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RETHINKING THE ENVIRONMENTAL LEGAL PERSONHOOD WITHIN THE GREEN DEAL FOR A MORE EFFECTIVE DEFENCE OF YOUR RESOURCES

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EXECUTIVE SUMMARY

The whole legal system of environmental protection and green policies is based on an homocentric approach that puts before the needs and priorities of humans. This proposal shifts the approach to a biocentric focus that puts forward the rights of our natural resources to defend themselves and to prioritise their needs of sustainability and well-being. A bold movement that would put the European Union at the forefront of environmental protection and consideration through its European Green Deal, as well as a reinforcement of its communities' biocultural rights.

Social Media summary

Should natural resources have legal personhood to defend their rights from a biocentric perspective? A European answer.

Keywords

#biocentrism #bioculturalrights #greenpersonhood

Short bio

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Introduction

The relation between the development of societies and the development of the law has always gone hand in hand. Sometimes laws reflected a belief that was already gaining popularity among the population, for example laws regarding advancing rights for minorities or the politically excluded, or the liberal Constitutions approved during the 19th century; and other times laws have simply set rules in certain areas, like private property, contracts, driving, etc. In this case, for a long time there have been movements demanding a better protection of the environment, clean air and water, restoration of ecological damage and many other issues related to a sustainable economic and social development. So it would be fair to say, ecologically speaking, society is more compromised with the environment than legislation, and institutionally there is still a lot to be done.

This is exactly what the European Green Deal aims to achieve, as a set of policies to put the European Union (EU) at the forefront of the fight against climate change, by listening to the claims its citizens have been advancing during these last decades. Incorporating the change suggested in this proposal to the Green Deal means a shift in paradigm by listening not only to its citizens but also to its resources and natural environments. It would mean recognising two subjects of rights, humans and nature, and therefore acknowledging a biologically centred system of law.

Therefore, the aim of this investigation is to work from existing legal structures to flexibilise and amplify their boundaries for a more comprehensive defence of the environment within the EU, which in the end has to enforce accountability, the characteristic that actually makes the EU unique and special. To reach this conclusion we will see first the legal and institutional framework available, the liberal approach to the extension of rights to the environment as well as different models that have already implemented this, and some examples that are being discussed within the Member States, while pointing out the benefits that arise from this approach, especially the defence of biocultural rights.

Personhood and the homocentric view

From a legal perspective there are certain things to remember. First of all, there is a difference between being a natural and a legal person, and having personhood. In law when we talk of a natural person we refer to human beings, usually from the time of birth and until the time of death, but this also differs between national legislations and is usually cause for debate on sensitive topics like freedom of abortion and inheritance rights. When we talk about legal person we refer to certain entities such as enterprises, public institutions, international organisations (IOs), foundations, NGOs, and many others, conditions to gain legal personality also differ between countries.

What is more common is the differentiation between existing- being a natural or a legal person- and enjoying legal personhood, which is linked to having a set of rights which usually deal with defending themselves. For example, a child has a right to their privacy, but if this were to be violated, the child would not appear before court by themselves, but with a guardian that defends their position. Natural persons usually acquire complete legal personhood when they come of age, unless they are defined by law as unable to protect themselves and/or their properties, and then they still have to keep a guardian appointed by the law, a situation that normally appears in cases of mental illness or incapacity due to age. A famous example of this situation is the conservatorship (the American institution for guardianship) placed upon Britney Spears. Britney was born in 1981, so according to US law she should have acquired full personhood in 1999, which she did. However

after a series of depressions and personal problems, in 2008 she was placed under a conservatorship (again, this can be also known as guardianship or tutorship, there are several legal forms), and she has not gained her personhood back until 2021 (Framing Britney Spears, 2021).

Regarding the case of legal persons, usually the acquisition of legal personality means the acquisition of legal personhood. When a business is created, immediately it contracts responsibilities with the law, the State, other States, other businesses and its own employees, and can be brought to court if it breaches those responsibilities. However, personhood may not entitle the same rights to all these organisations. One common difference is the subjugation to public or private contractual law, which depends mostly on the percentage of public investment in the company. Or accounting legal requisites to either or depending on its profit or non-profit objective.

What about IOs? For a while these were in a limbo. As physical institutions they had to comply with national legislation wherever they found themselves. Also, they had a responsibility towards their employees and contractors, if there were any. But usually, unless the parties involved wanted to, enforcement of their decisions was mostly discretional. This changed bit by bit with legal landmarks like the ICJ's 1949 advisory opinion following Count Folke Bernadotte's assassination, a Swedish diplomat working as an envoyé of the UN, where the Court acknowledge the right of the UN to raise a claim against a country (ICJ, 1949). Another example is found in the Convention of the Seas (1982), which acknowledged in article 4.2 of Annex IX functional juridical personality of IOs, which allows them to be part of the Convention; and further acknowledged in article 5.3 of Annex IX that member states that have transferred competences in a strict, delimited and defined manner in the areas of the treaty, lose their right to exercise them within the treaty and will be exercised by the organisation (Roldán, 1991). Actually, this became a key element as emphasis is put on the factual transference of competences, instead of allowing the most common arrangement of an IO being an inter-state treaty with international legal personality (Paasivirta, 2015). Further, in the EU case, the 2009 Lisbon Treaty established legal personality for the whole Union in article 47 of the TEU.

Finally, other subjects that may be parties in legal processes also include States and Public Administrations with have their own personhood to enter and enforce contracts and bring to court different sorts of broken compromises or violations of sovereignty (like in the ICJ Nicaragua case of 1986 between the Government of Nicaragua and the United States; or the violation of human rights as enforced by different international courts like the European Court of Human Rights or the Inter-American Court of Human Rights).

Does this mean we have exhausted the types of rights holders that may arise in societies? In 2018 the Commission denied personhood to Artificial Intelligence objects (which according to the Parliament could develop 'electronic personalities') (Delcker, 2018), so at least for now it seems there is no intention to recognize other types of parties in law. However, this is a proposal to extend personhood to environmental subjects, therefore we will consider the theoretical possibility.

Up until now, our approach to environmental protection has been from an homocentric view. This means we put humans (and humanity) as the category of analysis to evaluate impact, costs, benefits and needs. When considering whether a little collateral damage to a river is worthy or not of closing down the polluting factory, we would pit against the loss of jobs in the community, the impact of exports in the region or the political effects over future elections for the governing party, to name a few. Much of the existing literature on environmental philosophy is divided on two confronted sides: the ones that believe that caring for the environment should not hinder human development and therefore propose an approach that is not necessarily preserving of resources (like Slavoj Zizek); and the most popular ones that believe in restoration and protection of nature as it is by changing human habits and behaviours (like Bruno Latour or Serge Latouche).

Right now, the EU framework of environmental protection works on the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (the ELD).

The structure set by this directive is based on the 'polluter pays principle', which means that if a company causes environmental damage it will be held liable for its actions and so it must prevent or remedy the pollution and assume all the costs derived from it. Liability happens in the case of activities that include energy/mineral/chemical industries, production and processing of metals, waste management, textile and food production. The object protected are different species and natural habitats (with some exceptions, like damages caused by armed conflict).

As the legal tool used by the EU was a directive (not a regulation or recommendation), the Member States had to directly apply its provisions. In the Communication and Information Resource Centre for Administrations, Businesses and Citizens (CIRCABC) there is free access to an external evaluation of the Implementation of the Environmental Liability Directive by country, which gathers that all States have some sort of national regulation to protect the environment. However, the key to this proposal is to look at article 12 of the ELD which states that requests for action can be placed by:

"1. Natural or legal persons: (a) affected or likely to be affected by environmental damage or (b) having a sufficient interest in environmental decision making relating to the damage or, alternatively, (c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive. What constitutes a "sufficient interest" and "impairment of a right" shall be determined by the Member States".

Here, legal persons are limited to the general concept of legal personality (natural persons plus all the other organisations, businesses, NGOs, etc.). Also, it is up to the Member States to decide the right (by sufficient interest) to place a request regarding a natural resource. This approach proposes an extension of personhood to natural resources, which could then be part of their own processes for pollution by bringing to Court the persons responsible. There is a chance to change our environmental legal approach from a homocentric to biocentrist focus.

Further, if we talk about institutional framework in the EU regarding this matter, standing right next to the ELD we find the European Green Deal. As mentioned before, the Green Deal consists of a set of policies that mean to fight the adverse effects of climate change while laying the path for a green transition in human habits, production, consumption and lifestyle that is sustainable with the environment. Looking at the Green Deal's goals and achievements as publicized by the European Commission, some examples include:

- "The Commission also promotes the growth of the market for zero- and low-emissions vehicles. In particular, it seeks to ensure that citizens have the infrastructure they need to charge these vehicles, for short and long journeys.
- The green transition presents a major opportunity for European industry by creating markets for clean technologies and products […] These new proposals will have an impact across entire value chains in sectors such as energy and transport, and construction and renovation, helping create sustainable, local and well-paid jobs across Europe.
- The tax system for energy products must also support the green transition by giving the right incentives. The Commission proposes to align the minimum tax rates for heating and transport with our climate objectives, while mitigating the social impact and supporting vulnerable citizens.

- The new Social Climate Fund will support EU citizens most affected or at risk of energy or mobility poverty. It will help mitigate the costs for those most exposed to changes, to ensure that the transition is fair and leaves no one behind […] It will provide EUR 72.2 billion over 7 years in funding for renovation of buildings, access to zero and low emission mobility, or even income support.
- A circular and sustainable management of these resources will: improve our living conditions, maintain a healthy environment, create quality jobs, provide sustainable energy resources.
- With the shift to green transport, we will create world leading companies which can serve a growing global market. By working with our international partners, we will reduce emissions together in maritime transport and aviation around the world" (European Commission, 2021).

The European Green Deal focuses on issues like transportation, energy efficiency or decarbonisation of the economy, and its solutions involve creating jobs, new industries, clean and greener environments, water and air for its citizens, etc. Its ambitious, and necessary, program has one subject of rights which is humanity and not once it refers to the preserving of the planet and its resources, even when talking about protecting our planet it is only in relation to human living conditions. Therefore, following-up we will propose a shift in paradigm which could revolutionise the way the European Green Deal fights for the environment and recognizes citizens' rights.

Biocentrism theory and experience

In 1990, the philosopher Michel Serres wrote his essay on the 'Natural Contract', a proposal to make nature a legal subject with some rights that have been inherent to humankind: right to be whole, right to be not dominated but negotiated with. The signature of a Natural Contract would make humanity rethink the way it abuses nature and establish a new balance. To Serres, Nature speaks to us through its reactions to our damage and exploitation, and that we must interpret to refound the Natural Contract (Serres, 1990).

But Serres has not been the only one to propose that humanity listens to nature. In 1972, University of Southern California Prof. Christopher D. Stone published *Should Trees Have Standing?*, a textbook for the issue at hand. What would giving nature personhood mean exactly?

1. Nature would go to court as an affected party. A river would bring a factory to court for being polluted, on the basis of its own well-being, not on the basis of the humans affected by this.
2. The evaluation of the damage would be regarded in relation to nature, not the damage inflicted to humans. Pollution would be measured on its effects on air quality, on life sustainability, on health of flora or fauna.
3. The ruling would benefit the resource. Reparation and restoration for the environment.

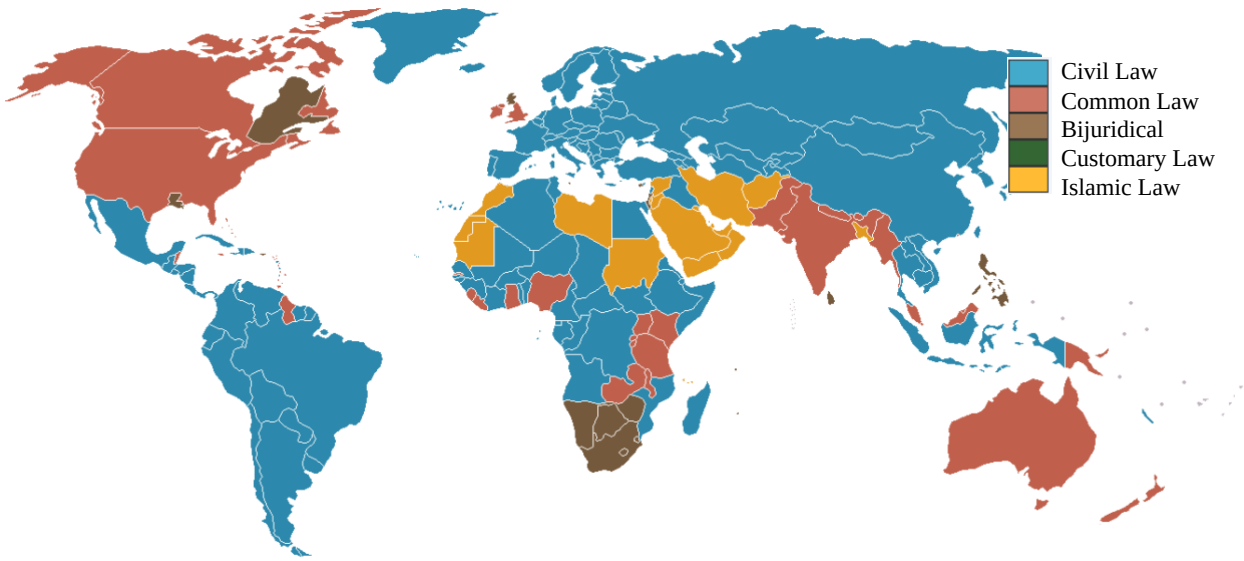
All these rights would not mean humans could not go to court with their own claims, but it would mean the affected natural resource would have their own claim and rights.

To institute this, Prof. Stone proposes to look at nature as we would at incompetents (persons that have been considered by law to be unfit to represent themselves in court), which would mean appointing a guardianship (conservatorship/tutorship) to speak in the name of the resource. This is called the guardianship approach.

We would then take article 12 of the ELD to consider its right to bring to court the person liable in cases where it is (a) affected or likely to be affected by environmental damage or (b) having a sufficient interest in environmental decision making relating to the damage or, alternatively, (c) alleging the impairment of a right. The Guardian would then have functions of inspection and evaluation of the resource's well-being, carry protective tasks (like monitoring), and bring to court for damages in the name of the resource.

This may seem a bit odd, in fact Prof. Stone jokes in the very title of the book about giving *trees* standing rights. However, there are many examples of this approach being enforced throughout the world right now. The following examples can be divided into two categories: the liberal approach that has been applied in countries with a common law tradition which seeks the utility behind a system of guardianship to protect certain resources and that is being built case by case (as is usual in these legal systems); and the eco-social approach with a more comprehensive look on the relation between societies and their environment (in the way Michel Serres proposes with his natural contract) that has been adopted mostly in Latin American countries through national legislation (who all share the civil law tradition).

Figure 1. Legal systems of the world



Source: Reddit. 2013

From the liberal (common law) approach we can gather examples from New Zealand (the Whanganui River and the Te Urewera park), India (Rivers Ganges and Yamuna, later revoked), Bangladesh (all rivers) or the US (Lake Erie in Toledo, Klamath River in California, etc).

From the eco-social (civil law) approach we can see the reform of the Ecuadorian Constitution in 2008 which includes the rights of Mother Nature (the *Pachamama*) that include: the right to be integrally respected and to the regeneration of its structures, functions and evolutive processes (article 73); the right to restoration (article 72); and the right for the State to promote natural and legal persons protecting nature (article 71), amongst others (Melo, 2013). Some resources that have gained guardianship in these countries include also the Vilcacamba river (in Ecuador) and the Atrato River (in Colombia). Also worthy of mention is the Bolivian Law of the Rights of Mother Earth of 2010, a short but comprehensive law on the rights of nature and the obligations of the State and its citizens and legal persons.

Locally, in Europe, we also have some examples. Certain German Länders (twelve out of the seventeen) provide some sort of group standing to protect natural resources before court (which is halfway to the guardianship approach). Also, in Spain there is an existing popular movement pushing for a popular legislative initiative to grant personhood to Mar Menor, an interior sea in ecological crisis (this would actually fit into the guardianship model and would be the first, if approved, in Europe).

Therefore this idea is not disconnected from reality and has demonstrated its effectiveness in the world. But the uniqueness of the EU is that it provides a supranational coordination to apply this extension of legal personhood. If the ELD were to be modified to include personhood of natural resources, it would create one of the most extensive systems of accountability in terms of environmental protection. Also, this would most likely enhance interstate cooperation in environmental matters through the civil society, European integration and unify the different speeds in green policies among the Member States.

There would be a direct effect too on the policies enhanced by the European Green Deal, which would have to include a more comprehensive approach

As an example. The Danube river crosses ten countries, seven of which are members of the EU (Germany, Austria, Slovakia, Hungary, Croatia, Serbia, Bulgaria, Romania, Moldova and Ukraine), and it goes through main cities in all those countries (like Munich, Vienna, Bratislava or Budapest to name a few). The Danube is a main economical source for all the populations that live close to its basin (they enjoy sports in the river, cultural events, tourism is fostered, there's fluvial transportation of products, also navigation and water drinking). There is an International Commission for the Protection of the Danube River which was established in 1994, and has functions to ensure sustainable water management, control pollution and control floods. It also offers a dispute settlement mechanism. However, the Commission cannot bring to court, in the name of the Danube, those that pollute or pose a risk to it. If it were to be granted personhood, an already existing management institution would take care of that new role and integrate it into its structure. Also, it would bring to justice any threat to the river’s well-being.

This illustrates that many times the guardianship can be placed on an existing institution, or on an international committee that has resources and a structure behind it. However, it can also be placed on civil society movements that organize themselves in the name of a resource, as is happening in Spain with Mar Menor. The matter of resources is no minor issue, but the EU already has a budget reserved for environmental matters and green transitioning, and also there can be institutional support at the State or regional level. Of course, incorporating this approach to the European Green Deal would mean expanding its policies to new subjects of rights.

Third generation rights benefits, biocultural rights

The guardianship approach shifts the focus of green policies from the homocentric to the biocentric approach. Guardians would seek the benefit of the environmental resource for itself and its components, not for the ways it relates to human life. However, enhancing the well-being of natural resources will have a direct effect on the societies that live in close relation to them. These are called biocultural rights.

The evolution of human rights has seen, with these ones, three evolutions. There are the first generation rights (civil and political rights) which first appeared by the end of the 18th century and have been developing ever since; then there is the second generation rights (social, economic and cultural rights) that made an appearance by the end of the 19th century; finally, there are the third generation rights, solidarity rights as the Council of Europe calls them (rights to development,

to peace, to a healthy environment, to share in the exploitation of the common heritage of mankind, to communication and humanitarian assistance) (Compass, 2012).

Biocultural rights could be included in this third category, but they are much more comprehensive of the relation between humans and their environment. The concept evokes the collective right of communities (indigenous, tribal and any other) to bond with the immediate environment they inhabit. It connects communities, resources, lands, tenure systems and ecosystems. They are the answer to the loss of biodiversity and environmental security. Also, they reinforce the relations between humans and the environment and the stewardship of lands and water, not only from the indigenous point of view (which would help protect their traditional ways of living) but also for farmers, villages, islands, etc. (Bavikatte & Bennet, 2015).

Policy recommendations

- A reform of the Environmental Liability Directive to consider under European Law the personhood of natural resources from a eco-social (civil law) approach.
- The inclusion in the European Green Deal policies of a more comprehensive approach (following the recognition of nature's rights) that reviews in every area the ways human but also nature's interests are taken into consideration.
- The coordination of the appointed Guardians (according to the internal law of the Member States) in a supranational entity. These Guardians may be already in existence and given new rights of defence of their object, or they may be newly created.
- The possibility that the European Court of Justice in Luxembourg hears the claims that may arise on the same procedural grounds as other issues, with the consideration of natural resources as damaged parties entitled to a reparation according to the damage done.
- The inclusion of biocultural rights within the list of third generation rights to enhance the bonds between political communities and their environment, rethinking the homocentric approach that has led the elaboration of Green policies to a biocentric approach that challenges the natural contract.

Conclusion

The EU has a unique institutional system to guarantee the homogeneous creation of a legislation (through its directives) of a tool that allows giving personhood to natural resources. This approach has been defended by environmental lawyers for some decades now, being Prof. Christopher D. Stone one of its main advocates to guarantee a better defence of the environment.

Implementing this approach would mean shifting entirely from the homocentric focus that has led Green policy in the EU for the last fifty years into one that recognizes that the environment is entitled to certain rights that are completely independent to whichever rights human beings believe they hold. Animals, plants, rivers, oceans, mountains, etc. They all have a right to be protected and well conserved not because we may profit from the beauty of them, but because they exist as their own beings.

Taking the Green Deal as a tool to coordinate green policies in different fields, this proposal would affect all of those fields (in a similar fashion to implementing a transversal gender focus on every policy to ensure equality). As subjects of rights, nature and resources would be entitled to care and protection. In each area, both human and natural costs and benefits would have to be weighed. Hence, not only people would have a right to access clean water, but the rivers and lakes

and sea would have their own right to be free of pollution. This is more of a change in substance from a legal perspective and would probably not have immediate effects on policy as humans' access to clean water in practice means that the water has to be clean. But it would have a direct effect on liability and the ways nature can defend its rights before court.

Luckily this has some collateral benefits for humans. As inhabitants of the planet, the better conservation of the environment (air, water) will hinder the damages already made by climate change. Also, communities that have a closer bonding to the specific resource will directly benefit as their biocultural rights are also protected through this approach, and they can maintain and develop a sustainable exploitation (cultural, economic, social, etc.) of their environment.

The system of guardianship is a big bet, it confers a lot of beings a right to protection when it recognizes their personhood. Therefore it must be thoroughly thought and tested. However there may be a lot to gain in terms of challenging the present models of abuse and exploitation of the environment, while at the same time giving communities power and independence to protect their environments.

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