"Anthropocentric notions of the value of nature at the heart of environmental law have failed to stem biodiversity loss". Discuss.

Introduction

Despite national and international laws in place intended to protect and maintain biodiversity, we have now entered 'the sixth mass extinction.'[1] When searching for a solution, anthropocentrism in the law is a red herring. Anthropocentrism encompasses a large range of attitudes towards the value of nature and the extent to which it should be protected. Those notions that disregard biodiversity are not a distinctly legal issue, but rather a broader societal one, and as such, there are limits to how far the law can solve this in the long term. However, it is possible to have effective solutions which stem biodiversity loss within the existing anthropocentric value framework and avoid the challenges of trying to create "ecocentric" law. This can be achieved by using different legal tools to protect biodiversity. The decision-making frameworks currently in place have struggled to deal with polycentric threats to biodiversity, scientific uncertainty, and conflict with other economic and social interests. As a result, key causes of biodiversity loss are excluded from these frameworks and go unregulated, while decisions undervaluing biodiversity on a local level are able to accrue. Alternative anthropocentric legal methods, like rights-based or market-based approaches, better overcome these regulatory challenges, and can be implemented most effectively to combat the biodiversity crisis.

"Environmental law", "biodiversity" and "anthropocentrism"

To effectively discuss the issues raised by this prompt, it is important to define several key terms.

"Environmental law" can be an amorphous concept, due both to the fact it is "hot" law,[2] and the way it has developed into a "distinct" area of law.[3] For the purposes of this discussion, I will focus on law which explicitly addresses protecting biodiversity and can therefore be fairly accused of failing to do so. This will include examining legislation, the decisions of actors involved in its administration, and the policy and guidance which make up this legal matrix.[4]

"Biodiversity" and "nature" are two terms that are often used synonymously - however, biodiversity specifically means "the *variability* among living organisms from all sources…. and the ecological complexes of which they are part." [5] This concept of variability is compatible with some loss of nature, so long as sufficient diversity of species remains.

Finally, "anthropocentrism" is often defined by drawing a stark dichotomy with "ecocentism."[6] This obscures the fact that "anthropocentrism" encompasses a huge range of positions towards nature, from resourcism to stewardship, all under the vague umbrella of "the centrality of human beings in

---

[1] Helen Briggs, 'Extinction crisis 'poses existential threat to civilisation'' (*BBC News*, 2 June 2020) < https://www.bbc.co.uk/news/science-environment-52881831 > accessed 24 April 2021

[2] It is 'hot' law in the sense that "'environmental law' is directly concerned with 'hot situations' in which the agreed frames, legal and otherwise, for how we understand and act in the world are in a constant state of flux and contestation" – see Elizabeth Fisher, "Environmental Law as 'Hot' Law" (2013) 25(3) Journal of Environmental Law 347, 347 - 348

[3] Different historical foundations for the subject of "environmental law" are identified in, inter alia, property law, pollution law, tort law and planning law – see Elizabeth Fisher et al, "Maturity and Methodology: Starting a Debate about Environmental Law Scholarship", (2009) 21(2) Journal of Environmental Law 213, 229

[4] The importance considering all these elements of the law is noted by Eloise Scotford and Jonathan Robinson, 'UK Environmental Legislation and Its Administration in 2013 – Achievements, Challenges and Prospects' (2013) 25(3), Journal of Environmental Law 383, 384

[5] UN Convention on Biological Diversity 1992, article 2 (emphasis added)

[6] See for example Louis J. Kotzé and Duncan French, "The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene", (2018) 7 Global Journal of Comparative Law 5, 8 – 17

the world."[7] While some anthropocentric notions of the value of nature may more readily permit biodiversity loss (e.g. those which ascribe merely aesthetic value to nature), other anthropocentric notions see the protection of nature as fundamental to our survival. Policy makers across the world recognise that healthy ecosystems are "the very foundations of our economies, livelihoods, food security, health and quality of life worldwide."[8] The ongoing Covid-19 pandemic has only thrown our relationship with nature into sharper relief. There are deeply anthropocentric perspectives which highly value biodiversity and its preservation.

Anthropocentrism in the current law – a red herring

It is true current laws created to preserve biodiversity have anthropocentric notions at their heart. For example, the stated objectives of the 1992 Convention on Biological Diversity are "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources."[9] Similarly, the Habitats Directive's main aim is "to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements." [10]

Particularly in the context of international environmental law, there is growing academic consensus that anthropocentric notions underpinning the law are the reason it has failed to adequately combat the environmental crises we face.[11] Some argue the law must become "ecocentric", meaning it protects nature "not only for the sake of human survival but fundamentally also for the sake of protecting Earth system integrity in its own right."[12] It is generally accepted that, from a practical point of view, ecocentric laws cannot and should not prohibit all human interventions impacting nature, as humanity needs to survive.[13] Rather, emphasis is placed on protecting parts of nature in "their natural state" and limiting human interference as far as possible.[14]

While this may seem desirable, there are some crucial problems with this ecocentric framing. Its focus on 'human intervention' perpetuates a "cultural myth … [which] encourages us to "preserve" peopleless landscapes that have not existed … for millennia"[15]. This attitude erases indigenous societies which promote the thriving of humanity alongside the cultivation of biodiversity.[16] The

---

[7] Vito De Lucia, 'Beyond anthropocentrism and ecocentrism: a biopolitical reading of environmental law' (2017) 8(2) Journal of Human Rights and the Environment 181, 184 (in particular fn 19)

[8] See the statement of IPBES Chair, Sir Robert Watson, in the article 'UN Report: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating'' (*UN – Sustainable Development Goals,* 6 May 2019) <https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/ > accessed 24 April 2021

[9] UN Convention on Biological Diversity 1992, art 1

[10] Council Directive 92/43/EEC of 21 May 1992, Official Journal L 206 (the '**Habitat's Directive**'), preamble. Note: This Directive continues to apply in the UK following Brexit by virtue of the Conservation of Habitats and Species Regulations 2017 (as amended by the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019))

[11] See De Lucia (n 7) 185

[12] See Kotzé and French (n 6) 16 – 17

[13] See Kotzé and French (n 6) 16

[14] See Kotzé and French (n 6) 16 – 17

[15] See William Cronon, *Uncommon Ground: Rethinking the Human Place in Nature* (1995) 69-90. See also recently published research by a team from the University of Maryland that concluded ""*The current biodiversity crisis can seldom be explained by the loss of uninhabited wildlands, resulting instead from the appropriation, colonization, and intensifying use of the biodiverse cultural landscapes long shaped and sustained by prior societies. Recognizing this deep cultural connection with biodiversity will therefore be essential to resolve the crisis*." – see Ellis et al., 'People have shaped most of terrestrial nature for at least 12,000 years' (2021) Proceedings of the National Academy of Sciences 118 (17) < https://www.pnas.org/content/pnas/118/17/e2023483118.full.pdf > - accessed 24 April 2021

[16]See some examples here - Donna Lu, 'Covid-19 hit biodiversity across the globe. Here's how to fix things', (*New Scientist,* 10 March 2021) < https://www.newscientist.com/article/mg24933252-700-covid-19-hit-biodiversity-across-the-globe-heres-how-to-fix-things/ > accessed 24 April 2021

Habitats Directive rightly notes that maintaining biodiversity "may in certain cases require the maintenance, or indeed the encouragement, of human activities."[17] Surely both biodiversity and humanity can thrive, rather than just survive, together?

To effectively combat the biodiversity crisis we face, we must recognise that humanity itself is part of the natural world. In fact, we are "'the most dangerous species in global history"[18], and our destruction of the world around us is now reaching "suicidal" levels.[19] It seems to me that the notion of protecting nature "in and of itself" could actually entail an "othering" of nature often attributed to anthropocentric law.[20] If misunderstood by legal actors enforcing the law, it pits protecting biodiversity against the interests of humanity, rather than aligning these goals.

Not only would retheorising the law on an "ecocentric" basis be slow, difficult, and require the introduction of novel ideas for legal actors to grapple with,[21] in practice it may not be more likely to stem biodiversity loss than certain anthropocentric notions. The current law, while anthropocentric, already emphasises that biodiversity must be conserved and maintained. The problem is we are currently using the wrong legal tools to achieve this goal.

The wrong legal tools

It is incredibly difficult to legislate to conserve biodiversity. As Hardin noted many years ago, the law struggles to deal with the "commons" and is much more comfortable with concepts like private property.[22] Fisher has identified that polycentricity in particular "renders bi-lateral understandings of legal relationships in international and domestic law problematic."[23] Thus, it can be challenging enforce legal obligations protecting biodiversity, which often faces polycentric threats. The law also faces other obstacles – biodiversity's threats are beset by scientific uncertainty, and it often comes into conflict with other valuable economic and social interests.

The current law has failed to rise to this regulatory challenge. The development of environmental law protecting biodiversity has largely been reactive to the emergence of scientific evidence of threats to species. While much of nature conservation law arose in the form of ad hoc, command-and-control legislation, the key legal method employed for the wider goal of stemming biodiversity loss is the creation of decision-making mechanisms intending to embed a preventive approach.[24] Key examples from the current law show the decision-making criteria central to these mechanisms end up excluding serious threats to biodiversity from the protection offered by legal frameworks and do not protect against a damaging pattern of 'case by case' decisions which undervalue biodiversity. Crucially, these issues are not inherent in all the legal tools the law has at its disposal to protect biodiversity.

"Hiding behind scientific evidence"

[17] Council Directive 92/43/EEC of 21 May 1992, Official Journal L 206, preamble
[18] See statement by Elizabeth Mrema, the executive secretary of the Convention on Biological Diversity, quoted by 'Ahead of biodiversity summit, UN officials call for action to preserve the natural world; (*UN News,* 28 September 2020) <https://news.un.org/en/story/2020/09/1074002> accessed 24 April 2020
[19] UN Secretary General António Guterres, "The State of the Planet" address Colombia University, 02 December 2020. <https://www.un.org/sg/en/content/sg/speeches/2020-12-02/address-columbia-university-the-state-of-the-planet> accessed 24 April 2021
[20] De Lucia, 'Towards an ecological philosophy of law: a comparative discussion' (2013) 4(2) Journal of Human Rights and the Environment 167, 169-170
[21] De Lucia (n 20) 190 – "Radical change is a process requiring time"
[22] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243, 1245
[23] Fisher (n 2) 351
[24] Scotford and Robinson (n 4) 292

A key weakness of decision-making mechanisms has been a reliance on 'scientific' criteria. The way we assess this evidence fails to account for polycentricity and scientific uncertainty, meaning some of biodiversity's biggest threats go unregulated.

A perfect example of this is the Habitats Directive. It uses different legal techniques to centre scientific evidence, including the protection of individual plants or species depending on the extent to which they are under threat[25], as well as 'enclave techniques' like the Natura 2000 network.[26] Potential threats to nature are identified in "plans" or "projects", so that the impact of particular actions and actors can be understood.[27] The Directive then imposes obligations to maintain biodiversity on the basis of this scientific evidence, requiring protected sites to be identified, maintained and restored to a "favourable" status,[28] and requiring "appropriate assessments" to see what impact a plan or project is likely to have on biodiversity.[29]

The central role of scientific evidence has been bolstered by the judiciary. The CJEU has required a purposive approach to the Directive to be taken based on the precautionary principle,[30] finding that for a plan or project to be approved "no reasonable scientific doubt" can remain as to the absence of adverse effects on the relevant site.[31] And yet, despite being found to be "fit for purpose" by the Commission as recently as 2016,[32] the Directive failed to reach its goal of ensuring 100% of Natura 2000 sites have a 'favourable' or 'improved' status by 2020; in fact, only 34% of sites had achieved this last year.[33]

This science-heavy framework has failed partly because it struggles to deal with scientific uncertainty. In *Savage v Mansfield DC,*[34] Natural England reported that a site was not a "special protection area,"[35] but could become one, and as such the local authority should consider the consequences of such designation in its decision making. The local authority did not take this advice, and subsequent judicial review confirmed nothing in the current legal framework could require it to follow this advice.[36] As Lees has noted, when contending with scientific uncertainty in the context of decisions assessing acceptable risk and balance, "hiding behind scientific evidence may undermine the rationality of the eventual decisions made."[37] In nuanced situations, the inability to meet certain criteria can exclude biodiversity from the law's protection entirely.

Additionally, the Directive's emphasis on scientific evidence has compartmentalised biodiversity and its threats in a way that is detached from the polycentric reality of biodiversity loss. Notably, the

---

[25] Habitats Directive, art 4 and annex III criteria (habitats), annex II and IV criteria (species)
[26] Habitats Directive, art 3
[27] Habitats Directive, art 6(3)
[28] Habitats Directive, art 4(4)
[29] Habitats Directive, art 6
[30] Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-07405
[31] Case C-258/11 *Peter Sweetman and Others v An Bord Pleanála* [2013] ECR-0000
[32] Commission, 'Executive Summary of the Fitness Check of the EU Nature Legislation (Birds and Habitats Directive)' SWD (2016) 473 final ('**Fitness Check**'), available at < https://ec.europa.eu/environment/nature/legislation/fitness_check/index_en.htm> accessed 24 April 2021
[33] 'EU protected habitats' (*European Environment Agency*, last modified 26 November 2019) <https://www.eea.europa.eu/airs/2018/natural-capital/eu-protected-habitats> accessed 24 April 2021
[34] [2015] EWCA Civ 4
[35] Special protection areas as designated pursuant to Council Directive (EC) 2009/147 (formerly Council Directive (EEC) 79/409) on the conservation of wild birds (Birds Directive) are included in the Natura 2000 network - see Habitats Directive, art 3
[36] [2015] EWCA Civ 4 [39] – [46]
[37] Emma Lees, 'Allocation of decision-making power under the Habitats Directive' (2016) 28 Journal of Environmental Law 191, 193

continuing decline of species and habitats associated with agriculture falls outside the Directive's categories of assessment, [38] despite this being a "major driver of biodiversity loss." [39] Allowing these threats to be systematically ignored means the destructive actions of individuals or practices of farms can accumulate in a way that is deeply damaging.

Balancing different interests in case-by-case decisions

Similarly, decisional mechanisms currently fail to impose a holistic, systematic approach to balancing biodiversity protection with other social and economic interests. Instead, they create a framework for decision-making on a 'case-by-case' basis by local decision-makers, who will almost always have a greater interest in prioritising other social or economic interests in each individual case before them.

An important example is UK planning law. Local planning authorities have a legal obligation to conserve biodiversity,[40] with government policy providing the primary framework outlining when to permit developments which could threaten biodiversity. Per the National Planning Policy Framework ('**NPPF'**) "helping to improve biodiversity" is one "environmental objective" which needs to be pursued "in mutually supportive ways" alongside the other identified environmental, economic and social objectives of "sustainable development."[41]

On paper, biodiversity seems to be elevated above other objectives by the NPPF. Paragraph 177 states that "the presumption in favour of sustainable development does not apply where the plan or project is likely to have a significant effect on a habitats site, unless an appropriate assessment has concluded that the plan or project will not adversely affect the integrity of the habitats site." In fact planning policies and decisions should really contribute "net gains" for biodiversity.[42] If significant harm to biodiversity cannot be avoided, paragraph 175 states planning permission should be refused, although it does allow for compensation of biodiversity loss "as a last resort". While this protection is not perfect, in the context of the other obligations requiring local authorities to conserve biodiversity, it seems this framework should stem biodiversity loss if conservation is consistently prioritised by decision-makers.

However, in practice, there is no actual obligation on decision-makers to prioritise biodiversity in this way. The courts have reiterated this guidance is not legally binding; rather its purpose is "to express general principles on which decision-makers are to proceed in pursuit of sustainable development."[43] In fact, despite its various objectives, judges have found "sustainable development" at its core favours permission for developments being granted.[44] The NPPF also identifies a large number of other factors planning authorities must consider, including "environmental" goals that can stand in direct opposition to preserving biodiversity.[45]

Administrative actors are left to assess the true weight of all these factors in the context of the particular decision at hand and the overall goals of the planning system. Under the current framework,

---

[38] Fitness Check (n31) 5

[39] Commission, 'The hidden biodiversity impacts of global crop production and trade' (2016) 461 Science for Environment Policy < https://ec.europa.eu/environment/integration/research/newsalert/pdf/hidden_biodiversity_impacts_of_global_crop_production_and_trade_461na2_en.pdf> accessed 24 April 2021

[40] Natural Environment and Rural Communities Act 2006, s 40

[41] Ministry of Housing, Communities and Local Government, 'National Planning Policy Framework' (CP 48, 2019) ('**NPPF'**) para 8

[42] NPPF (n39) para 170, 174 and 175

[43] *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37 [74] – [75] (Gill LJ)

[44] *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37 [85] (Gill LJ)

[45] E.g. 'making effective use of land', and 'the beauty of the countryside' - see NPPF (n39) para 8, 170 and 172

in each individual case before them, local decision-makers can be justified in permitting biodiversity loss in favour of other interests. In the vast majority of cases, each authority has an interest in permitting some biodiversity loss for an immediate economic or social gain (which they are often under significant pressure to realise). If all local authorities do this, biodiversity loss reaches catastrophic levels, and the current framework is unable to prevent this pattern of decisions causing serious damage.[46]

Can the law do better?

There are other legal mechanisms which do not have these flaws and effectively stem biodiversity loss in society's existing anthropocentric value framework.

One option is a rights-based approach. For the reasons outlined above, human rights requiring healthy ecosystems may be more readily applicable than a general right for nature itself to thrive.[47] However, many existing human rights are not adequately protected, and the balancing of different rights could lead to a pattern of undervaluing biodiversity similar to the current law.[48]

Another option is a market-based approach – in fact, mechanisms like biodiversity net gain targets and conservation covenants are at the heart of the new Environmental Bill.[49] These mechanisms use concepts the law is already comfortable with, and the potential effectiveness of targets can be seen in climate change litigation.[50] However, this approach lends itself to "compensation" of biodiversity loss, which undermines to the essential need to preserve existing biodiversity. It can also perpetuate an undesirable "commodification" of biodiversity, which may defer to the right of an owner to destroy their own property.

While these mechanisms can stem biodiversity loss more effectively, the true goal must be to ensure the long-term flourishing of biodiversity. The respect for the natural world this requires cannot be brought about by the law alone – we still see mockery of "bunny hugging"[51] or the protection of ancient woodlands despite legal frameworks in place to prevent their destruction.[52] More fundamental reconciliation with nature is something the law alone cannot bring about.

---

[46] This is the problem identified by Garret Hardin as the 'tragedy of the commons'- see Hardin (n 22)

[47] Note: there are some examples of nature being granted rights (e.g. the Constitution of Ecuador Ch 7 'Rights of Nature', and Michael Safi, 'Ganges and Yamuna rivers granted the same legal rights as human beings' (*The Guardian, 21 March 2017*) https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings accessed 24 April 2021) - however, this approach has not been adopted on a broader scale

[48] See for example the Supreme Court's recent conclusion in the Shamima Begum case that the protection of national security outweighed the right to a fair hearing - *R (on the application of Begum) v Special Immigration Appeals Commission and R (on the application of Begum) v Secretary of State for the Home Department* [2021] UKSC 7

[49] Environment HC Bill (2019 – 21) cls 92 – 94, cls 108 – 110, sch 14

[50] See for example the Court of Appeal's decision in relation to the proposed new Heathrow runway – Damian Carrington 'Heathrow third runway ruled illegal over climate change' *(The Guardian,* February 2020) < https://www.theguardian.com/environment/2020/feb/27/heathrow-third-runway-ruled-illegal-over-climate-change> accessed 24 April 2021. (NB this outcome was subsequently overturned in *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2020] UKSC 52)

[51] Fiona Harvey, 'Boris Johnson urges leaders to 'get serious' at climate summit' (*The Guardian*, 22 April 2021) - <https://www.theguardian.com/environment/2021/apr/22/boris-johnson-urges-leaders-to-get-serious-at-climate-summit> accessed 24 April 2021

[52] See for example protections to prevent wild hares and rabbits being killed under the Wildlife and Countryside Act 1981, s 10A and 11G, and the guidance to protect ancient woodlands in the NPPF para 175

Conclusion

When examining the failure of environmental law to stem biodiversity loss, the anthropocentric notions of the value of nature at the heart of the law are a red herring. Rather, the solution to this problem lies in changing the legal tools we use to protect biodiversity. Current decision-making mechanisms exclude serious threats to biodiversity from legal frameworks and protect a pattern of case-by-case decisions which undervalue biodiversity. Other anthropocentric legal mechanisms can best stem biodiversity loss, but they cannot ensure biodiversity flourishes for years to come.

Word count: 2482