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STANDING WITHOUT LEGAL PERSONALITY: THE PROCEDURAL DIMENSION OF RIGHTS OF NATURE IN THE EUROPEAN UNION

Abstract

In the face of the deepening environmental crisis and the increasing threats to nature, the search for new legal mechanisms aimed at strengthening environmental protection within the legal order has intensified. One of the proposed approaches is to grant legal personality to elements of nature. Although the legal framework of the European Union does not expressly confer legal or procedural capacity upon nature, there exist theoretical grounds that allow for considering nature as a rights-bearing subject. This article explores the concept that rests upon the correlation between rights and duties, which constitutes the foundation of legal subjectivity. The main purpose is to examine the procedural dimension of obligations towards nature within European Union law by identifying the actors and legal instruments that enable action in the interest of nature. The analysis encompasses the means available both at the national and EU levels. Emphasis is placed on the role of non-governmental organisations active in the field of environmental protection. Furthermore, special consideration is also given to the existing limitations faced by members of the public in securing access to justice in environmental matters.

KEYWORDS

rights of nature, legal subjectivity, environmental protection law, EU law, access to justice

SŁOWA KLUCZOWE

prawa natury, podmiotowość prawna, prawo ochrony środowiska, prawo Unii Europejskiej, dostęp do wymiaru sprawiedliwości

I. INTRODUCTION

The idea of the rights of nature is gaining increasing attention worldwide. While in South American States one may observe processes of constitutionalising the fundamental rights of elements of nature,¹ in European countries the concept remains relatively novel. At present, apart from the example of the Spanish Mar Menor lagoon,² there is no significant successful instance of conferring legal personality on a natural object in Europe at the national level. Similarly, the European Union (EU) does not recognise the legal personality of natural entities. Nevertheless, nature plays an essential role within the EU legal system.³

The purpose of this article is to examine whether there are entities capable of representing the interests of nature in a manner that allows one to conclude that the construction of the rights of nature is embedded in the legal system of the EU, despite the absence of formal recognition of legal personality. To this end, section 2 outlines the concept of rights of nature without legal personality, based on Hohfeld's framework. Section 3 identifies the actors engaged in the enforcement of nature's potential rights. Section 4 analyses the role of the European Commission (EC). Sections 5 and 6 discuss the position of members of the public and their access to justice at both national and EU levels. Finally, section 7 explores the role of preliminary references in the enforcement of norms with the participation of members of the public.

¹ See María Valeria Berros, 'Defending Rivers: Vilcabamba in the South of Ecuador' (2017) 6 *RCC Perspectives* 37.

² Ley 19/2022 de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca (BOE 2022 237).

³ See Maria Lee, *EU Environmental Law, Governance and Decision-Making* (2nd edn, Hart Publishing 2014) 1–27; Ludwig Krämer and Christopher Badger, *Krämer's EU Environmental Law* (9th edn, Hart Publishing 2024).

II. THE RIGHTS OF NATURE AS A CORRELATION OF DUTY AND RIGHT

The absence of formal articulation of a legal norm does not preclude recognition of an unexpressed subjective right.⁴ Proper reconstruction of entitlements requires consideration of the system as a whole or in its organised parts. According to doctrinal definitions, two features characterise a subjective right.⁵ First, a substantive norm prescribes specific behaviour in a given situation. Second, procedural norms should guarantee enforcement when the prescribed obligations are breached.

It is commonly held that if the legal system does not expressly confer legal personality on living or non-living elements of nature, they may be only objects, not subjects, of legal relations.⁶ Nevertheless, some scholars argue for recognising correlations of rights and duties between humans and elements of nature, functionally approximating a classical legal relation.⁷

An example of a comprehensive analysis of the structure of legal relations, serving as a key reference point for the legal subjectivity of natural objects, animals, and artificial intelligence, is the work of Wesley N Hohfeld, focused on the classification of broadly conceived rights.⁸ He observed that when referring to ‘rights’ legal science denotes diverse normative relations, which can be grouped into four pairs of correlatives: (i) right – duty, (ii) privilege – no-right, (iii) power – liability, (iv) immunity – disability.⁹

The existence of one element necessarily entails the correlation of the other. The relations described by Hohfeld in the ‘human-nature’ context were vividly

⁴ Krystyna Urbańska, *Prawo podmiotowe do dobrego środowiska w prawie międzynarodowym i polskim* (Ars boni et aequi 2015) 263.

⁵ See Aleksander Wolter, Jerzy Ignatowicz and Krzysztof Stefaniuk, *Prawo cywilne. Zarys części ogólnej* (4th edn, Wolters Kluwer 2020) 155; Małgorzata Pyziak-Szafnicka, ‘Prawo podmiotowe’ in Marek Safjan (ed), *System prawa prywatnego. Prawo cywilne – część ogólna* (Instytut Nauk Prawnych PAN 2007); Sławomira Wronkowska, *Analiza pojęcia prawa podmiotowego* (Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza 1973) 54.

⁶ See Ewa Łętowska, ‘Dwa cywilnoprawne aspekty praw zwierząt: dereifikacja i personifikacja’ in Adam Szpunar and others (eds), *Studia z prawa prywatnego: księga pamiątkowa ku czci Profesora Biruty Lewaszkiwicz-Petrykowskiej* (Wydawnictwo Uniwersytetu Łódzkiego 1997) 71–92.

⁷ Yaffa Epstein and Hendrik Schoukens, ‘A positivist approach to rights of nature in the European Union’ (2021) 12 *Journal of Human Rights and the Environment* 205.

⁸ Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *YLJ* 16. See also Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019) 141.

⁹ Cf Wronkowska (n 5) 50.

illustrated by Yaffa Epstein and Hendrik Schoukens.¹⁰ If a human is under a duty to refrain from polluting a river, the river holds a corresponding right to remain unpolluted.¹¹ An example of privilege would be the change of a river's course, while a power may be seen in the river's capacity to modify property rights of adjacent land (e.g., through lateral erosion). Immunity, in turn, may be illustrated by the impossibility of altering the legal status of the river by another subject's unilateral act. In legal texts, such correlations are rarely articulated explicitly. Instead, prohibitions, obligations, or entitlements of only one entity are prescribed. The detailed duties of the correlative party are then established through interpretation, which enables a comprehensive characterisation of the legal relation.

The classical concept of rights is a technical-legal construct useful for detailed inquiries within specific branches of law, yet its strict application may prove inadequate for rethinking the legal status of nature. The Hohfeldian framework creates theoretical grounds for constructing rights of animate and inanimate elements of nature without explicit legislative recognition of legal personality or standing. The existence of a right of nature requires the cumulative presence of two elements: (i) a material one – securing benefits for the natural entity, and (ii) a formal one – procedural instruments ensuring protection of the legally relevant interest. Where both conditions are met, such a legal relation may be qualified as functional legal subjectivity or *sui generis* subjectivity.

II. ACTORS INVOLVED IN THE ENFORCEMENT OF THE RIGHTS OF NATURE

Natural objects have no expressly established legal personality in EU law and, therefore, are not capable of representing their interests directly. Nevertheless, even certain entities with granted legal subjectivity can pursue their claims only through a representative, such as a legal guardian or governing body. Although the legal construct in question is not applied to natural objects, legal proceedings involve entities that carry out analogous functions and enforce the interests of nature. The enforcement in the EU can be conducted both on the national and the European level, which are based on the involvement of various entities, that can be divided into three categories – judicial authorities, executive authorities and members of the public.

¹⁰ Epstein, Schoukens (n 7) 210.

¹¹ *Ibid.*

Owing to their competence to issue adjudicatory rulings, national courts or the Court of Justice of the European Union (CJEU) play the primary role in the enforcement of substantive legal norms, but due to impartiality they cannot be considered as representative of any interest other than the administration of justice and, therefore, do not perform a function of a representative of elements of nature.

Executive authorities are a crucial element of the national and EU law enforcement. It might appear that, in seeking the enforcement of EU environmental norms, national authorities act in the interest of natural objects. Such a conclusion, however, is incorrect, as most EU environmental obligations predominantly derive from directives¹² and are incumbent upon the Member States. When a national authority undertakes measures aimed at securing the implementation of substantive norms, it acts in the interest of the obligated Member State, rather than in the interest of nature itself. Within this correlation of rights and obligations, the interest of nature is realised only indirectly, which precludes national authorities from being regarded as functional representatives of elements of nature. An institution of particular importance is the EC, which safeguards the enforcement of EU law. Its independence within the EU legal order, in conjunction with its special competences, enables it to undertake measures directed specifically at the implementation of substantive environmental law and at giving effect to the interests of nature.

Among non-institutional actors, a key role is played by members of society – non-governmental organisations (NGOs) and individual citizens. Of the entities mentioned above, they are often the most strongly interested in ensuring that the Member State fulfils its obligations ‘towards’ the natural environment. Their involvement in the process of implementing environmental protection norms is based on public participation and access to justice, the scope of which determines the actual possibility of influencing the realisation of environmental rights.

III. THE EUROPEAN COMMISSION

Under Article 17 of the Treaty on European Union, the European Commission ensures the application of the Treaties and supervises compliance with Union law, including environmental provisions.¹³ The principal legal instrument through which the EC discharges its centralised, systemic role is the action for infringe-

¹² Krämer, Badger (n 3) 52.

¹³ Consolidated version of the Treaty on European Union [2016] OJ C 202/1.

ment of Treaty obligations by a Member State. The procedure under Article 258 of the Treaty on the Functioning of the European Union (TFEU)¹⁴ extends to obligations stemming not only from primary law, but also from secondary Union law and empowers the EC to bring an action before the CJEU to ensure compliance by Member States with their obligations. The existing case-law shows that an infringement action may serve as an effective instrument for ensuring the implementation of EU law safeguarding the interests of nature.

In the *Commission v Poland* case,¹⁵ the Commission alleged infringements of the Habitats Directive¹⁶ and the Birds Directive¹⁷ resulting from the failure to adopt adequate forest management measures with the Białowieża Forest Natura 2000 site. The CJEU held that Poland had not met the conditions justifying a derogation from the protection regime and that the measures adopted posed a risk of ‘lasting harm to the ecological characteristics of that site’.¹⁸ The obligations arising from the directives to ensure measures necessary for the protection of habitats and species were assessed separately. However, the judgment emphasised that ecosystem integrity and the interdependence of its components must be equally preserved.¹⁹ The CJEU held that the Member State has failed to fulfil its obligations concerning both the habitat ecosystem and individual species of fauna and flora.²⁰

The *Commission v Poland* case is an example of the simultaneous presence of both the substantive and procedural elements of the functional legal subjectivity of nature. Firstly, the Court examined in detail the obligations stemming from directives. It underlined the necessity of preserving the integrity of the habitat ecosystem, as well as the specific obligations owed in respect of protected species. These findings are sufficient to satisfy the substantive element of functional subjectivity. Secondly, from a procedural perspective, the EC initiating the proceedings cannot be considered as pursuing its own interests, since the CJEU judgment had no direct effect on its legal or factual position. The infringement procedure serves to safeguard the public interest and to ensure the protection of elements of the natural environment. In this case, by exercising its powers, the EC functionally assumed the role of representative of the habitat ecosystem and of

¹⁴ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

¹⁵ CJEU Case C-441/17 *Commission v Poland* (Białowieża Forest) ECLI:EU:C:2018:255.

¹⁶ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206/7.

¹⁷ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2009] OJ L 20/7.

¹⁸ Białowieża Forest (n 15) para 164.

¹⁹ *Ibid* paras 89, 108, 115–121.

²⁰ *Ibid* para 268.

species of fauna and flora, thereby meeting the procedural element of functional legal subjectivity.²¹

Nevertheless, it is difficult to unequivocally conclude that the EC fulfils the function of a representative of the interests of nature within the EU legal system. The principal difficulty lies in the broad scope of discretion enjoyed by the EC as regards the decision to initiate infringement proceedings, coupled with the absence of any remedy if the EC decides not to act.²² This weakens the role of the mechanism under Article 258 TFEU, particularly in circumstances where information on a potential infringement originates from members of the public. While the EC possesses instruments enabling it to enforce obligations relating to nature, its systemic role goes far beyond environmental protection. The lack of specialisation of the EC implies that an action under Article 258 TFEU may be regarded as an instrument for the enforcement of the rights of nature only under narrowly defined conditions. Given the complexity of factual situations, it may turn out that, in a particular case, environmental protection comes into conflict with another fundamental value of the EU law, with it being impossible to achieve both simultaneously. In such a situation, the EC would face the necessity of balancing the competing interests and deciding which of them should be prioritised.

IV. MEMBERS OF THE PUBLIC BEFORE NATIONAL COURTS

Experience shows that public authorities do not always provide a sufficient guarantee of the full implementation of the Member State's obligations. Both individuals and NGOs should be granted access to adequate legal instruments enabling participation in matters of public interest, in particular through access to justice in environmental matters. Both the EU and the Member States are parties to the Aarhus Convention (AC)²³ which aims to enhance public involvement in

²¹ Similar conclusions may be drawn from the *Commission v Austria* case (CJEU Case C-346/14 ECLI:EU:C:2016:322), which concerned the misapplication of the Water Framework Directive (Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L 327/1) in the context of the construction of a power plant on the Schwarze Sulm river. The CJEU findings were formulated in a manner analogous to those in the *Commission v Poland* case. It appears that the absence of a finding of infringement in this case resulted from the improper formulation of the complaints by the Commission (see para 82).

²² See CJEU Case C-431/92 *Commission v Germany* ECLI:EU:C:1995:260, para 22.

²³ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) [2005] OJ L 124/4.

environmental matters based on three pillars: (i) access to information, (ii) public participation in decision-making, and (iii) access to justice.

The Aarhus Convention establishes both a general right of access to justice²⁴ and specific rights applicable in cases of violations of the right of access to information²⁵ and the right to public participation in decision-making.²⁶ The latter are guaranteed only to a subset of society possessing the status of ‘the public concerned’,²⁷ whereas access to justice under Article 9(3) extends more broadly to ‘members of the public’. Pursuant to Article 9(3), the parties are required to ensure ‘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’.²⁸ The Convention obliges to guarantee that such remedies are adequate and effective in law, while also meeting the requirements of impartiality, equality and timeliness.²⁹ The available legal instruments must furthermore allow for a direct review of the legality of the contested acts.³⁰

Given the brevity of Article 9(3) of the Aarhus Convention, the main issue concerns the manner in which the Parties are to shape the relevant procedures. The Aarhus Convention Compliance Committee has emphasised that the scope of access to justice should be interpreted broadly, comprising infringements of any legal norms that relate, in any way, to the environment.³¹ This includes obligations stemming from the EU directives and regulations binding the Member States, including provisions of directives that have not been properly transposed, but are nonetheless directly applicable by national courts.³²

The Parties enjoy a certain degree of autonomy in establishing the procedural framework for access to justice, both with respect to the type of procedure provided and the specific conditions governing the standing of entitled persons. On the one hand, there is no obligation to establish an *actio popularis* enabling all members of the public to challenge any infringement. On the other hand, the criteria adopted may not be so restrictive as to ‘effectively bar all or almost all

²⁴ Ibid Art 9(3).

²⁵ Ibid Art 9(1).

²⁶ Ibid Art 9(2).

²⁷ See *ibid* Art 2(5).

²⁸ Ibid Art 9(3).

²⁹ Ibid Art 9(4).

³⁰ Jonas Ebbesson (ed), *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations Publication 2014) 199.

³¹ Aarhus Convention Compliance Committee ACCC/C/2006/18 Denmark, ECE/MP.PP/2008/5/Add.4, para 26.

³² *Ibid* paras 26–27.

environmental organisations or other members of the public from challenging acts or omissions that contravene national law relating to the environment'.³³ An overly narrow definition of entities vested with standing could, in practice, render access to justice illusory.

Current implementation of Article 9(3) in secondary law remains fragmentary. It is limited essentially to Article 13 of Directive 2004/35/EC.³⁴ However, access to justice guaranteed under this provision is confined to the scope of the act. In the absence of further secondary legislation, and considering the principle of procedural autonomy, the responsibility for giving effect to the standard laid down in Article 9(3) rests with the Member States. This results in a differentiated level of protection and of minimum procedural guarantees available to members of the public, which has on several occasions been subject to review by the CJEU.

In the *Lesoochránárske zoskupenie VLK* case,³⁵ a Slovak environmental association was demanding recognition of its status as a party to administrative proceedings concerning an exception from the protection guaranteed to the brown bear. The CJEU held that Article 9(3), owing to its general wording, lacks direct effect.³⁶ Consequently, neither individuals nor NGOs can derive standing directly from EU law, including the Aarhus Convention itself. In the absence of specific provisions under EU secondary legislation, the responsibility to establish appropriate procedures rests with the Member States.³⁷ Concurrently, the national courts adjudicating disputes involving EU law, are under an obligation 'to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention'.³⁸ Accordingly, the interpretation of national procedural provisions should be oriented towards enabling environmental organisations to challenge administrative decisions which may potentially be contrary to EU environmental law.³⁹

It must be acknowledged that the limits of the principle of indirect effect, coupled with the manner in which national procedural norms are formulated, may in practice restrict a court from granting *locus standi* to individuals or NGOs.

³³ Ibid para 29. See also Aarhus Convention Compliance Committee ACCC/C/2005/11 Belgium, ECE/MP.PP/C.1/2006/4/Add.2, paras 33–37.

³⁴ Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L 143/56.

³⁵ CJEU Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* ECLI:EU:C:2011:125.

³⁶ Ibid para 45.

³⁷ Ibid para 47.

³⁸ Ibid para 50. See also CJEU Case C-106/89 *Marleasing v Comercial Internacional de Alimentación* ECLI:EU:C:1990:395 para 8.

³⁹ Ibid para 52.

While it is true that a national court is under an obligation to disapply domestic provisions that conflict with EU law in the context of a specific case, judicial practice suggests a certain reluctance of judges to set aside national law. This judicial hesitancy may constitute an additional obstacle to ensuring standing for members of the public.⁴⁰ In other words, even where a national judge is inclined to recognise standing, the clarity and rigidity of domestic provisions may preclude any departure from established practice in favour of the more general principles of the Aarhus Convention.

Although the CJEU consistently emphasises the need for uniformity in the application of EU law, such a result cannot be guaranteed as long as the determination of standing criteria remains decentralised. It is worth endorsing Ludwig Krämer's view that reducing divergences in the implementation of Article 9(3) of the AC could be achieved either by recognising its direct effect or through harmonisation by means of secondary legislation.⁴¹ Krämer considers that the direct effect of the access to justice is conceivable, while the CJEU's restrictive approach should be understood less as a matter of legal necessity and more as a political choice.⁴² While the actual motivations of the CJEU may be debated, it is undeniable that a more assertive judicial stance could significantly expand the range of actors enjoying general access to justice in environmental matters. Moreover, Member States have little incentive to extend such access, since it is often their own actions that constitute breaches of EU environmental law. For this reason, one should be sceptical of any assumption that national legislatures will, on a broad scale, introduce *actio popularis* or similarly liberal rules on standing for individuals and their organisations in environmental litigation.

Similar conclusions may be drawn from the *ProtectNatur* case,⁴³ which constituted an unsuccessful attempt to mitigate the consequences of the refusal to recognise the direct effect of Article 9(3) in the *Lesoochránárske zoskupenie VLK* case. The ruling essentially reiterates the general principles of EU law and the core theses of earlier judgments, albeit with a different emphasis, yet without offering sufficiently precise guidance for national legislators. However, what distinguishes *ProtectNatur* is its acknowledgment of the role of environmental NGOs in law enforcement. The CJEU appears to be more concerned with restrictions on the standing of such organ-

⁴⁰ The reluctance of national judges, despite its questionable nature from the perspective of legal norms, is simultaneously understandable, particularly in light of the predictability of rulings, which is desirable in every legal system.

⁴¹ Ludwig Krämer, 'Comment on case C-240/09 Lesoochránárske zoskupenie VLK: Access to justice in environmental matters: new perspectives' (2011) 8 JEEPL 392, 448.

⁴² Krämer, Badger (n 3) 151.

⁴³ CJEU Case C-664/15 *ProtectNatur*-, Arten- und Landschaftschutz Umweltorganisation ECLI:EU:C:2017:987.

isations than with limitations on individuals, emphasising that NGOs act ‘usually in the public interest, rather than simply in the interests of certain individuals’.⁴⁴ In the opinion of Advocate General Eleanor Sharpston, it is stressed that ‘environmental organisations give expression to the collective and public interest, which no one else would otherwise be able to defend. (...) In the long run, they make environmental procedures work better. In so doing, environmental organisations play a crucial role in protecting our shared environmental heritage’.⁴⁵

The actions and primary objectives of environmental NGOs make it possible to regard them as representatives of the rights of elements of nature, which in turn constitutes a formal basis for attributing to them *sui generis* legal subjectivity. Notwithstanding the concerns as to the manner in which their participation in the enforcement of environmental norms is implemented, particularly regarding the proper implementation of access to justice and the recognition of their *locus standi*, these organisations serve as a crucial guarantee of the enforcement of EU environmental law. By contrast, the role of individual citizens is less significant, as their participation in the enforcement of the rights of nature often combines the pursuit of both private and public interests. This dual character renders it challenging to draw a clear boundary between actions taken for individual benefit and those genuinely aimed at the protection of nature, thereby raising doubts about whether individual citizens can be considered as representatives of natural entities.

V. MEMBERS OF THE PUBLIC BEFORE EUROPEAN INSTITUTIONS

The EU law does not impose duties on the EU institutions in such a manner that their action could directly result in the violation of the substantive rights of nature. The primary responsibility in this respect rests with the Member States, which are obliged to ensure adequate protection of the natural environment. Nonetheless, the support expressed by EU institutions for a particular policy may conflict with the interests of nature and consequently produce adverse effects on its elements.

The EU institutions are not specialised in the protection of the natural environment and, therefore, rely on the expertise of specialists whose advisory input facilitates the proper balance of interests. Nevertheless, the final decisions may significantly depart from the recommendations provided. Environmental organisations play

⁴⁴ Ibid para 47.

⁴⁵ CJEU Case C-664/15 ProtectNatur, Opinion of AG Sharpston [2017] ECLI:EU:C:2017:760 para 80.

a particularly significant role in the decision-making process, as they advance the interests of nature, which frequently stand in opposition to private interests and would otherwise remain unrepresented. Moreover, due to their high level of specialisation, such organisations are more effective in safeguarding the interests of nature than individual citizens acting independently. Without granting NGOs standing to challenge the actions of the EU institutions, their other rights are not significant, as they amount merely to non-binding influence. As a party to the Aarhus Convention, the EU is under an obligation to implement its provisions, particularly Article 9(3). Nevertheless, mechanisms enabling the full realisation of the right of access to justice in environmental matters at the Union level have not yet been established.

Among the control instruments applicable across the EU legal system are the action for annulment of an EU act⁴⁶ and the action for failure to act.⁴⁷ However, public access to these remedies is severely limited by a restrictive interpretation of admissibility conditions.⁴⁸ In addition, the partial implementation of Article 9(3) of the AC at the EU level has been implemented through Regulation 1367/2006,⁴⁹ which provides an internal review procedure of acts adopted by EU institutions,⁵⁰ followed by the possibility of bringing an action before the CJEU.⁵¹

Since the CJEU denied the direct effect of Article 9(3), individuals may rely only on remedies expressly provided under EU law. Standing to bring a direct action rests on two premises.⁵² On the one hand, both Treaty provisions and Aarhus obligations support broad access to justice. Given environmental objectives and the general guarantees of the right to an effective remedy,⁵³ it is reasonable to expect the EU legislator to reduce barriers and extend *locus standi* for challenging institutional acts. On the other hand, existing rules remain restrictive, and case-law has entrenched their narrow reading.⁵⁴ For environmental NGOs, the

⁴⁶ TFEU Art 263.

⁴⁷ TFEU Art 265.

⁴⁸ See Barbara Iwańska, 'Zróznicowanie i ograniczenia w dostępie do wymiaru sprawiedliwości w sprawach ochrony środowiska. Uwagi na tle implementacji konwencji z Aarhus w prawie unijnym' [2020] Europejski Przegląd Sądowy 5, 14–15.

⁴⁹ Regulation (EC) 1367/2006 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, OJ L 264/13.

⁵⁰ Ibid Art 10.

⁵¹ Ibid Art 12.

⁵² Alicja Sikora, 'Konstytucjonalizacja ochrony środowiska w prawie Unii Europejskiej' [2017] Europejski Przegląd Sądowy 4, 14–15.

⁵³ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 Art 47.

⁵⁴ See CJEU Case C-25/62 *Plaumann v Commission* ECLI:EU:C:1963:17; CJEU Case C-583/11 *P Inuit Tapiriit Kanatami and others v Parliament and Council* ECLI:EU:C:2013:625. In environmental matters, see also CJEU Case C-297/20 *P Sabo and others v Parliament and Coun-*

key obstacle lies in their very nature, which is acting in the general, not private, interest. As a result, they rarely meet the requirements of being directly and individually concerned by a measure. The formulation of standing requirements reflects a reluctance to permit overly widespread actions, which would approximate *actio popularis*. While this concern may be legitimate for claims unrelated to environmental matters, the absence of a different implementation of Article 9(3) compels members of the public to satisfy restrictive criteria. These conditions are not framed in a manner that strikes a balance between avoiding unrestricted access to direct actions and preventing their effective denial.

A partial attempt to transpose the Aarhus Convention is found in Regulation 1367/2006. The mechanism under Article 10 was conceived as a means of enhancing the position of the public. However, due to its limited subjective and objective scope, it represents only a modest extension of existing rights.⁵⁵ Standing to initiate the review procedure is confined to NGOs fulfilling specified criteria.⁵⁶ Individual citizens, as well as NGOs not pursuing environmental objectives, are explicitly excluded. Moreover, the subject matter of such a review is restricted to administrative acts adopted by EU institutions or bodies under environmental law.⁵⁷ Outside its scope are, among others, general measures, soft law instruments, and acts not formally categorised as environmental law. This legislative choice precludes challenges to acts which, though not labelled as environmental measures, directly affect the natural environment, such as those adopted within the common fisheries policy. By contrast, under the broad interpretation of ‘national law relating to the environment’,⁵⁸ such measures would fall within the general right of access to justice.⁵⁹

The subjective and objective limits of the internal review mean that, although acts in scope of the mechanism may eventually be examined by the CJEU, Regulation 1367/2006 cannot be regarded as a sufficient implementation of Article 9(3). Its fragmented character does not tackle existing barriers, warranting a critical assessment of such an incomplete instrument. The Aarhus Compliance Committee has similarly held that neither the direct action standing criteria nor the internal review procedure constitutes full implementation of Article 9(3).⁶⁰

cil ECLI:EU:C:2021:24; CJEU Case C-565/19 P *Carvalho and others v Parliament and Council* ECLI:EU:C:2021:252.

⁵⁵ See Iwańska (n 48) 16.

⁵⁶ Regulation 1367/2006 (n 49) Art 11.

⁵⁷ *Ibid* Art 10(1).

⁵⁸ Aarhus Convention (n 23) Art 9(3).

⁵⁹ See CJEU Case C-565/19 P *Carvalho and others v Parliament and Council* ECLI:EU:C:2021:252.

⁶⁰ Aarhus Convention Compliance Committee ACCC/C/2008/32 European Union, ECE/MP.PP/C.1/2011/4/Add.1, paras 94–96.

It may be argued that the EU's approach to access to justice in environmental matters reflects a double standard.⁶¹ On the one hand, despite denying the direct effect of the Aarhus Convention, the CJEU supports domestic solutions guaranteeing broad access to justice at the national level.⁶² On the other hand, at the Union level, the legal norms and their interpretation are restrictive in a manner that virtually excludes members of the public from any possibility of challenging the actions or omissions of EU authorities.

Scholarly criticism highlights the EU's insufficient implementation of access to justice in environmental matters.⁶³ Excluding NGOs from judicial review leaves no specialised actors representing nature at the EU level. They should, therefore, be granted effective procedural instruments, as they act as a counterbalance to policies with adverse ecological effects. In the face of the fundamental absence of direct legal remedies for enforcing environmental protection norms, members of the public acting as representatives of nature are compelled to resort to indirect means of contesting actions or omissions that conflict with ecocentric interests.

VI. PRELIMINARY RULING PROCEDURE

Given the limited access of individuals to direct actions in the EU legal order, preliminary references serve a compensatory function.⁶⁴ The dual nature of this procedure is accurately captured by Alicja Sikora, who observes that: 'in the environmental law context, the preliminary reference mechanism (...) not only supplements the range of procedural remedies in light of the restrictive admissibility criteria of actions under Article 263 TFEU, but also seeks to address the

⁶¹ Hendrik Schoukens, 'Access to Justice before EU Courts in Environmental Cases against the Backdrop of the Aarhus Convention: Balancing Pathological Stubbornness and Cognitive Dissonance?' in Christina Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press 2019) 95.

⁶² See section 5 of this Article.

⁶³ See Schoukens (n 61) 115–117; Krämer (n 41) 448; Iwańska (n 48) 17–18; Jan Darpö, 'Pulling the Trigger: ENGO Standing Rights and the Enforcement of Environmental Obligations in EU Law' in Sanja Bogojevic, Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2020) 278–82; Katja Rath, 'The EU Aarhus Regulation and EU Administrative Acts Based on the Aarhus Regulation: the Withdrawal of the CJEU from the Aarhus Convention' in Christina Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press 2019) 72.

⁶⁴ Alicja Sikora, 'Rola sądów krajowych w egzekwowaniu unijnych norm prawa ochrony środowiska' [2021] *Rocznik Administracji Publicznej* 144.

most crucial substantive questions'.⁶⁵ Preliminary references exert significant influence on the evolving interpretation of EU law and allow its application to be adjusted to practical needs, which is particularly relevant in the area of environmental protection.

The preliminary reference procedure has a narrow subjective scope, as it may be initiated only at the request of a national court. Nevertheless, during the proceedings, parties may seek to persuade the court to submit a reference. Should the court accept such arguments, the parties thereby gain indirect access to the CJEU.⁶⁶ In this way, preliminary references and access to justice for members of the public in environmental matters constitute two complementary mechanisms advancing the protection of nature's rights.

A ruling delivered in preliminary reference proceedings is significant for two main reasons. First, the CJEU's interpretation is binding on the referring court. While the final decision, due to its knowledge of the factual and legal background, rests with the national judge, the CJEU provides interpretative guidance that effectively constrains divergent outcomes. Second, such rulings bind in cases with the same factual circumstances, thereby producing effects far beyond the specific dispute and shaping future case law in the Member States.⁶⁷

The mechanism of indirect access to justice at the EU level rests on two elements – direct access at the national level and the preliminary reference procedure. Only as parties before national courts can NGOs persuade judges to refer questions to the CJEU. The absence of guaranteed access to justice in environmental matters at the national level constitutes non-compliance with the Aarhus Convention and simultaneously excludes indirect access to the CJEU. The scope of domestic procedural rules determines NGOs' access to national courts and, consequently, to justice administered by the CJEU. The fewer restrictions imposed on members of the public in national procedures, the greater the likelihood that national judges will be convinced to submit preliminary references.

Given these dependencies, indirect access to the CJEU through preliminary references cannot be regarded as a sufficient implementation of Article 9(3) of the AC at the EU level, as it depends on multiple factors that may ultimately hinder obtaining an interpretation from the Court. Nevertheless, the preliminary reference procedure enables the CJEU to rule on environmental matters and plays

⁶⁵ Ibid 146 (author's translation).

⁶⁶ See Aneta Łazarska, 'Refleksje na temat czynników mrozących europejski dialog prejudycjalny' [2020] *Europejski Przegląd Sądowy* 5.

⁶⁷ See Koen Lenaerts, Kathleen Gutman and Janek Tomasz Nowak, *EU Procedural Law* (2nd edn, Oxford European Union Law Library 2023) 235.

a significant role in the development and harmonisation of the protection of substantive rights of nature.⁶⁸ It thus serves as a partial remedy for the exclusion of members of the public from access to justice at the EU level.

VII. CONCLUSION

The concept of functional legal subjectivity presupposes the coexistence of a material and a formal element. Elements of nature, although endowed with rights derived from substantive norms through the correlation of rights and obligations, lack the capacity to exercise them autonomously. Nonetheless, entities operating within the legal order may act as ‘representatives’ of nature, thereby fulfilling the formal requirement of the functional legal subjectivity.

Those who may be regarded as potential representatives of the interests and rights of nature include, above all, the European Commission and members of the public. The manner in which nature’s rights are exercised depends on the legal instruments available to each actor, their procedural standing, the capacity to exert binding authority, and the scope of their activity. While the Commission, as an executive institution of the EU, possesses powers of authoritative intervention and may bring infringement proceedings before the CJEU against Member States, the instruments available to members of the public, at both national and Union level, remain considerably limited.

This results primarily from the incomplete implementation of the Aarhus Convention, the procedural autonomy of Member States, the CJEU’s restrictive interpretation of access to justice in procedural matters, and the limited availability of direct actions for individuals. Restrictions on standing are compensated mainly through the preliminary reference procedure, which enables the enforcement of EU law in a specific case and shapes its future application. It also provides indirect access to the CJEU. Nevertheless, it cannot be regarded as an adequate mechanism for ensuring the participation of NGOs and individuals before courts in environmental matters.

In the author’s view, existing limitations on the enforcement of duties towards nature preclude attributing to them the function of ‘representatives’ of nature. The available legal instruments for realising substantive rights are so fragmentary that they cannot be regarded as fulfilling the procedural prerequisite of *sui generis*

⁶⁸ See CJEU Case C-674/17 Luonnonsuojeluyhdistys Tapiola Pohjois-Savo – Kainuu ry ECLI:EU:C:2019:851; CJEU Case C-461/13 Bund für Umwelt und Naturschutz Deutschland ECLI:EU:C:2015:433.

legal subjectivity. At the same time, one may hope that, given the importance of the environment for society as a whole, current procedural restrictions will be eliminated and legal norms adjusted to contemporary challenges.

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