The Symbolic Nature of Legal Rights

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Abstract

This article explores the application of human rights doctrine to the concept of nature as a rights-holder, drawing parallels between challenges faced by proponents of nature rights and children's rights activists. It delves into jurisprudential theories such as the will theory and interest theory to scrutinize the applicability of rights to diverse contexts. Critiquing symbolic legislation, it questions the efficacy of enacting laws for symbolic value alone. Instead, it proposes reframing legal rights as duties to promote a more holistic approach to addressing systemic injustices and upholding the welfare of both society and nature. Through this analysis, the article advocates for a shift towards a legal framework that prioritizes collective welfare over individual entitlements.

Point of Departure

I am not a scholar of environmental law, nor do I have a background in natural sciences like ecology or biology. However, I do have a background in children's rights and have written about human rights on many occasions.[1] This article endeavours to apply my understanding of human rights doctrine and philosophy to the concept of nature as a rights-holder. Despite appearing counterintuitive, there are numerous similarities between the challenges faced by proponents of "nature as a rights-holder" and children's rights activists throughout recent history. These challenges primarily arise from the so-called "will theory", which posits that rights holders cannot exist without agency.[2]

Today, the term "human rights" is utilised across various contexts and holds a significant place in legal writings, political debates, and everyday conversations. The concept of human rights can be traced back to Greek ideas about the individual person, Roman notions of law and rights, and Christian doctrine of the soul.[3] In many respects, the human rights doctrine represents a Western and imperialistic mental (and legal) legacy that warrants questioning and criti-

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[1] See for example Refors-Legge, Maria, *Skolans skyldighet att förhindra kränkande behandling av elever* [The school's obligation to prevent abusive treatment of students], Stockholms universitet, 2021, p. 55 ff; Refors-Legge, Maria, *Avstängning av elever och rätten till utbildning – en jämförelse av avstängningar som disciplinär åtgärd i Sverige och England* [Suspension of pupils and the right to education – a comparison of suspensions as a disciplinary measure in Sweden and England], Victoria Enkvist (eds.), Antologi om barnkonventionen och skolan [Anthology on the Convention on the Rights of the Child and the School], iUSTUS, 2021; Refors-Legge, Maria, *Religionsfrihet, skolplikt & diskriminering i grundskolan* [Freedom of religion, compulsory education & discrimination in primary school], Juridisk Publikation, 2019 and Refors-Legge, Maria, *Ordning i klassen – om lärares fysiska maktutövning över elever* [Order in the class – about teachers' exercise of physical power over students], Juridisk Publikation, 2020.

[2] Richards, David, *Rights and autonomy*, Ethics, 1981, p. 3–20. Goodin, Robert och Gibson, Diane, *Rights, Young and Old*, Oxford Journal of Legal Studies, 1997, p. 185–186; Buck, Trevor, *International Child Law*, u. 3, Routledge, 2014, p. 24. See also Perry, Michael, *The idea of human rights*, Oxford University Press, 1998 och Gewirth, Alan, *The community of rights*, The University of Chicago Press, 1996.

[3] Hunt, Lynn, *Inventing Human Rights – A History*, Norton, 2008, p. 20.

cal examination in its own right.[4] However, in this article, I will only acknowledge that the concept of human rights (and rights in general) carries with it a background noise of the conqueror's view of the conquered and the notion that the interpretations of the global West regarding what is "good" and "bad" are the only viable ones with which to comprehend (and resolve) the significant challenges posed by destroyed ecosystems, climate change, mass species extinction, poverty, and war.[5]

In this text, I will delve into the concept of rights and human rights alongside theories on symbolism and symbolic legislation. The aim is to challenge the assumption of necessity of introducing rights to address the extensive environmental challenges faced by all of Earth's inhabitants today, attributable, among other factors, to humankind's use of fossil fuels, the destruction of entire ecosystems, and the systematic extinction of other species on the planet.

What is a Right?

The concept of rights is challenging to define, as their very existence relies as much on emotions as on reasoning. The term "right" embodies the desire for protection, the necessity for recognition, and the hope of the powerless for shelter and understanding. It is often asserted that humans are inherently endowed with rights and that these rights are equal and self-evident.[6] However, this assertion of self-evidence presents a paradox: if the equality of rights is so apparent, why must it be proclaimed, and how can they be universal if not universally recognized?[7]

This paradox arises for several reasons. First, the need to proclaim the equality of rights indicates that, in practice, these rights are not always respected or enforced. Historical and contemporary struggles, such as the civil rights movement in the United States and ongoing efforts for gender equality globally, show that rights often need active advocacy and legal protection to be realized.[8]

Second, the idea of universal rights assumes a shared understanding and recognition across different cultures and societies, which is not always present. For example, cultural relativism argues that rights and moral principles are not universally applicable but are instead shaped by cultural contexts. Jack Donnelly notes that while human rights are universal in principle, their application can vary significantly across cultures due to differing societal values and norms.[9]

Moreover, the concept of self-evident rights is rooted in Enlightenment philosophy, particularly the works of John Locke and Thomas Paine, who posited that natural rights are inherent and inalienable.[10] Critics like Alasdair MacIntyre

4 For more on this, see for instance Chimni, Bhupinder, *Third World Approaches to International Law: A Manifesto*, International Community Law Review, 8(1), 2006, p. 12; wa Mutua, Makau, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, Harvard International Law Journal, 42(1), 2001, p. 31 and Baxi, Upendra, *The Future of Human Rights*, Oxford University Press, 2002, p. 89.

5 wa Mutua, Makau, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, Harvard International Law Journal, 42(1), 2001, p. 31

6 See for example Kant, Immanuel, *The Metaphysics of Morals*, Gregor, Mary (transl.), Cambridge University Press, 1996; Lecester Ford, Paul (ed.), *The Writings of Thomas Jefferson*, 10 vols., G. P. Putnam's Sons, 1892–99, vol. 2, pp. 42–58 and Glendon, Mary Ann, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, 2001, p. 310–314. See also Taylor, Charles, *Sources of the Self: The Making of Modern Identity*, Harvard University Press, 1989, p. 12 ff. and Hunt, Lynn, *Inventing Human Rights – A History*, Norton, 2008, p. 15 ff.

7 Hunt, Lynn, *Inventing Human Rights – A History*, Norton, 2008, p. 20.

8 Donnelly, Jack, *Universal Human Rights in Theory and Practice*, Cornell University Press, 2013, p. 20.

9 Donnelly, Jack, *Universal Human Rights in Theory and Practice*, Cornell University Press, 2013, p. 40.

10 Locke, John, *Two Treatises of Government*, Awnsham Churchill, 1686, p. 5 and Paine, Thomas, *The Rights of Man*, J.S. Jordan, 1791, p. 68.

argue that rights are not natural but are social constructs that gain meaning only within specific historical and cultural contexts.[11] This perspective challenges the notion of universal, self-evident rights by emphasizing the role of social and cultural factors in defining and recognizing rights.

In short, while the concept of rights aims to establish universal principles of justice and equality, the practical realization of these rights often requires continuous advocacy and adaptation to diverse societal contexts. The assertion that rights are self-evident and universal is complicated by the realities of cultural diversity and the need for ongoing efforts to ensure that rights are recognized and respected in practice.

As the historian Lynn Hunt articulates in her book *Inventing Human Rights*, the existence of human rights necessitates three interlocking qualities: they must be natural,[12] inherently belonging to humans,[13] and be traditionally universal.[14] This framework is essential for several reasons since without them, the concept of human rights would be fragmented and inconsistent, leading to unequal and selective application that undermines their effectiveness.[15]

Historically, fulfilling the requirements for universal human rights has proven nearly impossible, and humanity continues to grapple with these challenges today.[16] The difficulties arise because the requirements are deeply embedded in the complex and varied fabric of global societies. Efforts to universalize human rights must (among other things) contend with cultural relativism, entrenched inequalities, and political power dynamics. For instance, cultural relativism presents a significant barrier, as different societies hold diverse beliefs about what constitutes a right, leading to varying interpretations and implementations.[17] Entrenched inequalities further complicate the situation, as historical and systemic disparities in wealth, education, and access to resources create uneven starting points for different groups. Political power dynamics also play a crucial role, as those in power may resist changes that threaten their status, thus hindering the progress towards equality.[18]

The complexities could be illustrated through some thought provoking questions, for instance: at what age does a person attain the right to decide their own religious and political beliefs? Do immigrants possess the same rights as citizens? Are women afforded the same rights

11 MacIntyre, Alasdair, *After Virtue: A Study in Moral Theory*, University of Notre Dame Press, 1981, p. 69.

12 Human rights are considered natural because they are thought to arise from human nature itself. These natural rights are seen as inherent and inalienable, meaning they cannot be granted or revoked by governments but exist independently of any legal or social recognition.

13 For human rights to be meaningful and effective, they must be equal. Equality in rights implies that every individual, regardless of their characteristics or circumstances, possesses the same fundamental rights. This principle of equality is crucial to prevent discrimination and ensure that all people are treated with the same level of dignity and respect. Historical documents such as the Declaration of the Rights of Man and of the Citizen and the Universal Declaration of Human Rights emphasize equality as a core tenet, aiming to eliminate distinctions based on race, gender, nationality, or religion.

14 Human rights must be universally applicable globally to ensure that they provide protection and uphold human dignity everywhere. The universality of human rights is based on the premise that all human beings, by virtue of being human, are entitled to these rights regardless of their geographic, cultural, or political context. This global applicability is intended to foster international solidarity and cooperation in protecting human rights and addressing violations wherever they occur.

15 Hunt, Lynn, *Inventing Human Rights – A History*, Norton, 2008, p. 20.

16 Hunt, Lynn, *Inventing Human Rights – A History*, Norton, 2008, p. 20.

17 Donnelly, Jack, *Universal Human Rights in Theory and Practice*, Cornell University Press, 2013, p. 28–29 and Freeman, Michael, *Human Rights: An Interdisciplinary Approach*, Polity Press, 2011, p. 121–122.

18 See for instance Merry, Sally, *Human Rights and Gender Violence: Translating International Law into Local Justice*, University of Chicago Press, 2006, p. 75–77.

as men? Do transgender individuals enjoy the same rights as those who identify with their assigned gender at birth? To answer these questions and others like them the legal scholar turns to jurisprudential theory.

On the Will Theory and the Need for Agency

In the realm of jurisprudence, the concept of human rights has been a subject of extensive debate and analysis.[19] One theoretical framework that offers a lens through which to examine human rights is the will theory. Originating from the works of legal philosophers such as Immanuel Kant, Herbert Lionel Adolphus Hart, and Ronald Dworkin, the will theory posits that rights are contingent upon the capacity for agency, whereby individuals possess the ability to make choices and exercise their will freely. This perspective challenges traditional notions of rights as inherent or natural, instead emphasizing the role of individual autonomy and volition in the recognition and enforcement of rights.

Immanuel Kant's conception of rights lays the groundwork for the will theory by emphasizing the moral autonomy of individuals as rational beings. Kant argues that individuals have inherent worth and dignity by virtue of their capacity for rational thought, and that rights derive from this fundamental aspect of human nature. According to Kant, rights are grounded in the categorical imperative, which dictates that individuals must be treated as ends in themselves, rather than as means to an end.[20] This focus on individual moral autonomy aligns with the symbolic nature of rights, as it underscores the inherent dignity and value that rights symbolize. However, applying this to nature as a rights-holder presents challenges, as natural entities like rivers and forests do not possess rational thought or moral autonomy.

Building upon Kant's ideas, Hart further develops the will theory by articulating rights as protected spheres of discretion, wherein individuals are entitled to exercise their autonomy free from interference or coercion. Hart emphasizes the importance of agency in defining the boundaries of permissible conduct within a legal framework, arguing that rights serve to safeguard individual autonomy and freedom of choice.[21] This perspective highlights a core issue in attributing rights to nature: the lack of agency. Nature cannot exercise autonomy or discretion in the way humans can, which complicates the application of will theory to environmental rights. The symbolic promise of protection and recognition for nature, therefore, must be rooted in different theoretical grounds, such as the interest theory or a shift towards framing these protections as duties. By relating Kant's and Hart's theories to the broader discussion of nature as a rights-holder, we see that traditional human rights framework struggle to accommodate the non-agential nature of the environment. This necessitates a revaluation of how we conceive legal rights and the symbolic value they hold, pushing us towards alternative frameworks that bet-

[19] See Dembour, Marie-Bénédicte, What are human rights? – four schools of thought, Human Rights Quarterly, 2010, s. 1–2. See also Donnelly, Jack, *Universal human rights in theory and practice*, Cornell University Press, 2013; Perry, Michael, *The idea of human rights*, Oxford University Press, 1998; Gewirth, Alan, *The community of rights*, The University of Chicago Press, 1996; MacIntyre, Alasdair, *After Virtue: A Study in Moral Theory*, University of Notre Dame Press, 1981; Mutua, Makau, *Human Rights: A Political and Cultural Critique*, University of Pennsylvania Press, 2008; Stammers, Neil, *Human rights and social movements*, Pluto Press, 2009; Baxi, Upendra, *The future of human rights*, Oxford University Press, 2008; Habermas, Jürgen, *Between facts and norms: contributions to a discourse theory of law and democracy*, William Rehg (transl.), Polity, 1996 and Ignatieff, Michael, *Human rights as politics and idolatry*, Princeton University Press, 2001.

[20] Kant, Immanuel, *Groundwork for the Metaphysics of Morals*, Harper & Row, 1785, p. 29.

[21] Hart, Herbert, *Are There Any Natural Rights?*, The Philosophical Review, 64(2), 1955, p. 189.

ter capture the needs and protections required for both human and non-human entities.

From a children's rights perspective, the will theory presents a problem. Young children do, of course, have some form of agency; the agency to live, to be cared for, to be fed, to sleep, and to play, for instance. However, returning to the questions posed in the section above, can young children really be attributed with agency regarding, for instance, their religious beliefs? And even if they could, there is always the possibility that their agency, their choice so to speak, might go against their own safety and be detrimental to their health.

From a will theory perspective, nature faces a similar problem. Of course, every living thing on the planet carries with it the biologically hardwired strive to survive and to procreate, but what about rivers and lakes? What about the air, the rain, and the soil? Can these natural phenomena be attributed with any agency at all?

To solve these dilemmas the concept of "passive agency"[22] has been elevated by some authors and researchers. Passive agency refers to the idea that entities might influence their environment and be affected by it, even without possessing active, conscious decision-making capabilities. For example, a river shapes the landscape through which it flows, supporting ecosystems and affecting human activities, even though it does not do so intentionally. Similarly, trees, ants, and lions impact their environments through their natural behaviours and life cycles. However, many legal scholars would argue that they lack the capacity to communicate this influence in a way that would satisfy the requirements set out by the will theory.[23]

Thus, while nature may exhibit forms of passive agency, it does not align with the active agency required by the will theory, which focuses on autonomy and conscious decision-making. This distinction underscores the limitations of applying traditional human rights frameworks to environmental contexts and highlights the need for alternative approaches, such as the interest theory, which will be emphasised in section 4 below. Another alternative is that rights should be reframed as duties, which is something that I will argue at the end of this article in section 6.

On the Interest Theory and the Satisfaction of Fundamental Human Interests

In children's rights doctrine, the challenge of proving agency that would satisfy the will theory has given rise to the interest theory. The interest theory of rights posits that rights are based on the interests and needs of individuals rather than their capacity for agency. According to this perspective, rights derive from the satisfaction of fundamental human interests, such as the need for security, liberty, and well-being.[24] Proponents of the interest theory argue that rights should be understood as instruments for advancing the interests and welfare of individuals, rather than solely as expressions of autonomy and self-determination.[25]

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22 Gottlieb, Robert, *Environmentalism Unbound: Exploring New Pathways for Change*, MIT Press, 2002, p. 112.

23 Gottlieb, Robert, *Environmentalism Unbound: Exploring New Pathways for Change*, MIT Press, 2002, p. 112. Cf. Hart, Herbert, *Are There Any Natural Rights?*, The Philosophical Review, 64(2), 1955, p. 189.

24 Eekelaar, John, *The Emergence of Children's Rights*, Oxford Journal of Legal Studies, 6(2), 1986, p. 163 f; Freeman, Michael, *The Rights and Wrongs of Children*, Frances Pinter, 1983, p. 46 f; Archard, David and Skivenes, Marit, *Balancing a Child's Best Interests and a Child's Views*, International Journal of Children's Rights, 17(1), 2009, p. 16 and MacCormick, Neil, *Children's Rights: A Test-Case for Theories of Right*, Neil MacCormick (Eds.), Legal Right and Social Democracy: Essays in Legal and Political Philosophy, Clarendon Press, 1982, p. 154.

25 MacCormick, Neil, *Rights in Legislation*, Peter Hacker and Joseph Raz (Eds.), Law, Morality, and Society: Es-

This perspective on the purpose of rights parallels discussions in environmental law, particularly within the Rights of Nature (RoN) movement. The RoN movement, with its origins in indigenous traditional knowledge and ancestral cultures, has obtained concrete expression in courts, constitutions, and citizen referenda worldwide.[26] A key premise underlying this global initiative is that the Cartesian separation between man and nature is illusory and that all organic life is intimately connected.[27] The arrival of the *Anthropocene* has further exposed frailties in the concept of legal personhood and invited debate over the boundaries of nature itself.[28]

Even from an interest theory standpoint, there are questions that can be posed regarding nature as a rights holder. Advocates of the interest theory argue that rights should be based on the satisfaction of fundamental interests,[29] such as the need for ecological integrity and biodiversity. Recognizing nature as a rights holder thus requires redefining rights in terms of the broader ecological and ethical considerations inherent in the natural world.[30] A movement towards this direction can be gleaned, for instance, in Ecuador's 2008 constitution that grants nature the right to "exist, persist, maintain and regenerate its vital cycles", see tit. II, Ch. 7, art. 71. This legal innovation arguably reflects an ecocentric ethical orientation, valuing ecosystems as a whole rather than merely their utility to humans.[31]

The rights of nature have been interpreted and justified in various legal contexts, as seen in landmark cases from Ecuador, Colombia, and India. These cases provide insights into how legal systems (re)interpret nature and legal personhood in light of traditional and diffused ideas.[32] For example, in the Atrato River case in Colombia, the Constitutional Court emphasized the intrinsic rights of the river, recognizing its role in sustaining both nature and local cultures.[33] Similarly, India's High Court in the Ganges and Yamuna case granted these rivers the status of legal persons, highlighting their religious and ecological significance.[34]

However, instead of delving deeper into philosophical musings on personhood, agency, and ways of expressing fundamental interests, it is crucial to discuss whether rights, as imagined in a human rights framework, genuinely offer the kind of protection to nature that its proponents hope and that the world, for all intents and purposes, need. This discussion should start with the notion of rights as a symbol and the challenges that arise with symbolic legislation since rights for nature, much like other symbolic legal instruments, will face implementation

says in Honour of H.L.A. Hart, Clarendon Press, 1977, p. 198 f.

26 Kauffman, Craig and Martin, Pamela, *Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand*, Global Environmental Politics, 18(4), 2018, p. 54.

27 Boyd, David, *The Rights of Nature: A Legal Revolution That Could Save the World*, ECW Press, 2017, p. xxix.

28 Arias-Maldonado, Manuel, *The "Anthropocene" in Philosophy: The Neo-material Turn and the Question of Nature*, Frank Biermann and Eva Lövbrand (Eds.), Anthropocene Encounters: New Directions in Green Political Thinking, Cambridge University Press, 2019, p. 56.

29 See for instance Raz, Joseph, *The Morality of Freedom*, Oxford University Press, 1986, p. 166 and MacCormick, Neil, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*, Clarendon Press, 1982, p. 154.

30 See for instance Stone, Christopher, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, Southern California Law Review, 45, 1972, p. 456 and Boyd, David *The Rights of Nature: A Legal Revolution That Could Save the World*. ECW Press, 2017, p. 112.

31 Greene, Natalia, *The first successful case of the Rights of Nature implementation in Ecuador*, GARN, www.garn.org, 2011, retrieved 2024-05-24.

32 Gellers, Joshua, *The Great Indoors: Linking Human Rights and the Built Environment*, Journal of Human Rights and the Environment, 7(2), 2016, p. 243.

33 Center for Social Justice Studies et al. v. Presidency of the Republic et al., 2016.

34 Mohd Salim v. State of Uttarakhand & Others, 2017.

challenges and resistance from established legal and economic systems.[35]

To conclude, while extending legal rights to nature through frameworks like the interest theory offers a novel approach to environmental protection, the effectiveness of such rights depends on their practical enforcement and the broader socio-legal context. The recognition of nature as a rights holder represents a significant shift towards an ecocentric legal and ethical framework, but its success will ultimately hinge on overcoming the symbolic nature of such legislation and ensuring robust implementation and respect for these rights within human institutions.

What Is a Symbol?

Symbols are pervasive elements of human communication, permeating every aspect of our lives from language and art to culture and religion. In their essence, symbols are representations that convey complex meanings and ideas beyond their literal interpretations.[36]

At its core, a symbol is a visual, auditory, or conceptual representation that stands for something else. Unlike signs, which have a direct and explicit relationship with their referents, symbols possess deeper layers of meaning that may vary depending on cultural, social, and individual contexts. Charles Sanders Peirce, a prominent philosopher and semiotician, classified symbols as one of three types of signs, distinguishing them from indices and icons. According to Peirce, symbols rely on conventions and agreements within a community to convey meaning, making them inherently arbitrary yet culturally significant.[37]

Symbols serve various functions in human communication, functioning as tools for expressing abstract concepts, evoking emotions, and fostering social cohesion. In language, words themselves act as symbols, representing ideas, objects, or actions through arbitrary linguistic conventions. Moreover, symbols play a crucial role in visual communication, as seen in the use of images, gestures, and cultural artefacts to convey complex meanings and values.[38]

Beyond communication, symbols serve as vehicles for cultural expression and identity formation. Cultural symbols, such as national flags, religious icons, and ceremonial rituals, encode shared beliefs, values, and traditions within a society. These symbols not only foster a sense of belonging and solidarity but also reinforce cultural norms and ideologies, shaping collective identity and social cohesion.[39]

Symbols play a significant role not only in communication and culture but also in the realm of law and legislation. In legal contexts, symbols are employed to represent and embody abstract concepts, principles, and values, thereby shaping the interpretation and application of laws and regulations. The use of symbols in law and legislation has profound implications for the interpretation and application of legal norms and principles. Legal symbols not only convey substantive meaning but also evoke emotional responses and associations, influencing perceptions of justice, fairness, and legitimacy.[40]

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[35] Tarlock, Adan, *Is There a There There in Environmental Law?* Journal of Land Use and Environmental Law, 19(2), 2004, p. 217.

[36] Cassirer, Ernst, *The Philosophy of Symbolic Forms*, Yale University Press, 1955, p. 43.

[37] Peirce, Charles, *Pragmatism and Pragmaticism*, Charles Hartshorne and Paul Weiss (Eds.), Collected Papers of Charles Sanders Peirce, Volumes V and VI, Harvard University Press, 1931, p. 171.

[38] Saussure, Ferdinand, *Course in General Linguistics*, McGraw-Hill, 1916, p. 67.

[39] Billig, Michael, *Banal Nationalism*, Sage, 1995, p. 93.

[40] See for instance Goodrich, Peter, *Legal Emblems and the Art of Law: Obiter Depicta as the Vision of Governance*, Cam-

As described at the very beginning of this essay, the concept of rights, and human rights in particular, carries with it a heavy symbolism. Granting someone, or something, a right means granting them a symbolic promise of protection or even: *power*. Some would argue that this symbol is sufficient; that symbolism and the striving towards something better will eventually "heal" the injustices of the world. However, most people use rights as a means of asserting their *triumph*, leveraging them as arguments to compel others to respect their autonomy, property, or entitlement to, for instance, education or housing. In many cases, this is also how rights are "sold" by governments, politicians, and Non-Governmental Organizations (NGOs) worldwide. The codification of the right to, for instance, housing or education is seen as a means to create a better future. The act of granting rights to the powerless through legislation is perceived as evidence of political benevolence and strength.

Since rights are often perceived as triumphs, the expectation is not that they will *eventually* lead to improvement in some distant future. Rather, there is a common demand that rights should be *effective*[41] in the present and actionable in some way, typically through legal proceedings. This is where the criticism of rights as a form of symbolic legislation becomes central as a critique of human rights and rights in general.

bridge University Press, 2013, p. 45 and Resnik, Judith and Curtis, Dennis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*, Yale University Press, 2011, p. 14.

[41] It is my belief that effective laws should be a central objective in all legal systems. If laws are not effective, there is a risk that the deficiencies they are intended to remedy and the goals they are designed to fulfil remain unaddressed or unfulfilled. The laws then become, at best, ineffective and, at worst, a burden for authorities and individuals. My positions and reasoning on this can be found in my dissertation. See Refors-Legge, Maria, *Skolans skyldighet att förhindra kränkande behandling av elever* [The school's obligation to prevent abusive treatment of students], Stockholms universitet, 2021, p. 11–31.

What is Symbolic Legislation?

Symbolic legislation encompasses laws and regulations that are enacted primarily to convey symbolic messages or values, rather than to achieve tangible policy outcomes. These laws often target contentious or high-profile issues, such as discrimination, inequality, or social injustice, and are intended to signal a government's commitment to addressing these issues.[42] To legislate in a similar manner on the rights of animals, plants, or entire ecosystems would undoubtedly be possible as a form of political, symbolic gesture. Such legislation would possibly signal a commitment to recognising the intrinsic value and inherent rights of non-human entities within the legal framework. It could be argued that "granting" nature rights would serve as a powerful statement of environmental stewardship and a recognition of the interconnectedness of all living beings. Another argument for nature as a rights holder could be that the act of legislating might encourage greater public awareness and consciousness regarding the importance of biodiversity conservation and sustainable coexistence with nature. However, the effectiveness of such legislation would depend on its enforcement mechanisms and practical implementation, as well as broader societal attitudes towards the rights of non-human entities, and this is where the ineffectiveness of symbolic legislation can be gleaned.

It can be argued that symbolic legislation may lack substantive provisions or enforcement mechanisms necessary to bring about meaningful change. This type of legislation often serves as a form of political rhetoric or performative action designed to appease public opinion or project a positive image of government responsive-

[42] Scheppele, Kim, *The New Judicial Deference*, The Yale Law Journal, 103(6), 2004, p. 1989.

ness to social concerns.[43] By enacting laws that convey a superficial commitment to rights (both to human and non-human rightsholders) principles without implementing substantive measures, governments may undermine efforts to achieve meaningful change and accountability.[44]

Symbolic legislation may also serve to deflect attention from more pressing rights concerns or perpetuate a false sense of progress in addressing systemic injustices. By focusing on symbolic gestures rather than meaningful reforms or policy interventions, there is a risk of diluting rights norms and principles. This can lead to the co-option or depoliticization of both human rights activism and nature rights activism, as governments offer superficial concessions or gestures of compliance without addressing underlying power dynamics or structural inequalities.[45] Consequently, this may perpetuate a false sense of achievement or progress in the field of human rights, leading to complacency and a lack of accountability for ongoing human rights violations.

Without meaningful enforcement mechanisms or measures to address root causes of human (or nature) rights abuses, symbolic legislation may fail to deliver substantive improvements.

On Rights and Duties: Is There an Alternative?

In the landscape of modern legal discourse, the prevailing emphasis on individual rights has shaped legal frameworks globally. Advocating against human rights might be perceived as inhumane, just as arguing against rights for nature might seem like an unwillingness to halt humanity's exploitation of the natural world and other living beings. However, the effectiveness of rights as a legal tool in preventing man-made pollution, mass extinctions, and climate change should be a subject of debate.

As Wesley Newcomb Hohfeld theorized in the early 20th century, the idea of rights should be understood in relation to privileges, powers, and immunities.[46] Hohfeld argued that rights are not absolute but exist in conjunction with corresponding duties or obligations.[47] Understanding this interplay between rights and duties is essential for effective legal analysis and decision-making. Therefore, it is worthwhile to consider rights' counterparts, namely duties and obligations.

While rights typically imply an active subject with agency, whether through the will theory or interest theory, duties or obligations require no such active player. Instead of focusing solely on the rights of nature, it may be more pragmatic to concentrate on the duties and obligations of the state. This concept is not revolutionary, as many legal systems already recognize the state's duty towards its citizens. For example, in Sweden, municipalities have a duty to provide education, which corresponds to students' right to education, as outlined in the Swedish Education Act and the Swedish Instrument of Government. There is also a growing recognition of the anthropocentric right to a healthy environment, and efforts by people to hold governments accountable for this. For instance, in the United States, young climate activists in Montana have successfully argued in court that the state has a

43 Carozza, Paolo, *Subsidiarity as a Structural Principle of International Human Rights Law*, American Journal of International Law, 108(2), 2014, p. 213.

44 Forsyth, David, *Human Rights in International Relations*, Cambridge University Press, 2012, p. 155.

45 Moyn, Samuel, *The Last Utopia: Human Rights in History*, Harvard University Press, 2012, p. 88.

46 Hohfeld, Wesley Newcomb, *Some fundamental legal conceptions as applied in judicial reasoning*, The Yale Law Journal, 1917, p. 710 ff.

47 Hohfeld, Wesley Newcomb, *Some fundamental legal conceptions as applied in judicial reasoning*, The Yale Law Journal, 1917, p. 710 ff.

duty to protect the environment for future generations.[48] This landmark case and others like it[49] emphasizes the state's obligations towards environmental protection as a fundamental right of its citizens.[50]

The distinction between rights and duties is significant. While rights typically imply a need for action or demand from an active subject with agency, whether through the will theory or interest theory, duties or obligations imply an imperative to act without requiring such an active counterpart or rights-holder. Scholars such as Samuel Moyn has argued that focusing on state obligations rather than individual rights is a more effective strategy for addressing environmental issues.[51] Moyn suggests that a renewed commitment to duties can help address contemporary environmental catastrophes by rethinking our moral and legal priorities.[52] Similarly, Kathleen Birrell, Daniel Matthews and Peter Burdon, advocate for a re-engagement with, and focus on, obligations rather than rights in the Anthropocene. They argue that such a shift can better address systemic injustices and promote the collective welfare of society as a whole, including the non-human environment.[53]

By shifting the focus from individual rights to state obligations, legal systems can better address systemic injustices and promote the collective welfare of society as a whole, even for individuals and entities without agency. This approach recognizes the role of the state as a steward of public interest and underscores the importance of fulfilling its responsibilities towards both individuals and the environment.[54]

The important part that I wish to underline in this article is that, while rights focus on the needs and demands for action by individuals, duties emphasize the imperative for states to act, ensuring the welfare and rights of all, including the environment, thereby addressing broader societal and ecological concerns.

Reframing legal rights as duties could enhance legal analysis and decision-making by providing a more nuanced understanding of legal relationships. It encourages policymakers and legislators to consider not only the rights conferred upon individuals but also the corresponding duties that must be fulfilled to uphold those rights. This approach promotes a more holistic and balanced approach to legal interpretation and implementation.

In practice, viewing legal rights as duties can lead to more robust legal frameworks that prioritize the collective welfare of society and nature over individual entitlements. By recognizing the reciprocal nature of rights and obligations, legal systems can work towards creating a more just and equitable society where the rights of all individuals (human and non-human) are respected and upheld.

Conclusion

In conclusion, the discourse surrounding legal rights as a form of symbolic legislation presents a complex interplay between legal theory, politi-

48 Held et al. v. State of Montana. See also Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC] – 53600/20, Judgment 9.4.2024 [GC].

49 Verein KlimaSeniorinnen Schweiz and Others v. Switzerland [GC] – 53600/20, Judgment 9.4.2024 [GC].

50 Neal, Jeff, *Big (Sky) climate win*, Harvard Law Today, www.hls.harvard.edu, 2023, retrieved 2024-05-24.

51 Moyn, Samuel, *Rights vs. Duties*, Boston Review, www.bostonreview.net, 2020, retrieved 2024-05-24.

52 Moyn, Samuel, *Rights vs. Duties*, Boston Review, www.bostonreview.net, 2020, retrieved 2024-05-24.

53 See Birrell, Kathleen and Matthews, Daniel, *Re-storying Laws for the Anthropocene: Rights, Obligations and an Ethics of Encounter*, Law and Critique, 31(3), 2020, p. 67–89 and Burdon, Peter, *Obligations in the Anthropocene*, Law and Critique, 31(3), 2021, p. 83–102.

54 Birrell, Kathleen and Matthews, Daniel, *Re-storying Laws for the Anthropocene: Rights, Obligations and an Ethics of Encounter*, Law and Critique, 31(3), 2020, p. 67–89 and Burdon, Peter, *Obligations in the Anthropocene*, Law and Critique, 31(3), 2021, p. 83–102.

cal rhetoric, and societal values. As this essay has explored, the concept of rights carries significant symbolic weight, serving as both a promise of protection and a tool for asserting dominance or control. The prevailing emphasis on individual rights has shaped legal frameworks globally, yet the effectiveness of rights as a legal tool remains subject to debate.

The analysis of legal rights through the lens of jurisprudential theories, such as the will theory and interest theory, has revealed inherent challenges and contradictions in attributing rights to individuals, nature, or other entities. While the will theory emphasises agency as a prerequisite for rights, the interest theory focuses on the satisfaction of fundamental needs and interests. Both perspectives raise questions about the applicability of rights in diverse contexts and the extent to which rights can effectively address systemic injustices discussed in this article.

Moreover, the critique of symbolic legislation highlights the potential pitfalls of enacting laws primarily for their symbolic value, rather than to achieve tangible policy outcomes. Symbolic legislation may lack substantive provisions or enforcement mechanisms necessary to bring about meaningful change, leading to a false sense of progress and accountability. Furthermore, symbolic legislation risks co-opting or depoliticizing human rights activism and nature rights advocacy, perpetuating systemic inequalities and injustices.

In light of these challenges, reframing legal rights as duties offers an alternative approach to addressing systemic injustices and promoting the collective welfare of society and nature. By shifting the focus from individual entitlements to state obligations, legal systems can better address root causes of rights violations and promote a more holistic understanding of legal relationships. This approach recognises the role of the state as a steward of public interest and underscores the importance of fulfilling its responsibilities towards both individuals and the environment.

In conclusion, while the concept of legal rights remains central to modern legal discourse, it is essential to critically examine its symbolic implications and consider alternative approaches that prioritise the collective welfare of society and nature. By reframing legal rights as duties and obligations, legal systems can work towards creating a more just and equitable society where the rights of all individuals, human and non-human alike, are respected and upheld.