Incorporating a Rights of Nature Approach into the EU Legal Framework: Exploring Legal Mechanisms for Enhanced Wadden Sea Habitat Protection

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ABSTRACT

This research explores the incorporation of a Rights of Nature approach into the legal framework of the European Union on habitat protection. The study assesses the existing EU environmental framework and the barriers to Rights of Nature in the EU. It further analyses international case studies where Rights of Nature have been implemented. Drawing from this analysis, the study explores the feasibility and effectiveness of two legal instruments regarding the objective of enhancing habitat protection in the Wadden Sea. Through a comparison of these legal mechanisms, the research identifies practical implications of incorporating a Rights of Nature approach into the EU legal framework, in particular concerning the criteria for legal standing. The findings suggest that each legal mechanism faces significant challenges to incorporating a Rights of Nature approach, especially if not accompanied by a broader ecocentric shift across the EU legal framework. The implications of this study therefore have significance beyond the case of the Wadden Sea, providing insights into the broader integration of Rights of Nature into EU environmental law.

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I. **Introduction**

One of the most prominent environmental problems of the present day is the rapid deterioration of coastal ecosystems around the globe. Many coastal ecosystems worldwide are experiencing a significant loss of populations and species, thereby threatening to permanently damage crucial ecosystem functions and their ability to recover.[1] The reasons for these are multifold, including pollution, human exploitation, climate change, and commercial activities.[2] The Wadden Sea, bordered by Denmark, Germany, and the Netherlands, is such a coastal system under threat.[3] As this unique tidal ecosystem is home

[1] Eriksson, Britas, et al. "Major Changes in the Ecology of the Wadden Sea: Human Impacts, Ecosystem Engineering and Sediment Dynamics." *Ecosystems,* vol. 13, 2010, pp. 752-764.

[2] Lambooy, Tineke, et al. *Granting Rights of Nature to the Wadden Sea? An Exploratory Study.* Wadden Academy Report, 2022.

[3] Lotze, Heike. "Radical Changes in the Wadden Sea Fauna and Flora over the Last 2,000 Years." *Helgoland Marine Research,* vol. 59, 2005, pp. 71-83.

to a diverse array of animal and plant species,[4] it is imperative that its critical ecological functions can flourish without disturbance. However, the condition of the Wadden Sea has declined significantly.[5] Not only does the global problem of climate change also apply to the Wadden Sea, which threatens to 'drown' the tidal flats, but there are also numerous activities in the local context that disturb the Wadden Sea's natural ecosystem. Various industrial and commercial activities in and along the coastal areas of the Wadden Sea have negative impacts on the natural environment. Pollution occurs through agricultural activities that deposit nitrogen into the environment and the operations of several industries, such as shipyards and refineries. Commercial activities like gas exploration, salt drilling, electric cable installations, and fishing pose additional threats to the natural ecosystem functioning of the Wadden Sea. Considering the multiplicity of activities and factors negatively impacting the Wadden Sea, its protection is a highly complex and challenging task.[6]

The protection of the Wadden Sea has been the subject of national, multinational, and international agreements, thereby emphasising the need for coordinated efforts to ensure its preservation. In particular, much European Union (EU) legislation applies to the Wadden Sea. Environmental protection and sustainable development are integral to the EU's legal framework through Article 3 of the Treaty on the European Union (TEU).[7] In terms of conservation, the EU has implemented key directives that also apply to the Wadden Sea. For example, the 1979 Birds Directive and 1992 Habitats Directives have incorporated the Wadden Sea into the Natura 2000 network, mandating that habitats and species listed therein be maintained or restored to a favourable conservation status. Additionally, Member States are required to report periodically on the conservation measures taken.[8]

Despite this seemingly wide-ranging body of environmental protection measures, the decline of environmental quality across Europe is still ongoing.[9] The common explanation for this is that the European framework of environmental law faces various enforcement and implementation challenges.[10] However, there are also more structural factors that hinder the EU's environmental goals. In particular, the anthropocentric[11] nature of the current EU environmental legal framework has been identified as the main reason for its failure to meet its environmental objectives.[12] The instrumental definition of nature and the environment in the legal framework of the European Union negatively affects the achievement of the desired objectives of environmental protection, because there is an inherent discrepancy between the top-down, instrumentalist legal framework and the holistic and dynamic system of nature.[13] Therefore, Carducci and others suggest moving beyond this worldview toward a Rights of Nature approach, which recognises the interconnectedness of humans and nature.[14]

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[4] Lambooy et al. (n 2) *supra*.
[5] Lotze (n 3) *supra*.
[6] Lambooy et al. (n 2) *supra*.
[7] Schoukens, Hendrik. "Granting Legal Personhood to Nature in the European Union: Contemplating a Legal (R)evolution to Avoid an Ecological Collapse? (Part 1)." *Journal for European Environmental and Planning Law*, vol. 15, no. 3-4, 2018, pp. 310-332.
[8] Directive 92/43/EEC, art. 3
[9] Carducci, Michele, et al. *Towards an EU Charter of the Fundamental Rights of Nature.* European Economic and Social Committee, 2019.
[10] ibid.
[11] Anthropocentrism entails human-centeredness. It constitutes the belief that only humans have intrinsic value and deserve 'direct moral consideration'; *see* Goralnik, Lissy, and Michael Paul Nelson. "Anthropocentrism." *Encyclopedia of Applied Ethics*, edited by Ruth Chadwick, 2nd ed., Academic Press, 2012; Batavia, Chelsea, and Michael Paul Nelson. "For Goodness Sake! What is Intrinsic Value and Why Should We Care?" *Biological Conservation*, vol. 209, 2017, pp. 366-376.
[12] Ito, M, et al. "Towards an EU Fundamental Charter for the Rights of Nature: Integrating Nature, People, Economy." *Rights of Nature in Europe: Encounters and Visions*, edited by J G Ruales et al., Routledge, 2024, pp. 281-302.
[13] Carducci et al. (n 9) *supra*.
[14] ibid.

This study contributes to the discourse on reframing EU environmental law to achieve its environmental protection objectives, particularly within habitat protection. Focusing on the Rights of Nature approach within the EU's legal framework, it finds that current measures have been inadequate due to the anthropocentric nature and fragmentation of EU environmental legislation.[15] By integrating a Rights of Nature perspective into EU environmental legislation,[16] this study argues that such an approach shows promise in addressing the Wadden Sea's environmental challenges. To do this, both legislation and judicial development will be analysed. I will assess both mechanisms for their feasibility and effectiveness in habitat protection for the Wadden Sea. Feasibility is defined following Pedreschi and Scott, encompassing compatibility within the EU legal framework and the enforceability of each proposed method.[17] Effectiveness is viewed broadly, involving behavioural and problem-solving outcomes.[18] This way, effectiveness is ultimately about "obtaining results that are as close as possible to realizing the ideal expressed by the political actors, considering the context of operation."[19] This conception of effectiveness includes the measure of legal compliance and enforcement.[20]

II. The Rights of Nature Approach

Essentially, advocates of the Rights of Nature argue in favour of a fundamental shift in our approach to nature. They argue that nature can be better protected by adopting the view that nature has intrinsic value and therefore should be endowed with rights.[21] Rights of Nature can be distinguished between Rights of Nature as a legal philosophy and the legal provisions that are associated with it.[22] The underlying idea of the Rights of Nature approach in legal philosophy is to create a paradigm shift in how humans and nature interact.[23] The Rights of Nature as legal provisions are seen as a way to attain this objective.

Since the idea of granting rights to nature was first explored by United States lawyer Christopher Stone in 1972, the concept has

[15] Ito et al. (n 12) *supra*.

[16] The focus here is placed on the EU legal framework due to its far-reaching influence into the jurisdiction of the EU Member States, thereby allowing for a more unified and harmonised strategy for habitat protection across the three EU Member States that encompass the Wadden Sea. It also follows from the argumentation in this study that a more whole systems approach is needed to address the transboundary problems facing the Wadden Sea, which I argue can better be achieved at the EU level.

[17] Pedreschi, Luigi, and Joanne Scott. "External Differentiated Integration: Legal Feasibility and Constitutional Acceptability." EUI Working Paper RSCAS 2020/54, European University Institute, 2020.

[18] Carducci et al. (n 9) *supra*.

[19] Zamboni, Mauro. "Legislative Policy and Effectiveness: A (Small) Contribution from Legal Theory." *European Journal of Risk Regulation*, vol. 9, no. 3, 2018, pp. 416-430.

[20] Snyder, Francis. "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques." *Modern Law Review*, vol. 56, no. 1, 1993, pp. 19-31.

[21] To have intrinsic value is to hold a certain significance that cannot be reduced to human interests; *see* Gilbert, Jérémie, et al. "Understanding the Rights of Nature: Working Together Across and Beyond Disciplines." *Human Ecology*, vol. 51, 2023, pp. 363-378.

[22] Kauffman, Craig, and Pamela Martin. *The Politics of Rights of Nature: Strategies for Building a More Sustainable Future*. MIT Press, 2021.

[23] When it comes to Rights of Nature as a legal philosophy, I would like to point out two ideologies that have greatly shaped the trajectory of the Rights of Nature movement, namely the philosophy of Earth Jurisprudence and Indigenous ontologies. The idea of Earth Jurisprudence is to incorporate a more 'Earth-centered' approach to law and jurisprudence. This requires a reconceptualisation of current political, economic, and social structures to align them more closely with the natural world, rather than attempting to impose human will upon nature. Moreover, many of the ideas that Rights of Nature scholars advocate for can be found in various Indigenous ontologies and traditions. It can be stated that the underlying principles of Rights of Nature are closely related to many Indigenous worldviews that have historically perceived the interconnectedness of humans and nature. For more discussion on the Rights of Nature as a legal philosophy *see*, for example, Berry, Thomas. *The Great Work: Our Way into the Future*. Broadway Books, 1999, cited in Fukurai, Hiroshi, and Richard Krooth. *Original Nation Approaches to International Law*. Palgrave Macmillan, 2021; Cullinan, Cormac. "A History of Wild Law." *Exploring Wild Law: The Philosophy of Earth Jurisprudence*, edited by Peter Burdon, Wakefield, 2011; Harden-Davies, Harriet, et al. "Rights of Nature: Perspectives for Global Ocean Stewardship." *Marine Policy*, vol. 122, 2020.

been increasingly adopted in different jurisdictions around the world. In recent years, the concept of Rights of Nature has been codified into positive law in different legal orders, ranging from national constitutions to judicial rulings, each with unique approaches to implementation.[24]

Bolivia was one of the first countries to incorporate a Rights of Nature approach into its jurisdiction. Bolivia adopted the Law of the Rights of Mother Earth in 2010, which was converted into the Framework Law of Mother Earth and Integral Development for Living Well in 2012.[25] The Bolivian Indigenous community played a significant role in creating this new legislative act to enshrine the Rights of Nature into the domestic legal framework by advocating for a Rights of Nature approach and exerting pressure on the government to adopt a development model that is in line with Indigenous values.[26] The concept of Mother Earth, also referred to as *Pacha Mama*, has been defined in Article 3 of the 2010 Law as "a dynamic living system made up of an indivisible community of all living systems and living organisms that are interrelated, interdependent, and complementary, sharing a common destiny. Mother Earth is considered sacred in the worldviews of communities and peasant indigenous peoples." Furthermore, Bolivia has adopted an enforcement mechanism in which citizens are empowered to bring lawsuits in case of perceived violations of the subjects covered by the Framework Law.[27]

New Zealand has also developed the Rights of Nature through their national legislation. The development of the Rights of Nature discourse in New Zealand is inextricably linked with the government's increasing recognition of the worldview of Indigenous populations and their struggle to restore their relationship with the environment.[28] Most recently, this has led to New Zealand's recognition of the legal rights of certain ecosystems, such as the Whanganui River and the national park of Te Urewera.[29] The granting of rights to the Whanganui River was established through the Whanganui Agreement. The Agreement includes provisions that seek to safeguard and implement the Māori's physical and spiritual attachment to the river. The most notable result was the recognition of the Whanganui River as a legal entity with rights upon which ownership was transferred to a legal body that represents the river itself. This legal body is made up of two individuals who act as official guardians of the Whanganui River. These guardians are tasked with speaking and acting on behalf of the river, ensuring the consistent application of the identified needs and interests of the river.[30] In 2014, a similar struggle for self-determination and recognition resulted in the granting of rights to the national park of Te Urewera.[31]

Another example of granting rights to nature can be found in Colombia. In 2016, the Constitutional Court of Colombia ruled that the Atrato River is a subject of rights. This judgment stemmed from the necessity to take measures against harmful human activities in the Atrato River and its tributaries.[32] Due to the government's failure to take action, the Center of Studies for Social Justice, Tierra Digna, initiated legal proceedings against the government. In the proceedings that followed, the court found a "serious violation of the fundamental rights to life, health, water, food security, the healthy environment, the culture and the territory of the ethnic communities that inhabit the Atrato River basin and its tributaries, attributable to the Colombian State entities."[33] According to Article 8 of the

[24] Tănăsescu, Mihnea. *Understanding the Rights of Nature: A Critical Introduction*. New Ecology, 2022.
[25] Fukurai and Krooth (n 23) *supra*.
[26] Kauffmann and Martin (n 22) *supra*.
[27] ibid.
[28] ibid.
[29] ibid.
[30] Boyd, David. *The Rights of Nature: A Legal Revolution That Could Save the World*. ECW Press, 2017.
[31] Kauffman et al. (n22) *supra*.
[32] Vargas-Chaves, Iván, et al. "Recognizing the Rights of Nature in Colombia: The Atrato River Case." *Revista Jurídicas*, vol. 17, 2020, pp. 13-26.
[33] Pecharroman, Lidia. "Rights of Nature: Rivers That Can Stand in Court." *Resources*, vol. 7, no. 1, 2018, pp. 1-12.

Constitution, the Court observed that the protection of the environment is intrinsically related to the fundamental rights to life, health, territory, and culture.[34] The court demonstrated the interconnectedness of nature and human existence, emphasising the importance of the conservation of nature for the preservation of the "ways of life and cultures that interact with it."[35] The court referred to the ecocentric conception of nature, thereby conceptualising nature as a "real subject of rights that must be recognized by the States and exercised under the protection of its legal representatives, such as, for example, [namely] by the communities that inhabit nature or that have a special relationship with it."[36] Thus, the court ordered the protection of the Atrato River by granting it legal personhood and by assigning it representation.

The above examples, among others, demonstrate how Rights of Nature has been incorporated into different legal systems, reflecting the environmental, cultural, and social contexts that have contributed to its development. Considering these examples, I have identified two ways in which Rights of Nature have been incorporated into different legal contexts, namely (i) through new legislation, and (ii) through development by courts.[37] In the case of the latter, I assert that by employing a teleological interpretation method, courts can draw from existing legislation to progressively recognise and protect the intrinsic rights of nature. The teleological interpretation method is based on the notion that legal provisions pursue a particular objective and that these provisions should be interpreted in such a way to best promote this objective.[38] Despite the different legal instruments used, the goal remains to assert the Rights of Nature in various legal settings.

III. **Introducing Rights of Nature into the European Union**

Despite the seemingly comprehensive protection of the environment throughout the EU legal framework, Carducci and others criticise the substantive rights that the environment currently has in the EU, asserting an anthropocentric bias, meaning that they are not based on the intrinsic value of nature, but rather on the notion that the environment needs protection because its importance can be found in its use by humans.[39] Additionally, a significant barrier to enhanced environmental protection in the EU seems to be the criteria for standing faced by those advocating for the protection of nature. Nature itself does not currently have legal standing within the European Union. There are three primary legal pathways through which environmental cases can be brought before the Court of Justice of the European Union (CJEU) by environmental protection advocates. These are: the annulment procedure (Article 263 TFEU), the preliminary reference procedure (Article 267 TFEU),[40] and the administrative review process established by the Aarhus Regulation.

Firstly, Article 263 TFEU enables the CJEU to review the legality of EU acts. It distinguishes between privileged applicants (EU institutions and Member States) and non-privileged applicants (individuals and NGOs), with the latter required to meet stricter standing requirements, such as demonstrating "direct and individual concern." This has posed significant challenges for NGOs and individuals seeking to advance environmental cases, as they often fail to meet these criteria where the Court does not consider the

[34] Vargas-Chaves et al. (n 32) *supra.*
[35] ibid.
[36] Judgment T-622/16, *The Atrato River Case*, Constitutional Court of Colombia, 2016.
[37] This does not exclude other ways of how Rights of Nature has been incorporated into different legal orders. For example, Ecuador was the first country to incorporate Rights of Nature into its constitution. However, this study will not focus on this legal mechanism.
[38] Harašić, Žaklina. "More About Teleological Argumentation in Law." *Pravni Vjesnik*, vol. 31, 2015, pp. 23-38.
[39] Carducci et al. (n 9) *supra.*
[40] European Union, Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.

legislative act in question to be of direct or individual concern to those initiating the proceedings.[41] The preliminary reference procedure, outlined in Article 267 TFEU, allows national courts to seek the CJEU's interpretation of EU law. While this procedure provides a potential mechanism for individuals to challenge non-compliance with EU law, its effectiveness is contingent on the willingness of national courts to make referrals, which varies across Member States. Considering these barriers to standing in environmental cases due to the difficulty of showing direct and individual concern, the CJEU has strongly contributed to the development of greater access to justice in environmental matters for environmental NGOs to align with the objectives of the Aarhus Convention, in particular after the adoption of the so-called Aarhus Regulation.[42] This Regulation aims to strengthen access to justice in environmental cases by easing standing requirements for NGOs. For example, the 2021 amendment to the Aarhus Regulation permits NGOs to request internal reviews of EU administrative acts without demonstrating direct or individual concern. However, Article 12 of the Regulation does not guarantee automatic standing for NGOs in the CJEU, as they must still meet the admissibility conditions set by Article 263(4) TFEU.[43] As such, despite the expanded opportunities for NGOs to challenge EU acts, their access to the CJEU remains constrained by the overarching requirements of primary EU law.

Against the backdrop of deteriorating environmental quality across Europe, the question that arises is whether the current EU environmental law framework can tackle the systematic challenges of environmental protection. In this study, I argue that the Rights of Nature approach, with its fundamentally different understanding of substantive and procedural rights for nature, can address these challenges.[44] In the following Sections, I will focus on each incorporation method I have identified and apply them to the legal framework of the European Union.

IV. **New Legislation**

Bolivia and New Zealand have incorporated Rights of Nature into their national legislation in distinct ways, differing in (i) the scope of rights and (ii) how the rights in question are enforced. In other words, the main differences between the two jurisdictions can be found in the substantive and procedural rights of nature. This Section analyses the method of integrating Rights of Nature into the EU legal framework through new legislation. I will look at the cases of Bolivia and New Zealand to assess their feasibility and effectiveness regarding the integration of Rights of Nature into EU secondary law.

In accordance with Article 288 TFEU, the types of legislative acts that the European Union can adopt to exercise its competences are regulations, directives, decisions, recommendations, and opinions. The legal effects that each type of act entails ultimately depend on its specific nature.[45] A regulation has general applicability and is binding and directly applicable in the Member States, whereas a directive is binding upon all Member States insofar as the results achieved, leaving the choice of methods and form up to the Member States.[46]

Compared to regulations, directives provide a more flexible mechanism since Member States are allowed to choose the implementing form and method that is most suitable to them. At the same time, however, since a regulation is binding upon all Member States and directly applicable, it is usually the preferred

[41] Case C-565/19, *Armando Carvalho & Ors v EU Parliament & Council*, Court of Justice of the European Union, 25 Mar. 2021, [73].
[42] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 Sep. 2006.
[43] Garçon, Géradine. "The Rights to Access to Justice in Environmental Matters in the EU – The Third Pillar of the Aarhus Convention: Validity and Scope of the Review Procedures under Regulation (EC) No 1367/2006." *European Food and Feed Law Review*, vol. 8, no. 2, 2013, pp. 78-89.
[44] Schoukens (n 7) *supra*.
[45] Terziev, Venelin, et al. "Sources of European Union Law." *International E-Journal of Advances in Social Sciences*, vol. 19, 2021, pp. 346-354.
[46] TFEU (n 40) *supra*.

mechanism to achieve coherence and uniformity across the EU.[47] Directives need to be transposed into national law for their implementation which complicates the process of effecting uniform environmental protection. However, as Hoek and others argue, the integration of a Rights of Nature approach into the EU legal framework potentially touches upon sensitive administrative and constitutional matters, which is why a directive seems more feasible by allowing Member States some discretion to cooperate with this novel approach to environmental protection.[48] This is also why, I argue, proposals for secondary legislation incorporating Rights of Nature into the EU have focused on the legislative act of a directive. This can be exemplified by Nature's Rights' proposal on a new Directive on the Rights of Nature and Hoek and others' proposal for an EU Natureship Framework Directive.[49] Drawing from these proposals, this Section will focus on the legislative act of a directive.

A. *Extending the Bolivian Case to the European Union?*

In 2017, the organization Nature's Rights proposed a Draft Directive on the Rights of Nature.[50] The Draft Directive proposes a holistic view of nature, recognising the interconnectedness of the natural world, and broad procedural rights to empower anyone to litigate the rights of nature in front of courts. Following Article 1, the Draft Directive seeks to provide for the "substantive and procedural rights of nature, the rights of people in relation to nature, establishing a duty of care, protection and enforcement, and ecological governance." These substantive rights of nature are to be protected and enforced by "any physical person, individually or collectively, government, or non-governmental organization of the European Union." This understanding of procedural rights goes beyond what currently exists in EU environmental law, including the Aarhus Convention,[51] by allowing essentially anyone to act on behalf of nature in exercising its right to legal standing.[52] But is this approach feasible within the current EU legal framework?

The proposal of a directive is compatible with the EU legal framework, drawing upon the EU's legislative authority as outlined in Article 288 TFEU. Consequently, the content of such a proposal must align with the values expressed by the European Union. Pedreschi and Scott refer to this as the "constitutional acceptability" of EU measures, in which the proposed measure must align with the objectives and values established in EU primary legislation.[53] A way through which a new Directive on the Rights of Nature can be advanced is through the Commission. The Commission is the sole EU institution with the right of initiative in accordance with Article 17 TEU. This provides that the Commission can propose new legislation, including directives. It can use its right of initiative following a successful European Citizens' Initiative (ECI), but it can also come up with its own proposal following broad stakeholder consultations and impact assessments.[54] Typically, the adoption of new legislation follows a so-called ordinary legislative procedure. Through this procedure, the Commission submits a proposal to the

[47] Hoek, Niels, et al. "Implementing Rights of Nature: An EU Natureship to Address Anthropocentrism in Environmental Law." *Utrecht Law Review*, vol. 19, no. 1, 2023, pp. 72-86.

[48] ibid.

[49] See, for example, Ito, Mumta. "Draft Directive ECI for Rights of Nature." *Nature's Rights*, 2017; Hoek et al. (n 47) *supra*.

[50] Därpo, Jan. *Can Nature Get It Right? A Study on Rights of Nature in the European Context*. European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, 2021.

[51] As I have argued, the Aarhus Convention allows for broader standing for environmental NGOs. However, these NGOs still have to meet certain criteria to gain standing.

[52] Schoukens, Hendrik. "Granting Legal Personhood to Nature in the European Union: Contemplating a Legal (R)evolution to Avoid an Ecological Eclipse? (Part II)." *Journal for European Environmental and Planning Law*, vol. 16, no. 1, 2019, pp. 66-90.

[53] Pedreschi and Scott (n 17) *supra*.

[54] The 2017 Draft Directive on the Rights of Nature was to be advanced through such an ECI, but it was later abandoned due to the high costs and perceived challenges related to the process of the ECI.

European Parliament and the Council, who will have to agree on and approve the text of the proposal. In the Council, the adoption of a new directive becomes subject to negotiation between national representatives where they negotiate their nations' interests, requiring a balancing of national interests to ultimately reach an agreement. These negotiations often take a considerable amount of time. It can result in the weakening of the proposal drawn up by the Commission which usually involves revising the proposal to include "norms with a low degree of obligation, vague legal terminology, long transition and adjustment periods, and extensive exceptions to the rule."[55]

The Draft Directive seeks to establish a holistic view of nature accompanied by broad procedural rights for anyone to act on behalf of nature. Therefore, in its application, it requires Member States to "review national laws in light of the rights of nature."[56] By proposing to grant nature such rights, this inevitably means that the Draft Directive will require Member States to reassess and potentially modify their existing national legislations to ensure compliance with the new directive. For example, the Draft Directive requires Member States to develop mechanisms to ensure that perceived breaches become punishable by fine, or imprisonment.[57] I contend that the above aspects might lead to significant opposition and pushback from Member States in the legislative process. The broad scope of environmental protection based on a holistic notion of nature may raise questions regarding its implementation on the part of the Member States.[58] Moreover, the Draft Directive's requirement of Member States to review their national laws in light of the rights of nature, accompanied by the legislative steps that must follow such review, may be perceived as infringing upon Member States' sovereignty. Member States then deliberately oppose such a proposal due to its demand to fundamentally change pre-existing national legislation.[59] Therefore, from a political perspective, the adoption of the Draft Directive in this form therefore seems unlikely.[60]

B. *Extending the Case of New Zealand to the European Union?*

Hoek and others explore the possibility of a Natureship Framework Directive to implement a Rights of Nature approach into the framework of EU environmental law.[61] The concept of a "natureship" has been developed by Lambooy and others.[62] A natureship will function as both a public institution and a legal person that can be defined geographically and functionally. The statutory purpose of a natureship would be to safeguard the ecological integrity of a geographically defined area.[63] The natureship arrangement by Hoek and others reflects the arrangements present in New Zealand where specific natural entities enjoy legal personhood through a guardianship arrangement to preserve their interests. In this regard, the EU Natureship Framework Directive would appoint formal representatives with the authority to speak on behalf of and make decisions regarding the governance of a particular natural entity or area, which is called an EU Natureship.[64]

In the Natureship Framework Directive, a clear link is established with other fields of EU

[55] Knill, Christoph, and Duncan Liefferink. *Environmental Politics in the European Union: Policy-Making, Implementation, and Patterns of Multi-Level Governance*. Manchester University Press, 2007.
[56] Ito (n 49) *supra.*
[57] ibid.
[58] In this way, it fundamentally differs from other EU Directives that ensure environmental protection. For example, the Birds Directive and the Habitats Directive specify what ecosystems or species are protected under it. Within the framework of the Natura 2000 network, as put forward in Article 3 of the Habitats Directive, Member States have a high level of discretion in determining what ecosystems and species should be part of this. The Draft Directive's holistic notion of nature can therefore lead to questions regarding Member States' implementation.
[59] Falkner, Gerda, et al. "Non-Compliance with EU Directives in the Member States: Opposition Through the Backdoor?" *West European Politics*, vol. 27, no. 3, 2004, pp. 452-473.
[60] Schoukens (n 52) *supra.*
[61] Hoek et al. (n 47) *supra.*
[62] Lambooy et al. (n 2) *supra.*
[63] Hoek et al. (n 47) *supra.*
[64] ibid.

environmental law, such as the Nature Directives and the Natura 2000 network. This way, the Framework Directive can build on these legislative acts by automatically considering Natura 2000 areas to be eligible for legal personhood under a natureship arrangement.[65] This strategy can be effectively employed for the Wadden Sea since it enjoys the status of a Natura 2000 area. Consequently, this can enhance consistency in EU environmental law. Since the Natureship Framework Directive utilises existing environmental legislation, I argue that it could be more readily accepted by Member States because it allows them a degree of discretion to decide what areas they want to consider as natureships.[66]

C. *Effectiveness of the Rights of Nature through EU Secondary Law*

The effectiveness of a new Directive on the Rights of Nature entails its capacity to achieve the goal of improved habitat protection in the Wadden Sea. In the context of the EU, compliance refers to the extent to which national actors adhere to EU requirements by integrating and implementing EU legislation into their national context.[67] A directive first needs to be transposed into national legislation for its implementation.[68] The correct transposition of a directive into national law is essential for its effective implementation.[69] Once a directive has been adopted, this means that it must be transposed into national law "correctly" and in "due time."[70] Member States' compliance with these criteria depends on a number of factors, including Member States' willingness and national preferences on the one hand, and the legal complexity of the proposed directive on the other.[71] The generally long process of adopting a directive, including many different actors and opinions, can result in texts that may be more ambiguous and leave room for different interpretations.[72] This can then complicate the process of transposition and thereby result in non-compliance. Yet, to enforce the provisions in the adopted directive, it is essential that Member States correctly transpose the provisions into their national contexts.

The Commission can employ enforcement mechanisms to ensure Member State compliance with EU laws, such as infringement proceedings based on Article 258 TFEU. Infringement proceedings for EU directives can be initiated when a Member State does not transpose the provisions of a directive in a correct and timely manner into their national legislation or for acting contrary to the provisions in the directive.[73] Due to the increased costs of non-compliance, infringement proceedings can urge Member States to comply with their obligations concerning EU directives.[74] Nevertheless, the existence of compliance mechanisms does not automatically imply enforcement, for

[65] ibid.

[66] As expressed by the authors themselves, the concept of a natureship has not been extensively developed and currently holds no legal value. Therefore, it is still unsure what such an arrangement would look like in the EU context. However, regarding the readiness of acceptability of a Natureship Framework Directive, the authors suggest that the ultimate decision for selecting natureships is left to the discretion of the Member States. This approach underscores the importance of establishing a "stable and transboundary union of environmental governance … while keeping in mind the sensitive constitutional and administrative considerations underlying a potential EU Natureship." For a more comprehensive explanation of what an EU Natureship arrangement could look like, *see* Hoek et al. (n 47) *supra*.

[67] Zhelyazkova, Asya. "Complying with EU Directives' Requirements: The Link between EU Decision-Making and the Correct Transposition of EU Provisions." *Journal of European Public Policy*, vol. 20, no. 5, 2013, pp. 702-721.

[68] Steunenberg, Bernard, and Mark Rhinard. "The Transposition of European Law in EU Member States: Between Process and Politics." *European Political Science Review*, vol. 2, no. 3, 2010, pp. 495-518.

[69] ibid.

[70] König, Thomas, and Brooke Luetgert. "Troubles with Transposition? Explaining Trends in Member-State Notification and the Delayed Transposition of EU Directives." *British Journal of Political Science*, vol. 39, no. 1, 2009, pp. 163-84.

[71] ibid.

[72] Falkner et al. (n 59) *supra*.

[73] "Implementing EU Law." *European Commission*, 14 Jul. 2023.

[74] It must be noted that infringement proceedings are only those cases that the Commission detects and decides to act upon.

example, because it is not used due to political considerations.[75] Enforcement also includes the effective use of a directive in the national context. This means that directives must not only be transposed correctly and within due time by Member States, but that they must also be effectively applied within each national context to achieve the intended results. This reflects the need for actors to apply and refer to the provisions of the directive. Taking the example of Bolivia to reflect this necessity, it became clear that the 2010 Law of the Rights of Mother Earth faced several challenges in its application in the domestic context. One major reason for this was essentially that the civil society actors that had helped create the new legislation had abandoned support for the law.[76] This significantly weakened the power of the Rights of Nature laws in Bolivia, since the civil society actors that could invoke these laws did not do so as they did not perceive them as useful to support their cause.[77] This is problematic since newly introduced laws and provisions need time to develop through courts to establish themselves within the legal framework and set precedents. However, they must first be invoked before they can do so.

Bolivia empowers citizens to bring cases on behalf of nature, which allows for a broad participation of the public to enforce the rights of nature. Yet, Kauffman and Martin argue that the current arrangement of empowering anyone to represent the rights of nature has one major limitation, being that "while anyone can represent Nature to protect its rights, no one is obligated to do so."[78] This means that without the institutional framework in place to support the enforcement of the rights of nature, it is ultimately up to individuals to take such initiatives. This means that the enforcement of the Rights of Nature would also face challenges regarding collective action, such as concentrated costs and diffused benefits.[79] In the context of the EU, such broad procedural rights, as put forward by the Draft Directive on the Rights of Nature, would be complicated further since the application of these provisions in front of EU courts would be more difficult since it signifies a significant deviation from the rules of standing set out by the Treaties.[80] Therefore, it can be questioned whether such an approach can be most effective in ensuring the enforcement of the rights of nature.

On the other hand, a natureship approach can be effective since it establishes a transparent body to maintain the "ecological integrity" of the natural entity or area while lifting the burden from the EU Commission, the Member States, or NGOs to enforce and implement the rights of nature.[81] This way, a natureship can provide an "additional safeguard" for nature.[82] However, Gilbert and others critically note that a guardianship arrangement for nature has not been very developed in the EU environmental law framework and should thus be further explored.[83]

Based on this analysis, I contend that the case of New Zealand appears to be more feasible in

[75] I have explained this in more detail in the introduction.

[76] This was because the 2012 Framework Law that was supposed to support the enforcement of the 2010 Law of the Rights of Mother Earth was perceived as diverging too much from the original draft that aligned more closely with Indigenous worldviews. Consequently, the 2012 Framework Law was criticised for no longer adequately representing the views of the Indigenous groups and NGOs supporting the original draft, leading to a loss of support for the law: *see* Kauffman and Martin (n 22) *supra*.

[77] This is because the 2012 Framework Law argues that the Rights of Nature must be considered in light of socioeconomic rights to economic development. In practice, this resulted in many cases in which government officials invoked other socioeconomic rights to prioritise natural resource extraction against environmental protection, thereby weakening the Rights of Nature. For more explanation, *see* Kauffman and Martin (n 22) *supra.*

[78] Kauffman and Martin (n 22) *supra.*

[79] ibid.

[80] Schoukens (n 52) *supra.*

[81] Hoek et al. (n 47) *supra.*

[82] Stone, Christopher. *Should Trees Have Standing? Law, Morality, and the Environment*. Oxford University Press, 2010.

[83] Gilbert, Jérémie, et al. "'Caring for Nature': Exploring the Concepts of Stewardship in European Philosophies, Spiritual Traditions, and Laws." *Rights of Nature in Europe: Encounters and Visions*, edited by J G Ruales et al., Routledge, 2024.

the European context. This is because a guardianship arrangement can build on and co-exist with current EU environmental legislation, such as the Nature Directives and the established Natura 2000 network. Nevertheless, the introduction of a new directive, in either form, can be questioned regarding its effectiveness. Even though a directive introducing a Rights of Nature approach is highly ambitious, for the effective application of its provisions it must be embedded in an institutional context that allows for such ambition, which it currently does not. For this reason, Schoukens queries whether a directive, as part of EU secondary law, would be at the right level through which to pursue the Rights of Nature in the European Union.[84] This is because a Rights of Nature approach aims to bring about a paradigm shift that promotes a less instrumentalist approach to nature. Therefore, it can be questioned whether a directive is the best way to implement such a fundamental shift while leaving untouched the constitutional principles that are arguably inherently anthropocentric.[85]

V. **Development through Courts**

The second legal mechanism I have identified is the strategy of gradually incorporating a Rights of Nature approach into the legal framework of the European Union through court decisions, such as through the case law of the Court of Justice of the European Union.

For the feasibility of this mechanism, it is first important to consider the CJEU and its employment of the teleological interpretation method and whether rights of nature can be interpreted from existing EU law. The CJEU is tasked with ensuring that the law is observed in the interpretation and application of the Treaties.[86] The CJEU must interpret the law with the aim of filling any gaps in either primary or secondary EU legislation.[87] The Treaties lay down the framework of the European Union and are therefore drafted in broad terms, containing "many general notions and few concrete rules."[88] Therefore, the CJEU must fill normative gaps by providing concrete interpretations of these general provisions in practical cases. In its decisions, the CJEU has favoured a teleological interpretation method when interpreting EU primary legislation.[89] This is because the Treaties are "imbued with a purpose-driven functionalism" which is best served by an interpretation strategy considering its underlying objectives.[90] Thus, the CJEU has considerable discretion in interpreting the provisions of EU law but it must ensure that it does not encroach upon the limits conferred to it by the Treaties. Otherwise, this would constitute a type of judicial activism that exceeds its mandate. Therefore, the teleological interpretation method has been criticized for allowing excessive judicial discretion for the CJEU as it "removes all constraints resulting from the wording of the EU law provision in question."[91] Lenaerts and Gutiérrez-Fons argue that such criticism would be well-founded if the authors of the Treaties had solely intended the CJEU to be the "mouthpiece of the law." Yet, such a limited role for the CJEU contradicts the competence given to the CJEU to ensure the observation of the law in the interpretation and application of the Treaties.[92]

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[84] Schoukens (n 52) *supra*.

[85] Schoukens argues that the choice for a Directive to implement the rights of nature will have major repercussions on the existing EU legal order, upon which he questions whether it might not be more beneficial to implement nature's rights into the EU constitutional order. Pursuant to the hierarchy of EU law, implementing rights of nature at the highest level of law can offer a more structural and holistic solution to the problems EU environmental law currently faces. Yet, Schoukens argues, the extremely complex and lengthy process of a treaty review will downplay the success of the "constitutional scenario." For further explanation, *see* Schoukens (n 52) *supra*.

[86] European Union, Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art. 19(1).

[87] Lenaerts, Koen, and José Gutiérrez-Fons. *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice.* EUI Working Paper AEL 2013/9, European University Institute, 2013.

[88] ibid.

[89] ibid.

[90] ibid.

[91] ibid.

[92] ibid.

The question that follows is whether the rights of nature can be interpreted from existing EU law. Epstein and Schoukens argue that elements of an ecocentric approach can already be identified in the practices and laws of the EU.[93] The Rights of Nature rationale is about recognising the intrinsic value of nature and maintaining its ecological integrity. Schoukens perceives these objectives to be protected under some rules and decisions in EU law.[94] This is because EU environmental laws contain many positive and negative obligations to protect and refrain from damaging the environment.[95] According to Epstein and Schoukens, the obligations regarding the protection of nature following the strict interpretations of the CJEU can be taken as legal rights of nature.[96] This follows the Hohfeldian conception of rights that has been adopted by the Rights of Nature approach. This conception of rights regards legal rights as correlatives of legal obligations.[97] Thus, it asserts that "non-humans already have rights where their interests are protected by law."[98] The legal obligations imposed by EU environmental law are taken to protect the interests of nature, thereby granting nature rights that can be claimed and enforced.[99]

It should then be questioned whether this approach allows for the effective implementation of Rights of Nature into EU legislation. Compliance with CJEU judgments is ensured through their being binding and final.[100] If Member States fail to comply with the judgment of the CJEU, an infringement proceeding can be initiated by the Commission or another Member State through Article 258 TFEU and Article 259 TFEU respectively. When the CJEU issues a judgment, it does not merely apply the law to the specific case at hand but it also contributes to legal development by setting precedents.[101] The development of precedents can be a useful tool to gradually insert and enforce a Rights of Nature approach into the EU legal framework. The case law of the CJEU has been developed by actors bringing cases to court. However, as I have demonstrated, there are still institutional barriers to standing in the EU that are not easily overcome. Nevertheless, the CJEU can only rule on cases that have been brought before it. Therefore, it remains important that actors continue bringing cases. This can be done by the EU institutions or Member States who, as privileged applicants, can increasingly challenge EU environmental regulations or by individuals or environmental NGOs through other pathways. The latter can, for example, initiate cases at the national level that can be referred to the CJEU through a preliminary reference procedure.[102] Moreover, to effectively ensure a Rights of

[93] Epstein, Yaffa, and Hendrik Schoukens. "A Positivist Approach to Rights of Nature in the European Union." *Journal of Human Rights and the Environment*, vol. 12, no. 2, 2021, pp. 205-227.
[94] Schoukens (n 52) *supra*.
[95] Epstein and Schoukens (n 93) *supra*.
[96] ibid.
[97] Hohfeld, Wesley Newcomb. "Fundamental Legal Conceptions as Applied in Judicial Reasoning." *Yale Law Journal*, vol. 26, no. 8, 1917, pp. 710-770.
[98] Epstein and Schoukens (n 93) *supra*.
[99] It must be acknowledged that, within the rights of nature approach, there are debates regarding eligibility for rights and legal personhood. This debate surrounds the ideas regarding the basis of granting nature or natural entities rights. Epstein and Schoukens refer to the Hohfeldian conception of rights here, where rights are correlatives of environmental duties. However, there are also different conceptions of rights under the rights of nature approach. For example, following Joseph Raz's interest theory, entities can be assigned legal personality if they have interests. Thus, an entity's interest is sufficient in granting it legal rights, because it is part of the entity's well-being which has ultimate value. These conceptions of rights ultimately entail a different approach as to why nature should receive rights. However, for the purpose of Epstein and Schoukens' argument that rights of nature can already be derived from EU environmental legislation, it is logical to employ the Hohfeldian conception of rights. For a more in-depth discussion on the conception of rights in the rights of nature approach, *see*, for example, Epstein, Yaffa, and Eva Bernet Kempers. "Animals and Nature as Rights Holders in the European Union." *Modern Law Review*, vol. 86, no. 6, 2023, pp. 1336-1357.
[100] Beck, Gunnar. "Judicial Activism in the Court of Justice of the EU." *University of Queensland Law Journal*, vol. 36, no. 2, 2017, pp. 333-353.
[101] Derlén, Mattias, and Johan Lindholm. "Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions." *German Law Journal*, vol. 16, no. 5, 2015, pp. 1073-1098.
[102] Schoukens, Hendrik. "Rights of Nature as an Unlikely Saviour for the EU's Threatened Species and Habitats: A Critical Introduction to a Revolutionary Idea."

Nature consistent interpretation, it would be beneficial to educate lawyers and judges on its principles.[103] Even though the CJEU has increasingly taken a more proactive stance when it comes to environmental regulation, exemplified among other things through its broadening of standing for environmental NGOs, it can still be questioned whether the Court will always rule in favour of the environment, especially considering the inherently anthropocentric system within which it corporates. Therefore, since a Rights of Nature approach necessitates a significant shift away from this anthropocentric thinking, it can be questioned whether the level of the judiciary is where this radical shift can be achieved.

VI. Concluding Remarks and Recommendations

This research has examined two legal mechanisms for incorporating a Rights of Nature approach into the EU legal framework. Focusing on the Rights of Nature approach within the EU's legal framework, this study finds that current measures to environmental protection have been inadequate due to the anthropocentric focus and fragmentation of EU environmental legislation, which often prioritises human interests over the intrinsic value of nature itself. Shifting towards an ecocentric approach through the Rights of Nature, where nature's intrinsic value is legally recognised, could provide a better foundation for protecting vulnerable ecosystems like the Wadden Sea. Advocates of Rights of Nature seek a shift in our treatment of nature, arguing that the protection of nature is improved by recognising its intrinsic value through endowing it with rights. This study examined which legal instruments might be most feasible and effective for integrating Rights of Nature in the EU to enhance habitat protection in the Wadden Sea. Providing the Wadden Sea with substantive and procedural rights creates new opportunities for protection, though each mechanism varies in feasibility and effectiveness.

For new legislation, a directive that incorporates a guardianship model for specific natural entities seems more feasible, as it can leverage existing EU environmental laws. Yet, the specifics of guardianship within the EU remain underdeveloped and require further exploration. Additionally, directives face institutional challenges, especially regarding the ability of individuals and NGOs to enforce nature's rights before the CJEU. On the other hand, judicial integration through the CJEU appears more feasible. However, the gradual nature of judicial development and barriers to legal standing raise concerns about its effectiveness in driving the systemic change needed. Considering both legal mechanisms, I argue that new legislation would be much more effective in implementing the Rights of Nature uniformly across the EU, but considering the feasibility of this approach, it is unlikely for a new legislation to be implemented any time soon. Therefore, in the short term, I think it is more realistic to focus our efforts on bringing the Rights of Nature approach into courts. Courts can introduce a Rights of Nature approach into the EU legal framework by prompting legal practitioners and policymakers to consider a new approach to environmental protection.

Based on my analysis, I have formulated the following recommendations for further research:

1. More research should be done on how the transition from an anthropocentric to an ecocentric approach can be facilitated across the EU. This can include comparative studies on countries that have successfully integrated the Rights of Nature, identifying best practices, and proposing concrete policy changes to EU environmental legislation. In

Environmental Law for Transitions to Sustainability, edited by M Boeve et al., Intersentia, 2021.

[103] Rühs, Natalie, and Aled Jones. "The Implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature." *Sustainability*, vol. 8, no. 2, 2016, pp. 1-19.

particular, focus should be placed on the balancing exercise between human interests and nature's interests in these best practices. This research is important since, as I have shown, the introduction of a Rights of Nature provision does not automatically entail successful implementation. The research should thus focus on those cases where implementation was a success and what were the conditions for this success.

2. Based on my findings regarding the institutional barriers to prioritising environmental protection and legal standing to those advocating for nature, future research is necessary to explore how to ensure the institutional support necessary to empower enforcement bodies to prioritise the intrinsic value of nature. This can include training of EU officials on the importance of Rights of Nature.