Transnational Environmental Law, 11:3 (2022), pp. 463–474 © The Author(s), 2022. Published by Cambridge University Press.
doi:10.1017/S2047102522000401

Symposium Foreword

This Foreword introduces a collection of articles growing out of the online conference 'Private Rights for Nature' held by the Amsterdam Centre for Transformative Private Law (ACT), University of Amsterdam (The Netherlands), 4–5 June 2020.

Private Rights of Nature

Laura Burgers*

Abstract

The Rights of Nature concept not only breaks with the anthropocentrism of existing (environmental) law; it also recognizes that nature has private interests, in addition to being of public interest. That is, whereas in classic sustainability thinking, the use of certain resources is allowed as long as public interests are not systematically/systemically harmed, rights of nature facilitate the protection of nature before planetary boundaries are transgressed. This recognition of nature as having private interests enables the framing of disagreements around 'nature' as matters of corrective justice, which renders the application of private legal doctrines more easily conceivable and arguably even necessary.

The contributions to this Symposium Collection showcase the viability of the intersection of private law and rights of nature. Firstly, it is necessary to research how existing private law will influence the effectiveness of rights of nature. Such an exercise is undertaken by Björn Hoops, who carefully assesses what rights for the German Black Forest would mean in terms of German constitutional property law. The mirror image of this approach is to explore what impact Rights of Nature will have on private law. Such an approach is taken by Alex Putzer and co-authors in their article on the transformation of land-ownership regimes after the introduction of Rights of Nature in Ecuador and Uganda. A third line of scholarship assesses the significance of Rights of Nature for private law theory: Visa Kurki proposes a new concept of legal personhood, prompting us to think through the meaning of statements like 'a river is a legal person'.

Keywords: Rights of Nature, Private law, Sustainable development, Planetary boundaries, Private law theory

* Amsterdam Centre for Transformative Private Law (ACT), Faculty of Law, University of Amsterdam (The Netherlands).
Email: l.e.burgers@uva.nl.

I am very grateful to the members of my research group ACT for supporting the 'Private Rights for Nature' Conference, as well as to all presenters, chairs and attendees for attending and making it such an exceptional experience. My special thanks go to Tawnee Hill, who helped to organize the event, to the authors of this Symposium Collection for their helpful comments and incisive articles, and to the reviewers for their valuable comments. Of course, any inaccuracy in this article remains my full responsibility.

1. INTRODUCTION

Why combine the study of Rights of Nature with that of private law? It may seem a counterintuitive exercise. After all, environmental issues clearly concern everyone, meaning they are public matters, uniquely well-suited for public law regulation. Indeed, international environmental law belongs to the realm of public international law and, in most national legal systems, environmental rules are laid down primarily in administrative law, a branch of public law. Still, Rights of Nature highlight a *private* dimension, which in turn enables the framing of disagreements around 'nature'[1] as matters of corrective justice – it renders the application of private legal doctrines more easily conceivable, as will be set out below in Section 2.

The rise of the Rights of Nature movement is perhaps the most fascinating legal development of our time.[2] After Christopher Stone's 1972 article, 'Should Trees Have Standing?', the idea that non-human entities should be recognized as rights holders seemed mostly an intellectual exercise for decennia,[3] during which authors such as Thomas Berry and Cormac Cullinan continued to advocate it.[4] In 2006, the first binding Rights of Nature legislation was adopted: a municipal ordinance in the United States (US).[5] In 2008, Ecuador integrated Rights of Nature in its constitution.[6] Bolivia followed with a national law in 2010,[7] and Aotearoa New Zealand famously recognized rights of the Te Urewera forest in 2014 and those of the Whanganui river in 2017.[8] Currently, there are about 400 Rights of Nature initiatives worldwide.[9]

---

1 The term 'nature' is problematic because it generalizes everything that is not human into one term. In the absence of a better alternative, however, I use it in this Foreword.

2 For an overview of the movement, see D.R. Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (ECW Press, 2017); L. Burgers & J. den Outer, *Compendium Rights of Nature: Case-Studies from Six Continents* (Embassy of the North Sea, 2021). For the purposes of this article, I treat Rights of Nature, earth jurisprudence, wild law, and earth-centred law as synonymous.

3 C.D. Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (Oxford University Press, 2010).

4 T. Berry, 'Legal Conditions for Earth's Survival', in M.E. Tucker (ed.), *Evening Thoughts: Reflecting on Earth as a Sacred Community* (Sierra Club Books & University of California Press, 2006), pp. 107–12; C. Cullinan, *Wild Law: A Manifesto for Earth Justice* (Chelsea Green, 2011).

5 Tamaqua Borough, Schuylkill County, PA (US), Ordinance 612 of 2006, available at: http://files.harmonywithnatureun.org/uploads/upload666.pdf.

6 Constitution of the Republic of Ecuador 2008, English translation available at: http://files.harmonywithnatureun.org/uploads/upload657.pdf. See also L.J. Kotzé & P. Villavicencio Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6(3) *Transnational Environmental Law*, pp. 401–33.

7 Lei de Derechos de la Madre Terra, Ley 071 (21 Dec. 2010), available at: http://files.harmonywithnatureun.org/uploads/upload656.pdf; see also S. Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) *Transnational Environmental Law*, pp. 113–43.

8 Te Urewera Act 2014, Public Act, 2014 No. 51, date of assent 27 July 2014, available at: https://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Public Act 2017 No. 7, date of assent 20 Mar. 2017, available at: https://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html.

9 These include proposals for rights of nature that have not yet resulted in binding legislation. 155 of the initiatives come from the US; see A. Putzer et al., 'Putting the Rights of Nature on the Map: A Quantitative Analysis of Rights of Nature Initiatives across the World' (2022) *Journal of Maps*, pp. 1–8, available at: https://doi.org/10.1080/17445647.2022.2079432.

This Symposium Collection explores the private law dimensions of the Rights of Nature, building on contributions to an online conference hosted by the Amsterdam Centre for Transformative Private Law (ACT), University of Amsterdam (The Netherlands), in June 2020. These contributions are discussed in Section 3.

Before moving on, it is necessary firstly to reflect on the distinction between private and public law. This distinction is not clear-cut; much may be said for the position that private law is a form of public law.[10] Developments such as the so-called materialization and the constitutionalization of private law have blurred the public/private divide.[11] Indeed, through the constitutionalization of private law, fundamental human rights (traditionally seen as part of constitutional or international law) increasingly influence private legal relationships.[12] In this article, therefore, constitutional property law is seen as a part of private law, while acknowledging that this domain belongs to the sphere of public law as well.[13] Indeed, the distinction is primarily of an academic nature and is therefore most visible in law schools that separate public and private law departments and curricula. This article can be read as a call to join forces: private law (theory) can be of great interest for Rights of Nature, and vice versa.

2. THE PRIVATE DIMENSION OF RIGHTS OF NATURE

Sustainable development, the desirable path for the world out of poverty, is one of the most widely accepted principles of (international) environmental law. It is a central notion to the United Nations (UN) Sustainable Development Goals (SDGs) for 2030.[14] The term was coined in the 1987 'Brundtland Report', commissioned by the UN Secretary General,[15] which defined 'sustainable development' as development which 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[16] Sustainability, in this understanding, is of public

[10] The reason for this is that private law is promulgated by the legislature. Along these lines, some understand private law as rules enacted by private parties, for instance, in contractual clauses or in sectoral standards.

[11] See, e.g., J. Habermas, 'Paradigms of Law', in M. Rosenfeld & A. Arato (eds), *Habermas on Law and Democracy* (University of California Press, 1998), pp. 13–25; D. Oliver, *Common Values and the Public-Private Divide* (Cambridge University Press, 1999).

[12] See, e.g., T. Barkhuysen & M.L.V. Emmerik, 'Constitutionalisation of Private Law: The European Convention on Human Rights Perspective', in T. Barkhuysen & S.D. Lindenbergh (eds), *Constitutionalisation of Private Law* (Martinus Nijhoff, 2006), pp. 43–57; C. Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer Law International, 2008).

[13] This is much in line with what Collins calls the 'single source structure', in which both private and public law are deemed to be built on the foundation of fundamental rights: H. Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law', in H.W. Micklitz (ed.), *Constitutionalization of European Private Law: XXII/2* (Oxford University Press, 2014), pp. 26–59, at 37.

[14] UNGA Resolution 70/1, 'Transforming Our World: The 2030 Agenda for Sustainable Development', 25 Sept. 2015, UN Doc. A/RES/70/1, available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf.

[15] World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), available at: https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.

[16] Ibid., para. 27.

https://doi.org/10.1017/S2047102522000401 Published online by Cambridge University Press

interest, and the public in question is intergenerational. Undoubtedly, the 'future generations' in the definition refer to human beings, as confirmed by the 1992 Rio Declaration on Environment and Development, stipulating that '[h]uman beings are at the centre of concerns for sustainable development'.[17]

Critics of the concept of sustainable development point out that its two components – 'ecological sustainability' (sustainable) and 'economic growth' (development) – are inherently contradictory and therefore irreconcilable.[18] Moreover, the concept is criticized for being too vague to determine what is sustainable and what is not.[19]

Such a determination can be made with the aid of the so-called planetary boundaries framework developed by the Stockholm Resilience Centre in 2009, and updated in 2015.[20] This framework identifies nine planetary boundaries within which 'humanity can continue to develop and thrive for generations to come'.[21] The planetary boundaries of climate change, biosphere integrity (that is, biodiversity loss and extinction), land-system change and biogeochemical flows (nitrogen and phosphorus) are already transgressed.[22] Moreover, a recent study shows that the boundary of 'novel entities' is also crossed – this refers to chemical pollution such as the spread of plastics in the natural environment.[23] By now, the freshwater boundary is also transgressed.[24]

The planetary boundaries framework is extremely valuable for sustainability thinking. Whereas sustainability is sometimes colloquially understood as 'no climate change', the planetary boundaries framework highlights the importance of many more environmental issues. The framework has influenced policymakers and sustainability thinkers. For example, Kate Raworth's 'doughnut economics' concept references the planetary boundaries framework.[25] Raworth's doughnut is a model for a sustainable economy, in which social needs of humans are fulfilled (the 'social foundation'), while planetary boundaries are respected (the 'ecological ceiling'). Drawing these

---

[17] Rio Declaration, adopted by the UN Conference on Environment and Development, Rio de Janeiro (Brazil), 3–14 June 1992, UN Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I, Principle 1, available at: https://www.un.org/esa/dsd/agenda21/Agenda%2021.pdf.

[18] For such criticism on the UN SDGs, see J. Hickel, 'The Contradiction of the Sustainable Development Goals: Growth versus Ecology on a Finite Planet' (2019) 27(5) *Sustainable Development*, pp. 873–84. For a more general overview of criticism, see I. Lippert, 'An Introduction to the Criticism on Sustainable Development', Brandenburg University of Technology Cottbus (Germany), 10 Nov. 2004, available at: https://www.academia.edu/1064093/An_Introduction_to_the_Criticism_on_Sustainable_Development.

[19] See, e.g., K. Bosselmann, 'Losing the Forest for the Trees: Environmental Reductionism in the Law' (2010) 2(8) *Sustainability*, pp. 2424–48.

[20] W. Steffen et al., 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) 347 (6223) *Science*, p. 1259855.

[21] Available at: https://www.stockholmresilience.org/research/planetary-boundaries.html.

[22] Steffen et al., n. 20 above.

[23] L. Persson et al., 'Outside the Safe Operating Space of the Planetary Boundary for Novel Entities' (2022) 56(3) *Environmental Science & Technology*, pp. 1510–21.

[24] L. Wang-Erlandsson et al., 'A Planetary Boundary for Green Water' (2022) 3(6) *Nature Reviews: Earth & Environment*, pp. 380–92.

[25] K. Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (Chelsea Green, 2017).

https://doi.org/10.1017/S2047102522000401 Published online by Cambridge University Press

two considerations as circles, a doughnut-shaped space occurs in which the economy should unfold.[26]

Both the planetary boundaries framework and the doughnut economics model are anthropocentric. The planetary boundaries determine a space for 'humanity' to thrive, and human well-being is the centre of the doughnut model. This has both practical and symbolic consequences. Practically speaking, if the planetary boundaries had not taken human but all life on earth as its point of departure, the boundaries would probably have been set more tightly, for example, for climate change, as coral reefs are already dying with 1°C of warming, rather than 1.5–2°C. Symbolically, it is noteworthy that non-human entities are excluded from the 'social foundation' of the doughnut. After all, many non-human animals are very social beings too, and their needs merit protection: access to food, water, health, and education by someone of their own species, and, according to some scholars, even political voice.[27]

Rights of nature are often advocated for their potential to move beyond the anthropocentric focus,[28] although this has also faced scepticism.[29] Tănăsescu, for instance, argues that Rights of Nature are best understood as a way to divide power differently in existing human relations.[30] It is clear, however, that much of the existing Rights of Nature legislation has at least the normative aspiration of non-anthropocentrism, similar to how human rights carry the normative aspiration of universality even when universal respect for them has not (yet) become a reality.

There is another, strongly related and important difference between existing sustainability models and the Rights of Nature approach: that is, an understanding of 'nature' as being only of public interest or as also having private interests. Similar to the principle of sustainable development, the planetary boundaries framework approaches nature as an issue of public interest: parts of nature are of importance to all humans because of their contributions to the current ecosystem on which humans depend. Hence, for policymakers, it is easy to read the planetary boundaries framework as suggesting that global warming up to 1.5–2°C is acceptable, or that biodiversity loss to a certain extent is acceptable, as long as certain boundaries are not transgressed.

Such systemic thinking is important in current times, with systemic crises like biodiversity loss and climate change threatening humans.[31] However, by measuring

[26] See K. Raworth, 'The Doughnut of Social and Planetary Boundaries', 2017, available at: https://www.kateraworth.com/doughnut.

[27] S. Donaldson & W. Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press, 2011); E. Meijer, *When Animals Speak: Toward an Interspecies Democracy* (New York University Press, 2019).

[28] See, e.g., the scholarly 'Oslo Manifesto for Ecological Law and Governance', Ecological Law and Governance Association, June 2016, paras 3 and 9, available at: https://elgaworld.org/oslo-manifesto.

[29] See, e.g., S. Jolly, '"Rights of Nature" Is a Faux Rights Revolution Entangled in Anthropocentrism', *The Wire Science*, 21 July 2022, available at: https://science.thewire.in/environment/rights-of-nature-anthropocentrism.

[30] M. Tănăsescu, *Understanding the Rights of Nature: A Critical Introduction* (Transcript Verlag, 2022), pp. 16–7.

[31] What is more, I believe that awareness of ecology as a system can lead to increased environmental protection in climate change litigation where future generations are being represented by environmentalist claimants; see L. Burgers, 'The Minimum Principle: Future Generations in the Climate Case against

https://doi.org/10.1017/S2047102522000401 Published online by Cambridge University Press

nature's value in terms of how much it contributes to the wider system or good, sustainability thinking and environmental regulation more broadly[32] suggest an understanding of nature as being primarily of human public interest.

This understanding is complemented by Rights of Nature logic: even before deforestation becomes a global cause of alarm, the rights of the Te Urewera forest in Aotearoa New Zealand should prevent the felling of its trees. This forest is not only valued because it contributes to the ecological system as a whole, but also because it has a private interest to remain in existence. Surely, the forest has deep, public value for its inhabitants, the Tūhoe people, who were repressed for a century and a half by a (neo-)colonial regime, and the value of the forest to those people is also being recognized in the Act. Yet, the forest also has private interests and rights *per se*, as evidenced by the wording of the Act: 'Te Urewera has an identity in and of itself, inspiring people to commit to its care'.[33] In other words, people are inspired to care for Te Urewera because of its own identity, which is independent of the forest's contribution to the public interest of a stable global ecosystem. It should be noted that the term 'private interest' is very Western, in the sense that the Indigenous philosophy of the Tūhoe is characterized by its holism. Hence, my reading of the Act – which lays down in law many of the Tūhoe principles – is one of effects on Western understanding of nature, rather than on the meaning of Indigenous philosophy.[34]

A non-anthropocentric approach does not necessarily entail the recognition of (certain areas of) nature as having private interests. Although the two concepts are strongly related, it is possible to conceptualize sustainability in a non-anthropocentric but still systemic way.[35] Indeed, if not 'humanity' but 'life on earth' were supposed to thrive within planetary boundaries, sustainability as the goal of environmental regulation would still be a public goal, but with an expanded scope of both a human and non-human public rather than merely an (intergenerational) human public. On the other hand, even Rights of Nature legislation formulated in a rather general way is applied to advance environmental interests beyond a public interest: for instance, the Ecuadorian constitutional provisions stipulating rights of 'Mother Earth' were applied

Royal Dutch Shell', *Völkerrechtblog*, 19 Jan. 2022, available at: https://voelkerrechtsblog.org/the-minimum-principle.

[32] Even in environmental law that is not focused on sustainable development, this understanding is visible. For example, the 1946 International Convention for the Regulation of Whaling (ICRW) aims to protect whales for the sake of 'orderly development of the whaling industry', according to its Preamble (ICRW, Washington, DC (US), 2 Dec. 1946, in force 10 Nov. 1948, available at: https://iwc.int/convention), and the 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS) stipulates in its Preamble that wild animals should be protected 'for the good of mankind' (CMS, Bonn (Germany), 23 June 1979, in force 1 Nov. 1983, available at: http://www.cms.int/en/convention-text).

[33] Te Urewera Act 2014, n. 8 above, Art. 3(3).

[34] Indeed, Tănăsescu warns that we should not overstate the connection between Rights of Nature and Indigenous philosophies: M. Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies' (2020) 9(3) *Transnational Environmental Law*, pp. 429–53.

[35] For examples of sustainability legislation with this 'strong sustainability' focus, see K. Bosselmann, 'Strong and Weak Sustainable Development: Making Differences in the Design of Law' (2006) 13(1) *South African Journal of Environmental Law and Policy*, pp. 39–49.

https://doi.org/10.1017/S2047102522000401 Published online by Cambridge University Press

by the Constitutional Court to recognize rights of a specific forest, the Los Cedros Forest, leading to the revocation of two mining permits.[36]

Interestingly, rights of animals have an even less systemic character than rights of nature. Scholarship on animal rights is concerned mostly with individual animals: because the individual animal is a sentient being, it merits recognition as a holder of, inter alia, the right to life and freedom from suffering.[37] Animal rights activists litigate on behalf of individual animals, such as the elephant Happy.[38] Perhaps this is a reason why animal rights have been less successful than rights of nature in terms of the quantity of binding legislation adopted globally: rights of nature, because of their more systemic character, allow humans more freedoms than rights of animals would if they were recognized.[39] For example, rights of nature do not necessarily prohibit meat consumption,[40] whereas serious consideration of animal rights would.

Thus, in developing Rights of Nature legislation, 'nature' is seen increasingly as not only being of public interest, but also as having private interests of its own. This enables the application of private law to 'nature'. After all, private legal disputes typically centre around corrective justice between two parties:[41] one party has a (Hohfeldian claim-) right and the other a *correlating* duty, and the dispute can be resolved by taking into account the relationship between the two parties only. Whereas environmental concerns of a public nature raise eyebrows when they are resolved in private legal disputes (think of the controversy around climate change litigation through private law[42]), rights of nature that recognize the *private* interests of nature allow us to see certain conflicts around nature in terms of corrective justice, which can be resolved through private law and can rely on private enforcement by the representatives of nature.

---

[36] Corte Constitutional de Ecuador, 10 Nov. 2021, Caso Nro. 1149-19-JP/21, *Revisión de Sentencia de Acción de Protección Bosque Protector Los Cedros*, available at: http://files.harmonywithnatureun.org/uploads/upload1164.pdf.

[37] See, e.g., Donaldson & Kymlicka, n. 27 above.

[38] For the legal documents in this case see Nonhumanrights Project, 'First Elephant to Pass Mirror Self-Recognition Test; Held Alone at the Bronx Zoo', available at: https://www.nonhumanrights.org/client-happy.

[39] Another reason, arguably, is that the rights of nature correspond better to non-Western, Indigenous or chthonic worldviews.

[40] On the contrary, because of their intricate relationship with the rights of Indigenous or chthonic peoples, rights of nature may secure these peoples' hunting and fishing practices; see, e.g., L. Etchart, 'Indigenous Peoples and the Rights of Nature', in T. Gatehouse (ed.), *Voices of Latin America: Social Movements and the New Activism* (New York University Press, 2019), pp. 97–120, at 104. At the same time, analyzing the Aotearoa New Zealand Act on the Te Urewera Act, Coombes is critical of the conflation of human Indigenous interests and the interests of the forest, inter alia, because it could lock Indigenous peoples in a future of non-development; see B. Coombes, 'Nature's Rights as Indigenous Rights? Mis/recognition through Personhood for Te Urewera' (2020) 1–2 *Espace Populations Sociétés*.

[41] See, e.g., E.J. Weinrib, *The Idea of Private Law* (Oxford University Press, 2012); T. Nuninga, *Recht, Plicht, Remedie, Of: De Belofte van de Norm* (Wolters Kluwer, 2022).

[42] For an overview of this controversy, see L. Burgers, 'Justitia, the People's Power and Mother Earth: Democratic Legitimacy of Judicial Law-Making in European Private Law Cases on Climate Change' (PhD thesis, University of Amsterdam (The Netherlands), Nov. 2020), available at: https://dare.uva.nl/search?identifier=0e6437b7-399d-483a-9fc1-b18ca926fdb5.

3. DIFFERENT ROUTES IN PRIVATE LAW AND RIGHTS OF NATURE STUDIES

The three articles in this Symposium Collection each set out a different approach for combining the study of Rights of Nature and private law. The first approach explores how existing private law has an impact on the effectiveness of rights of nature when they are introduced in a certain jurisdiction. In 'What If the Black Forest Owned Itself? A Constitutional Property Law Perspective on Rights of Nature',[43] Björn Hoops assesses how existing German constitutional property doctrines could be applied to the German Black Forest in the hypothetical case that it would be declared to no longer be someone else's property but to own itself, like the river in Aotearoa New Zealand.[44]

Hoops' detailed evaluation shows how ingrained anthropocentrism is in the German jurisdiction. Recognizing that the Black Forest has rights would take away a considerable amount of that anthropocentrism and would be likely to ameliorate environmental protection. After all, as Hoops points out, when a human being owns a piece of land, they can do as they please unless certain behaviour is prohibited. However, when a natural entity owns itself, no one can touch it unless the representatives of the natural entity or the legislature explicitly authorize this.[45] Moreover, these representatives can challenge the legislative authorization under constitutional property law. Also, being recognized as a legal person owning itself would allow the forest to start constitutional property proceedings, giving it access to a whole new range of remedies.[46] In this context, Hoops signals that the remedy of financial compensation would not be suitable for a forest.[47]

Yet not all anthropocentrism would be taken away as a result of the proportionality tests included in German judicial doctrines around expropriation and constitutional property protection. In these tests the public interest has to be balanced against that of the property owner, and this public interest is traditionally interpreted in a way to accommodate the human economy.[48] In other words, even if the Black Forest were to be recognized as (its own) private property owner and thus as having private interests, enforcement of its rights could still depend on its economic value to a human public. Indeed, the environmental provision of the German Constitution (Article 20a) has the human intergenerational public as its beneficiary, not nature for its own sake.[49]

---

[43] B. Hoops, 'What If the Black Forest Owned Itself? A Constitutional Property Law Perspective on Rights of Nature' (2022) 11(3) *Transnational Environmental Law*, pp. 475–500. Of course, one can debate to what extent constitutional property law qualifies as 'doctrinal private law'; see also the remarks on the definition of private law in the Introduction above.

[44] Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, n. 8 above, Art. 12.

[45] Hoops, n. 43 above, pp. 483–4.

[46] Ibid., pp. 495 et seq.

[47] Ibid., p. 497. For these reasons, scholarship on restorative justice calls for rethinking remedies for nature: H. Wessels, 'Nature's Rights and Developing Remedies: Enabling Substantive and Restorative Relief in Civil Litigation', in B. Pali, M. Forsyth & F. Tepper (eds), *The Palgrave Handbook of Environmental Restorative Justice* (Springer, 2022).

[48] Hoops, n. 43 above, p. 491.

[49] Ibid., p. 489.

https://doi.org/10.1017/S2047102522000401 Published online by Cambridge University Press

The second approach represents the other side of this coin: instead of exploring the implications of private law for the Rights of Nature, it investigates what impact the introduction of rights of nature has on private law. In their article 'The Rights of Nature as a Bridge between Land-Ownership Regimes: The Potential of Institutionalized Interplay in Post-Colonial Societies',[50] Alex Putzer, Tineke Lambooy, Ignace Breemer and Aafje Rietveld explore how Rights of Nature affect land-ownership regimes in Ecuador and Uganda, respectively, using 'inter-legality' as their theoretical framework. Their article is key in substantiating the potential of the Rights of Nature to protect the environment against even private property rights of human landowners, and thus in defending Rights of Nature against all too critical voices.[51]

Inter-legality, the authors explain, is a way to assess what normative spheres have an impact on a certain domain while being agnostic on the hierarchy between these spheres.[52] The authors identify five normative spheres that affect the two post-colonial societies they study: a post-colonial political and legal system, chthonic legal traditions, civil society organizations, international (soft) law, as well as local and multinational corporations.[53] Whereas a legal pluralist analysis might find that these spheres are incompatible, inter-legality helps to bridge them; so do the Rights of Nature, the authors argue. The impact of Rights of Nature on land-ownership regimes is one way of bridging these various normative spheres.

The third approach reflects on private law theory and Rights of Nature. Visa Kurki, in 'Can Nature Hold Rights? It's Not As Easy As You Think', discusses his theory of legal personhood in the context of the Rights of Nature.[54] Legal personhood is a central concept in private law. For example, the Dutch and Italian civil codes enumerate who can be legal persons in their respective jurisdictions,[55] and the French civil code sharply distinguishes between the law of persons (*personnes*) and the law of things (*biens*),[56] similarly reflected in the German civil code.[57] The distinction between persons and things is challenged by Rights of Nature because, at least in the most common understanding of legal personhood, having legal rights (or obligations) implies having legal personhood. Hence, when the rights of a certain land area are recognized, it is no longer qualified as an immovable object/thing, but as a legal person.

[50] A. Putzer, T. Lambooy, I. Breemer & A. Rietveld, 'The Rights of Nature as a Bridge between Land-Ownership Regimes: The Potential of Institutionalized Interplay in Post-Colonial Societies' (2022) 11(3) *Transnational Environmental Law*, pp. 501–23.

[51] The authors explicitly contrast their own views with those of Jan Darpö: ibid., p. 502.

[52] Ibid., p. 506.

[53] Ibid., p. 519.

[54] V.A.J. Kurki, 'Can Nature Hold Rights? It's Not as Easy as You Think' (2022) 11(3) *Transnational Environmental Law*, pp. 525–52.

[55] See Dutch Burgerlijk Wetboek, Arts 2:1–4, available at: https://wetten.overheid.nl/BWBR0003045/2022-01-01; and Italian Codice Civile, Arts 11–12, available at: https://www.ipsoa.it/codici/cc/l1/t2.

[56] See respectively Livre Ier (Book I) and Livre II (Book II) of the French Code Civil, available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721/2022-08-07.

[57] See Buch 1 (Book 1) of the German Burgerliches Gesetzbuch addressing *Personen* (persons), and Buch 3 (Book 3) addressing *Sachen* (goods/things), available at: https://www.gesetze-im-internet.de/bgb.

https://doi.org/10.1017/S2047102522000401 Published online by Cambridge University Press

Kurki's sophisticated theory of legal personhood has challenged the latter understanding of legal personhood for some time.[58] In contrast with the binary position 'either one is a legal person, or one is not', Kurki presents legal personhood as a bundle of several incidents that can gradually add up to legal personhood. These incidents can be passive (for example, fundamental protection of life and bodily integrity), but they can also be active (such as the capacity to go to court to protect the other incidents).[59] One of the strengths of this theory is that it allows us to conceptualize non-human animals as legal persons, even if their rights are not explicitly recognized in legislation. That is, in Kurki's theory, they have only the passive incidents of legal personhood.

In this Symposium Collection, Kurki applies his theory to the Rights of Nature. For example, whereas the law of Aotearoa New Zealand states that the Te Urewera forest and the Whanganui river are 'legal persons',[60] Kurki challenges this classification, as his theory is built on the normative assumption that only sentient beings can be legal persons, and that plants and rivers do not have sentience.[61] He does think that humans can create a legal platform and call it the 'Whanganui river', but not that the river *really* is a legal person. Surely, the river cannot have the active incidents of legal personhood, as it will always be the river's representatives rather than the river itself who will instigate legal proceedings on its behalf.[62] The river cannot possess the passive incidents either because, according to Kurki (who builds on others), sentience is a necessary condition to be wronged.[63]

4. FURTHER AVENUES FOR RESEARCH

These three articles by no means exhaust the possible studies into the intersection between Rights of Nature and private law. Indeed, property and land-ownership could and have been included in Rights of Nature scholarship.[64] Many more studies need to be conducted, and the articles in this Symposium Collection provide worthwhile avenues for further research. As for the first approach – to investigate how existing private law will have an impact on the introduction of Rights of Nature in various jurisdictions – one could think of, for example, carrying out legal comparative studies on the strategic advantages of tort litigation based on the Rights of Nature versus tort litigation based on other environmental laws and human environmental rights, similar to Hoops' study into property law. More generally speaking, there are questions on personhood: for those jurisdictions that distinguish between private and public legal

[58] V.A. Kurki, *A Theory of Legal Personhood* (Oxford University Press, 2019).

[59] See Kurki, n. 54 above, pp. 542–5.

[60] See respectively Te Urewera Act 2014, n. 8 above, s. 11; Te Awa Tupua Act 2017, n. 8 above, s. 14.

[61] Kurki, n. 54 above, p. 531.

[62] Ibid, p. 546.

[63] Ibid, pp. 548–50.

[64] See, e.g., K. Sanders, '"Beyond Human Ownership"? Property, Power and Legal Personality for Nature in Aotearoa New Zealand' (2018) 30(2) *Journal of Environmental Law*, pp. 207–34; J. Bétaille, 'Rights of Nature: Why it Might Not Save the Entire World' (2019) 16(1) *Journal for European Environmental & Planning Law*, pp. 35–64.

https://doi.org/10.1017/S2047102522000401 Published online by Cambridge University Press

persons[65] to which of these two categories should nature belong? Also, how does classification as one of the two affect how much ecological protection is to be expected from recognition as a legal person?

The combined studies of contract law and rights of nature merit more academic attention as well. As Kurki points out, a river's representatives may conclude contracts with a third party on behalf of the river, for example, with a cleaning company.[66] This leads to a whole range of interesting questions, for example, in line with the second approach with which the impact of Rights of Nature on private law is assessed: should a hierarchy of remedies in the event of breach of contract – think of compensation versus specific performance – be reconsidered when one of the parties is a representative of nature? How does one party representing nature affect contractual interpretation doctrines? Should utterances of the representatives of nature in the phase of negotiating the contract be interpreted in an 'ecological' way? What about contractual duties of care?

Also, representatives of nature can employ foresters, for example, which could make labour law applicable. Is this relationship between the representatives of the forest and the forester comparable with existing work relations or do doctrines from, for example, medical contract law also apply? After all, the forest would hire a forester to maintain its health. Labour law is put into place to correct the power imbalance between employer (powerful) and employee (less powerful), whereas medical law is intended to balance the power of doctor (powerful) and patient (less powerful). So, who is the weaker party that merits protection in the scenario where the entity of nature is hiring a 'tree doctor'?

As for the third, more theoretical approach, there are also an abundance of issues to consider. Indeed, is sentience a necessary condition for the ability to be wronged? In tort or contractual proceedings is compensation at all conceivable as a remedy for cutting away part of an ancient forest – what is the essence of 'compensation' and what does that, in turn, mean for the 'idea of private law' that is presumed to lie in corrective justice?[67] Can humans meaningfully represent nature, if nature did not authorize these humans to speak on its behalf?[68] How do the ideas of the French philosopher Bruno Latour on a 'parliament of things'[69] relate to the Rights of Nature?[70]

The above questions surely are worthy of serious consideration. These doctrinal questions can be informative for Rights of Nature advocates because they shine light

---

65 Such as, e.g., the French and Italian legal systems.

66 Kurki, n. 54 above, p. 546.

67 See Weinrib, n. 41 above.

68 For a comparable problem with regard to future generations, see L. Burgers, 'Representing Future Generations through European Private Law Climate Change Litigation', in C. Mak & B. Kas (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Bloomsbury, 2023 forthcoming). For a theory that advances the idea that authorization by the represented is not a necessary condition for legitimate representation, see M. Saward, *The Representative Claim* (Oxford University Press, 2010).

69 See B. Latour, *We Have Never Been Modern* (Harvard University Press, 2012); B. Latour, *Facing Gaia: Eight Lectures on the New Climatic Regime* (Wiley, 2017).

70 This is a question that is investigated by the so-called Embassy of the North Sea, a collective of artists, philosophers, scientists, and policymakers in, e.g., L. Burgers, E. Meijer & E. Nowak, *De stem van de Noordzee: Een pleidooi voor vloeibaar denken* (Boom, 2020).

https://doi.org/10.1017/S2047102522000401 Published online by Cambridge University Press

on how much environmental protection is to be expected from rights of nature being laid down in law. These results can then inform more theoretical scholarship as test cases as well as a further basis for more theory. Also, to the extent that some of the questions suggested above come across as offensive to some,[71] it is useful to discuss exactly that, so that possibly destructive and (post-)colonial legal paradigms can be further challenged.

[71] Indeed, one of the speakers at the Private Rights for Nature Conference, Christopher Whitehead, noted that now that Western jurists have started to research the private rights of nature as arising in Indigenous legal traditions, they (unfortunately) risk offending these traditions, despite their good faith, and should do their best to minimize the risk. I have done my best in this contribution, and to those who nevertheless are offended, I apologize and want to say that I am eager to learn how not to do this in the future.

https://doi.org/10.1017/S2047102522000401 Published online by Cambridge University Press