Estrellita and the possibility of nature-based animal rights

Eva Bernet Kempers, PhD*

Abstract

In its judgement of 23 January 2022, the Constitutional Court of Ecuador concluded that individual animals are subjects of rights under the constitutional provision that recognises the rights of nature. Building upon a number of earlier cases in which rivers and mangroves had been recognised as rights-holders, it set out a framework for how animal rights should be understood in the Ecuadorian context. Through its conceptualization of the rights of animals as a dimension of nature's rights, it bridged the tensions between the more systemic approach to environmental protection on the one hand, and the more individualist approach of animal law on the other hand. This article will discuss the Estrellita judgement, taking it as a starting point to investigate the possibility of 'nature-based animal rights' as an alternative to the common understanding of animal rights as being grounded in the properties of individual beings. This investigation will then lead to a proposal for systemically integrating animal rights within the broader normative framework of rights of nature, reconciling the tensions between the ecosystem and the individual.

1. Introduction

From an outsider's perspective, environmental protection and animal law may appear like Tweedledum and Tweedledee. Both are generally placed on the progressive left side of the political spectrum; both seem to suggest that other-than-human interests are sufficient reasons to limit the maximization of human interests; and both pose a challenge to the anthropocentrism of the legal system. An insider, however, would know that, in practice, not everything is hunky-dory between the two. On the contrary, rather than seeing each other as allies, environmental scholars often oppose the idea of individual animals having rights and *vice versa*.[1] Specifically, whereas

* Postdoctoral researcher at the University of Antwerp, Belgium. Thanks to the Research Group Rights of Nature and Animals for providing the inspiration for this article during a Workshop on the synergies between rights of nature and animal rights at the University of Helsinki in 2023. Also thanks to the editors of GJAL for their thoughtful comments, which have greatly improved the article, and the anonymous peer reviewers for their suggestions.

[1] M Sagoff, 'Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce' (1984) 22 *Osgoode Hall Law Journal* 297; IJ Campbell, 'Animal Welfare and Environmental Ethics: It's Complicated' (2018) 23 *Ethics and the Environment* 49.

environmental protection aims to safeguard the integrity and viability of ecosystems and species from a systemic perspective, animal law attaches intrinsic value to individuals that experience pain and other sensations, beings who are 'sentient'.[2] As Harrop suggests, the two are derived from completely discrete origins, resulting in an 'epistemological gulf' between them.[3]

This division is mirrored in the tension between the movement that aims for the recognition of nature's rights (RoN) as a response to deficiencies of environmental protection law on the one hand, and the movement for the recognition of animal rights as a response to the deficiencies of animal protection law on the other.[4] Whereas the former strives to recognize 'nature' as subject of rights, often building upon other-than-Western worldviews,[5] the latter is regarded more as a form of a social justice movement, striving for the emancipation of an oppressed group of individuals based on their individual capacities.[6] The tension between the two is illustrated by the way in which they approach the issue of invasive alien species.[7] From the systemic perspective of rights of nature, eradication of individual hybrids and specimens that are classified as 'invasive' is usually perceived as necessary as their existence is regarded as a threat to the rights of the ecosystem as a whole.[8] From the individualist perspective of animal rights, any attempt to usurp the rights of individual animals to conserve the species or

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[2] G Wright, 'Animal Law and Earth Jurisprudence: A Comparative Analysis of the Status of Animals in Two Emerging Discourses' (2013) 9 *Australian Animal Protection Law Journal* 5.
[3] S Harrop, 'Climate Change, Conservation and the Place for Wild Animal Welfare in International Law' (2011) 23(3) *Journal of Environmental Law* 441.
[4] V Platvoet, 'Wild Things: Animal Rights in EU Conservation Law' (2023) 26(2) *Journal of International Wildlife Law & Policy* 79.
[5] See for a discussion J Gilbert and others, 'The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's "Greening" Agenda' (2023) *Netherlands Yearbook of International Law* 2021. Not all manifestations of rights of nature aim to foster environmental protection. Sometimes, they are motivated more by the struggle for Indigenous rights, see e.g. the case of New Zealand, EM MacPherson and F Clavijo Ospina, 'The Pluralism of River Rights in Aotearoa, New Zealand and Colombia' (2018) 25 *The Journal of Water Law* 1. For an in-depth introduction, see M Tănăsescu, *Understanding the Rights of Nature* (Transcript 2022).
[6] B Boyle, 'Free Tilly: Legal Personhood for Animals and the Intersectionality of the Civil and Animal Rights Movements' (2016) 4 *Indiana Law Review for Social Justice* 169.
[7] See H Schoukens and E Bernet Kempers, 'The Challenge of Invasive Alien Species to (the Implementation of) Earth Jurisprudence in Europe' in J García Ruales and others (eds), *Rights of Nature in Europe: Encounters and Visions* (Routledge 2024).
[8] G Wright, 'Animal Rights and the Rights of Nature: A Brief Overview' (2012) [Prepared for the Earth Laws Symposium, 'Animal Rights and the Rights of Nature', Southern Cross University, 6 October 2012] https://www.academia.edu/7122584/Animal_Rights_and_the_Rights_of_Nature_a_brief_overview accessed 17 September 2024; M Hutchins and C Wemmer, 'Wildlife Conservation and Animal Rights: Are They Compatible?' in M Fox and L Mickley (eds), *Advances in Animal Welfare Science 1986/87* (The Humane Society of the United States 1986) 115.

ecosystem can be compared to a form of 'environmental fascism':[9] individuals, who have moral worth, are sacrificed for 'the greater good', that is, abstract concepts such as 'species' and 'ecosystems'.[10] As Hutchins has put it: '[i]t is time to face up to the fact that animal rights and conservation are inherently incompatible and that one cannot be an animal rights proponent and a conservationist simultaneously'.[11]

In light of this alleged incompatibility, it is remarkable that, in January 2022, the Constitutional Court of Ecuador reconciled the two strands of thought at once in a groundbreaking judgement concerning a woolly monkey named 'Estrellita'.[12] Rather than viewing them as being in tension, the Court saw animal rights as a dimension of the rights of nature.[13] It explicitly stated that individual animals are subjects of rights under the Ecuadorian Constitution, which recognises the rights of nature.[14] The paradigms of rights of nature and animal rights were thus conceived not as opposites, but as two sides of the same coin.[15] However, the Court construed animal rights in a way that is distinct from the way in which animal rights are commonly conceptualised in European and North American scholarship. Its interpretation opens a door to a different conception of animal rights less in tension with the broader aim of protecting nature, as furthered by RoN. Such conceptualization may answer the question of whether, and in what way, the rights of animals fit within the normative framework of rights of nature.

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[9] T Regan, *The Case for Animal Rights* (University of California Press 1983) 359–63.
[10] See for a discussion V Platvoet (n 4).
[11] M Hutchins, 'Animal Rights and Conservation' (2008) 22 *Conservation Biology* 815, 816.
[12] Constitutional Court of Ecuador, *Mona Estrellita*, Sentencia No. 253-20-JH/22, 27 January 2022. The judgment often refers to an amicus curiae brief, see: BMJ Animal Law & Policy Program at Harvard Law School and Nonhuman Rights Project, *Constitutional Court of Ecuador Case No. 253-20-JH Amicus Curiae* (2021) https://animal.law.harvard.edu/wpcontent/uploads/ENGLISH.-HLS-NhRP-amicus-curiae-Ecuador.pdf accessed 17 September 2024.
[13] Constitutional Court of Ecuador, *Mona Estrellita*, Sentencia No. 253-20-JH/22, 27 January 2022. It seems to draw from the amicus curiae brief in this respect (Ibid). See also M Condoy Truyenque, 'An Analysis of the Estrellita Constitutional Case from an Animal Rights Perspective' (2023) XIX *Animal and Natural Resource Law Review of the Michigan State University College of Law*.
[14] In article 71-74. See in particular Constitution of Ecuador, art. 71. "Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes…"
[15] See for an earlier version of the argument elaborated in this paper the following blogpost E Bernet Kempers, 'Do Rights of Nature Include Animal Rights?' (4 May 2023) https://blogs.helsinki.fi/animallawblogseries/2023/05/04/do-rights-of-nature-include-animal-rights/ accessed 10 September 2024.

Even though some authors have discussed the conflict and potential reconciliation of rights of nature and animal rights in the abstract,[16] the growing body of case law now makes it possible to operationalise how animal rights fit in the rights of nature paradigm in a jurisprudential manner.[17] This article takes the case of Estrellita as a starting point to develop a conception of animal rights that can be distinguished from the way in which it has, until now, been given shape in American and European scholarship. The alternative theoretical framework will be labelled as 'nature-based animal rights', and contrasted with 'sentience-based animal rights',[18] which is the conception of animal rights that has received most attention in animal law literature hitherto. Whereas sentience-based animal rights are generally individualistic, this article puts forward the argument that nature-based animal rights can be construed as a more relational and contextual form of animal rights. In the context of nature-based rights, properties, such as sentience, still play an important role, but they do so as a differentiating factor of interpretation (in the determination of the contents of rights), rather than a 'ground' for rights. After establishing the framework of nature-based animal rights, it will be suggested that, despite some potential problems, it has some advantages over the sentience-based version due to its potential to build a bridge with environmental protection and its contextual suitability in legal systems that have made a transition to a more biocentric or ecocentric legal paradigm.

It should be noted that, rather than staying within the contours of the Ecuadorian context, the aim of this article is to construe nature-based animal rights as a theoretical framework that is loosely based on the Ecuadorian judgement, yet intended as a more general inspiration for how to understand the rights of individual animals in the context of rights of nature. Hence, the hope is that this operationalization will be further developed by rights of nature scholars, and be of guidance to courts and lawyers

[16] Wright (n 2).
[17] M Montes & K Stilt, 'Naturalized Rights of Animals, Animalized Rights of Nature' (13 May 2024) https://ssrn.com/abstract=4826699; K Stilt, 'Rights of Nature, Rights of Animals' (11 December 2020) *Harvard Law Review Forum* 134, 276 https://ssrn.com/abstract=3746727; M Montes & K Stilt, 'Estrellita the Woolly Monkey and the Ecuadorian Constitutional Court: Animal Rights Through the Rights of Nature' (2023) *ReVista Harvard Review of Latin America* https://revista.drclas.harvard.edu/estrellita-the-wooly-monkey-and-the-ecuadorian-constitutional-court-animal-rights-through-the-rights-of-nature/ accessed 10 September 2024.
[18] Sentience-based animal rights are also labelled as 'properties-based animal rights' by J C Gellers, *Rights for Robots: Artificial Intelligence, Animal and Environmental Law* (Routledge 2020) 65. See also the description of 'sentientist' approach to animal rights R Fasel, *More Equal than Others: Humans and the Rights of Other Animals* (Oxford University Press 2024) ch 5.

in those jurisdictions in which rights of nature have already been, or are about to be, recognised. It is, in other words, a proposal for how to systemically integrate animal rights within the broader framework of rights of nature in a jurisprudential manner, freely based upon the Estrellita judgement.

The article is structured as follows. The second section will outline how 'sentience-based animal rights' are generally given shape in European and American animal law scholarship. In the third section, the case of Estrellita will be discussed, analysing how the Ecuadorian Constitutional Court arrived at the conclusion that animals are subjects of rights under the rights of nature provision. In the fourth section this way of thinking about animal rights is taken as a starting point to further operationalise nature-based animal rights. In the fifth section, nature-based animal rights are contrasted with sentience-based animal rights, and it will be argued that it can offer an alternative framework to understand the rights of animals in the context of rights of nature.

2. Sentience-based animal rights

The common starting point of animal rights advocacy is the idea that individual animals should have fundamental legal rights for the same reasons that humans have human rights. Striving for the 'liberation' of animals from human domination,[19] it employs a rhetoric of equality that is similar to that of, for instance, the women's rights movement, and the civil rights movement in the US.[20] Excluding animals from rights and personhood is, according to this narrative, a form of speciesism comparable to sexism and racism. As 'species membership' is seen as a morally irrelevant criterion, it cannot form the basis of animals' exclusion from legal rights. Another property that explains the limit of rights to humans has to be identified. However, proponents of the movement hold that once we look for such a property (e.g., rationality, autonomy, creativity, or language), we find that there is no single capacity that all humans do, but all other animals do not possess.[21] All grounds for human rights (except perhaps a religiously inspired notion of 'dignity') are either underinclusive, excluding some

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[19] P Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals* (HarperCollins 1975).
[20] B Boyle, 'Free Tilly: Legal Personhood for Animals and the Intersectionality of the Civil and Animal Rights Movements' (2016) 4 *Indiana Law Review for Social Justice* 169.
[21] See for an in-depth discussion of this argument S Stucki, *One Rights: Human and Animal Rights in the Anthropocene* (Springer 2023).

human beings as well, or overinclusive, also including animals.[22] In order to consistently apply human rights, we need to accept that animals, too, belong in the circle of rights-bearers: their fundamental interests should be protected with legal rights. Because this approach extends rights to animals on the basis of certain identifiable properties of animals (most often their sentience), we can refer to it as 'properties-based animal rights' or, more specifically, 'sentience-based animal rights'.[23]

Animal rights understood in this sense can historically be regarded as a response to 'welfarism', which represents the dominant paradigm of existing animal protection law. Even though animals are legally protected in most jurisdictions today, animal welfare acts only do so while assuming that using animals for human gain is acceptable.[24] Animal protection laws are therefore often quite weak and incomplete, protecting animals only insofar as it is in line with human interests in their use, and thus failing to protect any substantial interests of animals (such as the interest in life, or in bodily integrity). At most, they require the minimalization of 'unnecessary' harm to animals, while leaving the definition of 'necessary' open to broad interpretation.[25] Such laws may give the impression that they protect animals in a robust way, but, in reality, they further the traditional paradigm that classifies animals as 'property' of humans. Animals, in this paradigm, are reduced to a status of objects of law, comparable to inanimate things. Proponents of animal rights generally regard welfarist laws as insufficient and even immoral, as they continue (and perhaps even legitimise) the exploitation of animals for human use without ever questioning the exceptionalist status that humans grant themselves based on merely their species.[26] Many animal rights advocates thus strive for a change in status of animals from property to person, protected with fundamental rights similar to human rights.[27]

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[22] See R Fasel, 'Simply in Virtue of Being Human'? A Critical Appraisal of a Human Rights Commonplace' (2018) 9 *Jurisprudence* 461.

[23] See also the description of 'sentientist' approach to animal rights by Fasel (n 18). See for an elaborate discussion: J Kotzmann & MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches, and Applications* (Hart Publishing 2024).

[24] R Fasel & S Butler, *Animal Rights Law* (Hart Publishing 2023) ch 1.

[25] S Stucki, 'Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights' (2020) 40 *Oxford Journal of Legal Studies* 533. Fasel & Butler describe such rights as 'thin rights' (n 24) at 89.

[26] See G Francione, *Animals, Property, and the Law* (Temple University Press 1995).

[27] As argued by Steven Wise, see for instance S Wise, 'Animal Rights, One Step at a Time' in MC Nussbaum & CR Sunstein (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press 2004) 19-50.. For an excellent approach to 'sentient rights', see also A Cochrane, 'From

It should be noted that there are various differences between the animal rights positions that are grouped together here. Some animal rights approaches are 'abolitionist'; they assume that once animals have rights, most or all human uses of animals will be banned.[28] Most notably, it will be impossible to use animals for entertainment, or kill animals for food, since their right to life would easily outweigh humans' interest in eating meat or using animals for entertainment. However, over the last decades, various differentiated forms of animal rights have been developed, making the traditional debate between welfarism and abolitionism seem somewhat outdated.[29] For instance, philosophers Will Kymlicka and Sue Donaldson have proposed a political theory of animal rights in their famous book *Zoopolis*. They argue that animal rights are based on the kind of relations animals have with human societies, leading to a growth in approaches supporting the idea that rights may differ according to the role animals take in relation to humans.[30] This would mean that different rights would be held by wild animals, liminal animals who move in and out human societies, and domesticated animals, respectively.[31]

Also, the grounding of rights tends to vary. Arguably, a majority of scholars take 'sentience' as the most important characteristic, as they regard it as a necessary condition for having interests that can give rise to rights.[32] Other arguments have, however, been made for 'agency' as the defining property,[33] as well as 'autonomy',[34]

Human Rights to Sentient Rights' (2013) 16 *Critical Review of International Social and Political Philosophy* 655; M Montes Franceschini, 'Animal Personhood: The Quest for Recognition' (2021) 17 *Animal & Natural Resource Law Review* 93.

[28] G Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press 1996).

[29] J A Gleckel, G Brosofsky & C Leahy, 'A New Age of Animal Law' (2024) 101 https://papers.ssrn.com/abstract=4678331 accessed 10 September 2024.

[30] S Donaldson & W Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011).

[31] Ibid. See also W Kymlicka, 'Social Membership: Animal Law Beyond the Property/Personhood Impasse' (2017) 40 *Dalhousie Law Journal* 123.

[32] For instance M Nussbaum, *Justice for Animals: Our Collective Responsibility* (Simon & Schuster 2023). See also A Cochrane, 'From Human Rights to Sentient Rights' (2013) 16 *Critical Review of International Social and Political Philosophy* 655.

[33] J Jowitt, 'Legal Rights for Animals: Aspiration or Logical Necessity?' (2020) 11 *Journal of Human Rights and the Environment* 198.

[34] S Wise, 'The Legal Thinghood of Nonhuman Animals' (1996) 23 *Boston College Environmental Affairs Law Review* 471; S Wise, 'Hardly a Revolution—the Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy' (1998) 22 *Victoria Law Review* 793.1.

'subject-of-a-life'[35] or 'vulnerability'.[36] Furthermore, there are substantial differences with regard to the question of whether or not animal rights include the right to liberty and thus can be reconciled with having animals as companions. Alasdair Cochrane famously argues for "animal rights without liberation", stating that various domesticated animals have no intrinsic interest in liberty and therefore do not need a right to be free.[37] Again, others have mainly focused on the rights of wild animals, arguing that they should have a right to property over their territories.[38] Lastly, whereas some regard rights to be incompatible with animals' status as property, others have suggested that animals could remain objects of ownership rights while having rights at the same time.[39] In short, there is a large and diverse landscape of approaches that fall within the animal rights paradigm.

What most of these approaches have in common, however, is their liberal, individualistic basis,[40] and the way in which they take existing human rights and expand them towards another group of living beings based on their individual characteristics. Animals have rights because they, as individuals, possess properties that are considered ethically relevant: it is the very nature of the animal individual that requires their inclusion in the circle of right-holders.[41] It is largely due to this individualist orientation that sentience-based animal rights easily clash with the more systemic approach to environmental protection. In order to argue for the inclusion of animals in the circle of rights-holders on the basis of a characteristic, a necessary line has to be drawn between those entities that do, and those entities that do not possess the required characteristics: natural entities such as trees, and animals without

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[35] Regan (n 9).
[36] M Deckha, 'Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm' (2013) 50 *Alberta Law Review* 783; A B Satz, 'Animals As Vulnerable Subjects: Beyond Interest Convergence, Hierarchy, and Property' (2010) 16 *Animal Law* 65.
[37] A Cochrane, *Animal Rights Without Liberation* (Colombia University Press 2012).
[38] K Bradshaw, *Wildlife as Property Owners: A New Conception of Animal Rights* (University of Chicago Press 2020); J Hadley, *Animal Property Rights* (Lexington Books 2015).
[39] D Favre, 'Living Property: A New Status for Animals Within the Legal System' (2010) 93 *Marquette Law Review* 1021; A Fernandez, 'Not Quite Property, Not Quite Persons: A Quasi Approach for Nonhuman Animals' (2019) 5 *Canadian Journal of Comparative and Contemporary Law* 1; V Kurki, 'Why Things Can Hold Rights: Reconceptualizing the Legal Person' in V Kurki & T Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer 2017); E Bernet Kempers, 'Transition Rather than Revolution: The Gradual Road Towards Animal Legal Personhood through the Legislature' (2022) 11 *Transnational Environmental Law* 581.
[40] With the exception of some recent critical approaches, such as the idea of 'legal beingness' by Maneesha Deckha: M Deckha, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (University of Toronto Press 2021).
[41] See also M Calarco, *Thinking Through Animals* (Stanford University Press 2015).

sentience such as insects, fall outside of the scope.[42] Most animal rights scholars, thus, deny the idea that plants or other non-sentient entities could plausibly be regarded as 'rights-holders'.[43] The idea that abstract concepts such as 'species' or 'nature' would be able to have rights, is generally disregarded as not in line with a long tradition of Western theories of rights, for instance the interest theory or the will theory of rights.[44] The rationale there is that as such abstract entities are not sentient and cannot have interests, they cannot possibly hold rights in any meaningful way.[45]

Animal rights scholarship has suffered critiques from various directions. On the one hand, animal welfarist scholarship argues that a better way forward is to improve the existing laws and their enforceability,[46] suggesting that extending legal personhood to animals may have dangerous implications,[47] or that it makes a better fit with the common law than civil law context.[48] On the other hand, critical legal scholars suggest that the liberal basis of animal rights only reproduces a certain paradigmatic human, privileging human-like animals at the expense of those that are not sufficiently 'like us'.[49] Others have critiqued the individualist focus of animal rights, arguing that the approach fails to '[account] for and [do] justice to all of nature, including individual nonhuman subjects and entire ecosystems, as well as the many natural places and entities in between'[50], and has led to a 'rather stale debate over the type of human trait that offers the most compelling grounds for treating animals like more than mere machines.'[51] It should be noted, however, that the narrative of animal rights as based

[42] S Wise, *Drawing the Line: Science and the Case for Animal Rights* (Basic Books 2003).
[43] V A J Kurki, 'Can Nature Hold Rights? It's Not as Easy as You Think' (2022) 11 *Transnational Environmental Law* 525.
[44] See for a discussion of both theories of rights V A J Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019).
[45] This position was also taken by Feinberg in his important work J Feinberg, 'The Rights of Animals and Unborn Generations' in W Blackstone (ed), *Philosophy and Environmental Crisis* (University of Georgia Press 1974).
[46] P Christiaenssen, 'Dierenrechten: De Heilige Graal?' (2023) *Tijdschrift voor Privaatrecht* 1269. R A Epstein, 'Animals as Objects, or Subjects, of Rights' in C R Sunstein & M C Nussbaum (eds), Animal Rights: Current Debates and New Directions (Oxford University Press 2004).
[47] R L Cupp, 'Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals' (2016) 33 *Pace Environmental Law Review* 517.
[48] Bernet Kempers (n 39).
[49] T L Bryant, 'Similarity or Difference as a Basis for Justice: Must Animals be Like Humans to be Legally Protected from Humans?' (2007) 70 *Law and Contemporary Problems* 207; See also C A MacKinnon, 'Of Mice and Men: A Feminist Fragment on Animal Rights' in C Sunstein & M Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press 2004).
[50] A Peterson, *Being Animal: Beasts and Boundaries in Nature Ethics* (Columbia University Press 2013).
[51] J C Gellers, *Rights for Robots: Artificial Intelligence, Animal and Environmental Law* (Routledge 2020) 65.

in individual properties is intuitive and logically consistent in light of the long tradition of 'juridical humanism' in the context of Western societies, as it builds on the established human rights doctrine and literature.[52] The idea of extending rights to a larger number of subjects is in line with the way in which the law, and the recognition of rights, has developed over time.[53] It is therefore not surprising that sentience-based arguments have largely dominated the debate on animal rights until now.

3. Animal rights in the Estrellita-judgement

When Ecuador became the first country to incorporate a recognition of 'rights of nature' in its Constitution in 2008, it was widely proclaimed as a success for the rights of nature movement and became a popular subject for academic research on the topic.[54] As a central aim, the Constitution proclaims to build 'a new form of public coexistence, in diversity and in harmony with Nature, to achieve the good way of living', by granting nature legal rights.[55] Nature is defined as the place 'where life is reproduced and occurs', and it has the right to 'have its existence respected holistically, and to the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes.'[56] Furthermore, the constitution empowers 'all individuals, communities, peoples and nations' to call upon public authorities to enforce the rights of nature, thus opening the courts to any person who wants to lodge a claim enforcing nature's rights.[57] Since their incorporation in 2008, the rights of nature have been further developed and applied by courts at various levels.[58] Even though different judges seem to apply the rights in different manners, most cases have resulted in positive outcomes for the

[52] See for a discussion of 'juridical humanism' T Pietrzykowski, *Foundations of Animal Law: Concepts–Principles–Dilemmas* (Wydawnictwo Uniwersytetu Śląskiego 2023) 25-32.
[53] P Singer, *The Expanding Circle: Ethics, Evolution, and Moral Progress* (Princeton University Press 2011).
[54] S Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5 *Transnational Environmental Law* 113; M G Bastos Lima & J Gupta, 'Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand' (2013) 13 *Global Environmental Politics* 46; L Schimmöller, 'Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador' (2020) 9 *Transnational Environmental Law* 569.
[55] Constitución de la República del Ecuador [Constitution of the Republic of Ecuador] (20 October 2008) preamble. See for a discussion: L J Kotzé & P Villavicencio Calzadilla, 'Somewhere Between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6 *Transnational Environmental Law* 1.
[56] Constitución de la República del Ecuador [Constitution of the Republic of Ecuador] (20 October 2008) art 71.
[57] Constitución de la República del Ecuador [Constitution of the Republic of Ecuador] (20 October 2008) art 74.
[58] Up to April 2024, 64 cases have appeared on RoN. See for an overview: https://www.derechosdelanaturaleza.org.ec/casos-ecuador/.

protection of nature in the form of animals, rivers, forests, or national parks.[59] According to Tănăsescu and others, rights of nature in Ecuador 'are increasingly seen as a blueprint for granting rights to ecosystems' and 'could have significant implications elsewhere'.[60]

Whereas many of the cases concerning rights of nature have to do with non-animal parts of nature such as rivers and mangroves,[61] in 2021 also 'animal species' were found to fall within the constitutional protection.[62] Moreover, earlier criminal judgments condemned illegal shark fishing and trafficking, stating that species of sharks are protected by rights of nature because they form a vital part of the marine ecosystem.[63] Nevertheless, in all cases the reasoning seems to takes its point of departure from a more environmental or ecological approach: certain species of animals are protected because they are important for the ecosystem.[64] The question remained whether such protections would also extend to individual wild animals, regardless of the role of their species. This is the question that stood central in the case of Estrellita.

The case of Estrellita was one of the cases that were selected by the Constitutional Court in order to further develop and clarify its interpretation of rights of nature. At the time of the judgement, the monkey Estrellita had already died. Hence, no practical implementation could be given to the judgement. Nevertheless, the case is widely regarded as exemplary of how the rights of individual animals should be understood in the context of rights of nature.[65] Apart from that, the case will have a broader legal effect, as one of the outcomes was the order of the Court that the Ecuadorian

[59] C M Kauffman & P L Martin, 'Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail' (2017) 92 *World Development* 130; C M Kauffman & P L Martin, 'How Ecuador's Courts Are Giving Form and Force to Rights of Nature Norms' (2023) 12 *Transnational Environmental Law* 366.
[60] See also M Tănăsescu, E Macpherson, D Jefferson & J Torres Ventura, 'Rights of Nature and Rivers in Ecuador's Constitutional Court' (2024) *The International Journal of Human Rights* 1
[61] Constitutional Court of Ecuador, 'Sentencia' in Judgment No. 1149-19-JP/21 (Los Cedros), November 10, 2021, 43.
[62] Constitutional Court of Ecuador, 'Sentencia' in Judgment No. 1149-19-JP/21 (Los Cedros), November 10, 2021, 43.
[63] Judicial Department of the Parroqui, *Unidad Judicial Penal Parroquia Iñanquito, Distrito Metropolitano de Quito, Pelea de Gallos,* Juicio No: 17294201901759, 5 December 2019.
[64] See also Kauffman & Martin (n 59).
[65] A Peters, 'Rights of Nature Include Rights of Domesticated Animals' in PB Donath, A Heger, M Malkmus & O Bayrak (eds), *Der Schutz des Individuums durch das Recht* (Springer 2023) 15-30.

parliament should give rise to legislation in which the rights of animals would be set out in more detail.[66]

One of the most remarkable aspects of the Estrellita case is the path the Court took to conclude that animals have rights under the rights of nature provision. In its judgement, the Court first defines ‘nature’ in order to determine whether and to what extent animals fall within the scope of the protection. Here, it refers to previous judgements observing that the Ecuadorian constitution rests upon a socio-biocentric paradigm ‘that goes beyond the classic anthropocentrism’,[67] and regards ‘Nature as a participant in the economy with its own rights (to conservation and existence)’.[68] Consequently, ‘nature’ should be regarded as ‘a community of life. All the elements that compose it, including the human species, are linked and have a function or role.’[69] In this regard, the Court seems to build upon the theoretical framework of ‘Earth Jurisprudence’ as a more systemic and holistic approach to nature.[70] However, it goes on to note that rights of nature protect nature in each of its singular elements, including forests and wild animals whose species is threatened.[71] This means that animals also fall within the scope of what ‘nature’ consists of. As the Court states, ‘[w]ithin the levels of ecological organization, an animal is a basic unit of ecological organization, and being an element of Nature, it is protected by the rights of Nature and enjoys an inherent individual value.’[72] The rights of nature thus not only protect species, but also an individual animal, since it would not be possible to recognise an intrinsic value to nature as a whole and neglect the same value to its elements: indeed, according to the court ‘the value that the Constitution places on Nature has a common axiological basis with animal rights’.[73]

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[66] Constitutional Court of Ecuador, *Mona Estrellita*, Sentencia No. 253-20-JH/22, 27.01.2022, para 89. See for a critical discussion of the project surrounding new law (Proyecto de Ley Orgánica de los Animales) M Lostal, A Shanker & D Calley, 'Un paso adelante, dos atrás: la búsqueda de ‘derechos’ en el proyecto de ley sobre derechos de los animales en Ecuador' (2024) 2 *DALPS (Derecho Animal-Animal Legal and Policy Studies)* 504–587.
[67] Constitutional Court of Ecuador, *Mona Estrellita*, Sentencia No. 253-20-JH/22, 27 January 2022, para 56.
[68] Ibid, para 61. Note that the Court consistently capitalises the word ‘Nature’.
[69] Ibid, para 63.
[70] P Burdon, 'The Earth Community and Ecological Jurisprudence' (2013) 5 *Oñati Socio-Legal Series* 81.
[71] Constitutional Court of Ecuador, *Mona Estrellita,* Sentencia No. 253-20-JH/22, 27 January 2022, para 65, quoting Constitutional Court of Ecuador. Final judgment No. 22-18-IN/21, para 27.
[72] Ibid, para 73.
[73] Ibid, para 94.

The Court devotes an entire section of the judgement to clarify the way in which, specifically, the rights of wild animals should be understood. Here, it makes a clear differentiation with the way in which rights of nature were given shape previously. The Court warns that 'animals should not be protected only from an ecosystemic perspective or with a view to the needs of human beings, but mainly from a perspective that focuses on their individuality and intrinsic value.'[74] This means that we cannot see nature's rights as equal to animal rights: according to the Court, the rights of animals are held by specific members of the animal kingdom, while the rights of nature are more generally applicable to the existence of all natural species.[75] At the same time, animals are subjects of rights 'different from human beings' that cannot be equated to human beings, as their demands for legal protection are different. Hence, their rights 'should be observed as a specific dimension – with their own particularities – of the rights of Nature.'[76] The Court also addresses the content of animals' rights. The most important right spelled out in this regard is 'the right to free development of their animal behaviour', which includes rights to be free from hunting and other anthropogenic activities, among other rights.[77]

In order to further operationalise what rights of nature mean as applied to wild animals specifically, the Court then coins two principles of interpretation. First is the 'interspecies principle' which guarantees the protection of animals with a 'concrete grounding in the characteristics, processes, life cycles, structures, functions and evolutionary processes that differentiate each species.'[78] Second is the 'principle of ecological interpretation'. This principle captures the need to 'interpret animal rights at the level of ecological organization'.[79] According to the Court, all rights 'must be interpreted based on these principles, since biological interactions are the foundation of the interdependence, interrelation and equilibrium of ecosystems'.[80] Essentially,

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[74] Ibid, para 79. This reasoning seems to build upon the amicus curiae, which is referred to various times in the judgement: Brooks McCormick Jr. Animal Law & Policy Program at Harvard Law School & Nonhuman Rights Project, Constitutional Court of Ecuador Case No. 253-20-JH Amicus Curiae, (2021), https://animal.law.harvard.edu/wpcontent/uploads/ENGLISH.-HLS-NhRP-amicus-curiae-Ecuador.pdf.
[75] Constitutional Court of Ecuador, *Mona Estrellita,* Sentencia No. 253-20-JH/22, 27 January 2022, para 93.
[76] Ibid, para 83.
[77] Ibid, para 112.
[78] Ibid, para 97.
[79] Ibid, para 101-104.
[80] Ibid, para 101-104.

this means that when 'a predator kills its prey in compliance with the trophic chain, the right to life of an animal is not illegitimately violated'.[81] Lastly, it comes to the actual determination of whether, and in what instances, the rights of the monkey Estrellita were violated. It concludes that those rights were violated at three moments (at the time of removing her from her natural environment, at the time of confiscation by authorities, and her placement in a zoo).[82]

The principles of interpretation bring in the most controversial aspect of the Estrellita judgement: according to the Court's reasoning, humans eating other animals cannot be prohibited. Following the argument of the Ecuadorian Court, the rights of animals under the Constitution do not imply that humans should stop consuming animals for food, as we humans as well are part of nature, being omnivores and thus capable of eating animals.[83] This argument is questionable, since it seems to naturalise the consumption of meat by humans, despite of the fact that humans have the option not to eat meat.[84] Furthermore, it emphasises that the fact that animals are subjects of rights does not preclude killing invasive alien species, as such species endanger the very web of life by distorting the ecological balance.[85] This has led some scholars to conclude that the rights of nature framework fails to offer any substantive protections to animals, and thus remains an essentially welfarist approach that offers merely weak protections to animals.[86]

Nevertheless, in some respects, the position of the Ecuadorian court is still very much a rights-based view. This becomes clear when Court sets out the implications of the recognition that animals are subjects of rights. Apart from substantive dimensions (translating into the above discussed positive and negative obligations of the state), the recognition of animal rights also has a procedural dimension. The Court establishes 'the right of any person or legal entity, collectivity or human group to exercise legal actions and resort to public authorities, in the name of Nature, to demand the protection and reparation of its integrity or that of its elements, which includes

[81] Ibid, para 102.
[82] Ibid, part II.
[83] Ibid, para 103.
[84] See also Montes & Stilt (n 17).
[85] Constitutional Court of Ecuador, *Mona Estrellita*, Sentencia No. 253-20-JH/22, 27 January 2022, para 105.
[86] Eg. Condoy Truyenque (n 13).

animals.'[87] In other words, one of the most revolutionary aspects of recognizing animal rights through rights of nature may not be the substantive contents of the rights, but rather their procedural effects. By granting various procedural rights to animals, including the right to seek redress and the right to demand enforcement, the judgement has opened the courts' doors to animal defenders, allowing them to speak for animals whenever their rights have been violated.

4. Conceptualising nature-based animal rights

The approach of the Constitutional Court of Ecuador in interpreting animal rights in the context of rights of nature, provides a pathway to conceptualize animal rights that is somewhat different from the way in which animal rights have been understood in American and European legal scholarship as 'sentience-based'. It seems to offer a way to give shape to animal rights that are not solely based on the possession of a particular property, but rather as dependent on the context of the ecological relations of which the animals are part.[88] We may call this way of thinking about animal rights 'nature-based animal rights'. In order to further operationalise such 'nature-based animal rights' as a potential alternative way of thinking about the rights of animals, there is a need to explore a) how animal rights can be given shape as a dimension of rights of nature, b) what the human obligations correlative to nature-based animal rights would be, and c) whether or not domesticated animals are included in the scope of animals that are rights-holders, among other things. In this section, such questions will be discussed, and a potential operationalization for a framework of nature-based animal rights will be proposed.

a) How should we understand animal rights as a dimension of nature's rights?

Whereas sentience-based animal rights are based on the idea that animals derive their value from their individual properties, nature-based animal rights are grounded in the idea that animals derive their value from being part of the ecosystem or 'nature' that is protected with rights. Hence, rather than a movement of expanding rights from the human person to other individuals, the movement is one of trickling down from the holistic level of 'nature' to the systemic level of species and collectives, and further

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[87] Constitutional Court of Ecuador, *Mona Estrellita*, Sentencia No. 253-20-JH/22, 27 January 2022, para 121.
[88] See also A Gutmann, 'Derechos Relacionales de los Animales: El Animal en El Marco Del Derecho Constitucional Ecuatoriano' (2024) 41 *Foro: Revista de Derecho* 71–89.

towards the individual level. It is because as the State has a duty to protect the rights of nature, it also has a duty to protect the animals living in nature. The rationale is not based on the argument that because human rights are protected, animal rights should, by extension, be protected too (as the sentience-based animal rights supposes). We could imagine this to mean also that the interpretation and application of animal rights happens through a more ecological lens. It is in this regard that the so-called 'principle of ecological interpretation' can be of help, as coined by the Ecuadorian Constitutional Court as a new principle giving shape to animals' individual rights. This principle implies the interpretation of animal rights at various levels of ecological organization.[89] In other words, rights in a nature-based framework may be interpreted differently according to the level of organization at which they are located.

In this regard, I propose to distinguish three levels of interpretation of nature's rights: the individual, systemic, and holistic level.[90] This means that rights of nature should be understood not only at the holistic level of 'nature as a subject of rights' but also at the more systemic dimension of populations, species, and collectives – since nature, essentially, is made up of such collectives – and to the individualistic dimension of entities that are either sentient or non-sentient – since such collectives are, eventually, made up of individual entities. Indeed, as Donoso states, '[p]ut simply, rights of nature…are not individualistic rights, they are rights held by a whole or, in other words, by a collective entity.'[91] The different dimensions are, however, interdependent: individual entities always exist as embedded in larger networks of collectives and ecosystems, which, in turn, exist in the context of the ecosystems (or 'nature'), which have to be taken into account. Such operationalization can be illustrated as follows:

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[89] A similar idea was put forward by C Cullinan, *Wild Law: A Manifesto for Earth Justice* (Chelsea Green Publishing 2011) 101.: "each member of a community has both the right to be part of that community and the 'right' to be recognised as a distinct entity within it", p. 101. T Berry, *The Great Work* (Harmony/Bell Tower 1999).

[90] In ecology, sometimes 6 levels are distinguished (see eg. T Smith & R Smith, *Ecology* (Pearson Education 2012)). However, for law, the division in three main levels seems optimal.

[91] A Donoso, 'Toward a New Framework for Rights of the Biotic Community' in D Corrigan & M Oksanen (eds), *Rights of Nature: A Re-Examination* (Routledge 2021) 142.

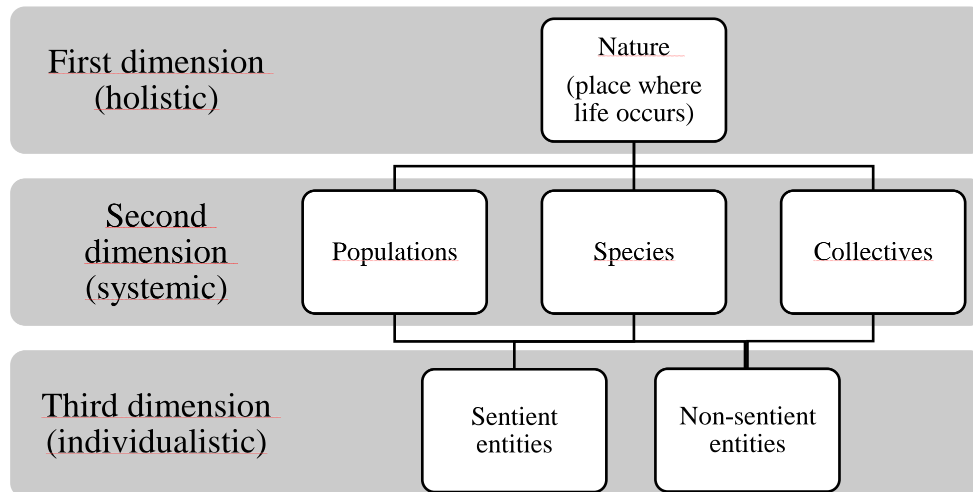

Figure 1. Schematic overview of three-dimensional concept of nature

This understanding of animal rights as a dimension of rights of nature thus asks for a more relational interpretation than what is common to sentience-based animal rights. Hence, in the interpretation of animal rights as rights of nature, 'one must focus on the kind of relationship that these different rights—individual and collective—would have to have in order for them to co-exist harmonically.'[92] Wrongful harm, in this perspective, is constituted by (intentional or non-intentional) anthropogenic disruptions of the relationships making up nature at these different levels. Hence, wrongful harm may be the capture of a woolly monkey from its natural environment (individual level), the use of toxins that threaten viable populations of frogs in rivers (systemic level), or the introduction of invasive species that threaten nature's ability to provide life in the first place (holistic level).[93] Thus, when judges have to decide on the rights of a squirrel, for instance, such rights should not only be interpreted at the level of the individual squirrel (where its properties are taken as guidance) but also at the level of the species (where the status of the species as endangered is taken into account) and the holistic level (where the health of its habitat is taken into account).

This makes clear that the rights of any entity in this framework should always be understood in their context, e.g. with reference to the other dimensions, such as the

[92] Ibid, 149.
[93] It should be noted that 'nature' at this level may be defined differently aligning with the legal culture in which rights of nature manifest itself, e.g. as 'the place where life occurs' or 'the web of life', or in a more scientific manner as "all the animals and plants in the world and all the features, forces, and processes that exist or happen independently of people" (Cambridge Dictionary).

status of the species or ecosystem in which they reside. Hence, individual wild animals hold rights to develop their free behaviour, but 'species' (on the systemic level) also hold rights, for instance, to 'exist and, consequently, not to be extinct for non-natural or anthropic reasons.'[94] As they have to be interpreted simultaneously, this means that the rights of an specimen of an endangered species may then be found to weigh more than the rights of a specimen that poses risks to the systemic dimension of nature (by threatening the balance of an ecosystem) in a specific situation. Hence, as opposed to the sentience-based perspective that would ascribe equal rights to all individuals, as a dimension of rights in the nature-based conception the status of the species can come in as an important limiting factor to an individual's rights. In the same way, the three-dimensional understanding of nature would imply an inherent limit to human rights, stemming from their embeddedness in and interdependence with the systemic and holistic dimension of nature.[95]

Such three-dimensional interpretation thus tries to seek a convergence between the rights of nature at distinct levels of organization. As an example: it is clear that if humans introduce an invasive species disrupting the balance of an ecosystem, could this be considered as a form of anthropogenic harm that violates nature's rights. However, when aiming to restore the balance by culling an invasive species that endangers the ecosystem, the approach should depend on the properties of the species involved. When species that have the ability to feel pain are concerned, this would, for instance, require the selection of a method of eradication that causes less pain, as this would arguably give rise to a right not to suffer. Rather than directly killing individual animals, a more adequate method here would, for instance, be the prevention of reproduction. Methods that prevent harmful invasive species from reproducing are already being used in several cases, for instance with grey squirrels in the United Kingdom.[96] In light of the existing alternatives (e.g., the use of toxins), this method is more respectful of animal individuals' rights, yet also takes account of the systemic and holistic level of nature's rights, thus interpreting animal rights 'at the level of ecological organization'. In this way, we can see how animal rights perceived as such are

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[94] Constitutional Court of Ecuador, *Mona Estrellita*, Sentencia No. 253-20-JH/22, 27 January 2022, para 111.
[95] A more detailed discussion of the implications for regarding human rights as grounded in nature's rights lies, however, outside of the scope of this article.
[96] Schoukens & Bernet Kempers (n 7).

eventually grounded in nature as a holistic web of relations, while not neglecting the value of individual beings. Sentience is a factor of differentiation that influences the interpretation of rights due to the fact that the individuals making up a sentient species are able to suffer, and thereby a justified approach to take to minimise pain and harm to the beings involved, but it is not the defining or grounding factor in the allocation of rights to beings. Hence, also individual members of non-sentient species also have rights, albeit different rights.

b) *What are the obligations correlative to nature-based animal rights?*

Now that we have explored the rights of individual animals as a dimension of nature's rights could be given shape, the question arises how and when these rights are violated. In other words, to what kind of duties do nature-based animal rights give rise? Whereas sentience-based animal rights have a clear starting point, namely the doctrine of human rights, it is less clear what the precise contents of nature-based animal rights would be. As Corrigan and Oksanen therefore suggest, '[p]recisely which duties correspond to the RoN, will depend on the content of these rights and on the nature of right-holders, which might vary from sentient animals to plants and ... to non-sentient and inanimate sites like rock formations and rivers.'[97] This idea is also reflected in the case of Estrellita, as the Court made clear that the rights of nature 'are not reduced to guaranteeing the rights mentioned in positive normative bodies but recognize all those rights that, even if not explicitly included, are suitable for the protection of Nature.'[98] The Court thus explicitly rejects a *numerus clausus* for rights of nature: it leaves it open to the courts to determine which rights and duties are at stake on a case-to-case basis. In this way, the contents of nature-based rights are inherently contextual, and should always be interpreted in specific cases, rather than being codified in an exhaustive manner.

Nevertheless, it is possible to distil a general idea of the kind of duties that nature-based animal rights lead to. In Estrellita, the Court noted that the main obligations correlative to animals' rights consist of (i) the obligation of the State to promote, protect and ensure the development of the free behaviour of wild animals; and, on the

[97] D P Corrigan & M Oksanen, 'Rights of Nature: Exploring the Territory' in D P Corrigan & M Oksanen (eds), *Rights of Nature: A Re-Examination* (Routledge 2021) 10.

[98] Constitutional Court of Ecuador, *Mona Estrellita,* Sentencia No. 253-20-JH/22, 27 January 2022, para 96.

other hand, (ii) the prohibition for the State or any person to intervene, impede, interfere or hinder this free development.[99] This suggests that violations of wild animals' rights can take place in three manners: a) when the State fails to promote and facilitate the development of free behaviour of wild animals (by way of omission), b) when the State intervenes, impedes, interferes or hinders the free development of behaviour (by way of commission) and c) when a person hinders their free development.[100] Notably, only 'anthropogenic disruptions' may cause infringements of nature's rights: the rights can never be violated by forces of nature itself.[101] This conceptualization is attractive, as it differentiates between the duties of the State (which has not only a negative but also a positive duty towards animals' development of natural behaviour) and the duties of individual persons, who do not have a positive duty to facilitate the free behaviour of wild animals (for which they, arguably, would also not have the means). It sets out the central entitlement to a duty of care that human beings and the State have in respecting, protecting, and fulfilling nature-based animal rights. The circumstances of the case will then determine the strength of the human obligation that the involved animal rights give rise to.

The manifestation of the negative duty correlating with the animal rights to free development of their natural behaviour is quite straightforward: it would arguably mean leaving animals alone so that they can live their natural lives, refraining from capturing them out of their natural environments. In contrast, it is the positive duty of care that requires further scrutiny. To what extent can humans be held under a positive duty to take action to facilitate animals' flourishing? When can an omission lead to a rights-violation? In this context, it seems reasonable to assume that the more dependent an animal is on human, and the more they live in interaction with human society, the stronger and more specific the entitlement is to facilitate the development of their natural behaviour. Instead of speaking about the protection of 'the individual' versus the protection of 'the species', we can then think about animals' right to develop their natural behaviour as giving rise to more specific and individually targeted obligations when animal flourishing is closely connected with human society, and less

[99] Constitutional Court of Ecuador, *Mona Estrellita*, Sentencia No. 253-20-JH/22, 27 January 2022, para 114.
[100] Using a similar wording as the Constitutional Court of Ecuador itself, see Ibid.
[101] As a tornado or flood would not 'violate' human rights either.

specific and more general obligations when animals live relatively independently from human society.[102] Such operationalization can be illustrated as follows:

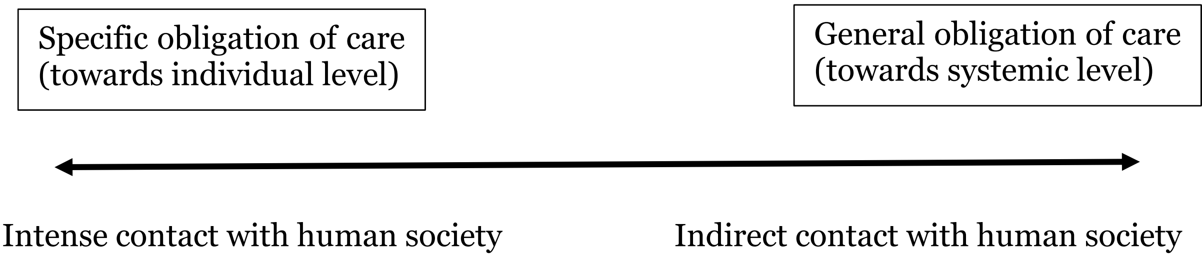

Figure 2. Human obligations relating to nature-based rights

This graph could then give guidance to the question on how to interpret the positive human obligations correlative to animal rights. For instance, an individual animal falling sick would not require any active intervention on the part of humans when he or she lives at a distance from human societies, whereas respect for the rights of an animal living in human care would require such active intervention. When we are speaking about animals living in the wild, it is a more general duty of care that correlates with their animal rights: for instance, a duty to ensure the health of the ecosystem in which they live. Hence, proximity (which can only be established on a case-by-case basis) becomes a crucial factor in the determination of which human obligations are correlative to nature-based animal rights. Perceived as such, the obligation of care correlative to nature-based animal rights can thus be conceptualised as a gradual scale ranging from the aim to protect the systemic level (species, populations or collectives), to the aim to protect the individual level of nature's rights.[103] In this way, the opposition to more systemic forms of environmental protection is overcome: when speaking about an individual animal living amongst humans (such as Estrellita), the duty of care towards facilitating their flourishing is particularly strong, whereas towards a woolly monkey living in nature humans would only have a more general duty of care that requires maintenance of their habitats so that their species can flourish on their own. Together with the principles of

[102] This conceptualization is inspired by the philosophical works of Keulartz & Swart, see J Keulartz & J A A Swart, 'Animal Flourishing and Capabilities in an Era of Global Change' in *Ethical Adaptation to Climate Change* (MIT Press 2013); J Keulartz, 'Towards an Animal Ethics for the Anthropocene' in J Keulartz & B Bovenkerk (eds), *Animal Ethics in the Age of Humans* (Springer 2016).
[103] This graph was inspired by the works of J Swart, 'Care for the Wild in the Anthropocene' in J Keulartz & B Bovenkerk (eds), *Animal Ethics in the Age of Humans* (Springer 2016).

interpretation, this scale can thus give guidance to the courts in determining the exact content of the rights and duties in each specific case.

a) Which animals fall under the scope of nature-based animal rights?

Lastly, the question arises whether nature-based animal rights also extend to domesticated animals, or whether they remain confined to wild animals. Even though Estrellita explicitly focuses on the rights of wild animals, rights of nature have already been applied to domesticated animals in other Ecuadorian cases,[104] for instance, in a 2011 case involving a request for a popular consultation that would give cantons the authority to prohibit bullfights.[105] The Court in this case accepted the consultation request with minor changes, without delving deeply into the connection between bullfighting and the rights of nature, yet confirming that bulls are legally 'beings that are part of Pachamama' and, 'by virtue of belonging to nature, they have the right to have their existence and integrity protected'.[106] Similarly, in a judgement concerning the legality of cock fights, the judge noted that 'since the State protects nature, and as roosters are part of nature, they are also subjects of protection of constitutional rights. In cockfighting, when roosters are forced to fight each other with the intent to win, they suffer injuries, mistreatment, including mutilations, and in extreme cases, death. The 2008 Constitution of Ecuador explicitly recognises nature as a subject of rights, and attacking the lives of these living beings, which are part of nature, constitutes a severe and irreparable damage'.[107] Hence, it seems possible for rights of nature to be extended to domesticated animals. This is also the position of Anne Peters, who suggests that: 'the Estrellita judgment implicitly acknowledges rights of pigs, cows, and poultry while at the same time implying that the rights of animals may be lawfully restricted.'[108] It should be noted however that such interpretation does seem to take a step away from

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[104] M Montes & K Stilt, 'Estrellita the Woolly Monkey and the Ecuadorian Constitutional Court: Animal Rights Through the Rights of Nature' (2023) *ReVista Harvard Review of Latin America*, available at: https://revista.drclas.harvard.edu/estrellita-the-wooly-monkey-and-the-ecuadorian-constitutional-court-animal-rights-through-the-rights-of-nature/.

[105] Constitutional Court of Ecuador, 'Sentencia' in Juicio n° 0001-11-CP (Enmienda de la Constitución), 15 February 2011. See V Morales Naranjo, 'Deconstruir la cultura taurina en Ecuador para construir los derechos de los animales' (2020) *Foro: Revista de Derecho* n.º 34, 199;

[106] Constitutional Court of Ecuador, 'Sentencia' n° 0001-11-CP (Enmienda de la Constitución), 15 February 2011, at 4. It should be noted that this was not the independent reasoning of the Court itself, as in this section of the judgment it is confirming the President's stance on the matter.

[107] Judicial Tribunal of the Parroquia Iñaquito, 'Sentencia', n.° 17294201901759, 5 December 2019.

[108] Peters (n 65), at 18.

the more narrow way in which the Constitutional Court of Ecuador gave shape to the rights of wild animals specifically.[109]

The most likely answer to this question is therefore that the rights of nature can potentially include the rights of domesticated animals. However, the operationalization of rights of nature as applied to domesticated animals would arguably be different from the way in which the contents of nature-based animal rights have been conceptualised in the previous sections. Determining the rights of domesticated animals may pose another kind of difficulties because their domesticated nature means that it is difficult to determine an ecosystemic function beyond providing for humans: a function they would lose if transferred to their original habitats.[110] The principle of ecological interpretation may therefore not be relevant to the contents of domesticated animals' rights. Instead, other principles may be coined that are guiding, such as the principle to equal treatment based on species (preventing discrimination between animals based on their use-category[111]). The potential scope and contents of the rights of nature as applied to domesticated animals are outside the scope of the present article, but may be subject to further research.[112]

5. Nature-based animal rights as alternative to sentience-based animal rights

The proposal for a theoretical framework of nature-based animal rights, as (tentatively) outlined in this article, differs from the sentience-based views in many ways, even if there are also some similarities. Most importantly, a difference can be found in the route through which animal rights are established. With regard to nature-based animal rights, it is not the 'human' that is taken as the starting point, but rather the overarching level of relations ('nature', as the place where life occurs) which is recognised as the source of rights. This also has some implications for the contents of nature-based animal rights. Whereas sentience-based animal rights usually revolve around those fundamental rights most associated with human rights doctrine, such as

[109] C Contreras & M Montes, 'Derecho constitucionales para animales no humanos en Ecuador: El caso de Estrellita, la mona chorongo' (2022) 9 *Revista General de Derecho Animal y Estudios Interdisciplinares de Bienestar Animal* 1.
[110] See also Wright (n 2).
[111] J Eisen, 'Liberating Animal Law: Breaking Free from Human-Use Typologies' (2010) 17 *Animal Law* 59.
[112] Building further on Peters (n 65).

the right to liberty and bodily integrity, nature-based animal rights prioritise an animal's right to develop their natural behaviour, giving rise to a gradual duty of care on the part of the State and individual persons to facilitate the development of natural behaviour of animals. The individual capacities of animals are thus less important in the grounding of their rights, yet may influence their interpretation and application: sentience may still be the reason to treat animals differently from non-sentient beings. Furthermore, whereas many sentience-based animal rights theories attach a large importance to the notion of personhood, regarding it as the basis for holding 'fundamental rights',[113] nature-based animal rights do not need to involve a concept of 'the person'. This means that nature-based animal rights may regard animals as a form of non-personal subjects of rights.[114] Lastly, conceiving animal rights as nature-based also influences the way in which human rights have to be understood: the human is no longer 'at the centre' of the universe, but rather a part of the web of relations that constitutes nature. Hence, nature-based rights require a more radical reconceptualization of our understanding of 'rights' to begin with, as inherently relational rather than purely individualistic.

There are, however, also some potential problems with the idea of basing animal rights on the rights of nature. First of all, reading animal rights as grounded in the web of life that constitutes nature opens the door to arguments in favour of continuing certain practices that are potentially infringing animals' rights (such as growing and killing them for food) due to the 'nature' of the human species. This we can call the danger of the 'naturalization' of rights, the move towards a situation in which nature, as it is, is considered 'good', falling victim to the naturalist fallacy.[115] We have seen how, in the Ecuadorian judgment, such reasoning translated in the remark that raising and killing animals for food cannot be prohibited, since humans are omnivores by nature.[116] This sounds problematically similar to the argument that men have a natural right to reign over women, since they are biologically stronger and have subjugated them for millennia. In some ways, therefore, nature-based rights seem to grant animals a

[113] See for instance the works of Wise (n 27).
[114] T Pietrzykowski, 'The Idea of Non-personal Subjects of Law' in V A J Kurki & T Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer 2017); Montes Franceschini (n 27).
[115] See also A Rawson & B Mansfield, 'Producing Juridical Knowledge: "Rights of Nature" or the Naturalization of Rights?' (2018) 1 *Environment and Planning* 99.
[116] M Guim & M Livermore, 'Where Nature's Rights Go Wrong' (2021) 107 *Virginia Law Review* 1347, 1419.

weaker form of rights than the sentience-based rights would promise, and may fall victim to anthropocentric interpretation. The question is, however, whether a similar danger is not also present with regard to sentience-based animal rights, as there, too, it will still be the human judges shape and contents to the rights of animals.[117] Another concern with a nature-based approach to animal rights is the danger of overextending rights to the point where everything has rights, potentially diluting the concept of rights to begin with. Indeed, it is difficult to conceive how to strike the right balance between recognizing the intrinsic value of all entities in nature and ensuring that rights remain meaningful. At the same time, however, we have seen how a nature-based conception of animal rights requires a more radical reconceptualization into a multi-dimensional concept of rights that takes account of the different levels. Hence, rather than just extending the existing rights-doctrine to other beings, the change of paradigm here will alter the very interpretation and application of rights.

In any case, both of these concerns seem to dissipate in the face of the reality that rights of nature are being recognised in a growing number of jurisdictions at this moment.[118] We have seen through concrete examples in Ecuador, but also in other jurisdictions in which rights of nature are being recognised, that a transition towards nature-based animal rights is arguably smaller than a revolution towards 'liberation' of animals in the form of a civil rights movement based on their similar properties. Many of the rights of nature initiatives could potentially be interpreted as implying that individual animals (being part of nature) would have strong legal rights, albeit through a different route. Importantly, chances are that when no comprehensive account of 'nature-based animal rights' is developed in legal doctrine, most individual animals may simply lose out when jurisdictions start to develop a more systemic interpretation of nature's rights in which only ecosystems and species (yet not the individual animals) are subjects of rights.[119] Such animal-unfriendly interpretation does not seem too far-fetched, as from the perspective of a more conservationist approach to nature conservation this would

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[117] And their interpretation of such rights may depend on what (or who) they had for breakfast. See M Liebman, 'Who the Judge Ate for Breakfast: On the Limits of Creativity in Animal Law and the Redeeming Power of Powerlessness' (2011) 18 *Animal Law* 133.

[118] See D Humphreys, 'Rights of Pachamama: The Emergence of an Earth Jurisprudence in the Americas' (2017) 20 *Journal of International Relations and Development* 459. According to Putzer et al, there are now more than 400 rights of nature initiatives worldwide. A Putzer et al, 'Putting the Rights of Nature on the Map: A Quantitative Analysis of Rights of Nature Initiatives Across the World' (2022) 18 *Journal of Maps*. See also the ecojurisprudence monitor which keeps track of Rights of Nature: https://ecojurisprudence.org/, accessed on 20 July 2024.

[119] Except perhaps those animals that are members of endangered species. See also Platvoet (n 4).

arguably be a logical way to develop nature's rights as a tool for better environmental protection. Indeed, as Corrigan states, 'if protecting biodiversity is our goal, sentience is a poor criterion, and the animal liberation or animal rights approach is clearly inadequate.'[120] Hence, the further operationalization of nature-based animal rights has a certain practical relevance – and urgency.

Consequently, the added value of a nature-based conception of animal rights may not primarily lie in it being conceptually stronger than the sentience-based view, but rather in a) its contextual suitability and b) its procedural implications. With regard to its contextual suitability, it is clear that nature-based animal rights, as opposed to sentience-based animal rights, has the potential to integrate the rights of individual animals in the fast-growing jurisprudence on rights of nature. The nature-based conception of animal rights may, therefore, be especially relevant for jurisdictions that have recognised rights of nature, or have adopted a more 'socio-biological' or 'ecocentric jurisprudential lens', as is the case in a growing number of Latin American jurisdictions, where it is unlikely that the sentience-based view on animal rights as a civil rights movement will gain support.[121] In other words, whereas sentience-based animal rights fit in well with a legal culture of juridical humanism as present in the European legal culture, nature-based animal rights may be more suitable for a legal paradigm that has an eco- or biocentric orientation. With regard to its procedural implications, it should be noted that nature-based animal rights go far beyond what the current welfarist paradigm requires procedurally, and thus represents more than mere 'simple' rights.[122] Whereas welfarist laws primarily focus on the humane treatment of animals and their well-being, maintaining an anthropocentric interpretation of 'standing' nature-based animal rights recognise the intrinsic value and relevance of animals for law. Hereby, they guarantee the adequate justiciability of their legal protections by guaranteeing the possibility to go to court 'in the name of' animals. In other words, the recognition of animal rights through a rights of nature

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[120] D Corrigan, 'Human Rights and Rights of Nature: Prospects for a Linkage Argument' in D Corrigan & M Oksanen (eds), *Rights of Nature: A Re-Examination* (Routledge 2021) 111.

[121] Which is developing in an increasing number of Latin American jurisdictions. See also the Wild Parrot Case by the Brazilian Supreme Court of Justice, which advocates for a shift towards a biocentric or ecocentric jurisprudential lens. See for a discussion C Hall, 'Diffusing the Legal Conceptions of the Global South and Decolonizing International Law: Crystallizing Animal Rights Through Inter-Judicial Dialogue' (2023) 4 *Frontiers in Animal Science* 1. See also V De Lucia, 'Towards an Ecological Philosophy of Law: A Comparative Discussion' (2015) 4 *Journal of Human Rights and the Environment* 167.

[122] Such protections can, at most, be regarded as 'simple rights'. See Stucki (n 25).

paradigm does open the court doors for non-human beings, thereby greatly improving their legal situation.

Sentience-based animal rights	Nature-based animal rights
• Grounded in individual properties (sentience)	• Grounded in nature as a web of relations
• Central rights: rights to life, bodily integrity, liberty	• Central rights: right to development of natural behaviour
• Extends the existing framework of human rights	• Requires reconceptualization of rights as embedded in nature
• Sentience as a ground for rights	• Sentience as a differentiating factor for interpretation
• Often a connection to legal personhood	• No connection to legal personhood necessary
• Fit in with juridical humanism/ anthropocentric jurisprudential lens	• Fit in with RoN/ ecocentric jurisprudential lens

Figure 3. Comparison between sentience-based and nature-based animal rights

6. Conclusion

The movements striving for the recognition of nature's rights and those striving for the recognition of animal rights have many things in common. Most importantly, they both aim to challenge the long-held anthropocentric basis of our legal system. They aim to reshuffle the existing division of power, giving a voice to those formerly disregarded as mere 'objects'. They aim to reshape the relations between humans and non-humans in favour of a more respectful and sustainable way of living together. However, whereas rights of nature are rooted in a more systemic approach to environmental protection, animal rights build upon the narrative of social justice movements, expanding the circle of individual subjects of rights. This has caused the two movements to remain moving in relatively separate domains, despite their similarities.

The 2022 case of Estrellita before the Constitutional Court of Ecuador shows that animal rights and rights of nature do not need to remain isolated from each other. It suggests that individual animals can be regarded as subjects of rights under the

normative framework of rights of nature, at least in the context of Ecuador. This article has taken Estrellita as a starting point to investigate the possibility of 'nature-based animal rights', inspired by the way in which the Constitutional Court of Ecuador conceptualises the rights of wild animals. By recognising animals as integral components of ecosystems, interpreting and applying their rights using the 'interspecies principle' and the 'principle of ecological interpretation', such approach bridges the gap between more systemic forms of environmental protection and individualist animal rights. Such conceptualization of nature-based rights provides a potential framework for understanding and integrating animal rights within the context of RoN, allowing for a more harmonious and integrated approach that serves both the aims of protecting the environment and the animals living within it.

Nature-based animal rights can be distinguished from the more common conception of animal rights grounded on the properties of individuals. It may be particularly relevant in regions and legal systems where RoN legislation and principles have been or are being adopted. By acknowledging animals as part of the natural world while recognizing their individual intrinsic value, nature-based animal rights facilitate the inclusion of animals within these legal frameworks. Apart from that, nature-based animal rights clearly go beyond the welfarist approach to animal protection by granting animals procedural rights, regarding them as parties to legal cases involving them, and sometimes, even giving every citizen the possibility to represent animals in court, as was the case in Ecuador. In comparison with sentience-based animal rights, nature-based rights thus offer the potential for a more environmentally sensitive conceptualization of animal rights. The hope is that this operationalization will be further elaborated by rights of nature and animal rights scholars and be of guidance for courts and lawyers in those jurisdictions in which rights of nature have already been, or about to be, recognised.