or omissions, through a right to file a public interest law suit.<sup>106</sup> The criteria for such access to be provided remains an aspect to be laid down in national law. In this case, it means the issue of standing is still to be primarily determined by EU law.<sup>107</sup> Recent case law of the Aarhus Convention Compliance Committee (ACCC) also highlights the flexibility of the Convention in either defining certain requirements to be included or that which should be avoided. It is stated that while parties are not obliged to establish a system to establish a system of *actio popularis*,<sup>108</sup> it is clear that criteria laid down by national law cannot be an excuse for introducing or maintaining ‘so strict criteria that they effectively bar all or almost all of environmental organizations from challenging acts or omissions’ in breach of national law.<sup>109</sup>

This flexibility, sometimes a blessing, is also its curse. When examining the implementation of this right with the EU requirements for non-privileged applicants, it is discovered that the concept of individual and direct concern is not only incompatible but contradictory to the Aarhus rights.<sup>110</sup> NGOs and individuals would *de facto* be unable to exercise this right because of the nature of environmental damage. In an anthropocentric perspective, an injury to the environment is an injury to everyone and therefore an injury to no one as it does not individually concern anyone person, but many people, even if it is far more severe in nature. As it is virtually impossible for environmental harm to fulfil the strict test, it is a loss to environmental standing and also the environment.<sup>111</sup> The Court of First Instance<sup>112</sup> in *Jégo-Quéré v Commission* attempted to redefine the rules governing individual access to courts, stating that no reason is compelling to read into the notion of individual concern, a requirement that a citizen challenge against a general measure must be differentiated from all others affected by it. Rather, it was held that individually concerned could be fulfilled if the measure affected an individual’s legal position:

in a manner which is both definite and immediate by restricting his rights or by imposing obligations on him. The number and the position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.<sup>113</sup>

Furthermore, the EU institutions, particularly the Court of Justice deny the rule of law by effectively ruling out every form of public interest litigation, contrary to the case law of the ACCC. Not only is it conflicting with Aarhus, but also with the rule of law, a fundamental

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<sup>106</sup> See also Belgium ACCC/2005/11, [27].

<sup>107</sup> *Aarhus Convention*, art 9(3).

<sup>108</sup> Deriving from Roman penal law and also known as open standing, this is an action which can be brought by any member of the public in the interests of the public as a whole: A J Boudewijn Sirks, ‘Cognitio and Imperial and Bureaucratic Courts’ in Stanley N Katz (ed), *The Oxford International Encyclopedia of Legal History*. (Oxford University Press, 2009).

<sup>109</sup> Belgium ACCC/2005/11, [35].

<sup>110</sup> Aarhus Convention Compliance Committee, Findings and recommendations with regard to Communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, adopted on 14 April 2011 (*2011 ACCC Part I Findings and Recommendations*). This was based on a communication from ClientEarth in 2008.

<sup>111</sup> *Ibid.*

<sup>112</sup> Now known as the General Court.

<sup>113</sup> Case T-177/01 [2002] ECR II-2365.

principle of the European Union, which hold that neither Member States nor institutions can avoid review of measures adopted by them.<sup>114</sup> The procedures afforded to individuals are rendered meaningless if they are inaccessible.

### C *The Aarhus Regulation on administrative review*

After much criticism, the EU made a feeble attempt to compensate for its blocked access to judicial review, through the drafting of the Aarhus Regulation. The Aarhus Regulation introduced an internal review mechanism. Article 10 of that regulation provides that any NGO who satisfied the requirements in Article 11,<sup>115</sup> is entitled to make a request for internal review of any institution that has adopted or failed to adopt an ‘administrative act’ under environmental law.

Apart from the Plaumann doctrine remaining as good law, there remains three fundamental issues with the Aarhus Regulation. First, it does not extend to individuals as is required by article 9(3) of the Aarhus Convention. Second, according to Article 10 of the Aarhus Regulation, the request for internal review is to be addressed against the EU body that had adopted the measure. It is thus the same EU body which adopted the original measure that shall decide on the internal review, denying fairness to article 9(3) decisions as required by article 9(4) of the Aarhus Convention.<sup>116</sup> Finally, the Aarhus Regulation narrowly defines the range of administrative acts to be ‘any measure of individual scope under environmental law, taken by a Union institution or body, and having legally binding and external effects’.<sup>117</sup> Individual scope is severely limited as it does not encompass many environmental measures of a general nature.<sup>118</sup> Therefore, as pointed out in March 2017 by the ACCC, the internal review procedure in the Aarhus Regulation does not fulfil the requirements of article 9(3) Aarhus Convention.<sup>119</sup>

The understanding that the Aarhus Regulation’s limitation to administrative acts of individual scope was incompatible with the Aarhus Convention was confirmed in the General Court. In *Vereniging Milieudefensie & Stichting Stop Luchtverontreiniging v Commission*, the Dutch government sought to postpone the attainment deadline for the annual limit for nitrogen dioxide under an EU Directive, to which the Commission agreed. An NGO, one of the objects of which

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<sup>114</sup> *Parti écologiste "Les Verts" v European Parliament* (C-294/83) [1986] ECR 1339; *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993), art 2 (‘TEU’).

<sup>115</sup> The NGO must satisfy four requirements: that it be an independent and non-for-profit legal person; its primary aim is to promote environmental protection; it has existed for more than two years and actively pursues its environmental goals; and the subject matter of internal review is covered by its objective.

<sup>116</sup> Anais Berthier and Ludwig Kramer, *The Aarhus Convention: Implementation and compliance in EU law* (2014) The European Union Aarhus Centre <<https://www.clientearth.org/>>.

<sup>117</sup> *Aarhus Regulation*, art 2(1)(g).

<sup>118</sup> For example, a decision amending Directive 91/414/EEC to include several hazardous substances was inadmissible, as well as a Common Fisheries Policy regulation establishing total allowable catches an upcoming fishing season.

<sup>119</sup> Findings and recommendations of the Aarhus Convention Compliance Committee concerning compliance by the European Union with the Aarhus Convention (ACCC/C/2008/32(EU)) – 17 March 2017 (‘2017 ACCC Findings and Recommendations’), [52]-[53], [94]. For other criticisms see paragraph [104].

was to improve air quality, wished to challenge this decision by subjecting it to an internal review. However, the Commission refused, citing that it was not an administrative measure of individual scope pursuant to the Aarhus Regulation. The NGO then initiated an annulment action under article 263 TFEU, arguing that it was an individual scope, or alternatively that article 10 of the Aarhus Regulation contravenes 9(3) of the Aarhus Convention by limiting the scope of acts that could be challenged. While the former argument inevitably failed, the alternative succeeded due to the fact that the object and purpose of the Aarhus Convention could not be to limit acts in an environmental context, where most are of general application.<sup>120</sup>

Despite these decisions, there still remain deep limitations. First, the outcome merely annuls the Commission's finding that the decision was inadmissible for internal review, but has no effect as to the substance of the case.<sup>121</sup> Second, it was made clear that:

A measure of individual scope will not necessarily be of direct and individual concern to a non-governmental organisation which meets the conditions laid down in Article 11 of [the Aarhus Regulation].<sup>122</sup>

In any event, the cases were disappointingly overturned by the Court of Justice on appeal, avoiding a legality review of the Aarhus Regulation.<sup>123</sup> It was held that international law is only capable of being relied on directly as a standard of review if obligations are unconditional and sufficiently precise in nature. In this case article 9(3) was found not to be.<sup>124</sup> As only citizens who meet the criteria laid down in national law are entitled to exercise the rights provided for in article 9(3) of the Aarhus Convention, the provision is subject to article 263 to access EU Courts, or in the case of internal review, to article 10 of the Aarhus Regulation. Consequently, individuals cannot rely directly on article 9(3) of the Aarhus Convention before the Courts of the European Union.

#### D *Post-Lisbon deficiencies remain*

To recall, there are three possibilities to initiate an action under article 263 TFEU. The first limb is the possibility for an individual to institute proceedings when personally addressed by an act. The second limb allows a person to bring a claim where an act is of 'direct and individual

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<sup>120</sup> *Vereniging Milieudefensie & Stichting Stop Luchtverontreiniging Utrecht v Commission* (General Court, T-396/09, 14 June 2012). See also *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission* (General Court, T-338/08, 14 June 2012).

<sup>121</sup> See also *TestBioTech eV v Commission* (General Court, T-177/13, 15 December 2016), [56].

<sup>122</sup> *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission* (General Court, T-338/08, 14 June 2012), [71]-[84].

<sup>123</sup> *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (Court of Justice of the European Union, C-401/12 P to C-403/12 P, EU:C:2015:4, 3 January 2015), [52] ('*Council v VM and SSLU*'); *Council and Others v Stichting Natuur en Milieu and Pesticide Action Network Europe* (Court of Justice of the European Union, C-404/12 P to C-405/12 P, EU:C:2015:5, 13 January 2015), [44]. See also Hendrik Schoukens, 'Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: Kafila Revisited?' (2015) 31(81) *Utrecht Journal of International and European Law* 46, 48.

<sup>124</sup> *Council v VM and SSLU*, [54]-[55]. See also *Lesoochranarske Zoskupenie VLK* (General Court, C-240/09, 8 March 2011), [45], a preliminary ruling concerning NGO request to be a party to proceedings regarding the issues of protection of brown bears under the Habitats Directive in Slovakia in which the Court found that article 9(3) of the Aarhus Convention cannot have direct effect.

concern'. As discussed above, in the ACCC's 2011 findings, it was revealed their interpretations were not in compliance with the Aarhus Convention because environmental associations could not be encompassed as a part of members of the public.<sup>125</sup> The Lisbon Treaty came into force 1 December 2009.<sup>126</sup> On a *prima facie* view, it appeared to facilitate public access through the introduction of a third limb. The phrase that any natural or legal person may institute proceedings against 'regulatory acts which are of direct concern to them and do not entail implementing measures' was added, thus removing the requirement for individual concern.<sup>127</sup> However, the ACCC, the compliance mechanism put into place under the Aarhus Convention, reviewed the Lisbon changes to standing and the courts' jurisprudence on access to the EU Courts for environmental matters (criticisms on the Aarhus Regulation by the ACCC were laid out above). Overall, the ACCC came to the conclusion that the EU is non-compliant with article 9(3) of the Aarhus Convention, as will be explained.<sup>128</sup>

In the *Inuit* case, it was clarified that a regulatory act covers all acts of general application with the exception of legislative acts.<sup>129</sup> This seemingly wider access is still considerably narrower than the wording of 'acts and omissions' in article 9(3) of the Aarhus Convention.<sup>130</sup> Furthermore, and in any event, it is countered by a more stringent applicant of the notion of direct concern, in which an altered economic state would not reach the threshold. This was illustrated in the case, through a regulation which prohibited the import of seal products into the EU.<sup>131</sup> The General Court found that only the importers into the EU of seal products were directly concerned. This is because, in contrast to the hunters of seals, the subject of the Regulation was the import of seal products and not the hunting of seals.

The criterion of direct concern was also interpreted by the General Court in the *Microban* case in the same manner as the second limb prior to Lisbon. It still requires that an individual's legal situation must be directly affected.<sup>132</sup> While there is hope than an individual can claim that an interfering EU measure affects their interest to enjoy a clean environment,<sup>133</sup> the ACCC criticized that it is still non-compliant with article 9(3) of the Aarhus Convention. This is because most NGOs in the environmental sector would not fulfil this criterion when acting against a particular contested measure. This approach was already confirmed by a 2016 judgment of the General Court, in which Pan Europe, an environmental NGO, was denied standing because it could not be considered directly concerned on that basis.<sup>134</sup> As pointed out

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<sup>125</sup> 2011 ACCC Part I Findings and Recommendation, [77].

<sup>126</sup> *Treaty on European Union*, opened for signature 7 February 1992, [1992] OJ C 191/1 (entered into force 1 November 1993), as amended by *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009).

<sup>127</sup> TFEU, art 263(4).

<sup>128</sup> 2017 ACCC Findings and Recommendations, [83].

<sup>129</sup> *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* (T-18/10) [2011] ECR, II-75, [56].

<sup>130</sup> 2017 ACCC Findings and Recommendations, [71].

<sup>131</sup> *Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products* [2009] OJ L 286, 39.

<sup>132</sup> *Microban International Ltd and Microban (Europe)* (T-262/10) [2011] ECR II-0000.

<sup>133</sup> But this has not been tested.

<sup>134</sup> *PAN and others v Commission* (General Court, T-600/15, 28 September 2016).

by the ACCC, though article 9(3) of the Aarhus Convention provides parties, like the EU, with a margin of discretion to establish benchmarks for standing in national law, this discretion could ‘not be used to exclude all NGOs acting solely for the purpose of promoting environmental protection’.<sup>135</sup>

As a final note, an act not entailing implementing measures was read by the General Court in *Microban* as meaning that such an act must leave no discretion to the addressees of the measure entrusted to implement it.<sup>136</sup> Again, the ACCC held that some of the acts that should be subject to review pursuant to article 9(3) of the Aarhus Convention would not fulfil this benchmark.<sup>137</sup>

European courts continue to interpret access to justice criteria so rigidly that it precludes challenges, particularly by NGOs, against the decisions of EU institutions, agencies and bodies. The EU should take the present findings seriously and not continue to ignore shortcomings despite its many warnings. It should not have a monopoly in preserving the environment. Public participation is needed to keep these institutions in check and accountable for mistakes, corruption or passivity, especially where member states are unwilling to prosecute.<sup>138</sup> Importantly, it also fosters public empowerment.<sup>139</sup> In order to strengthen the EU’s environmental governance, more drastic action is needed to ensure compliance through more effective procedural guarantees. This can be achieved through a rights of nature framework, backed by administrative capacities to implement and enforce it.<sup>140</sup>

#### IV ANALYSIS OF ISSUES IN A RIGHTS OF NATURE FRAMEWORK PROPOSAL

Clear and enforceable standards is not only an attribute, but a prerequisite for effective environmental governance at a national level and thus protection of the environment.<sup>141</sup> As we have seen, the alternative option to this failing EU system, other than a radical new proposal, is simply to continue to expand the procedural rights given to citizens and NGOs under the EU Directive. However, this has proven not to enhance environmental protection through standing over the past decade.<sup>142</sup> This section will debate the current issues with a framework proposal for rights of nature within the EU, including ethical and practical. As will be seen, using the EU’s current machinery, an altered treaty and new regulation will be able to fulfil rights of nature effectively.

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<sup>135</sup> 2017 ACCC Findings and Recommendations, [75].

<sup>136</sup> It is purely automatic and resulting from EU rules alone without the application of other intermediate rules: *Dreyfus v Commission* (C-386/96 P) [1998] ECR, EU:C:1998:193, [43].

<sup>137</sup> 2017 ACCC Findings and Recommendations, [78].

<sup>138</sup> Jonathan Adler, ‘Stand or deliver: citizen suits, standing and environmental protection’ (2001) 12 *Duke environmental law and policy forum* 39.

<sup>139</sup> Richard P Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge University Press, 2009) 131.

<sup>140</sup> Fulton and Wolfson, above n 4, 14; Francesca Spagnuolo, ‘Beyond participation: administrative-law type mechanisms in global environmental governance: Toward a new basis of legitimacy?’ (2009) 15 *European Public Law* 49, 59-60; May and Daly, above n 105, 32.

<sup>141</sup> Fulton and Wolfson, above n 4, 13.

<sup>142</sup> Schoukens, above n 123, 66.

## A *Philosophical considerations*

This section will outline the philosophical considerations of the rights of nature. As seen in Part I, the origins indeed stem from indigenous values and beliefs. First, it will be determined whether the presence of an indigenous population is a prerequisite to a rights of nature framework, before delving into the various ethical perspectives. Ultimately, it will be discovered that legislating rights of nature is the morally appropriate course of action, but successful implementation it will depend on the willingness of the EU.

### 1 *Indigenous perspectives*

While there is no internationally accepted definition for indigenous peoples, it is accepted that there are common elements. Generally, they are a distinct community through continuity of a traditional society with common ancestry to the original inhabitants of the land, that have resided in, or have uninterrupted ties to a particular region, depending on the conditions of settlement of that territory. Members must also identify as individually belonging to that group.<sup>143</sup> The customary lifestyle includes a determination to ‘preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.’<sup>144</sup> Each group will have specific manifestations of culture, for example through language, religion, lifestyle and/or livelihood.

Out of the ethnic groups traditionally inhabiting European countries, many majority populations, for example the Greeks, can be seen as native, because the current European populations are the product of three major migrations that took place in prehistory.<sup>145</sup> However, within the EU territories, there are very few present-day indigenous populations that reach the threshold of an indigenous people, due to the loss of living as a traditional society and strong connection to the land. The majority of EU Member States now live abiding by Western philosophies, especially as languages have died and merged, races mixed and clans faded. However, two notable minority indigenous populations within EU Member State territory remain. They include the Basque people of northern Spain and southern France and the Sami people of northern Scandinavia.<sup>146</sup> These limited populations would make it extremely difficult for the EU to implement rights of nature should indigenous populations be needed.

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<sup>143</sup> Derived from various sources such as UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report on the Study on the Problem of Discrimination against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7 (1986) [379]-[382] (‘UN Sub-Commission Indigenous Report’); International Labour Organization Indigenous and Tribal Peoples Convention C169, adopted 27 June 1989 (entered into force 5 September 1991); United Nations Permanent Forum on Indigenous Issues, *Indigenous peoples: conflict, peace and resolution*, 15<sup>th</sup> sess (May 2016). UN Sub-Commission Indigenous Report, [379]-[382].

<sup>144</sup> UN Sub-Commission Indigenous Report, [379]-[382].

<sup>145</sup> Torsten Gunther and Mattias Jakobsson, ‘Genes mirror migrations and cultures in prehistoric Europe — a population genomic perspective’ (2016) 41 *Current Opinion in Genetics & Development* 115.

<sup>146</sup> There are of course other European indigenous populations residing in modern day Russia, which is not part of the EU.

Indigenous populations are becoming influential as political actors realigning how the natural world is conceived. It was made clear from the studies above that especially in Ecuador and Bolivia, the presence of a majority indigenous population or even minority, as was the case in New Zealand, was a large inspiration in the modern movement for rights of nature.<sup>147</sup> These groups not only conceptualise the relationship between humans and nature as equal, rather than that of dominance and subordination, but they also have a deep spiritual connection with nature, considering it a living entity. Indeed, as mentioned above, the Whanganui Iwi are known as the River People, who often say, ‘*Ko au te awa. Ko te awa ko au*’, which translates to ‘I am the river. The river is me’.<sup>148</sup> Another example is the concept of “good living” or “living well”, which pervades the whole constitution of Ecuador in the preamble, and was seen specifically at article 74, amongst others. This is a Quichua expression known as *sumak kawsay*, and also known in Spanish as *buen vivir*. The idea centres on harmonised and balanced living amongst nature, rather than living materialistically *better*. It is respectful of nature and all it gives us.<sup>149</sup> In the Northern Hemisphere, Chief Seattle, a 19th century American Indian chief from the Duwamish Tribe, famously talked about every inch of the earth being sacred, the strange notion of selling nature’s commodities, such as water, when we do not own them,<sup>150</sup> as well as comparing nature to family.<sup>151</sup>

While it is established that in all countries that have adopted rights of nature laws thus far, the common denominator is the presence of local peoples, only one country so far has truly required the presence of indigenous groups to be able to function. New Zealand is this country, giving equal representation of the areas given rights to the government and native tribes. In contrast, it was seen that in Bolivia and Ecuador any citizen was constitutionally guaranteed standing to bring an action to enforce these rights. Thus, while indigenous philosophies definitely helped to spur and develop the rights of nature movement globally, there is no reason discovered why there would *need* to be an indigenous presence for a rights of nature framework to be workable. The indigenous *understanding* of mankind’s relationship to the natural world that underpins the rights of nature is just that. While it may seem strange to those unaccustomed with curtails to freedom,<sup>152</sup> it is an *understanding* that Western nations can *choose* to base themselves off, even if they operate within the legal structures that are not conducive to indigenous philosophies. This is because, it is a moral issue, which depends on the willingness and commitment of each nation to fundamentally shift its values. In fact, if the example is taken of New Zealand, the concluded settlements are only adapted to the values of a particular tribe, and other local inhabitants of other faiths do not have their beliefs acknowledged. This gives grounds that rights of nature should be a purely moral issue, in order to maintain the neutrality of pluralism and secularism, which the EU displays elsewhere in its policies.

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<sup>147</sup> Especially in New Zealand and India, the local people’s ability to undertake their role as steward of the rivers have been violated through commercial interference.

<sup>148</sup> Magallanes, above n 63.

<sup>149</sup> Alberto Acosta, ‘El buen vivir para la construcción de alternativas’ in Albert Acosta, *Bitacora Constituyente* (Abya-Yala, 2008).

<sup>150</sup> Nash, above n 8, 275-277 referring to Chief Seattle various speeches and works such as *How can one sell the air?*

<sup>151</sup> *Ibid.*

<sup>152</sup> Perhaps because these philosophies devalue individual human life relative to integrity, diversity and continuation of the ecosystem: Nash, above n 8, 73, 121-160.

In fact, the requirement of the presence of an indigenous population would only serve to conflate the right to culture with rights of nature. For example, Jordi Manzano argues that the constitutional inclusion of rights of nature in Ecuador equates them with the rights of man and ultimately leads to the subjugation of environmental rights to economic rights that contradicts the notion *sumac kawsay*.<sup>153</sup> The economic aspects are discussed further below. However, indigenous cultural worldviews should not be simply transferable to a legal framework for nature. This assumes that community interests are always compatible with nature. Yet the homogenization of divergent interests has already been done to some extent.<sup>154</sup> In Bolivia, it was seen that the definition of nature even *included* human communities. While humans, particularly indigenous groups, are dependent upon and have deep connections with the land, it should not be forgotten that this proposal is one for nature. It should not be subsumed within a human rights movement where its force may become weak because first, only those parts of nature seen as worthy of protecting by humans will be afforded it, and second, it may create the potential for conflict between human and nature's rights.<sup>155</sup> Thus, in some ways the very driving forces for rights of nature become the flaws in current regimes.

## 2 Theological perspectives

Even if such presence was needed, and noting the EU's small indigenous populations, religious values could align with and therefore also provide the grounds for a rights of nature framework to be accepted by Europeans. That is because theology of the natural world also asserts the intrinsic worth of the non-human world.<sup>156</sup> According to a 2012 poll on religion in the European Union by Eurobarometer, it was found that 72% of EU citizens are Christians.<sup>157</sup> Of that, Catholicism is the most widespread denomination, accounting for 48% of EU citizens.

It is stated in Genesis 1:28, 'God said to them, "Be fruitful and multiply and fill the earth and subdue it, and have dominion over the fish of the sea and over the birds of the heavens and over every living thing that moves on the earth"'.<sup>158</sup> Dominion over every living thing is the phrase at issue, which could be construed as an open invitation to boast human feats over the rest of creation. Under the influence of legal positivists, as well as growth in mercantile activity, property became detached from theological reflection and more readily associated with commercial value.<sup>159</sup> Removing these influences, one can denote having dominion over the

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<sup>153</sup> Manzano, above n 38, 51.

<sup>154</sup> Most prominently, rhetoric in the Ecuadoran constitution and some United Nations documents fails to make distinctions between the rights of nature as a separate entity and the indigenous right to culture. See UN Economic and Social Council, *Study on the need to recognize and respect the rights of Mother Earth*, UN Doc E/C.19/2010/4, 14, which study contends that nature is so intertwined with humanity in the indigenous worldview that it is Pachamama.

<sup>155</sup> Laurel Fish, 'Homogenizing Community, Homogenizing Nature: An Analysis of Conflicting Rights in the Rights of Nature Debate' (2013) *Stanford Undergraduate Research Journal*, 6, 9.

<sup>156</sup> Nash, above n 8, 112: For example, many Asian religions such as Shinto, Buddhism and Hinduism also have at the core of their faith the rejection of anthropocentrism.

<sup>157</sup> European Commission, *Discrimination in the EU Report: Special Eurobarometer 393* (2012) <<http://ec.europa.eu/>> 233.

<sup>158</sup> *Holy Bible, revised standard edition* (Thomas Benson and Sons edition, 1953).

<sup>159</sup> Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart Publishing 2004) 103-104.

earth not as a divine commandment for humans to reign the world solely for man's benefit, but as a trustee or steward to protect all of God's creatures.<sup>160</sup> The basis for Catholic concern over environmental issues such as climate change is also exemplified in Psalm 24:1 when it is stated that 'the earth is the Lord's and all that it holds'. From a theological perspective, it could be argued that Christianity supports the rights of nature as a part of loving and caring for all God's creations. By extension, to continue with improper and destructive behaviours against earth would not only endanger the livelihood of all of these creations, but dishonour God and the life-sustaining air, water and fruits that He bestowed upon mankind.

This seems to have found support by the Catholic Church for many decades, particularly in recent years by Argentinian Pope Francis, dubbed the "great reformer".<sup>161</sup> His Holiness, on World Environment Day 2013, stated that, 'we are losing the attitude of wonder, contemplation, listening to creation. The implications of living in a horizontal manner [is that] we have moved away from God, we no longer read His signs'.<sup>162</sup> However, he was not the first Pope to raise such issues. In January of 2010, Pope Benedict XVI stated that, 'if we wish to build true peace, how can we separate or even set at odds, the protection of the environment and the protection of human life'.<sup>163</sup> This was echoed, further back on World Peace Day in 1990, by Pope John Paul II, who raised concerns about the consequences of human interference upon ecosystems and the wellbeing of future generations, going as far to say that common heritage points to the 'necessity of a more internationally coordinated approach to the management of the earth's goods'.<sup>164</sup>

While it is highlighted in this paper that the concept of rights of nature can have roots within indigenous as well as religious philosophies that may make it palatable for many of the EU citizens, it argues that neither of these are necessary. Atheism is the negation of theism, that is, the denial of the existence of a God or Gods. Thus, an atheist holds the belief that there is no God.<sup>165</sup> Atheism is on the rise worldwide, with the latest estimate at 7% of the global adult population.<sup>166</sup> Expanding the category to "no religious affiliation" in general, non-religious is now the world's third largest "faith", at around 16.5% of the global adult population, behind only Christianity and Islam.<sup>167</sup> The same survey by the Pew Research Survey stated that 18.2% of Europe is religiously unaffiliated.<sup>168</sup> Specifically, there are a number of Member States that made the list for the highest percentage of atheists, including France, Sweden, Estonia,

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<sup>160</sup> Nash, above n 8, 88-90, 92.

<sup>161</sup> Austen Ivereigh, *The Great Reformer: Francis and the Making of a Radical Pope* (Picador, 2015).

<sup>162</sup> Pope Francis, Untitled (Speech delivered at St Peter's Square, Vatican City, 5 June 2013).

<sup>163</sup> Pope Benedict XVI, 'Address of His Holiness Pope Benedict XVI to the Members of the Diplomatic Corps for the Traditional Exchange of New Year Greetings' (Speech delivered at the Sala Regia, Vatican, 11 January 2010).

<sup>164</sup> Pope John Paul II 'The Ecological Crisis a Common Responsibility, Peace with God the Creator, Peace with all Creation: Message of His Holiness for the Celebration of World Peace Day January 1 1990' (Speech delivered at the Vatican, 8 December 1989).

<sup>165</sup> Simon Blackburn (ed), *The Oxford Dictionary of Philosophy* (Oxford University Press, 2<sup>nd</sup> ed, 2008).

<sup>166</sup> Ariela Keysar and Juhem Navarro-Rivera, 'A World of Atheism' in Stephen Bullivant and Michael Ruse, *Oxford Handbook of Atheism* (Oxford University Press, 2013).

<sup>167</sup> Pew Forum on Religion and Public Life, *The Global Religious Landscape: Religiously Unaffiliated* (18 December 2012) Pew Research Center <<http://www.pewforum.org/>>.

<sup>168</sup> Including both atheists and agnostics.

Germany, Belgium, Finland and the United Kingdom, amongst others. Non-religious is now even the majority in the Czech Republic, while in the Netherlands, almost 70% of the population in 2015 had no religious affiliation, since steadily increasing from 33% in 1966.<sup>169</sup> As seen below, it will be explained you do not need to belong to an indigenous group or practice Hinduism to understand that nature has a right to exist, but is continuously being destroyed.

### 3 Moral perspectives

For two thousand years, western ethicists have focused almost exclusively on the conduct of people towards each other.<sup>170</sup> Similarly, while environmental regulation currently manifests itself through an array of provisions concerned with curbing negative consequences arising from human action, there is not to be found any deeper rationale beyond this purely instrumental concern with human wellbeing and erosion of our quality of life, whether it be health or economic related.<sup>171</sup> This section will discuss whether this notion deserves to be rejected and whether, regardless of religious beliefs or values, the environment is worthy of protection intrinsically and not as a mere instrument to managing a contemporary social problem.<sup>172</sup>

Philosopher John Locke stated that ‘every person, by virtue of their existence, shared a natural right to continue existing’.<sup>173</sup> He also reasoned that animals can suffer and that harming them needlessly is morally wrong. However, it was not noted from the perspective that it is cruel to animals, but that it is degrading for humans who would not be compassionate to their own kind.<sup>174</sup> It took many years for this right to move towards the inclusion of non-human subjects into this sphere. However, in the last century, advocates for the rights of non-human subjects have been more forthcoming.<sup>175</sup> For example, Henry More was an animist from Cambridge University who believed that there was a spirit of the world in every part of nature that held it together. He pointed to the interconnectedness of all life, for example the death of one creature which will, as nutrients in soil, nourish the earth to support other life.<sup>176</sup> Holmes Rolston also theorized that there is intrinsic value where there is positive creativity.<sup>177</sup> As everything originates in nature, it can be argued that there is value that should be inherently recognised and protected, even if its health and thriving provide no immediate measurable financial benefit to humans living nearby. It was stated by scholar Edward Payson Evans that man is truly a part and ‘product of nature as any other animal and attempt to set him up on an isolated point outside

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<sup>169</sup> Tom Bernts and Joantine Berghuijs, *God in Nederland: 1966-2015* (Ten Have, 2016).

<sup>170</sup> Nash, above n 8, 121-122; David R Keller (ed), *Environmental Ethics: The Big Questions* (Wiley-Blackwell 2010) 1.

<sup>171</sup> Coyle and Morrow, above n 159, 1-2, 9, 199, 212.

<sup>172</sup> Coyle and Morrow, above n 159, 199.

<sup>173</sup> John Locke, *Two Treatises of Government* (Cambridge University Press, 2<sup>nd</sup> ed, 1967) 289.

<sup>174</sup> John Locke, *Some Thoughts Concerning Education* (A and J Churchill, 1693).

<sup>175</sup> Since the 1940s, scholars such as James Lovelock, and Arne Naess have developed the framework for the recognition of rights that acknowledged human interdependence with the environment: UN Economic and Social Council, *Study on the need to recognize and respect the rights of Mother Earth*, UN Doc E/C.19/2010/4 (15 January 2010), [47].

<sup>176</sup> Donald Worster, *Natures Economy: The Roots of Ecology* (San Francisco, 1977) 41-42.

<sup>177</sup> Holmes Rolston III, ‘Naturalizing Values: Organisms and Species’ in Louis Pojman (ed), *Environmental Ethics* (Wadsworth Publishing Company, 2<sup>nd</sup> ed, 1998) 107-119.

of it is philosophically false and morally pernicious'.<sup>178</sup> However, no matter how many support the view stipulating that humans should not be placed *above* nature, it still remains unclear as to the justification of *why* it would be wrong to do so.

The opposing view is of course that the treatment of nature does not matter as the environment has no consciousness or awareness, and cannot suffer. There is no pain, only physical reactions.<sup>179</sup> It becomes somewhat clearer when you include every living being, including animals, who can suffer, in the definition of nature. Approval or disapproval of human conduct could then be considered by the 'extent to which an action increases or decreases the health of the whole community and the quality or intimacy of the relationships between its members'.<sup>180</sup> As Aldo Leopold's famous land ethic states, 'a thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise'.<sup>181</sup> He described ethics itself as self-imposed limitations on freedom of action that derive from the recognition that the 'individual is a member of a community of interdependent parts'.<sup>182</sup> It is also encapsulated by John Muir, an environmental philosopher:

How narrow we selfish, conceited creatures are in our sympathies! How blind to the rights of all the rest of creation! Why should man value himself more than as more than a small part of the one great unit of creation?<sup>183</sup>

As already alluded to by Locke, nature has many benefits to humans, from practical uses such as food, medicine, science and industrial products, to cultural, recreational, educational and aesthetical uses.<sup>184</sup> It was even seen in the case study of Bolivia, that while indigenous philosophies played a major role, the fact that climate change will drastically affect the citizens of Bolivia was just as strong a driving force. As there are many anthropocentric motivations to rigorously protect the environment,<sup>185</sup> some prefer to argue its protection through human rights such as the right to culture and education, amongst others.<sup>186</sup> Indeed, many nations have also expanded human rights to include the right to a healthy environment.<sup>187</sup> As ecosystems are pushed to collapse, such rights cannot be fulfilled without securing rights of nature itself. So, even from an anthropocentric view, rights of nature can be seen as necessary for the

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<sup>178</sup> Edward Payson Evans, *Evolution, Ethics and Animal Psychology* (Appleton and Co, 1898).

<sup>179</sup> P S Elder, 'Legal Rights for Nature: The Wrong Answer to the Right(s) Question' (1984) 22(2) *Osgoode Hall Law Journal*, 285, 288-289.

<sup>180</sup> McCullinan, above n 62.

<sup>181</sup> Aldo Leopold, *A Sand County Almanac* (Oxford University Press, 1949) 204, 224-225.

<sup>182</sup> *Ibid* 203-205, 218, 226.

<sup>183</sup> John Muir, *A Thousand Mile Walk to the Gulf* (1867) 324, 326.

<sup>184</sup> Cyril de Klemm, 'The Conservation of Species: The Need for a New Approach' (1982) 9(4) *Environmental Law and Policy* 117.

<sup>185</sup> Elder, above n 179, 290.

<sup>186</sup> Mark Sagoffi, 'On Preserving the Natural Environment' (1974) 84 *Yale Law Journal*, 205, 221-222.

<sup>187</sup> Countries from within the EU include Finland, Greece, Spain and France. The ECHR does not guarantee a right to a healthy environment, but the European Convention on Human Rights may be implicated in environmental cases as mentioned earlier.

achievement of other human rights.<sup>188</sup> Thus even if nature does not suffer, mankind will if it does not act upon the unique knowledge it possesses to refrain from destructive practices.<sup>189</sup>

One author even argues that humans, as part of nature and through its manipulation, have simply proved that they are better suited for survival in comparison to other forms of life.<sup>190</sup> However, this is indeed where human responsibility to protect the environment is derived from. The power that humans have acquired has enabled rapid and widespread transformation to nature.<sup>191</sup> Simply because humans possess this power does not morally entitle the destruction of life forms that have taken millennia to come into being. To the contrary, the dominant position brings responsibility for the welfare and fate of millions of species. Even if one disagrees, the continuation of environmental manipulation in destructive manners should at least be stopped given it jeopardizes our survival as a species.<sup>192</sup> Though rights are not demanded by nature, humans have the responsibility to articulate and defend nature as another occupant of the planet. This is irrelevant of whether an underlying moral attitude is agreed with or it is simply that human interest is argued, as both lead to the conclusion that the environment must be preserved. This is not to say that immediate human and environmental needs will always align, but that overall protection is a common goal. However, it remains a complex challenge to change to the underlying assumption that human interests and environmental protection should coincide, even if they do not currently.<sup>193</sup>

## B *Practical issues*

While it has been determined through an interest based analysis that a more drastic environmental movement is needed, the rights of nature is still riddled with practical issues. This section will now discuss the possibility of the initiative from a realistic and achievable point of view. The first main theme will be to compare whether a framing of rights is more appropriate than responsibilities, which includes the prioritising of competing rights and any potential conflict with property ownership. Second will concern the issue of representation, including whether, even if it is possible for humans to act on behalf of nature and know its needs, humans will always act in accordance with such needs, even when it means sacrificing these short-term desires. Ultimately it will be determined whether these issues can be overcome, or if they will pose permanent obstacles to rights of nature, before the rights of nature proposal is submitted for within the current EU system of standing. Finally, it will conclude with a comment of political and economic hurdles.

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<sup>188</sup> This is confirmed in *Stockholm Declaration*, which states that 'Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself'.

<sup>189</sup> Diamond, above n 2.

<sup>190</sup> Elder, above n 179, 290.

<sup>191</sup> See Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age* (University of Chicago, 1985); Holmes Rolston III, 'Rights and Responsibilities on the Home Planet', 18 *Yale Journal of International Law* (1993) 251, 263.

<sup>192</sup> Manzano, above n 38, 57-59.

<sup>193</sup> Coyle and Morrow, above n 159, 157-158.

## 1 *Conception of rights: property rights, responsibilities and balancing interests*

Property rights and the freedoms accompanying them tend to demarcate the scope of concern associated with use in ways harmful to the environment. While a right is a moral entitlement to have or do something, restrictions arise when the overwhelming needs of the common good demand it.<sup>194</sup> Rights of nature, however, does not *have* to seek to eliminate property ownership, but to the authority of an owner to cause substantial harm to natural entities that not only exist as that property, but depend upon it. This would prove too difficult to overhaul in many nations, in which property law forms a fundamental basis of the legal systems. Even in the case study of Ecuador, it was seen that natural resources remain the property of the state. If you take the example of humans, human labour can be used within an employment context, without automatically denying human rights.<sup>195</sup>

Ownership has as much to do with obligations as rights,<sup>196</sup> and this can extend to duties outside human relationships. The question then becomes if it is necessary to give rights to nature, in preference to thinking in terms of responsible freedom. One author has argued that it isn't more rights that are needed, but less. He advocates for an approach not focused in the paradigm of rights, but rather a 'holistic approach in which nature is not one subject amongst others, but the place where all subjects live'.<sup>197</sup> This approach sees humans committing to the stewardship of nature, where rights such as ownership are read in conjunction with responsibilities owed to nature.<sup>198</sup> However, it is argued here that there is no reason to see rights and responsibilities as mutually exclusive. This conception of rights of nature, where humans have duties towards nature, is exactly what the movement aims for, where humans are a part of, not apart from, the earth community.<sup>199</sup> But maintaining it within the framework of rights resolves the issue of standing that mere restrictions to freedoms could not.<sup>200</sup> By putting ecosystems on an equal footing with humans, also as a living entity, the conception of humans as masters or as separate from nature is dismissed.<sup>201</sup> It is also a reflection the high value humans must place upon nature, making nature harder to ignore, when balancing competing rights.<sup>202</sup> Therefore, rights of nature can help to alleviate the tension between the idea that property rights results in minimum legal accountability and the social collective interest for property owners to take care in exercising

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<sup>194</sup> Coyle and Morrow, above n 159, 57.

<sup>195</sup> Nash, above n 8, 129.

<sup>196</sup> Coyle and Morrow, above n 159, 4-5.

<sup>197</sup> Manzano, above n 38, 57.

<sup>198</sup> Ibid, 57-59; Holmes Rolston III, 'Environmental Ethics: Values and Duties to the Natural World' in Frederick Herbert Bormann and Stephen R Kellert (eds), *The Broken Circle: Ecology, Economics, Ethics* (Yale University Press, 1991); Kevin Gray and Susan Francis Gray, 'The Idea of Property in Land' in Susan Bright and John Deward (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 15.

<sup>199</sup> Murat Arsel, 'Between "Marx and Markets"? The State, the "Left Turn" and Nature In Ecuador' (2012) 103(2) *Tijdschrift Voor Economische En Sociale Geografie (Journal of Economic & Social Geography)* 150.

<sup>200</sup> If the view is taking that other rights should be ready subject to nature merely as a responsibility, this remains in the substantive field of law. Whereas rights will enable a claim to be brought from the perspective of nature and not humans.

<sup>201</sup> Eduardo Gudynas, 'Buen Vivir: Today's Tomorrow Development' (2011) 54(4) *Development* 441.

<sup>202</sup> Coyle and Morrow, above n 159, 7.

those rights.<sup>203</sup>

Of course, while giving nature legal personhood will resolve some enforcement issues in environmental law, EU legislators and the judiciary will inevitably need to prioritise rights in tough circumstances where substantive rights of nature may conflict with economic or social policy.<sup>204</sup> If the example of Ecuador is taken, the rights of nature are surrounded by a broad list of other constitutionally enshrined rights, including nutritional food, access to communication technologies, even ‘the practice of sports and free time’ and ‘tax exemptions for elderly persons’.<sup>205</sup> The inclusion of such an extensive spectrum of rights risks the ability to effectively prioritise the enforcement of these rights, thus diminishing the significance of the entire list as a whole.<sup>206</sup> There will even be situations where competing interests within and between ecosystems exist. For example, given that hydropower can substitute for fossil fuel use, a court may find itself balancing the negative affects to a river versus the harms caused by air pollution and oil extraction from fossil fuels and disruption to species’ habitat.<sup>207</sup> These conundrums are more prominent when only certain elements in an ecosystem have rights, such as is the case in New Zealand.

As seen in the previous paragraph, comparing and prioritising competing rights will inevitably entail sacrifices. Nevertheless, it is a necessary mode of resolving tensions.<sup>208</sup> For these reasons rights of nature, although separate to any human right, should not be looked at in isolation when determining violations.<sup>209</sup> If these tensions are not acknowledged, the overall consequences can be high. This is demonstrated further through a Nepalese case. In that case, the development of a college was denied due to environmental reasons. However, this deprived the community in question of much needed doctors.<sup>210</sup> In contrast, there will likely be scenarios where certain actions will be in violation of both natural and human communities. While this paper does not try to imply that it will not be a difficult task, it will in many ways be useful as a pressuring force upon society to restrain consumerism and shift not only its actions, but attitude away from a utopian frame of mind where all interests can be fulfilled through exploiting and protecting nature simultaneously.<sup>211</sup>

## 2 Representation

### a) Legal fiction

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<sup>203</sup> Mark Shephard and Paul Martin, ‘The political discourse of land stewardship reframed as a statutory duty’ in Brad Jessup and Jim Rubenstein, *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012) 71-72; Coyle and Morrow, above n 159, 107.

<sup>204</sup> Fish, above n 155, 10.

<sup>205</sup> *Constitution of Ecuador*, art 13; art 16; art 24; art 37; art 66.

<sup>206</sup> Manzano, above n 38, 57.

<sup>207</sup> Fish, above n 155, 9.

<sup>208</sup> Fish, above n 155, 10.

<sup>209</sup> Mary Elizabeth Whittemore, ‘The Problem of Enforcing Nature’s Rights under Ecuador’s Constitution: Why the 2008 Environmental Amendments Have No Bite’ (2011) 20(3) *Pacific Rim Law & Policy Journal Association* 671, 671-675.

<sup>210</sup> *Yogi Narahari Nath v Honorable Prime Minister Girija Prasad Koirala* NKP 33.

<sup>211</sup> Manzano, above n 38, 56-61.

Throughout legal history, each successive extension of rights upon some new entity has always initially been absurd and ridiculed, whether it was for women, children, foetuses, people with disabilities, African-Americans and so forth.<sup>212</sup> However, the unthinkable gradually (and on occasion, violently) becomes conventional.<sup>213</sup> Like corporations, estates, universities and other inanimate objects that can be parties for the purposes of adjudicatory processes, nature would be, under a framework proposal, an artificial person for the purposes of standing in the EU. As stated above, like corporations, estates universities and so forth, nature does not speak. Nonetheless, inarticulation does not mean the absence of interest. Lawyers, like is the case for most citizens, will speak on behalf of the interests of these entities. As touched upon in Part A, one of the main arguments put forward against rights of nature is how can human advocates determine what it is that nature *needs*. For example, Christopher Stone, in his now famous article ‘Should Trees Have Standing?’, recounted a case in which the rights of two dolphins were asserted after a lab assistant activist released them from their tanks back into the wild. When he was subsequently charged for theft of property, the assistant responded that he was not stealing, but actually saving two juristic persons from slavery. However, because marine biologists testified that dolphins bred in captivity are not adequately equipped to survive a life in the wild, the assistant was sent to jail.<sup>214</sup>

This case does not prove that humans are ill-equipped to act in the interests of nature. In fact, to the contrary, it easily overcomes an argument that nature cannot convey its desires. Through scientific developments, the definite needs of nature can be determined. Without fulfilling such needs, both perceptible and non-visible deterioration occurs. For example, if a lawn needs water, scientific methods will discover a dry soil, apart from the more obvious signs of dry, yellowed spot, or shrivelled texture.<sup>215</sup> All the previous case serves to illustrate is that there should be some requirements for who can bring an action on behalf of nature.

*b) Assumption that actio popularis is nature’s best interest*

While the question of whether it is possible that humans have the ability to act on behalf of nature in their interests was answered affirmatively, a pressing conundrum in the implementation of a framework remains to be determined. That is, who is the most appropriate representative of nature and whether they will *choose* to act in the best interests of nature. As was seen in both Ecuador and Bolivia, the constitutional language correlates to an enshrined right of actio popularis to enforce rights of nature. That means there open standing for any citizen to bring an action in defence of the rights of nature, regardless of whether or not direct harm has been suffered (see above). While there have been some victories in Ecuador, even these decisions can be criticised and there have been many more failures. This framing of nature’s rights can not only create litigious burdens or excess strain on courts, but presumes that advocates will not only act without ulterior motives, but acknowledge the heterogeneous interests in a given society.<sup>216</sup> But this will not always be the case given that open standing, in

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<sup>212</sup> Stone, above n 9, 110-111.

<sup>213</sup> Nash, above n 8, 8.

<sup>214</sup> Stone, above n 9.

<sup>215</sup> Ibid.

<sup>216</sup> Fish, above n 155, 7-8.

actuality, can include non-locals unfamiliar with the territory and even corporate interests using a claim to further personal agendas.

The first “successful” instance to vindicate the rights of nature occurred in Ecuador in *Wheeler c Director de la Procuraduria General Del Estado de Loja*. On 30 March 2011, the rights of the Vilcabamba River were recognised in the Provincial Court of Justice in Loja in a case against the Provincial Government of Loja, after being denied in the first instance for a lack of standing. In this case the local government were responsible for the Vilcabamba-Quinara road expansion project parallel to the river. It was argued that they were in breach of nature’s rights through the dumping of construction debris into the river, which resulted in the narrowing of its width and increasing its flow, subjecting nearby populations to flooding and other risks.<sup>217</sup> The project was done also without an environmental impact assessment. The case is significant because damage only need be proved to nature. Moreover, the Provincial Court set an important precedent in holding that nature’s rights would prevail over other constitutional rights in the event of a conflict. The proceedings also confirmed that the burden of proof is upon the defendant to show there is no damage.<sup>218</sup>

However, the claim was filed on behalf of the river by Richard Wheeler and Eleanor Huddle, two American citizens who live part-time in Ecuador and own valuable riverside property downstream from the project. After some investigation, it was discovered they have plans to develop a retreat outside of Vilcabamba. Thus, it can be deduced that concern for a victory was not for nature, but a personal interest in a prime development that was and would continue to be adversely affected as a result of flooding.<sup>219</sup> While the claim probably did have at least some positive effect for the river and surrounding environment, a tourist resort will likely have an equal or greater impression on the area. This case therefore displays the oversight of power disparities in *actio popularis* by facilitating claims that are disconnected from both local and broader societal needs.<sup>220</sup> It also reinforces an assertion that rights of nature must be contextualised and balanced with social implications. In this case the economic impact or increased mobility and access provided by the road, as well as local perspectives, were seemingly ignored. In any event, enforcement of the ruling was weak, with the Provincial Government of Loja slow to comply with the mandated reparations.<sup>221</sup>

While Ecuador faces instability and corruption within its legal and political systems,<sup>222</sup> as well as large wealth disparities between foreigners and citizens, which enhances the possibility for successful personal interest claims, the threat still applies in the EU. It is intended that rights

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<sup>217</sup> Natalie Greene, *The first successful case of the Rights of Nature implementation in Ecuador*, The Global Alliance for the Rights of Nature <<http://therightsofnature.org/>>.

<sup>218</sup> Erin Daly, ‘Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights’ (2012) 21(1) *Review of European Community & International Environmental Law* 63, 63-66. However, it could also be argued that it is superfluous as did not actually use the rights of nature but reversal or burden of proof.

<sup>219</sup> Erin Daly, *Ecuadorian Court Recognizes Constitutional Right to Nature* (2011) Widener Environmental Law Center <<http://blogs.law.widener.edu/>>.

<sup>220</sup> Fish, above n 155, 7-8.

<sup>221</sup> Daly, above n 218.

<sup>222</sup> Whittemore, above n 209.

of assist in fighting back against destructive corporations and developers, and largely deny the possibility of personal interest claims. However, even with open standing, there may be two categories of communities. The first may vigorously oppose projects for personal reasons or otherwise, which can then simply then be moved to other neighbourhoods, being the second stream of communities. These, seen from the case above, may not have the resources, or even desire to oppose projects.<sup>223</sup> To conclude, this analysis shows that there should be some limits to open standing, in order to filter guardians that not only have a lack expertise to act in nature's best interest as seen earlier, but also to filter those who will purposefully choose not to.

Conversely, New Zealand and India take a different approach to standing, in that rivers and other parts of nature have been appointed a guardian figure. This, on the other end of the spectrum, is too closed, only allowing a small number of people to act on behalf of the entities interests. Not only does it not provide access to justice, New Zealand's formulations of the rights of nature does require the presence of an indigenous group, which was criticised earlier. The EU can learn from these flaws when formulating a framework, as will be seen below.

### 3 *The struggle of incorporating rights into modern politics and economics*

The other major failure of nature's rights seen in the case studies above is the heavy dependence on natural resources that remains in many modern economies and has led to some unsatisfactory decisions. As stated, there have been some small victories in Ecuador. In 2009, a case was brought by involved community members from the canton Santo Domingo de los Colorados, who complained of water soil and air contamination from a pork-processing plant. Interestingly, the rights on nature in articles 71-72 of the Constitution were not claimed. While the applicants claimed the constitutional rights to health, as well as a safe and clean environment, the judge applied rights of nature independently.<sup>224</sup>

However, the failures are many more. In 2014, the Tangabana highlands in the Chimborazo province, an ecosystem of great importance for water and carbon capture, became the first case in which a demand for rights of nature was lost. Here the claimants, environmental groups, brought a claim against a private company to remove a pine tree plantation to reforest and restore the ecosystem. At both first instance and on appeal, the applicants failed because they could not prove they owned the land. It is now currently being appealed again by the activists, this time to the Constitutional Court of Ecuador, who argue ownership is irrelevant because of open standing within the Constitution.<sup>225</sup> Moreover, in 2013, local communities and NGOs objected to an open-pit mining project in El Condor Mirador, a biodiversity hotspot, on the basis that the development's environmental impact assessment confirmed contamination in the area and lead to the extinction of at least three endemic amphibian species and one reptilian species that call the ecosystem home. Despite this risk, the project proceeded in violation of article 73, even after appeal, with the judge found no violation of nature's rights, despite clear

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<sup>223</sup> Fish, above n 155, 7-8.

<sup>224</sup> Craig Kauffman and Pam Martin, 'Testing Ecuador's Rights of Nature: Why Some Lawsuits Succeed and Others Fail' (Paper presented at International Studies Association Annual Convention, Atlanta, 18 March 2016), appendix titled 'Table 1 Ecuador's Rights of Nature Cases'.

<sup>225</sup> Ibid.

evidence. The judge even stated that, contrary to the earlier Vilcabamba River case, that development, as a public interest, will always prevail.<sup>226</sup> Even when nature's rights are constitutionally embedded, it seems to be a façade and that states will overlook them, or interpret them flexibly, in the case of economic development. These cases question the legitimacy and abiding power of these rights.<sup>227</sup>

In *República del Ecuador Asamblea Nacional, Comisión de la Biodiversidad y Recursos Naturales* (2011), the Ecuadorian government filed a claim against illegal gold mining operations in the remote districts of San Lorenzo and Eloy Alfaro of the north Esmeraldas province. The rights of nature were found to be violated by the operations, who were polluting nearby rivers. The ruling was swiftly enforced, after military armed forces were ordered to conduct operations to seize equipment and destroy the sites.<sup>228</sup> This shows that Ecuador's jurisprudence is extremely arbitrary, especially when comparing the previous El Condor Mirador case. While both concerned similar situations, only the 2011 case produced a positive outcome. The only differences are that the 2011 case was filed by the government and it was against an *illegal* mine. This implies that the government is willing to take action only where they are losing income they would have if it was not an illegal mine. 14.8 percent of gross domestic product (GDP) in Ecuador comes from profits from natural resources.<sup>229</sup> This paradoxical situation means the ability to fulfil rights of nature, as well as guarantee social rights and the economic opportunity of citizens,<sup>230</sup> as required within the Constitution, depends on increased income from activities of significant environmental impact.<sup>231</sup> It is clear from the cases above that the tension between development and environmental protection appears so far to be resolved in favour of the former.<sup>232</sup>

Like Ecuador, the Bolivian government must also balance leniency for powerful environmental movements, with a rights of nature framework at odds with economic realities. Bolivia's economy is also heavily dependent on the extractive industries of tin, silver, gold and other raw materials, with profits comprising 12.6 percent of Bolivia's of the country's GDP.<sup>233</sup> Even Pablo Solon, a high-profile rights of nature advocate, resigned his post as Bolivian ambassador to the UN. In a letter from September 2011 from Pablo Solon to President Morales, it was allegedly stated that 'there must be coherence between what we do and what we say'.<sup>234</sup> It appears clear that the reason for his departure is that he could not lobby for the rights of nature at an international level, while his country's hypocritical extractive policies remained in place. Further, it seems that rights of nature is more of a national vision than concrete obligation.

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<sup>226</sup> Ibid.

<sup>227</sup> Manzano, above n 38, 48.

<sup>228</sup> Daly, above n 218.

<sup>229</sup> Kiana Herold, *The Rights of Nature: Indigenous Philosophies Reframing Law* (6 January 2017) Earth Law Centre <<https://www.earthlawcenter.org/>>.

<sup>230</sup> See, eg, *Constitution of Ecuador*, art 277, in which the State is responsible for economic development, as well as 284.

<sup>231</sup> Manzano, above n 38, 53-54 referring to Agustín Grijalva, 'Regimen constitucional de biodiversidad, patrimonio natural y ecosistemas fragiles: y, recursos naturales renovables' (2010).

<sup>232</sup> Manzano, above n 38, 53-54 referring to Julio Echeverría, 'Complejización del campo político en la construcción democrática en el Ecuador' (2010).

<sup>233</sup> Herold, above n 229.

<sup>234</sup> Jason Mark, 'Natural Law' (2012) 27(1) *Earth Island Journal*.

Even in European countries, a strong link is found between satisfaction of social rights and increased pressure of natural resources,<sup>235</sup> where the main commodities exported include machines and motor vehicles, plastics and pharmaceuticals. Nevertheless, also high on the list of exports is iron and steel, fuels, wood pulp and paper products.<sup>236</sup> While this does not pose an issue for a procedural change to standing, it would be still to substantive rights of nature. But as renewable energy gains traction, it rights of nature may generate innovation in this field and pose less of an issue, particularly within the EU. In many respects, it is a question of willingness on behalf of a nation. Of course, a shift in priorities is required. At time, social benefits or other human desires may be sacrificed in order to achieve the long-term goal of a more sustainable planet. If sincere commitment to protect rights of nature cannot be given, the concept of granting nature essential should be reconsidered in terms of the capacity and willingness of a nation to adhere to them. Unwavering reliance on an extractive economy with no real ability to change simply makes rights of nature antithetical and idealistic.

#### 4 *Fitting rights of nature into the EU*

In Part 1 of the practical issues of a rights of nature framework so far it is concluded that rights of nature, and not simply more limitations are needed. This section will discuss how to frame the concept of rights of nature in EU law and whether there is already the machinery to do so.

##### a) *Procedural and substantive options*

As briefly alluded to, there are two options which could be employed within the EU. The first is to regard nature as a living entity. In this regard, nature would be considered a natural or legal person for the purposes of article 263 and 265 TFEU, enabling it to undertake judicial review. The consequences for an action to annul under article 263 TFEU is that the act is declared void.<sup>237</sup> A regulation, similar to the Aarhus regulation, could also be enacted to enable nature to be able to conduct administrative review.<sup>238</sup> There would need to be separate rules on who could act on behalf of nature, discussed further below. By changing who would qualify as directly effected in standing would enable a guardian on behalf of nature to enforce already existing substantive environmental laws. A procedural amendment should be comparatively easy to implement in contrast to the elastic quality of a substantive environmental right, given its basis in procedure rather than ecology. This is because procedural obligations are clear, explicit and objective. There is no act of balancing or searching for definitions which can affect the environment on the one hand, and the economy on the other, depending on how narrow or wide an interpretation is taken. It is strictly judicial.<sup>239</sup>

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<sup>235</sup> Dietrich Murswiek, *Umweltschutz Als Staatszweck* (Economica Verlag, 1995) 48.

<sup>236</sup> Economy Watch, *Europe Trade, Imports and Exports* (9 April 2010) <<http://www.economywatch.com/>>.

<sup>237</sup> TFEU, art 264. This paper does not address compensation or damages to nature, which should be dealt with at a national level, between individuals and a Member State, or between individuals.

<sup>238</sup> In addition to fixing non-rights of nature issues such as individual scope, as outlined in Gaps in EU law.

<sup>239</sup> May and Daly, above n 105, 44-46.

This leads to the second option. A procedural proposal could work alone or in conjunction with the second option, which is to take a step further and create substantive rights for nature in EU law. In this option, actions that injure nature itself in violation of its rights could be rendered void, in addition to enforcing current substantive environmental laws. While the purpose of this paper is not to delve into the latter option, it will briefly describe what rights should then be expected. To recall, in the Bolivian case study it outlined the right to vital life, to diversity of life, to pure water and clean air, the right to equilibrium and restoration.<sup>240</sup> Similar rights were also seen in the Universal Declaration of the Rights of Nature. However, one could argue that these rights are too vague and uncertain as any questions arise. Does a single tree have the right to life? If not, how many trees would need to be cut down to violate this right? If nature should have the right to be free from cruel treatment, what is cruel? This of course will be a balancing act.

If we consider nature as an ecosystem, which is discussed below, it will involve the consideration of many factors. For example, take the tree example once more, it will not just be the amount of a particular tree that was deforested, but whether that tree is endangered, or is an ancient forest and takes longer to regenerate. These types of factors will lean towards a violation and should be non-exhaustive. However, other factors such as restoration within the ecosystem, or in other ecosystems, would contribute towards compliance with such rights. Ultimately when considering rights of nature, it is important to reflect upon which human activities are unnecessarily destabilizing the Earth's climate, alternative options, and the ease and cost of these options.<sup>241</sup> This is necessary as to not hinder development and growth, but also providing an incentive to find more efficient uses of the environment.

#### *b) Definition nature*

It must be determined what aspects, whether nature generally, or specific parts, will be protected. This paper proposes that ecosystems should be the nature considered a living entity and protected with rights. An ecosystem is a biological or community of interacting living organisms, with their non-living or physical components of their environment.<sup>242</sup> Nature as an ecosystem is generally echoed in Ecuador and Bolivia, in more spiritual terms.<sup>243</sup> In a local bill from Spokane, Washington, this the definition of nature was also given as 'ecosystems, including but not limited to, all groundwater systems, surface water systems and aquifers'.<sup>244</sup> As was seen in the first section of 'Practical issues', discussing the conception of rights, single entities, such as the case with the river in New Zealand, will make balancing competing interests more difficult. To the extent possible, nature should be seen as a whole. Nevertheless,

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<sup>240</sup> *Bolivian Constitution*, art 7.

<sup>241</sup> This is particularly important but more so in non-EU countries, to make sure nature's rights do not act against the poor and marginalised because they have limited options.

<sup>242</sup> This includes aspects such as air, sunlight, water and minerals. Eugene P Odum, *Fundamentals of Ecology* (Saunders, 3<sup>rd</sup> ed, 1971).

<sup>243</sup> See Part II, with the general consensus theme that nature is an indivisible, living community of interrelated beings. However, this proposal opts for a secular view.

<sup>244</sup> Fish, above n 155, 7.

some legal title must be afforded to it. Therefore, the definition of nature at an EU level should be modelled from the basic definition of an ecosystem.

c) *Guardian*

Here it will be concluded as to who will act on behalf of nature in order for it to be able to bring a claim to enforce current laws or its rights. In the representation section of ‘Practical issues’, it was seen that both *actio popularis* and a limited guardian situation both have potential disadvantages, especially where such guardians are a representative of indigenous populations and therefore risk conflating human interests and natures. Thus, a balance must be struck between the two so that the guardians are truly acting in nature’s best interest to the best of human capabilities. Accordingly, the EU should enable applicant’s acting on behalf of nature have knowledge of the ecosystem, a general interest in its wellbeing and that can accurately represent it in proceedings.<sup>245</sup> NGOs for many years have already acted as a voice that nature does not have itself.<sup>246</sup>

Currently under the Aarhus Regulation, an NGO must satisfy four requirements. The NGO must be an independent and non-for-profit legal person with the primary aim is to promote environmental protection. Furthermore, it must have existed for more than two years and actively pursues its environmental goals. Finally, the subject matter of internal review must be covered by its objective.<sup>247</sup> The Aarhus Regulation criteria already provides a good filter for rights of nature in the EU. With small tweaks, they could be appropriate for NGOs to act on behalf of nature in judicial proceedings. The first three criterion are essential, and could stay as is. While the goal of environmental protection is a necessity, a two-year existence ensures that the NGO is somewhat competent, established and organised. Moreover, ensuring that the NGO is actively pursuing goals shows that the it has a genuine and sincere intention to acting in nature’s interest, rather than a facade. The final criteria is also relevant, as the NGO will have knowledge of the relevant type of ecosystem at issue. However, it should instead it should read ‘the subject of judicial review’. For these reasons, NGOs are the actors capable of crucial steward role in a rights of nature framework.

## V CONCLUSION

Environmentalists work to minimize damage can only go as far as ineffective laws, especially when they remain in the context of a deeply flawed system. Traditional environmental activism, including mere regulation and the human centric view of standing, have proven to be ineffective thus far. This particularly so in the European Union, where it was seen that there have been failures at two levels in trying to improve access to justice. Both standing in judicial review under the TFEU and subsequent administrative review measures in the Aarhus

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<sup>245</sup> Fish, above n 155, 10.

<sup>246</sup> Kal Raustiala ‘The “Participatory Revolution” in International Environmental Law’ (1997) 21 *Harvard Environmental Law Review*, 537, 567.

<sup>247</sup> *Aarhus Regulation*, art 11.

Regulation are highly restrictive. In the latter case, it is only applicable more NGOs and not individuals. In any event, the requirement of individual scope is virtually useless against environmental measures of a general purpose. In the former case, Lisbon Treaty amendments may show some reprieve for individuals with the addition of a third limb removing the individual concern requirement, but it remains virtually impossible for NGOs to bring a claim.

There are two broad reasons supporting rights of nature to be adopted. Firstly, to continue unlimited growth assumes the unfettered use of nature for convenience and profit and this is the genesis of the crisis that humanity now faces today. Economic systems and development policies are founded upon anthropocentric models, assuming that nature would never fail or, where it does, technology will save the day. Environmental degradation spawned from this wasteful and consumer based society is propelling us towards a major planetary catastrophe. While humans naturally try to maximize their own accumulation of benefits, a society that wishes to survive and flourish must identify and take account of real consequences.<sup>248</sup> Secondly, and equally important, is the morally appropriateness of the action. For these reasons, nature should secure not only the highest legal protection, but highest societal value, through the recognition of rights, irrelevant of intrinsic or extrinsic motivations to protect the environment. ‘If the machine of government... is of such a nature that it requires you to be the agent on injustice to another, then, I say break the law’.<sup>249</sup> Thus, this paper suggests that there should be a fundamental change in that standing should not begin and end with humans, to avoid access to justice in EU stalled for another ten years on non-compliance.<sup>250</sup>

Many countries have begun to implement a rights of nature framework. This paper analysed those in the United States, Ecuador, Bolivia, New Zealand and India. Such movements were spurred and shaped by indigenous populations within those countries, which shed light to an alternative to the human presumption of sovereignty over the natural world. The impact of rights of nature through “limitations” to conventional ideals indicates a decline or at least rupture in the significance of state sovereignty in international law and politics. With or without such rights, the trend is nevertheless that environmental governance moves towards a dynamic global civil society influenced by citizen and NGO contribution, particularly through access to dispute resolution mechanisms. The turning point is that now the construction of legal systems can be done in a manner both inspired and empowered by the expansion of procedural assurances to non-State actors such as indigenous groups, as well as private individuals. This does not undermine but strengthens the efficiency, effectiveness and legitimacy of regulatory systems.<sup>251</sup>

While rights of nature are ingrained within indigenous philosophies that are community-centric, culturally sensitive and ecologically-balanced, the ability remains for such rights to

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<sup>248</sup> Rachel Carson, *Silent Spring* (Houghton Mifflin, 1962).

<sup>249</sup> Henry David Thoreau, ‘Resistance to Civil Government’ *Aesthetic Papers* (G P Putnam Sons, 1849).

<sup>250</sup> Schoukens, above n 123.

<sup>251</sup> Raustiala, above n 246, 538-539, 558. See also Kal Raustiala, ‘States, NGOs and International Environmental Institutions’ (1997) 41 *International Studies Quarterly* 719.

extend to nations with no indigenous populations. Rights of nature should not be confined simply because such rights signal the influence of native groups as political actors. In any case, many religions can be interpreted in an eco-theological manner. Moreover, as can be seen in Ecuador and Bolivia, even nations that have a majority indigenous population and are the first to ambitiously guarantee the rights of nature do not, in any event, have the capabilities to effectively implement the new framework, or conflate human and nature's interests.

It is acknowledged that there are many challenges involved in formulating a functioning rights of nature framework. Nevertheless, the current system is already preposterous in many ways. In this paper, it is argued that many of these issues can be overcome and managed in an EU proposal for rights of nature. It proposes nature, and specifically an ecosystem, be granted legal personhood, in order to be undertake judicial review of the EU institutions, with NGOs as its guardian. An NGO provides the balance between non-pluralistic and limited indigenous guardians on one hand, and open standing, on the other. It is also possible that apart from simply solving an issue of standing to enforce current substantive laws, rights of nature can also extend to substantive law itself. The elasticity of such rights makes the latter option more difficult to implement, but not impossible.

Of course, much of nature's rights enforcement and path forward depends on the mind set and commitment to such an issue, by both the government and its citizenry.<sup>252</sup> This paper does not attempt to say there are no complications to fully realise the rights of nature. As rights of nature currently stand there are deep limitations, with economic dependence on non-renewable industries to name one. It will require a necessary shift in public attitude and society's assumptions about human control. However, the willingness to give up certain freedoms, such as sovereignty for states, and luxuries for individuals, will be the willingness for a healthy future. At the very least, the discussion that humankind should reimagine its relations with and protection of nature that was previously non-existent is generated by rights of nature. No matter the obstacles, it thus raises awareness and brings mankind closer to a more sustainable way of living that will allow the Earth to be preserved for future generations of nature and humans alike.

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<sup>252</sup> Marc Becker, 'Correa, Indigenous Movements, and the Writing of a New Constitution in Ecuador' (2011) 38(1) *Latin American Perspectives* 47, 47-62.

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