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Rights of Nature: why it might not save the entire world?

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Thirty-six years after the Christopher Stone's proposal to grant Nature a legal personality[2], the Ecuadorian constitution started to make Rights of Nature (RoN) a reality in positive law[3], followed by further developments around the globe[4]. Inevitably, it revived the discussion about recognizing such RoN. In addition to the historical theoretical and philosophical debate, it now exists a legal questioning about the implementation and enforcement of those rights. Following such debates, it has been a surprise while reading the title of a recent book entitled "*The Rights of Nature: A Legal Revolution That Could Save the World*" written by David Boyd[5]. Even if the content of the book is more balanced, the first feeling was that the title was very exaggerated[6], wondering where is the revolution here and how could RoN save the world? Indeed, even if in our view Christopher Stone's article has always been a great thinking – one of the most stimulating ever written in Environmental Law – we reached the conclusion that, given the substantial developments of Environmental Law since 1972,

[1] I would like to thank my colleagues and friends who could consider themselves as "RoN supporters", such as Valéria Berros, Olivier Clerc and Jean-Pierre Marguénaud. By their counter-argumentation, they helped me improve mine.

[2] Christopher D. Stone, « Should trees have standing? Towards legal rights for natural objects », 45 *South California Law Review* 450 (1972).

[3] See Louis J. Kotzé and Paola Villavicencio Calzadilla, "Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador", *Transnational Environmental Law*, 6:3 (2017), pp. 401-433; Craig M. Kauffman and Pamela L. Martin, "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian lawsuits Succeed and Others Fail", *World Development*, Vol. 92, 2016, pp. 130-142.

[4] Inter alia in Bolivia (see Paola Villavicencio Calzadilla and Louis J. Kotzé, "Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia", *Transnational Environmental Law*, 2018, online, pp. 1-28), New Zealand, India (see Victor David, « La nouvelle vague des droits de la nature. La personnalité juridique reconnue aux fleuves Whanganui, Gange et Yamuna », *Revue juridique de l'environnement*, 2017, pp. 409-424), in some parts of the United-States and France (Nouvelle Calédonie), etc.

[5] David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World*, ECW Press, Canada, 2017.

[6] Other authors are much more cautious, such as Louis J. Kotzé and Paola Villavicencio Calzadilla. For example, according to them, "the constitutionalization of the rights of nature in Ecuador does not necessarily mean that more ecocentric laws, policies and governance practices will immediately come about" (Louis J. Kotzé and Paola Villavicencio Calzadilla, "Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador", *Transnational Environmental Law*, 6:3 (2017), p. 432).

the Stone's proposal was not an absolute necessity anymore. Therefore, this paper proposes to imagine that the David Boyd's book has a question mark at the end of the subtitle. The purpose of this article is thus to propose one answer to the question: are RoN a legal revolution that could save the world?

The RoN's theory is often based on three assumptions: first, environmental law is supposed to be too anthropocentric to be able to consider the Nature's intrinsic value[7]; second, RoN would be a legal revolution, i.e. the legal realization of a paradigm shift[8]; third, RoN would be more effective than environmental law to "save the world"[9]. Trying to relativize those views, we would like to demonstrate that those three assumptions might be at least partially false.

The methodological posture adopted in this article is distanced, critical and reflexive, keeping in mind that "*scientific observation is always a polemical observation*"[10]. In other words, the goal is not to pretend holding the truth, we strongly believe that the adversarial debate can bring us closer to it and push knowledge forward. We are also convinced that such debate is beneficial for both RoN supporters and skeptics. Thus, arguments expressing skepticism about RoN are pushing the supporters to improve their argumentation and *vice versa*. We thus follow an inclusive approach where both views can coexist. We just firmly believe that RoN must be discussed[11]. In the end, our goal is not to raise a dispute in the environmental lawyers' "family", but to offer constructive criticism.

RoN can be studied from different perspectives: *inter alia* ethical, philosophical, religious, political or legal. Our goal is not to study their philosophical premises, even if a philosophy of law analysis would be interesting as far as RoN are a contemporary form of natural law. However, for the time being, we won't repeat the positivist critics of the natural law tradition[12]. We would like to keep a proper legal perspective and to focus on RoN's ontology, in order to test such instrument as itself. This is also implying to distinguish, as far as possible, two kinds of point of view. On the one hand, as a "citizen", it is possible to be interested by the philosophy which is at the foundation of RoN, also convinced that Humans are only one little piece of the game and that we must protect Nature's intrinsic value. But, on the other hand, it is obvious that the role

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[7] For example, see David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World*, *op. cit.*, p. xix; xxiii; xxv.

[8] For example, see David R. Boyd, *ibidem*, p. xxxv; 182.

[9] For example, see David R. Boyd, *ibidem*, p. xxxv; 143; 232.

[10] Gaston Bachelard, *Le nouvel esprit scientifique*, 1934, Quadrige, PUF, réed. 1984, p. 16.

[11] In that respect, it is important for supporters and skeptics not to victimize themselves unlike what David Boyd does when he compares RoN supporters to those who showed that the earth was not at the center of the universe and who "were ostracized, excommunicated, even burned at the stake" (David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World*, ECW Press, Canada, 2017, p. xxxiv).

[12] A good summary is provided in Alexandre Viala, *Philosophie du droit*, Ellipses, 2010, p. 140 s. et p. 157 s. ; Eric Millard, *Théorie générale du droit*, Connaissance du droit, Dalloz, 2006, pp. 37-42 ; Michel Troper, *La philosophie du droit*, 3e éd., Que sais-je ?, PUF, 2011, p. 16 s. ; Henri Lévy-Bruhl, « La Science du Droit ou "Juristique" », *Cahiers Internationaux de Sociologie*, Vol. 8, 1950, p. 125.

of legal scholars is to put RoN under legal review and to remain critical regarding RoN's promises, as it is their role to criticize Environmental Law.

In our view, the technical feasibility of RoN must be taken for granted. Not only Christopher D. Stone was very convincing almost fifty years ago, but also several States now brought RoN in positive law. Therefore, such debate would be outdated. Another angle would be to assess RoN's implementation in those States. However, not only it has already been done by very good researches[13], but also, we would like to keep focusing on RoN as an instrument, as itself. That's why we would like to focus on RoN's possible effects, on their promises. Indeed, we defend that, regardless their implementation, RoN are not intrinsically a miracle solution to improve environmental protection. Because their supporters present RoN as an alternative to existing Environmental Law, because they often pretend that RoN will improve Nature conservation, it is important to screen the credibility of such alternative. Therefore, this article is not a pamphlet against RoN itself, but an argumentation against the simplistic idea that RoN would be able to save the world.

Before starting to argue, two more warning remarks are necessary. First, the scope of this reflection is limited to the framework of our European legal culture. This is the views of a western scholar, accustomed with Environmental Law within the EU, notably in France. Therefore, it is obvious that those views are too narrow. Second, there are no reasons for our views to be very original. Indeed, the RoN's critic has already been done a long time ago[14]. However, its comeback since 2008 might justify reconsidering it. Indeed, following RoN's expansion around the globe, voices are rising to promote it, even in the European Union where the legal protection of the environment is quite sophisticated. Moreover, the arrival of RoN in positive law is displacing the debate from the philosophical ground to the legal one. This is the ground where Christopher Stone itself played in 1972, this is the only one where legal scholars can play.

Therefore, we argue that RoN are not a legal revolution and will not save the world. It is rather a legal trend – not so much opposed to Environmental Law – which is not fundamentally changing the nature of legal issues concerning legal norms' effectiveness. For those who wants to save the planet by using Law, it will take more than recognizing RoN all around the globe. The contribution of the RoN theory to the legal protection of the planet can be written down to fair value by balancing the three RoN's assumptions described above.

As a consequence, it is important to underline, first, that Environmental Law is able to consider the intrinsic value of Nature **(1)**, second, that Rights of Nature are not a legal

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[13] See *inter alia* Louis J. Kotzé and Paola Villavicencio Calzadilla, "Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador", *op. cit.*, pp. 401-433; Paola Villavicencio Calzadilla and Louis J. Kotzé, "Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia", *op. cit.*, pp. 1-28.

[14] See *inter alia* P.S. Elder, « Legal Rights for Nature: the Wrong Answer to the Right(s) Question », *Osgoode Hall Law Journal*, vol. 22, n° 2, 1984, pp. 285-295.

revolution **(2)** and, third, that Rights of Nature might not keep its promises regarding saving the world **(3)**.

1. Environmental Law is able to integrate the intrinsic value of Nature

The first assumption underlying the RoN's theory is that classic Environmental Law is too anthropocentric to be able to consider the Nature's intrinsic value, whereas RoN would be able to protect such intrinsic value. There would therefore be an opposition coming up between RoN and classic Environmental Law regarding the issue of the intrinsic value. In theory, according to RoN supporters, Environmental Law is the result of the Cartesian philosophy, reproducing the Nature/Culture dualism, where Humans are dominating Nature and legally, Nature is an object. On the contrary, RoN are inspired by an ecocentric philosophy and therefore Nature is a subject. Such radical opposition, even if it could exist in terms of philosophical foundations, becomes largely artificial on a legal point of view.

We believe that this opposition is broadly exaggerated by RoN supporters in order to emphasize more easily the interest of RoN. Indeed, it is possible to argue that environmental law is less anthropocentric than it used to be (**1.1**), that property rights can be limited (**1.2**), that Environmental Law protects the intrinsic value of Nature (**1.3**), whose recognition of the pure ecological harm is a good example (**1.4**). Moreover, on the procedural ground, access to justice can be broad and make unnecessary to give Nature a legal personality (**1.5**) and the burden of proof can be made lighter (**1.6**).

1.1 CEL is less anthropocentric than it used to be

Prehistoric Environmental Law was clearly anthropocentric, as shown for example by the Convention for the Protection of Birds Useful to Agriculture of 1902 and the Convention between the United States and Other Powers Providing for the Preservation and Protection of Fur Seals of 1911. Species were firstly protected only because there were useful to humans.

However, since prehistory, Environmental Law has evolved and changed in nature. It came from a set of norms applicable to the environment to a set of norms in favor of the environment. It is the finalist dimension of Environmental Law, now confirmed into positive law[15]. Nowadays, at most RoN supporters can argue that "Law" is anthropocentric, but Environmental Law is not. In other words, when RoN supporters argue that Environmental Law is anthropocentric, they deliberately choose to underline a false image of Environmental Law, an outdated vision. Of course, there

[15] See for example article 2, paragraph 1, of the regulation n° 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. Environmental Law is defined as legislation which "contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources".

are a part of anthropocentrism into the current Environmental Law, but it is far from being limited to that.

Indeed, past and recent developments of Environmental are now mostly founded on the idea of an interdependence between Humans and Nature. This is not only the case in *soft law* instruments such as the Rio Declaration of 1992 which recognize "the integral and interdependent nature of the Earth, our home". It is also in constitutional norms. For example, the Preamble of the French Constitutional Charter of the environment of 2005 emphasize the following:

> "Natural resources and equilibriums have conditioned the emergence of mankind;
> The future and very existence of mankind are inextricably linked with its natural environment;
> The environment is the common heritage of all mankind;
> Mankind exerts ever-increasing influence over the conditions for life and its own evolution".

We are thus close to the Chief Seattle famous quote "The earth doesn't belong to us, Man belongs to the earth". At the highest level of the norms' hierarchy, in Descartes' homeland, the Charter of the environment questions the dualism and underlines the interdependence, and that without recognizing rights to Nature.

1.2 Property rights can be limited

RoN supporters often see property rights as a western instrument of Nature domination by Humans. Here, our goal is not to defend property at all costs, as we are aware of its faults, but just to relativize RoN's narrative on property.

Indeed, it is now common that property rights are limited in the name of environmental protection. It is legally possible to avoid its adverse effects on Nature. Of course, such limitations are not implemented everywhere on the planet, but it is crystal clear that it is legally possible to limit the scope of property rights.

Every single day, property rights are limited by objective law, especially by Planning Law and Environmental Law, in the name of Nature protection. For example, a lot of public easements are implemented to protect the environment. Thus, the adverse effects of property rights are only the result of the liberty left by objective norms. It is enough to improve objective environmental norms to limit property rights.

Such limitation is also common and accepted in the supreme, constitutional and international courts case law. As a matter of example, in the European Union, the right to property recognized under article 17 of the charter of fundamental rights of the European Union is "not an absolute right" according to the European Union Court of Justice. It "must be viewed in relation to its social function. Consequently, its exercise may be restricted, provided that those restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, disproportionate

and intolerable interference, impairing the very substance of the right guaranteed". The court clearly held that:

> "protection of the environment is one of those objectives (of general interest) and is therefore capable of justifying a restriction on the use of the right to property"[16].

Before that, the European Court of Human Rights held in 2007 that:

> "Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations"[17].

Recently, the French "Conseil constitutionnel", which is the equivalent of a constitutional court in the French legal system, held, concerning the prohibition of plastic use, that the legislative power can limit the constitutional freedom of enterprise when such limitations are justified by constitutional requirements or public interest, if those limitation are proportionate. Concerning the plastic prohibition, the "Conseil constitutionnel" ruled that it was not disproportionate to the public interest relating to environmental protection[18].

Moreover, the "abuse of right" theory is common and can be applied to property rights to limit its adverse effects on the environment[19].

Lastly, in the climate changes context, radical legislations are progressively emerging. For example, several legislations prohibited the exploitation of natural resources in France, such as the act prohibiting the exploration and exploitation of liquid or gaseous hydrocarbon mines by hydraulic fracturing of 2011[20] and the act terminating research and exploitation of hydrocarbons of 2017[21]. Of course, such acts have weaknesses. For example, in October 2018, the company "Total" was granted the extension of a permits to carry out 5 oil exploration drilling off French Guyana. Indeed, the permit procedure was started before the adoption of the 2017 act, which doesn't have a retroactive effect. However, such acts show that it is perfectly possible to prohibit the exploitation of

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[16] EUCJ, 15th January 2013, *Jozef Krizan*, C-416/10, §§ 113-114; *Revue juridique de l'environnement*, 2013, pp. 374-376, comment Julien Bétaille.

[17] ECHR, 27th November. 2007, *Hamer v. Belgium*, n° 21861/03, § 79; see Jean-Pierre Marguénaud, "La petite maison dans la forêt", *Recueil Dalloz*, 2008, pp. 884-887.

[18] CC, 25th October 2018, n° 2018-771 DC, *Loi pour l'équilibre des relations commerciales dans le secteur agricole et alimentaire et une alimentation saine, durable et accessible à tous*, §§ 13-19.

[19] Gonzalo Sozzo, "El giro ecológico del abuso de derecho", RDAmb 51, 15/09/2017, 1, AP/DOC/628/2017 ; Michael Byers, "Abuse of Rights: An Old Principle, A New Age", 47 McGill L.J. (2001-2002), pp. 389-431.

[20] Loi n° 2011-835 du 13 juillet 2011 visant à interdire l'exploration et l'exploitation des mines d'hydrocarbures liquides ou gazeux par fracturation hydraulique et à abroger les permis exclusifs de recherches comportant des projets ayant recours à cette technique. See Christel Cournil. « Adoption of legislation on shale gas in france: Hesitation and/or progress » », *European Energy and Environmental Law Review*, Kluwer Law International, 2013, 22 (4), pp.141-151.

[21] Loi n° 2017-1839 du 30 décembre 2017 mettant fin à la recherche ainsi qu'à l'exploitation des hydrocarbures et portant diverses dispositions relatives à l'énergie et à l'environnement.

natural resources without giving Nature a legal personality. On the contrary, the Ecuadorian example, with the decision to exploit oil in the Yasuni national park, shows that the recognition of RoN is not a solid guarantee. Thus, whatever RoN are recognized or not, the States remain sovereign on their natural resources. We can regret it, but it remains a reality against which the RoN do not change much.

Therefore, limiting the adverse effects of property rights is not a matter of giving rights to Nature, it is much more matter of political will and judges interpretation.

1.3 Nature Conservation Law protects the intrinsic value of Nature

RoN supporters pretend that RoN are able to protect the intrinsic value of Nature, whereas Environmental Law could not. It is firstly important to avoid confusions. There are no reasons for RoN to systematically protect the intrinsic value of Nature and it is also possible to protect the intrinsic value of Nature without using RoN. That's the meaning of what Mary Warnock said: "the question of whether it would make sense to allow claims for standing on behalf of animals or trees should not be confused with another question, namely, whether such individual animals or species of animal (or trees or insects, or species of these kinds) have intrinsic value. It is possible to acknowledge such value by protective legislation, without the provision to them of standing as plaintiffs in their own right"[22].

We therefore understand that RoN are far from being the only way to protect the intrinsic value. Even if Environmental Law is sometimes anthropocentric, it can also consider the intrinsic value of Nature[23]. In a certain way, the intrinsic value is in the heart of Environmental Law. Of course, concepts like "ecological services" are the tools of an anthropocentric value system. It is more and more used by economists and progressively transposed into positive law[24]. However, it is important not to forget the heart of Nature Conservation Law: from the beginning, Nature conservation is a matter of principle more than a utilitarian approach.

Indeed, Nature Conservation Law is far from protecting only the "useful" dimension of ecosystems. Most of the protected Nature doesn't have an immediate and direct interest for Humans. More precisely, Humans are able to decide Nature protections without taking into account their own interest. It is clear for example into French positive law. A national park is created when ecosystems are of "special interest" and if it is important to protect it from degradation[25]. A natural reserve is created to ensure

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[22] Mary Warnock, Should trees have standing?, *Journal of Human Rights and the Environment*, Vol. 3 Spécial Issue, 2012, p. 59.

[23] See Gilles Martin, « L'arbre peut-il être une victime ? », in Clément, M., Martin, G., Timmermans, Ch., (2018), *Le livre blanc « Le droit prend-il vraiment en compte l'environnement ? »*, Recueil de conférences du Collège Supérieur Lyon dans le cadre du cycle « Droit et environnement », Le Collège Supérieur Lyon (www.collegesuperieur.com), novembre 2018.

[24] However, even if the transposition of this concept into positive law gives questionable results, it is undeniable that the progresses made by scientific ecology have been crucial to convince of the interest to protect Nature.

[25] Article L. 331-1 of the environmental code.

the conservation of elements of the natural environment "of national interest"[26]. A specie, a natural habitat or a geological site is protected when such protection is justified by "a particular scientific interest" or by its "essential role in the ecosystem" or when the "conservation of the natural heritage" requires such protection[27]. We therefore understand Nature is protected when it is "interesting" to do it… but nothing says it should be interesting "for humans". Thus, in French positive law, nothing validates the idea that Nature is protected for anthropocentric reasons. It is protected because scientists says it's important to do it, and real science does not distinguish what is useful for humans or not. For example, the protection is not reserved to symbolic species such as lions, elephants, primates, bears and wolfs. It is also applying to ugly and useless species, to species without any cultural or economic value for humans. Moreover, in the European Union, it is the "ecological integrity" of Natura 2000 sites which is protected by the Habitats directive and by judges[28], whatever its usefulness for Humans.

It is also key to understand that "the intrinsic value cannot be extrinsic to human consciousness; it is necessarily the product of human assessment even if it leads to non-instrumental valuation"[29]. In other words, the intrinsic value is necessarily assessed by humans, and this is not a reason to conclude that such assessment is necessarily made in their own interest. This is exactly what is happening in France when a scientific official body decides to put a new specie on the list of protected species.

Environmental Law also uses other means which protect the intrinsic value of Nature. Thus, criminal environmental law punishes environmental offences whatever the consequences of such offences on humans. The environment itself is protected. However, the most interesting example to show that Environmental Law is perfectly able to protect the intrinsic value of Nature without recognizing RoN is the recognition of the "pure ecological harm" in French tort law.

1.3 Pure Ecological Harm is compensated

Contrary to what authors have been thinking in the past, the recognition of the legal personality to Nature is not the only possible path to compensate the pure ecological harm. Such path was opened by the directive 2004/35 on environmental liability but

[26] Article L. 332-2 of the environmental code.
[27] Article L. 411-1 of the environmental code.
[28] For example, about the Bialowieza forest, see EUCJ, 18 April 2018, *European Commission v. Poland*, C-441/17 ; Julien Bétaille, « L'efficacité du référé européen et le principe de précaution au secours de la forêt de Bialowieza – Commentaire sur CJUE, ord. référé, 27 juillet 2017 et ord. référé, grande chambre, 20 novembre 2017, *Commission européenne c. République de Pologne*, C-441/17 R », *Droit de l'environnement*, n° 263, 2018, pp. 14-22
[29] Marianne Moliner-Dubost, *Droit de l'environnement*, Cours, Dalloz, 2015, p. 52. The quote in French is the following: "la valeur intrinsèque ne peut pas être extrinsèque à la conscience humaine ; elle est nécessairement le produit d'une évaluation humaine même si elle aboutit à une valorisation non instrumentale".

it remained to be realized[30]. That was the case in France when, in the *Erika* case of 2010, the French *Cour de cassation* accepted to compensate the pure ecological damage[31]. After that, the 2016 act on biodiversity modified the French civil code and provided a legal regime on the compensation of ecological damages[32]. Thus, the ecological harm is notably defined as a damage to "ecosystems elements or functions"[33] and is distinguished from economic and moral harms. It is a damage to Nature itself, to its intrinsic value. Such damage is compensated, without Nature being a subject of law.

1.4 Broad access to justice makes unnecessary to give Nature a legal personality

Access to justice is a key argument to demonstrate how unnecessary is to give a legal personality to Nature. Indeed, the lack of access to justice was the main argument of Christopher Stone while facing the narrow conception of standing by American judges in the *Mineral King* case.

At that time, Christopher Stone was perfectly right to describe RoN as one of the options to solve this issue. Judicial actions to defend the environment were quite rare and legal systems were not yet adapted to this.

The point is that, historically, Stone's proposal was not followed, but it doesn't mean that the issue of standing was not addressed. Indeed, western legal systems followed another direction to get the same result. It was chosen to soften the litigation conditions. It progressively appeared at the domestic level. For example, in France, the act on Nature conservation of 1976 created an accreditation system for environmental NGOs which gives a broad access to justice, allowing to challenge administrative decisions such as environmental permits and to initiate civil and criminal actions against polluters[34]. Then, the same trend appeared at the international level when principle 10 of the Rio Declaration provided that "effective access to judicial and administrative proceedings, including redress and remedy, shall be provided". The relevance of such strategy, involving to improve Nature protection before the courts, was well perceived by the philosopher of law François Ost in 1995:

[30] The International Court of Justice recently recognized the ecological damage (ICJ, 2nd February 2018, *Costa Rica v. Nicaragua*, n° 150; see Yann Kerbrat et Sandrine Maljean-Dubois, « La reconnaissance du préjudice écologique par la Cour internationale de justice », *Droit de l'environnement*, n° 266, 2018, pp. 90-91.

[31] See Cass., crim., 25 septembre 2012, n° 10-82.938; *Environnement*, 2012, n° 12, pp. 13-21, note Marie-Pierre Camproux-Duffrène.

[32] Simon Taylor, *Extending the Frontiers of Tort Law: Liability for Ecological Harm in the French Civil Code*, JETL 2018; 9(1): 81–103.

[33] Article 1246 of the civil code.

[34] About the accreditation system, see Michel Prieur, Julien Bétaille, Marie-Anne Cohendet, Hubert Delzangles, Jessica Makowiak & Pascale Steichen, *Droit de l'environnement*, 7e éd., Précis, Dalloz, 2016, n° 146 et seq.

> "Rather, (...), than granting Nature of the subject of right tinsel and give it a borrowing role on the judicial scene (...), is it not rather appropriate to finally grant a real right of access to justice to NGOs that defend Nature?"[35].

Finally, the Aarhus convention was signed in 1998 and provided very broad access to justice, notably under article 9, paragraph 3:

> "Each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment".

This article is moreover broadly interpreted by judges, both by the Aarhus convention compliance committee[36] and the European Union Court of Justice. For example, even if Member States are free to apply criteria, it must lead, in practice, to a broad access to justice. That was the reason why access to justice in Germany was challenged before the European Union Court of Justice[37]. The court also sentenced the United Kingdom because of its prohibiting cost of access to justice[38].

In the Aarhus convention rationale, the bet is that the public, notably NGOs, are altruist and defends the environment in Courts. Therefore, it is not necessary to grant legal personality to Nature as Nature already have "guardians" before the courts. Of course, it remains issues regarding the implementation of such rationale, but it works both in theory and in practice[39].

That's might be part of the reasons why such example has been followed even in Latin America and the Caribbean. Indeed, States signed the so-called "Escazu convention".

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[35] François Ost, *La nature hors la loi – L'écologie à l'épreuve du droit*, 1995, rééd., *La Découverte*, 2003, p. 204. In French: "Plutôt, (…), que d'affubler la nature des oripeaux du sujet de droit et de lui confier un rôle d'emprunt sur la scène judiciaire (…), ne convient-il pas plutôt d'accorder enfin un réel droit d'action en justice aux associations qui la défendent ?". See as well François Ost, « Personnaliser la nature, pour elle-même, vraiment ? », in Philippe Descola (dir.), *Les Natures en question*, Collège de France, Odile Jacob, 2018, pp. 205-226.

[36] See for example the decisions of the Committee concerning access to the action for annulment before the European Union Court of Justice (14th April 2011 and 17th March 2017, case n° ACCC/C/2008/32 ; Julien Bétaille, « Accès à la justice de l'Union européenne, le Comité d'examen du respect des dispositions de la Convention d'Aarhus s'immisce dans le dialogue des juges européens », *Revue juridique de l'environnement*, 2011, pp. 547-562)

[37] EUCJ, 12th May 2012, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, C-115/09, *Revue juridique de l'environnement*, 2011, p. 653, chron. Julien Bétaille.

[38] EUCJ, 11th April 2013, *David Edwards & Lilian Pallikaropoulos*, C-260/11, *Journal européen des droits de l'homme*, n° 4, 2013, p. 696, chron. Julien Bétaille ; EUCJ, 13th February 2014, *European Commission v. United Kingdom*, C-530/11, *Journal européen des droits de l'homme*, n° 4, 2014, p. 558, chron. Julien Bétaille.

[39] An author would prefer to replace such rationale by RoN (see Tamlyn Jayatilaka, *Rights of Nature: The Right Approach to Environmental Standing in the EU?*, LLM Paper, Ghent University, 2017). Such proposal is focused on the issue of access to justice before the EUCJ, which indeed remains a problem. However, it has to be taken into account the progresses that have been made for 10 years in this area, mainly thanks to the actions driven by the NGO ClientEarth.

This regional agreement on Access to Information, Public Participation and Justice in Environmental Matters was adopted on the 4th of March 2018 in Escazu, Costa Rica. It applies the principle 10 of the Rio Declaration at the regional level and its article 8 notably provides that "each Party shall guarantee the right of access to justice in environmental matters in accordance with the guarantees of due process".

Whatever the implementation issues remaining in Europe, the French example shows that the Aarhus rationale can be effective, instead of granting rights to Nature. Because Environmental NGOs were given legal standing, Nature found representatives in Courts. Environmental NGOs are a legal person defending their own statutory object, which is to defend the environment. Consequently, they are the equivalent of the Stone's guardians[40]. Nature has a voice before judges[41].

More broadly, access to justice is opened to individuals too, but the most effective remains NGOs actions. Environmental NGOs can get an "accreditation" when few criteria are fulfilled[42]. The main one is to have been in business for at least three years. Such accreditation provides an easier access to justice in order to defend the environment. Indeed, article L. 142-1 al. 2 of the environmental code provides a standing presumption. Such NGO is presumed to have standing to challenge administrative decisions having directly something to do with its statutory object and producing damaging effects on the environment[43].

For example, let's imagine a case where an administrative decision has adverse effects on the natural environment, in a place located in the middle of nowhere where no individuals can get *locus standi* because nobody lives close enough to this area. In such a case, an accredited NGO which official geographical scope includes this area has standing to challenge this decision before the judge, because the effects of this decision affects the statutory object of the NGO, which is the protection of the natural environment. This example shows that this kind of issue, which are problematic in some countries[44], can be solved without granting legal personality to Nature[45].

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[40] RoN supporters sometimes pretend that the way Nature is currently represented before the courts is not good because its representation is made through humans' interests (on this issue, see Lucille Boisseau-Sowinski, « La représentation des individus d'une espèce animale devant le juge français », *VertigO*, Hors- série 22, septembre 2015). However, it is exactly the same problem with the Christopher Stone's "guardians": it remains humans (natural or legal person) representing Nature.

[41] See Gérard Monédiaire, « Sur la nature du droit de la nature », *Caesura*, *Canoas*, n° 4, 1994, p. 65.

[42] See L. 141-1 et seq. of the environmental code.

[43] CE, 8 février 1999, *Fédération des associations de protection de l'environnement et de la nature des côtes d'Armor*, rec., p. 20.

[44] See Hendrik… infra (Hendrik's article in this review)

[45] It is also important to notice that RoN are not, in practice, a guaranty to get standing. It remains standing issues even in Ecuador (see Mary Elizabeth Whittemore, « The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite », *Pacific Rim Law & Policy Journal*, Vol. 20, n° 3, 2011, p. 667). Moreover, access to justice is apparently broader in Costa Rica than in Ecuador whereas Costa Rica doesn't recognize RoN (Edgar Fernandez Fernandez, «

Access to civil and criminal courts is also possible for Environmental NGOs, in accordance with article 9, paragraph 3, of the Aarhus convention. Concerning access to the civil judge, the plaintiff must demonstrate a "legitimate interest" and a "direct damage"[46]. However, when the plaintiff is an Environmental NGO, it is not difficult, in practice, to show that a pollution is a "direct damage" to its statutory object. Concerning access to criminal proceedings, there are no specific standing conditions to undertake a basic complaint or a private prosecution procedure. However, to undertake a complaint "avec constitution de partie civile", it is necessary to previously seize the prosecutor[47]. Concerning torts actions undertaken on the occasion of a criminal trial, accredited Environmental NGOs have a standing presumption under article L. 142-2 of the environmental code.

Therefore, in France, at least for accredited Environmental NGOs, access to justice in environmental matters is quite broad[48] and makes unnecessary to grant Nature a legal personality, as long as Nature is already in courts. It doesn't mean there are no issues at all, but those are not about the standing criteria. It is more concerning the general functioning of justice, such as the lack of means of the criminal justice or the evolution of the administrative case law, which is, to some extent, more and more focused on legal certainty at the expense of compliance[49]. Therefore, there are always elements needing for improvement or to watch out, but access to justice in environmental matters basically works and this is a shared vision with seasoned Environmental NGO lawyers[50]. As far as we are aware, those lawyers, practicing access to environmental justice every day, see the RoN debate as purely speculative or philosophical, without practical interest to improve Nature protection on the ground.

1.5 The burden of proof can be made lighter

Les controverses autour de l'intérêt à agir pour l'accès au juge constitutionnel : de la défense du droit à l'environnement (Costa Rica) à la défense des droits de la nature (Équateur) », *VertigO*, Hors-série 22, septembre 2015).

[46] Article L. 1240 of the civil code and article 31 of the civil procedure code.

[47] Article 85 of the criminal procedure code.

[48] See Julien Bétaille (Ed.), *Le droit d'accès à la justice en matière d'environnement*, Presses de l'IFR de l'Université Toulouse 1 Capitole, LGDJ, 2016.

[49] See Julien Bétaille, « Les limites européennes à la subjectivisation du contentieux de l'urbanisme », *Bulletin juridique des collectivités locales*, 2018, to be published.

[50] See for example Julien Bétaille & Antoine Gatet, *Legal Analysis of the Main Sources of Interpretation of the Access to Justice Rights in France*, Research project "Access to Justice for a Greener Europe" (ATOJ EARL) driven by ClientEarth, July 2018. It must be noticed that some academics are in favour of RoN, such as Marie-Angèle Hermitte, namely the first one to follow the Christopher Stone's arguments in France. For her, the key argument in favour of RoN arises from the equality of arms principle (Marie-Angèle Hermitte, « La nature, sujet de droit ? », *Annales HSS*, 2011, n° 1, p. 212). Thus, it would be necessary to grant Nature a legal personality, for Nature to be able to defend itself in courts against polluters. However, as mentioned above, our opinion is different, it is that Nature is already in courts through Environmental NGOs.

Another Christopher Stone's arguments is that RoN are to lighten the burden of proof. According to him, "in a system which spoke of the environment "having legal rights," judges would, I suspect, be inclined to interpret rules such as those of burden of proof far more liberally from the point of the environment"[51].

It would be interesting to check if this assumption has happened in fact in countries like Ecuador or Bolivia. But, above all, once again, the evolution of Environmental Law for decades has to be taken into account. Of course, the burden of proof is a very serious issue in environmental matters, but it can be addressed without granting rights to Nature. For example, based on the polluter pays principle, the European Union Court of Justice held that Member-States have the possibility to implement presumption, in order to lighten the causal relation in case of pollution[52]. Such easing of the burden of proof is a matter of judicial interpretation, much more than RoN related.

To conclude about the first assumption of the RoN's theory, it is possible to defend, given the evolution and enhancement of Environmental Law since the seventies, that Environmental Law protects the intrinsic value of Nature at least as RoN would be able to protect it. The opposition between Environmental Law and RoN is mostly artificial and is used by RoN supporters in order to put artificially their theory forward.

2. Rights of Nature are not a legal revolution

The second assumption of the RoN's theory is that rights of nature are a "legal revolution", notably because it realizes a paradigm shift.

We believe that qualifying RoNs as a "legal revolution" is the figment of the enthusiasm aroused by the novelty of the RoN's recognition at the constitutional level. It is, at that stage, important to step back and realize that, even if RoN may be a philosophical paradigm shift, it is not a revolution on the legal ground.

Indeed, even if RoN are a different approach, it remains a legal instrument which cannot operate without humans. This is RoN's aporia (**2.1**). Moreover, RoN basically remains, exactly like the human right to environment, an obligation of Humans regarding Nature (**2.2**). There is nothing revolutionary in this.

2.1 The aporia: RoN cannot operate without humans

The RoN's theory implies that to protect Nature's intrinsic value, it is necessary to grant legal personality to Nature in order to avoid that its interests would be mixed with human interests. Nature should be able to defend itself its own interests, which

[51] Christopher D. Stone, « Should trees have standing? Towards legal rights for natural objects », 45 *South California Law Review* 450 (1972), p. 488.
[52] EUCJ, 9th March 2010, *Raffinerie Mediterranee (ERG) SpA*, C-378/08; *Revue juridique de l'environnement*, 2010, p. 503, comment Pascale Steichen.

are different from Humans' interests. Therefore, it would be necessary to avoid the Humans' mediation[53].

Here comes the RoN's aporia. Indeed, nothing can legally happen without humans. In other words, as long as Law is an instrument produced by Humans (which is not challenged), every attempt to protect Nature by using Law necessarily goes through Humans. That's why RONs needs Humans (i.e. the Christopher Stone's "guardians") to work like classic Environmental Law needs it. Such aporia has been identified for a long time:

> "since all of law is a human construct, it follows that we can identify any matter of concern and legislate about it, if we want to. Whether or not non-humans have rights, only humans can be actors in the legal system"[54].

Moreover, as RoN cannot legally work without Humans, it runs the same risk than Environmental Law, namely to be accused of anthropocentrism. For example, whatever we have objective norms protecting the brown bear or we grant the brown bear a legal personality, such animal will always need Humans to go to courts. Bears have no choice, they are submitted to the risk of an anthropocentric approach of Nature conservation. Once again, RoN are not different from Environmental Law. It is possible to regret it, but Law, as a human technique, will always have an anthropocentric dimension, even if the intrinsic value can be taken into account, as mentioned above. Serge Gutwirth describes such issue as follows:

> "granting rights to non-human entities may degenerate to an even bigger anthropocentrism. Indeed, only Humans are able to translate the Nature's "interests" into the legal language"[55].

This is confirmed in practice: the "guardians" are of course always Humans. For example, article 71 of the Ecuadorian Constitution provides that: "all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature". This looks like an *actio popularis*, but is far from being legally revolutionary. It is the same in other parts of the world, such as in New Zealand[56]. Guardians, which are all humans, are in charge of managing a river. This is about the same than in the European Union when a public authority, for example a legal person directed by humans, is in charge of managing a watershed[57].

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[53] About the representation of Nature before judges, see Marie-Pierre Camproux & Jochen Sohnle (ed.), *La représentation de la nature devant le juge : approches comparatives et prospectives*, VertigO, 2015.

[54] P.S. Elder, « Legal Rights for Nature: the Wrong Answer to the Right(s) Question », *Osgoode Hall Law Journal*, vol. 22, n° 2, 1984, p. 291.

[55] Serge Gutwirth, « Culture contre Nature », in *Des droits pour la nature*, Editions Utopia, 2016, p. 41.

[56] About the development of the rights of rivers, see Victor David, « La nouvelle vague des droits de la nature. La personnalité juridique reconnue aux fleuves Whanganui, Gange et Yamuna », *Revue juridique de l'environnement*, 2017, pp. 409-424.

[57] In France, two kinds of legal persons are in charge of managing the watersheds: the "Agences de l'eau" and the "Etablissements publics territoriaux de bassin" (see Michel Prieur, Julien Bétaille, Marie-

That's why RoN supporters should be more careful before speaking about a legal "revolution". As Dinah Shelton said:

> "Environmentalists may be concerned that inevitably the legal personhood of nature will have to be defended by humans. If these humans are appointed by the government, environmental concerns may not always be paramount. Any guardians will have responsibility for developing a management plan and deciding on what particular activities should be permitted. In theory, environmental agencies already undertake these responsibilities in respect to public lands and protected areas"[58].

However, we believe that the issue is even more deep than the one of who are the guardians. Indeed, basically, RoN brings the same kind of obligation than objective norms.

2.2 The lack of specificity: RoN remains an obligation of Humans regarding Nature

RoN are not fundamentally different than classic environmental objective norms. This is based on the basic idea whereby Rights and Obligations are the two sides of the same coin. Indeed, a right is a permission, an ability to do or not. Such permission necessarily implies an obligation and, conversely, an obligation implies a permission. If *X* has the right to do *A*, *Y* must abstain to hinder *X*'s right. Therefore, *Y* has the obligation to do something or to abstain for *X* to enjoy its right. Also, if *Y* has an obligation regarding *A*, for example to protect it, it means that *X* has the permission to enjoy *A*.

What if we apply this to Nature? If we have a right to environment, it means that the environment must be protected by all persons. Thus, persons have the obligation to protect the environment. The right to environment implies an obligation to protect the environment. Then, what about rights of Nature? If Nature has the right to be respected, it implies that all persons have the obligation to protect Nature[59]. Therefore, both the right to environment and the rights of Nature lead to the same objective obligation, namely the persons' obligation to protect Nature.

Anne Cohendet, Hubert Delzangles, Jessica Makowiak & Pascale Steichen, *Droit de l'environnement*, 7e éd., Précis, Dalloz, 2016, n° 433-437; Bernard Drobenko, *Introduction au droit de l'eau*, Editions Johanet, 2014, p. 80 et seq.).

[58] Dinah Shelton, « Nature as a legal person », *VertigO*, Hors-série 22, septembre 2015, n° 47.

[59] It is somehow admitted by David Boyd when he says that "Rights of Nature impose responsibilities on humans to modify our behavior" (David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World*, *op. cit.*, p. 230).

Such equivalence is apparently confirmed in practice. Indeed, in Ecuador, it happens that a court « uses the environmental right and the right of nature interchangeably without any clear distinction as to their respective application"[60].

In each case, the obligation is the responsibility of persons. Of course, objective norms are not just about humans. Non-humans can be beneficiaries of the obligation, but only natural and legal persons can legally have the duty to comply with such obligation. This is what Hans Kelsen recalled in its *Pure Theory of Law*:

> "Although modern legal orders regulate only the behavior of men, not of animals, plants, and things, it is not excluded that these orders prescribe the behavior of man toward animals, plants, and things. For example, the killing of certain animals (in general or at specific times), the damaging of rare plants or historically valuable buildings may be prohibited. But these legal norms do not regulate the behavior of the protected animals, plants, and things, but of the men against whom the threat of punishment is directed"[61].

This is the basic Environmental Law model. It uses objective norms to oblige all persons to respect Nature.

In the end, even granting the legal personality to Nature, the RoN's theory cannot do more. As there are an objective norm behind the right to environment, there are also the same kind of norm behind the rights of Nature. This is why RoN are absolutely not a "legal revolution". Somehow, it would be possible to defend that, even without legal personality, Nature already have rights, because those rights are necessarily implied by the right to environment and by objective norms protecting Nature.

Somehow, the academic debate about RoN is a lack of time. Indeed, wondering about the best theoretical approach leaves in the dark to real issue, the one of concretization, realization and effectiveness of norms protecting Nature. The question is the same since 1972: are Humans able to limit themselves and how law can force them to effectively protect Nature?

3. Rights of Nature might not keep its promises regarding saving the world

The third RoN's theory assumption is that RoN would be more effective than environmental law to "save the world". Indeed, RoN supporters often starts their argumentation with a promise to improve Nature protection. For example, without any more arguments, an author defends that "if animals and plants were legal persons,

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[60] Louis J. Kotzé and Paola Villavicencio Calzadilla, "Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador", *Transnational Environmental Law*, 6:3 (2017), p. 428.

[61] Hans Kelsen, *Pure Theory of Law*, 2nd ed., 1960, transl. By Max Knight, The Lawbook Exchange, Ltd. Clark, New Jersey, 2005, p. 32.

it would be much more difficult to kill or destroy them: they would have subjective rights then, which could be enforced in court"[62]. Another one says that: "by granting rights to Nature, it is easier to improve Nature conservation"[63]. In addition, according to David Boyd, "rights of nature movement has the potential to create a world where people live in genuine harmony with nature"[64]. Their argumentation is moreover based on the idea that Environmental Law is not effective, that would be why it should be replaced by the rights of Nature[65]. Sometimes it goes even further: "in the Anthropocene, the anthropocentrism of environmental law more generally, and rights specifically, is considered to justify and promote ecological ravaging"[66]. Here there is none for long to defend that Environmental Law is ravaging the planet (!). On the contrary, we believe that maybe "Law" is allowing to ravage the planet, but "Environmental Law" is putting limits to that freedom. It could even be possible to defend that, in the recent history of Law, Environmental Law was the first branch of Law to protect the interests of non-human entities, whereas other branches on deal with humans. Therefore, Environmental Law is part of the solution, not the problem. By deliberately targeting Environmental Law, RoN supporters go after the wrong target.

First, the idea that Environmental Law is not effective is a widespread "cliché". This issue is much more complicated, and it can't reasonably be said that Environmental Law doesn't work (**3.1**). The bet made by the RON's theory, beyond the paradigm shift, is that a subjective approach would be more effective than objective Environmental Law. However, the opposition between subjective and objective approaches might not be the right angle. Indeed, both approaches need a concretization to be effective. Here secondly comes the reality test. Indeed, RoN are facing the same challenges than Environmental Law, namely issues relating to compliance, implementation, enforcement and effectiveness (3.2). Facing those challenges, it doesn't change much to adopt a subjective approach rather than an objective one.

3.1 Environmental Law is relatively effective

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[62] Jens Kersten, « Who Needs Rights of Nature », in Anna Leah Tabios Hillebrecht María Valeria Berros (ed.), Can Nature Have Rights? Legal and Political Insights, RCC Perspectives, *Transformations in Environment and* Society, 2017 / 6, p. 10.

[63] Victor David, « La lente consécration de la nature, sujet de droit. Le monde est-il enfin Stone ? », *Revue juridique de l'environnement*, 2012, p. 483. In French : "avec la reconnaissance de droits à la nature, il devient plus facile de renforcer la protection de la nature".

[64] David R. Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World*, *op. cit.*, p. 232.

[65] David R. Boyd, *ibidem*, p. xix; Victor David, « La lente consécration de la nature, sujet de droit. Le monde est-il enfin Stone ? », *Revue juridique de l'environnement*, 2012, p. 470 ; 485 (the author starts to argue about a particular case, where facility pollution was not sentenced before the first instance judge. Then he says that RoN would do better in such a case. And finally, at the end of the article, he has to say that the facility was sentenced by the court of appeal, applying classic environmental law).

[66] Louis J. Kotzé and Paola Villavicencio Calzadilla, "Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador", *Transnational Environmental Law*, 6:3 (2017), p. 403.

RoN supporters pretend Environmental Law is not effective. Indeed, it is easily possible to feel that Environmental Law powerless in front of the ecological crisis. Here comes the contemporary Environmental Law paradox:

> *While on the one hand Environmental Law has never been so sophisticated, on the other hand, environmental degradation has never been so deep.*

Therefore, would Environmental Law miss its target? Such conclusion would be far too simple. Indeed, there are at least two arguments leading to pretend that Environmental Law is relatively effective.

Firstly, there are numerous examples of Environmental Law successes: effectiveness of the Montreal Protocol on substances that deplete the ozone layer of 1987[67], a substantial network of protected areas[68], the improvement of the fight against oil spill, etc. There are also reasons to be optimistic about species protection, even when scientists describe an important biodiversity loss across the planet. Indeed, scientific studies show the effectiveness of the Bern convention and of the Birds directive in Europe[69]: species with the highest level of protection are more likely to increase their population, and this is even more pronounced in States that have been members of the European Union for a long time. Therefore, it can be observed that Environmental Law clearly makes a difference.

Secondly, let's test the non-law hypothesis and reverse the logic. What if environmental law did not exist? Of course, the ecological crisis would be even more serious. For example, concerning facilities' pollution, the absence of environmental rules would certainly have led to a much worse situation. In the absence of thresholds, the freedom of market would probably have led to increased industrial pollution. Of course, somehow, thresholds give a right to pollute. Nevertheless, it is at first a limit to the freedom to pollute. Therefore, the non-law hypothesis would have been worse for the environment. The same type of analysis is also valid for nature protection. It is highly likely that more species would have disappeared if they had not been legally protected, as the European Commission has shown while assessing the Habitats and Birds directives[70].

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[67] See Andrew Klekociuk et Paul Krummel, « After 30 years of the Montreal Protocol, the ozone layer is gradually healing », *The Conversation*, 17th September 2017.

[68] For example, the Natura 2000 network could ideally be bigger, but it is already 18% of the European Union territory.

[69] See Fiona J. Sanderson et al., « Assessing the Performance of EU Nature Legislation in Protecting Target Bird Species in an Era of Climate Change », *Conservation Letters*, July 2015, 0(0), 1–9. See as well Elie Gaget, Thomas Galewski, Fréderic Jiguet & Isabelle Le Viol, « Waterbird communities adjust to climate warming according to conservation policy and species protection status », *Biological Conservation*, Volume 227, November 2018, pp. 205-212.

[70] "It is clear that the status and trends of bird species as well as other species and habitats protected by the Directives would be significantly worse in their absence" (European Commission, *Executive summary of the fitness check of the EU Nature legislation*, 16th December 2016; SWD(2016) 473 final).

Therefore, even if Environmental Law is certainly not ambitious enough, not radical enough, not fast enough and not sufficiently enforced, it doesn't mean that it deserves to be thrown and replaced by RoN. Moreover, such replacement would lead to the same effectiveness issues.

3.2 RoN are facing the same effectiveness challenge than Environmental Law

First empirical studies show the limits of RoN's implementation, notably in Ecuador and Bolivia. For example, "Ecuador's amendments are more likely to have an impact if Ecuador implements structural and procedural changes"[71]. Indeed, granting Nature a legal personality is only one piece of the puzzle. In fact, most of it is relating to what Herbert Hart named "secondary norms"[72]. Whereas primary norms prescribe human beings to perform or abstain from certain behaviors, secondary norms ensure that new primary rules can be introduced, that we can control their implementation and that sanctions are applicable in case of transgression. In practice, primary norms doesn't work without appropriate secondary norms.

More broadly, effectiveness has not much to do with the chosen approach, whatever it is objective or subjective. Indeed, effectiveness depends on a large variety of factors, both legal and extra-legal. Therefore, if RoN supporters wants to "save the world", they would have to look at all those factors instead of focusing on a philosophical paradigm shift. For example, there a lot of legal factors that can be identified and are looking for improvement, such as, *inter alia*, norms' coherence, sanctions, corruption, impartiality of public authorities and judges, administrative inertia, regulators' capture, access to justice, judges' interpretation, execution of judicial decisions, etc.[73].

Therefore, the issue must be addressed more broadly than the RoN approach does. That's why the concept of Environmental Rule of Law is looking much more interesting, because of its complexity and, thus, its ability to include the multiplicity of the effectiveness factors.

As a conclusion, the RoN's theory needs to be putted into perspective to show that it is not "a legal revolution that could save the world". If the goal is to save the world, and if Law can be part of the solution, it might be better to improve Environmental Law from the inside, helping it to be faster, more radical and more effective to fight

[71] Mary Elizabeth Whittemore, « The Problem of Enforcing Nature's Rights under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite », Pacific Rim Law & Policy Journal, Vol. 20, n° 3, 2011, p. 691.

[72] See Herbert Lionel Adolphus Hart, *Le concept de droit*, 1961, (trad. Michel van de Kerchove), Publications des Facultés Universitaires Saint Louis, 1976, p. 105.

[73] See Julien Bétaille, *Les conditions juridiques de l'effectivité de la norme en droit public interne, illustrations en droit de l'urbanisme et en droit de l'environnement*, thèse, droit, Limoges, 2012, 765 pages.

the ecological crisis. This implies to work on a large scale of factors rather than focusing on a philosophical siren song.

By taking a step back, some might say that Environmental Law, instead of RoN, is a revolution. Indeed, "the emergence and development of environmental law represents a shifting conception of the relationship between property and environmental values ultimately removed from the utilitarian framework inherited from the eighteenth-century positivists"[74]. Therefore, Environmental Law might not need to be revolutionized by RoN, but could be, itself, a revolution. However, this remains very hard to say, as Environmental Law is still too young for us to be able to assess it properly. Legal revolutions are not always easy to identify.

[74] Sean Coyle et Karren Morrow, *The philosophical foundations of environmental law – Property, Rights and Nature*, Hart publishing, Oxford and Portland, Oregon, 2004, p. 107-108.