The Big Bad EU?

Species Protection and European Federalism

A Case Study of Wolf Conservation and Contestation in Sweden

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Dissertation presented at Uppsala University to be publicly examined in Room 4573, Gamla Torget 6, Uppsala, Friday, 19 May 2017 at 10:15 for the degree of Doctor of Laws. The examination will be conducted in English. Faculty examiner: Professor Dr. An Cliquet (Ghent University).

Abstract
Epstein, Y. 2017. The Big Bad EU? Species Protection and European Federalism. A Case Study of Wolf Conservaton and Contestation in Sweden. 63 pp. Uppsala: Department of Law. ISBN 978-91-506-2632-2.

This dissertation examines how eco-knowledge intersects with the changes to EU legal cultures and practices known as eurolegalism. This conjunction has created a mechanism for the extension of EU law in the Member States even in the face of a weakened EU.

Through a portfolio of six articles, controversies over the protection of wolves in Sweden are used to illustrate and explicate the changing roles and responsibilities of various actors in protecting species, and the centralization of competence for environmental protection in Europe at the EU level. In doing so, some substantive requirements of the Habitats Directive are also analyzed. The first article maps the movement of competence to determine conservation policy towards the EU level and away from international and Member State actors. The second article examines what the EU requires of its Member States by analyzing the Habitats Directive's key concept, favourable conservation status. It also makes normative arguments for how contested aspects of this concept should be interpreted to best achieve the Directive's conservation goals. The third article deepens this analysis by applying these arguments to the Swedish wolf population. The fourth article is a case commentary illustrating the enforcement of the Habitats Directive through public interest litigation to stop the hunting of Swedish wolves. The fifth argues that the greater availability of public interest standing in the US than in the EU has led to the greater implementation of federal law. The sixth argues that greater availability of public interest litigation in Sweden than previously is also leading to the greater enforcement of "federal" EU law. Each of these articles demonstrates or explains factors that lead to the hollowing out of state power in favor of the EU and interest groups.

Keywords: Habitats Directive, species protection, subsidiarity, Endangered Species Act

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ISBN 978-91-506-2632-2
urn:nbn:se:uu:diva-318698 (http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-318698)

For the Wild

Acknowledgements

A doctoral thesis is by definition the accomplishment of an individual but perhaps more importantly a reflection of an academic community. I am grateful to my many colleagues whose support is reflected here.

Thanks are foremost due to my advisor Jan Darpö who set me on this journey and guided me through it. Thank you for encouraging me to pursue this dream. I was also lucky to have two co-advisors who both contributed outside perspectives, Brad Karkkainen and Anna Jonsson Cornell. Thank you Brad for helping ensure the quality of my analysis of American environmental law and for travelling long distances to share your expertise. Thank you Anna J.C. for advising comparative aspects of this thesis and for your wisdom and kindness throughout.

The articles in this thesis were part of the interdisciplinary research project *Claws and Laws: A Dialogue between Law and Ecology*. Thank you to project leader Guillaume Chapron, who has been a sounding board, research collaborator and co-author over the past three years; I look forward to our continued collaboration. Thank you to my other mentors on this project, Anna Christiernsson and José Vicente López-Bao, who were always ready, willing and able to discuss carnivore conundrums or contribute thoughtful feedback. I would also like to express my gratitude to Helene Lindahl of the Swedish Environmental Protection Agency for feedback and assistance during this project, as well as to the Swedish Environmental Protection Agency for research funding.

I am grateful to my colleagues in the Higher Seminar in Environmental Law at the law faculty. Thank you Gabriel Michanek, Charlotta Zetterberg, Annika Nilsson, Maria Forsberg, Ylva Arvidsson, Michael Ajnesåhl, Melina Malafry, Henrik Josefsson, Agnes Hellner, Jason Czarnezki and Emily Stein for input and conversations throughout my research studies, and for a collaborative and stimulating research environment. You have each contributed to my development as a scholar and I will always treasure our discussions and debates through these years.

Thanks are also due to my colleagues at the law faculty for your friendship and conversation. I want to name in particular those who made specific contributions to the text: Thérèse Björkholm (method), Victoria Enkvist (Swedish), Love Rönnelid (Foucault), Jaakko Salminen (Finnish) and Santa Slokenberga (EU).

I have received critique and suggestions from several individuals who generously gave their time to help me improve various pieces of this project. Thank you especially to Doug Evans of the European Topic Centre on Biological Diversity, Arie Trouwborst of Tilburg University, Liz Fisher of the University of Oxford, Susanne Gerland of the Swedish Ministry of the Environment and Energy, and Chris Hilson of the University of Reading for your valuable input. Christina Allard of Luleå University of Technology and Christina Olsen Lundh of the Vänersborg Land and Environmental Court were the opponents at my licentiate defense and doctoral final seminar, respectively. Thank you for your thoughtful and constructive oppositions.

Thank you Dag Blanck and Danuta Fjellestad for hosting and including me in the American Studies Higher Seminar Series. The feedback I received from this diverse group helped me think about my research in new ways.

I am grateful for additional perspectives gained during two sojourns outside Uppsala University. Thank you Tuija Hilding-Rydevik, Håkan Tunon and others at the Swedish Biodiversity Centre, where I was a project researcher for four months during 2013 and 2014, for a collaboration that I hope will continue to bear fruit. I am also immensely grateful to Kai Kokko, Elina Vaara and Antti Belinskij of the University of Helsinki for hosting me as a visiting researcher in 2015. I learned so much from you.

And lastly but not leastly, thank you to my sweet husband who read and commented on countless drafts, and to my parents, who were always available for another discussion about wolves.

List of Papers

This thesis is based on the following papers, which are referred to in the text by their Roman numerals.

I Epstein Y. (2014) The Habitats Directive and Bern Convention: Synergy and dysfunction in public international and EU law. *The Georgetown International Environmental Law Review*, 26 (2):139-173.

II Epstein Y, López-Bao JV & Chapron G. (2016) A legal-ecological understanding of favourable conservation status for species in Europe. *Conservation Letters*, 9(2):81-88.

III Epstein Y. (2016) Favourable conservation status for species: Examining the Habitats Directive's key concept through a case study of the Swedish wolf. *Journal of Environmental Law,* 28(2):221-244.

IV Epstein Y & Darpö J. (2013) The wild has no words: Environmental NGOs empowered to speak for protected species as Swedish courts apply EU and international environmental law. *Journal for European Environmental & Planning Law,* 10(3):250-261.

V Epstein Y. (2017) Killing wolves to save them? Legal responses to "tolerance hunting" in the European Union and United States. *Review of European Community and International Environmental Law*, 26(1).

VI Epstein Y. Through the eyes of the wolf: Adversarial legalism, Federalism, and Biodiversity Protection in the United States and European Union. Manuscript.

Contents

Introduction

1. Subject Introduction

The European Union's Habitats Directive requires the Member States to take measures to maintain and achieve the favourable conservation status of listed protected species, including banning their killing.[1] Wolves are one such protected species. Their conservation has not been without conflict; several Member States have disagreed with the European Commission about to what degree wolves should be protected. However, the Directive has been credited with facilitating the recovery of wolves in Western Europe, both by those who celebrate their return and those who revile it.[2]

Sweden is one of the countries in which national wolf management policies have arguably come into conflict with EU requirements. Sweden authorized a hunting season for wolves over the objections of the European Commission in 2010, and again in most of the years following. Sweden's dispute with the Commission is ongoing; however, over half a decade later, the Commission has not brought Sweden to the Court of Justice to enforce EU law. The legal questions surrounding Sweden's compliance with EU species protection have nevertheless been litigated—in Swedish courts. Because EU law contains not only substantive environmental legal requirements for the Member States, but also some procedural ones, Member States must allow environmental organizations to enforce EU environmental law in national courts. Several times over the past several years, these courts have held Sweden in violation of EU law and ordered Sweden to stop the hunting of wolves.[3] In other cases, and notably in a recent decision of the Supreme Administrative Court, the court has taken different positions from the European Commission and held that Swedish wolf hunting did not violate EU law.[4] So while increased litigation opportunities in Member State courts have facili-

[1] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive).

[2] Arie Trouwborst, Luigi Boitani & John D. C. Linnell, 'Interpreting "Favourable Conservation Status" for Large Carnivores in Europe: How Many are Needed and How Many are Wanted?' 26 *Biodiversity & Conservation* 37, 38-39 (2017); Erica von Essen, *In the Gap between Legality and Legitimacy: Illegal Hunting in Sweden as a Crime of Dissent* (Swedish University of Agricultural Sciences 2016) 21-22.

[3] E.g., Decision of the Stockholm Administrative Court of 23 Dec. 2014, cases 30966-13 & 598-14; Judgment of the Stockholm Administrative Court of 2 May 2013, case 2428-13.

[4] E.g., HFD 2016 ref. 89; Judgment of the Sundsvall Administrative Court of Appeal of 13 January 2016, cases 2949-15 & 2950-15.

tated the implementation of EU law, it has not necessarily resulted in the implementation of the interpretation of EU law promoted by EU actors. Sweden and the European Commission continue to disagree about how Swedish wolves should be managed, but in an EU humbled by Brexit and widespread anti-EU sentiment, enforcement action by the Commission on this point looks increasingly unlikely.[5]

Using the litigation surrounding wolf protection in Sweden as an example, I argued in my licentiate thesis that the EU has *consolidated* regulatory power in environmental matters through *decentralizing* the right to enforce EU law.[6] In this doctoral thesis, I continue to examine the relationship between the EU and its Member States in protecting species and the role of public interest litigation in negotiating it through this example. I aim to show that wolf management in Sweden can be understood as part of a larger trend in the EU towards a regulatory system enabled by litigation. That European integration is facilitated by litigation is not a new argument;[7] Daniel Kelemen describes this process in the context of individual rights in his book *Eurolegalism*.[8] Riffing on Robert Kagan's description of the American method for making policy and resolving disputes as adversarial legalism, Kelemen argued that the EU's regulatory style is leading to a more adversarial legal culture in Europe.

Like Kelemen, I find comparison with the US useful for understanding the evolving federal structure of the EU and the expanding role of public interest litigation in implementing policy. While cooperative federalism is not as pronounced in the American species protection legislation as it is in other areas of environmental law—responsibility for protection has remained largely with federal actors—litigation against these federal actors has strongly influenced how wolves are protected and managed in the US. The result of this litigation has often been stronger legal protection for wolves. However, like in Sweden, a federal court has recently dealt a blow to the continued protection of wolves, accepting a federal agency's decision to remove federal protection for wolves in part of the US.[9] As has long been clear in the US,

[5] James Kanter & Steven Erlanger, 'E.U., Pressured from Inside and Out, Considers a Reboot' New York Times (March 1, 2017); Andreas Hofmann, 'Left to Interest Groups? On the Prospects for Enforcing Environmental Law in the European Union' (conference paper, 2017); Jan Darpö, 'The Commission: A Sheep in Wolf's Clothing? On the Infringement Proceedings as a Legal Device for the Enforcement of EU Law on the Environment, Using Swedish Wolf Management as an Example' 13 *Journal for European Environmental & Planning Law* 270 (2016).

[6] Yaffa Epstein, *Governing Ecologies* (Uppsala University 2013) 19-20.

[7] See especially Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004).

[8] R. Daniel Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011).

[9] Defenders of Wildlife v. Zinke, case 14-5300 (D.C. Cir. March 3, 2017).

regulation through litigation does not necessarily result in more stringent environmental protection or greater legal certainty.[10]

My purpose in analyzing the Swedish wolf litigation though the lens of adversarial legalism is largely descriptive rather than normative.[11] My goal is to explain a long-standing controversy—how Swedish wolves should be protected or not—as an example of how EU law has been given greater effect through decentralized litigation. I do not take a position on whether the implementation and enforcement of EU law through public interest litigation is a good thing or a bad thing, whether it is more or less effective than other methods from an EU law or environmental standpoint, or whether it promotes or hinders democracy. On the one hand, if adversarial legalism works to promote European integration, Member State autonomy is limited through litigation, thus reinforcing policy that is made further way from the people who are most impacted. This has been both criticized as a democratic deficit[12] and lauded as the rule of law being enforced.[13] On the other hand, groups of individuals are able to influence which legal questions are answered and what species are prioritized through litigation. This results in the potential for groups of individuals to have greater impact on species protection in the Member States,[14] but also the potential to be less effective at ensuring species protection overall than bureaucratic decision making and enforcement.[15] Like American adversarial legalism, European adversarial legalism has the potential to make federal law more or less responsive and democratic, and like Kagan, my goal is neither "to call for its burial, nor particularly to praise it."[16] I hope that mapping this example will help clarify recent developments in the management of wolves in Sweden, as well as species protection in the EU more generally, and what might be some effects or challenges in the future.

The Swedish example is unique in many ways. Sweden has a unique physical landscape, and its inhabitants belong to unique hunting, herding and farming cultures that have led to unique carnivore conflicts. It also has a legal culture that was particularly reticent to allow public interest litigation compared with many other EU Member States.[17] However, conflict over

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[10] Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press 2001), 218-220.

[11] On the value of description to the understanding legal developments, see Anne Orford, 'In Praise of Description' 25 *Leiden Journal of International Law* 609 (2012).

[12] Erica von Essen & Hans Peter Hansen, 'How Stakeholder Co-management Reproduces Conservation Conflicts: Revealing Rationality Problems in Swedish Wolf Conservation' 13 *Conservation & Society* 332 (2015).

[13] Darpö, supra note 5 at 292.

[14] Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007), 250.

[15] *See* Kagan, supra note 10 at 42 (on the efficiency of strong bureaucratic structures).

[16] ibid. at 4. Like Antony, he may have been a bit disingenuous in this claim.

[17] E.g., Italy, France & Great Britain. Cichowski, supra note 14 at 121.

large carnivore recovery has been common in many Member States.[18] And although deficiencies in public interest standing have been particularly acute in Sweden, other barriers to access to justice exist in many other Member States, such as lack of effective remedies[19] and excessive costs.[20] Some of these barriers may also be giving way due in part to EU pressure. So while the situation described in this thesis is only one example, its arguments about the expansion of the EU's regulatory impact through decentralized adversarial legalism are broadly relevant.

2. Goal and Research Questions

The goal of this dissertation is to provide a conceptual map of the changing roles of actors responsible for species protection in Europe, using wolves in Sweden as an example. In doing so, it analyzes some substantive requirements of the Habitats Directive, such as what favourable conservation status means and when hunting may be allowed.

The central research questions addressed are:

1. What is the role of the state in protecting species relative to other actors at the EU or international level? Specifically, what margin of discretion does Sweden have in allowing the hunting of wolves in light of international and EU law?

2. How have obligations to widen access to justice under international and EU law impacted species protection in the Member States? What is the role of non-governmental actors in the enforcement of EU and international species protection laws? Has NGO litigation increased the impact or improved the implementation of EU species protection law in Sweden?

3. How has the scope of the shared competence in environmental matters been impacted by expanded access to justice for NGOs? What is the role of NGOs in limiting state control over species protection?

[18] Arie Trouwborst, 'Living with Success—and with Wolves: Addressing the Legal Issues Raised by the Unexpected Homecoming of a Controversial Carnivore' 23 *European Energy & Environmental Law Review* 89 (2014).
[19] Yaffa Epstein, *Access to Justice: Remedies — Article 9.4 of the Aarhus Convention and the Requirement for Adequate and Effective Remedies, Including Injunctive Relief* (2011).
[20] Yaffa Epstein, *Approaches to Access: Ideas and Practices for Facilitating Access to Justice in Environmental Matters in the Areas of the Loser Pays Principle, Legal Aid, and Criteria for Injunctions* (2011).

A taxonomy by Martha Minow identified nine types of legal scholarship, which are categorized according to research goal.[21] Several taxa of legal scholarship often coexist in a single project.[22] As is clear from my research questions, my overall purpose falls into the category of projects that seek to "study, explain, and assess legal institutions, systems, or institutional actors."[23] I have several additional goals pursued within the articles that comprise this dissertation. The first is doctrinal restatement of the law, particularly with regards to specific legal concepts and requirements of the Habitats Directive.[24] I aim to provide doctrinal analysis of this directive that will be useful even to those who are not interested in my other types of arguments or analyses. My second secondary goal is to critically analyze certain aspects of the Habitats Directive, particularly related to its concept of "favourable conservation status." By this I mean that I seek to examine the construction of certain legal concepts and uncover the implicit assumptions or biases underlying them.[25] Exposing these assumptions allows for a thoughtful reevaluation of the use of these concepts. A third taxon in which parts of this project may be categorized is that of comparative inquiry.[26] Most of these articles seek to explain a problem through comparison in some way, whether between EU law and domestic or international law, between natural science and legal science, or between species protection laws of different countries.

3. Perspective and Method

3.1 Perspective

This is a thesis in environmental law and the perspectives and methods chosen reflect this orientation. One of the advantages of a collected thesis is the ability to take a multifaceted approach, examining a question from several perspectives. In some articles I have chosen a normative environmental approach, by which I mean that I adopted several assumptions reflecting environmental protection goals. One of these is that legal instruments for the protection of ecology and its components should be construed so as to effectuate the instruments' conservation goals. Another assumption is that meaningful communication between legal and natural scientists is possible, and therefore that law can respond to ecological problems. A third is that large carnivores should be protected in compliance with EU law. These assump-

[21] Martha Minow, 'Archetypal Legal Scholarship: A Field Guide' 63 *Journal of Legal Education* 65 (2013).
[22] Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong (Eric) Chui, *Research Methods for Law* (Edinburgh University Press 2007) 16, 19-20.
[23] Minow, supra note 21 at 67.
[24] For a description of doctrinal restatements, see Minow, supra note 21 at 65.
[25] For a description of critical projects, see Minow, supra note 21 at 68.
[26] For a description of comparative and historical inquiries, see Minow, supra note 21 at 68.

tions are likely to produce a different result than a starting assumption that, for instance, property damage should be prevented to the extent possible without incurring greater economic damage in the form of fines imposed by the EU court or loss of ecosystem services.

I have otherwise adopted an analytical historical perspective. I examine primary sources such as legal texts, court decisions, guidance documents and meeting notes, as well as secondary scholarly sources, like a historian, to describe and understand institutional change.[27] My assumptions are that examining how laws and concepts were constructed and function and the contingencies that led to a particular result can provide valuable information about that result.[28]

3.2 Methods

The methods employed seek to wed these perspectives with my research questions. They include doctrinal Swedish and EU law methods, environmental law methods, and comparative law methods.

3.2.1 Doctrinal Methods

My point of departure for analysis is the valid law, which I use doctrinal methods to identify. I use EU law method to analyze rights and obligations under the Habitats Directive. By this, I mean I analyze the binding and non-binding sources of EU law and apply the methods of EU law interpretation identified by the Court of Justice in order to make a claim for how questions concerning EU law should be resolved.[29] In particular, these methods include textual, contextual, teleological and consistent interpretation.[30] Especially significant sources of non-binding EU law used in this study are the preparatory materials for the Habitats Directive and various sets of interpretive guidelines issued or endorsed by the European Commission.[31]

When analyzing what the valid law is in Sweden, I additionally consider Swedish sources of law and interpretation methods. The sources of law pri-

[27] For the distinction between doctrinal and historical research, see Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' 17 *Deakin Law Review* 83, 117 (2012).
[28] *See* Peter Miller and Nikolas Rose, *Governing the Present* (Polity Press 2008), 6 (on asking how not why); Orford, supra note 11 at 621 et seq. (on the value of "arranged facts").
[29] Koen Lenaerts and José A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice,' 20 *Columbia Journal of European Law* 3 (2014).
[30] Ibid.; Joined Cases C-335/11 and C-337/11, HK Danmark v. Dansk Arbejdsgiverforening, EU:C:2013:222 (2013) para. 29; Case 283/81, CILFIT and others v. Ministry of Health, EU:C:1982:335 (1982).
[31] Preparatory work has been given increasingly important weight by the Court of Justice. Carl Fredrik Bergström & Jörgen Hettne, *Introduktion till EU-rätten* (Studentlitteratur 2014), 56 et seq.

marily include the texts of the relevant laws and regulations themselves, preparatory works,[32] judicial decisions, and scholarly analysis, each of which are assigned different scopes and functions within the Swedish doctrine of sources.[33] Binding sources of law in Sweden are the laws and constitutions along with international and EU law norms.[34] Judicial precedent is technically not binding, but in practice the decisions of the highest courts are regarded as authoritative, as are, to a lesser extent, appeals court decisions.[35] Although also non-binding, preparatory work has traditionally been given greater weight within the Swedish system compared with non-Nordic legal cultures.[36] This is perhaps due the Swedish constitutional imperative that all political power derives from the people, and the idea that the preparatory works give insight into the will of the legislature (Riksdag), which is the law-making representative of the people.[37] Scholarly analysis or doctrine has been described as the "spider in the web" of the legal system, which weaves together and systematizes the other sources of law.[38]

I generally frame my conclusions in terms of what a court applying EU law and its doctrine of sources would do rather than what the court should do. That is, I prefer what might be called Scandinavian rather than American realist approach to the role of legal science. The American approach is rooted in Holmes' famous claim that the law is merely a prediction of what the courts will do;[39] this predictive approach supports the framing of arguments in terms of what the court would likely find.[40] In contrast, according to the Scandinavian realist approach, the legal scholar uses the methods of analysis and sources of law that a judge would use to make a claim about what the correct legal answer is—what the court *should* find.[41] That is, as Hägerström

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[32] The Swedish förarbeten, preparatory works, are the approximate equivalent of travaux préparatoires in EU law or legislative history in the United States.

[33] Marie Sandström, 'The Swedish Model: Three Aspects of Legal Methodology' in Péter Cserne et al., *Theatrvm Legale Mvndi: Festschrift in Honour of Csaba Varga* (2007), 297, 304.

[34] Aleksander Peczenik, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation* (Norstedts Juridik 1995), 214; Joel Samuelsson & Jan Melander, *Tolkning och tillämpning* (Iustus Förlag 2003), 29-50.

[35] Peczenik, supra note 34 at 232. To paraphrase Samuelsson & Melander, supra note 34 at 39, to disregard precedent is allowed, but it's lousy legal science.

[36] Sandström, supra note 33. Bergström & Hettne, supra note 31 at 61-62, note that the weight given to preparatory works seems to be decreasing, though it continues to be guiding to the extent that it contains relevant information for interpreting the law.

[37] Swedish Instrument of Government, art. 1.

[38] Sandström, supra note 33 at 302.

[39] Oliver Wendell Holmes, 'The Path of the Law' (1897), reprinted in 110 *Harvard Law Review* 991, 994 (1997).

[40] E.g., Arie Trouwborst et al., 'Interpreting "Favourable Conservation Status" for Large Carnivores in Europe: How Many Are Needed and How Many Are Wanted?' 26:1 *Biodiversity Conservation* (2017), 37, 43.

[41] Max Lyles, 'Tradition, Conviction or Necessity? An Attempt at a Traditionalist Interpretation of the Uppsala School's Theory of Legal Doctrine' in *Rechtswissenschaft Als Juristische Doktrin* (2009), 158, 169.

argued, the legal scientist's role is to aid the judge in interpreting the law rather than to predict his result or theorize it.[42] Hägerström's project to secure the relevance of the legal scientist was successful and doctrine became and continues to be considered a source of law in Sweden.[43] I find that this Scandinavian approach is therefore a better fit in a legal system in which doctrine is a source of law, at least when utilizing doctrinal methods of analysis.

3.2.2 Environmental Law Methods

I use several related critical environmental law methods: the Uppsala Environmental Law Method (ELM), law and ecology, and critical political ecology. By critical, I mean that sources other than doctrinal legal sources are used to understand or normatively critique the law, here mainly sources from the natural sciences. ELM and law and ecology share a normative goal of environmental protection, while critical political ecology questions the narratives and assumptions through which ideas of nature are created.[44] The common thread of these methods is their goal of making heard voices that have sometimes been obscured in the text or application of the law.

I moved to Sweden in the autumn of 2011 to begin writing this thesis. That fall, Tomas Tranströmer won the Nobel Prize in literature and I heard for the first time his poem entitled "Från mars "79" (From March '79):

> Trött på alla som kommer med ord, ord men inget språk
> for jag till den snötäckta ön.
> Det vilda har inga ord.
> De oskrivna sidorna breder ut sig åt alla håll!
> Jag stöter på spåren av rådjursklövar i snön.
> Språk men inga ord.
>
> And as literally as I can render it:
>
> Tired of all who come with words, words but no language
> I went to the snow covered island.
> The wild has no words.
> The unwritten pages spread out in all directions!
> I happen upon the tracks of deer hoofs in the snow.
> Language but no words.[45]

[42] ibid. at 174, citing Axel Hägerström, 'Till frågan om begreppet gällande rätt' *Tidsskrift for rettsvitenskap* (1931), 48, 86-88.
[43] ibid.
[44] Tim Forsyth, *Critical Political Ecology: The Politics of Environmental Science* (Routledge 2003), 12; Bruno Latour, *Politics of Nature: How to Bring the Sciences into Democracy* (Harvard University Press 2004), 25.
[45] From Tomas Tranströmer, *Det vilda torget: Dikter* (Bonniers 1983). Used with permission.

The line "the wild has no words" reminded me of the legal situation for large carnivores in Sweden at the time—wild things protected by law, but not only were they unable to use words to defend their rights in court, no one was able to use words for them. There was no right for NGOs or other public interest plaintiffs to litigate hunting decisions on behalf of protected species in Sweden, a right that had been instrumental for species protection in the US. The result was a classic differend, in which wolves could never win adequate protection because they could not speak the language of laws or rights.[46] I thought then that Tranströmer's words would make a good title for an article criticizing the Swedish system. Then things changed: in 2013 the Swedish Supreme Administrative Court recognized public interest standing in hunting cases. I decided it was time to write *The Wild Has No Words*, which was co-written by my advisor Jan Darpö, but now with the felicitous subtitle *Environmental NGOs Empowered to Speak for Protected Species as Swedish Courts Apply EU and International Environmental Law*.

Tranströmer was not of course bemoaning the insufficiencies of environmental standing when he wrote that the wild has no words. He meant that nature has a means of communication that is more profound than human language. I find that this idea also pervades the writings of legal scholar Staffan Westerlund, crafter of ELM. Westerlund argued that the law must be created and interpreted in accordance with the needs of nature because nature cannot be persuaded to follow human commands.[47] In order to bring the legal system into compliance with ecological needs, the jurist must understand what ecological systems and their elements tell us, or at least what ecologists tell us about them. Reflecting on Westerlund, through the lens of Tranströmer, I find that the role of the environmental jurist in the Swedish context is that of translator. The jurist must learn to read the tracks in the snow and translate them into words that can be given legal force. I do not mean literally that one must learn to track wolves as a legal methodology, though that would be perhaps a wise next step in my legal training. But one must be able to understand the wolf well enough to tell the lawmaker and the judge how the wolf has been impacted by anthropogenic law and what the wolf needs from our law in order to flourish.

ELM is therefore a critical method which insists on the use of natural scientific data in evaluating the law.[48] I embrace the use of interdisciplinary, external criticism of the law, but counter to Westerlund, I do not accept the natural sciences' claim of universality.[49] When natural science concepts are

[46] Jean-François Lyotard, *The Differend: Phrases in Dispute (*trans. Georges Van Den Abbeele, Manchester University Press, 1988).
[47] Staffan Westerlund*, En hållbar rättsordning: Rättsvetenskapliga paradigm och tankevändor* (Justus 1997).
[48] Annika K. Nilsson, *Enforcing Environmental Responsibilities: A Comparative Study of Environmental Administrative Law* (Uppsala University 2011), 50.
[49] Staffan Westerlund*, Fundamentals of Environmental Law Methodology* (2007) at 600.

used in law—made internal to the law—these concepts must also be interrogated. Here, I use critical political ecology, which, like critical legal studies, seeks to illuminate implicit biases and instabilities in facially neutral claims.[50] I examine the construction of legal concepts, in particular that of favourable conservation status, by demonstrating that the ecological concepts they are built on themselves lack a universally agreed upon (or even commonly agreed upon) formulation. In doing so, I am able to illuminate where values play a role in determining scientific facts.

I do not find it sufficient however to merely deconstruct.[51] I use law and ecology to argue for how the open textured legal ecological concepts should be interpreted. There are many different methods within the law and ecology umbrella.[52] I use the term to mean the use of ecology to explain and evaluate the law, in a similar way to how law and economics may use economics.[53] Like many critical movements,[54] my method takes a perspective that is often subordinated in law, here that of the wolf. It asks what is good from the wolf's perspective. As one cannot ask the wolf, the environmental jurist must become an interpreter of the wolf's interest.

In order to adequately translate for the environment, the jurist must develop a working knowledge of ecology, or partner with someone who does. An interdisciplinary approach is considered essential by Westerlund. While he is not the only environmental law scholar to advocate that the environmental jurist become conversant in environmental science,[55] he is perhaps the first to do so quite so forcefully, going as far as to insist his graduate students complete internships in ecology as part of their legal education. In his *Fundamentals of Environmental Law Methodology*, he explains that environmental law is simply put not legible without environmental knowledge.[56]

I have spent time reading ecology texts, but I am not an ecologist. Instead, I have partnered with conservation scientists Guillaume Chapron[57] and José

[50] Tim Forsyth, supra note 44 at 20-21.
[51] This use of deconstruction in normative argumentation is criticized as hopelessly American by Pierre Schag in 'A Brief Survey of Deconstruction' 27 *Cardozo Law Review* 741, 745, 747 (2005). I agree, but consider the American usage to be a worthwhile translation in and of itself, rather than simply a perversion of Derrida's non-method.
[52] For several alternate uses of the term, see Andreas Philippopoulos-Mihalopoulos, *Law and Ecology: New Environmental Foundations* (GlassHouse 2011).
[53] For similar usage of 'law and ecology,' see e.g., Mary Jane Angelo, *The Law and Ecology of Pesticides and Pest Management* (Routledge 2016), 5; Richard Oliver Brooks, Ross Jones, and Ross A. Virginia, *Law and Ecology: The Rise of the Ecosystem Regime* (Ashgate 2002).
[54] E.g., Therése Fridström Montoya, *Leva som andra genom ställföreträdare: En rättslig och faktisk paradox* (Uppsala University 2015).
[55] E.g., Elizabeth Fisher, 'Environmental Law as "Hot" Law' 25 *Journal of Environmental Law* 347 (2013).
[56] Westerlund, *Fundamentals of Environmental Law Methodology*, supra note 49 at 512.
[57] Associate professor, Department of Ecology, Swedish University of Agricultural Sciences.

Vicente López-Bao[58] to formulate a *Legal-Ecological Definition of Favourable Conservation Status for Species*. We used dialectic to discover what the law allowed, what the wolf allowed, what the law required, what the wolf required. We began with the question of what constitutes favourable conservation status. I replied with the definition stated in the law, as glossed by the Court of Justice. Chapron and López-Bao responded by posing a set of questions necessary for ecologists to understand in order to calculate whether conservation status was favourable. I responded with some parameters allowed by law. They responded with parameters that would promote a healthy wolf population and asked which were required by law. I used these parameters as hypotheses to test the law, and determined which were required and which were merely allowed. They responded with a series of equations representing our recommendations for a flourishing wolf population. I responded with a textual set of guidelines and recommendations.

In this fashion we were able to refine the lineaments of favourable conservation status and the acceptable space for discretion by national policymakers. Our interdisciplinary method can be described as a form of the tree walks advocated by Meredith Root-Bernstein.[59] She describes a method for joint interpretation between social and natural scientists utilizing a deep reflection on the studied object. By keeping the focus on the protected species, researchers across disciplines can find the essential questions to ask each other and generate a meaningful dialogue centered on what each discipline can contribute to developing structures for meeting the needs of that species. Together, Chapron, López-Bao and I constructed an interdisciplinary tool for understanding favourable conservation status that I used to critique the Swedish application of this concept to the Swedish wolf.

3.2.3 Comparative Methods

Comparative methods permeate this thesis; every article contains some sort of comparison. Some of these comparisons are vertical: international law is compared to EU law; EU law is compared to Member State law. Others are horizontal: national law is compared to national law; Federal US law is compared to EU law. Comparison can facilitate a deeper understanding of one's own legal system.[60] In some instances, the aim of my comparison is simply to show difference. In *The Wild has No Words* as well as in *Examining the Habitats Directive's Key Concept through a Case Study of the Swedish Wolf*, what EU law requires of its Member States is compared to what Swedish law does, with the normative presumption being that Swedish law

[58] Research fellow, Research Unit of Biodiversity, Oviedo University.
[59] Meredith Root-Bernstein, 'Personal Reflections on Natural History as Common Ground for Interdisciplinary Multispecies Socio-Ecological Research' 3 *Geography and Environment* e00015 (2016).
[60] Filippo Valguarnera, 'Judicial Policymaking in Sweden' 61 *Scandinavian Studies in Law* 185, 186-187 (2015).

should be aligned with EU requirements. The aim of the comparison of *Synergy and Dysfunction* is to show difference between international and EU species protection law. While focused around the Habitats Directive and Bern Convention, this article also evaluated some strengths and weaknesses of the EU and Convention as institutions. By analyzing the differences on the micro and macro levels,[61] this article was able to point to benefits and problems in their interaction, and provide something of a warning of potential pitfalls in collaboration between Council of Europe and EU.

Other parts of this thesis focus on the comparison between the US and EU. I use what I call environmental functionalism to again compare these systems on the micro and macro analytical levels. Environmental functionalism is a type of functionalism, which compares rules that have the equivalent function in different legal systems.[62] Environmental functionalism compares rules for environmental protection, here the protection of species. While the functional method is highly criticized, it remains the predominant method of comparative law.[63] Darpö and Nilsson argue in their article *On the Comparison of Environmental Law* that this method is particularly suitable to environmental legal analysis.[64] I agree, some of the strongest criticisms of functionalism, especially its failure to treat differences in legal cultures,[65] are blunted when the fulcrum of the comparison is the rules affecting the literal terroir of the soil or other natural phenomena.[66]

Westerlund too endorsed a sort of environmental functionalism, though with a more specific purpose. He argued for the utility of comparative law in addressing deficits between environmental policy goals and results. He used what he called a Linnaean approach in stating that the central thesis of environmental law is that "how nature reacts to a specific anthropogenic impact is totally independent of how the legal order in the country in question has developed."[67] For this reason, according to Westerlund, legal analysis must proceed from the natural scientific, falsifiable reality. By comparing anthropogenic impacts of different legal systems, one can gain knowledge, inspiration, and understanding of how to best fulfil environmental policy objec-

[61] That is, on the specific and systemic levels. Gregory Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014), 50.
[62] Ralph Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann & Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), 363.
[63] Jaakko Husa, 'Comparative Law, Language and Doctrine' in Mark Van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2013).
[64] Jan Darpö and Annika Nilsson, 'On the Comparison of Environmental Law' 3 *Journal of Court Innovation* 316 (2010).
[65] Chrisopher A. Whytock, *Legal Origins, Functionalism, and the Future of Comparative Law*, 2009 *Brigham Young University Law Review* 1879, 1886 (2009).
[66] Blunted but not eliminated. Caution is nevertheless required to avoid universalizing environmental explanations. Forsyth, supra note 44 at 208-209.
[67] Westerlund, *Fundamentals of Environmental Law Methodology*, supra note 49 at 600.

tives, in particular sustainable development.[68] Though fully conscious of the natural beings at the center of this thesis, I do not compare conservation outcomes in the Linnaean fashion championed by Westerlund. The wolf is instead simply used as a focus for examining difference and similarity in the compared systems.

I begin each of the two US comparative studies, *Killing Wolves to Save Them* and *Through the Eyes of the Wolf*, by comparing specific aspects of wolf management according to the Habitats Directive and Endangered Species Act. These two laws take different forms and use different methods to pursue their similar goals of species protection. To seek to achieve this goal, both contain certain prohibitions and requirements, both have mechanisms for identifying which species should be protected and making changes to their lists of protected species, and both have legal means by which they are enforced. Focusing on those elements of the legislative acts that have similar functions enables comparison of these very different systems for species protection.[69] In both articles, I use my preliminary conclusions to make some broader claims. As private litigation[70] is increasingly used to enforce species protection law in the EU, as it has long been used in the US, it is highly relevant to examine what the impact of this enforcement method has been in the US. The US is of course a very different union than the EU, with a different legal culture, as well as different physical landscape. One particularly significant difference is that most legal conflicts concerning the Endangered Species Act and Habitats Directive respectively are resolved in the federal court system in the US and in the national courts in the EU. Comparisons must therefore be drawn with caution. But by examining some of the similarities and differences of these two systems, I hope to contribute to a deeper understanding of some changes that have been occurring in the legal culture of litigation in the EU.

4. Prior Research & Theoretical Framework

This thesis examines the protection of wolves through the theoretical frameworks of regulatory federalism, adversarial legalism, and governmentality, the last of which I define as the rationalities and techniques by which political subjects are governed.[71] The rationality of environmental protection and

[68] ibid. at 601-602.
[69] Michaels, supra note 62 at 363.
[70] By which I mean litigation initiated by non-government actors.
[71] Governmentality admittedly has been defined in numerous ways. See, e.g., Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon & Peter Miller, *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991), 87, 102-103; Nikolas Rose, Pat O'Malley, & Mariana Valverde, 'Governmentality' 2 *Annual Review of Law & Social Science* 83, 83 (2006).

the technologies of government—such as expert analysis and bureaucratic processes—that "conduct conduct"[72] with the purported purpose of pursuing environmental protection have been called "environmentality"[73]

Two recent works have analyzed wolf protection through this environmentality lens. Håkon Stokland examined the construction of the concept "minimum viable population" by the scientists, politicians, bureaucrats, nature protection advocates and others who participated in determining the minimum viable population of wolves in Norway.[74] He showed how the answer to the purportedly factual question of how many wolves are necessary to maintain a viable Norwegian population is the result of its contested history. Juha Hiedanpää and Daniel Bromley argue in their recent book that favourable conservation status is used by the EU as a technology for negotiating control over Member States' regulatory policy.[75] Playing what these authors call the "harmonization game," the EU is able to hide its "authoritarian tendencies" behind scientific expertise and a supposed need for European integration.[76] According to the authors, various EU policies push individuals to change their behaviors to serve the EU's interests in biodiversity protection.[77] Stokland and Hiedanpää and Bromley respectively use the governmentality framework to examine how wolves, or our ideas about them, are constructed by law and how EU law is in part constructed by wolves.

I take a similar approach to Stokland when examining the construction of minimum viable population as a building block of the EU-law-created concept of favourable conservation status. As we both demonstrate, the answer to the question of how many wolves are needed to protect a population is contingent on a series of choices made by scientific, political, and other actors. Stokland argues that governmental technologies such as the use of these facially neutral concepts can be used to redefine and limit the nature they purport to protect; in his case, the minimum viable wolf population was transformed into the maximum allowable population, thus ensuring a population continually at the edge of extirpation.[78] I expand on these arguments by showing how political and scientific choices contributed to the superficially neutral definitions used in identifying favourable conservation status, emphasizing the role of litigation in delimiting these choices. In doing so, I

[72] Governmentality has been described as the "conduct of conduct." Peter Miller & Nikolas Rose, *Governing the Present* (Polity Press 2008), 16.
[73] Timothy W. Luke, 'Environmentality as Green Governmentality' in Eric Darier, *Discourses of the Environment* (Wiley-Blackwell 1998), 121.
[74] Håkon B. Stokland, 'How Many Wolves Does It Take to Protect the Population? Minimum Viable Population Size as a Technology of Government in Endangered Species Management (Norway, 1970s-2000s)' 22 *Environment and History* 191 (2016).
[75] Juha Hiedanpää & Daniel Bromley, *Environmental Heresies: The Quest for Reasonable* (Springer 2016), 163 et seq.
[76] ibid. at 177.
[77] ibid. at 183-184.
[78] Stokland, supra note 74 at 220.

introduce the non-governmental litigant as contestant in Hiedanpää and Bromley's harmonization game.

This game is one that has more and more frequently been played in national courts, which are being used to decide new types of questions, like how many wolves make up a viable population and whether hunting increases social tolerance of wolves. I therefore additionally utilize theories of regulatory federalism and adversarial legalism to examine the role and impact of the private litigant in implementing EU environmental law.[79] Whether the EU should be analyzed as a *sui generis* organization or some type of federation has largely been resolved in favor of the latter. As Robert Schutze has argued, the "sui generis" theory is more of a non-theory that discouraged analysis.[80] Although the EU lacks some of the features associated with a federal state, many scholars consider it at least a "quasi-federation," some going so far as to call it a "federation in all but name."[81] But whatever the precise contours of this quasi-federation, Kelemen argues that at least when it regulates, the EU is most fruitfully analyzed as a federation.[82]

Of particular concern in environmental law is how EU federalism works to protect the environment. Schutze describes how environmental law changed from a policy area dominated by the Member States to an area of shared competence. As the EU has attained greater competence in this policy area, it is important to examine the ways in which it has exercised this competence. Like in other federal systems, according to Kelemen, the lion's share of policy making is made at the federal level while states maintain most of the control over how the policies are implemented.[83] He further claims that litigation is one important tool that enables this EU federalism to function.[84] Litigation alleging violations of EU species protection law is sometimes initiated by the European Commission, but is more frequently initiated by NGOs.[85] As paths to direct access to EU courts for NGOs are few, questions concerning EU species protection law are increasingly resolved in Member State courts.[86] The national courts thus play a particularly

[79] R. Daniel Kelemen, *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond* (Harvard University Press 2004); Kagan, supra note 10; Kelemen, *Eurolegalism*, supra note 8.
[80] Robert Schutze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford 2009), 3.
[81] Jan Wouters et al., 'The European Union: A Federation in All but Name' in Daniel Halberstam & Mathias Reimann, *Federalism and Legal Unification: A Comparative Empirical Investigation of Twenty Systems* (Springer 2014), 191.
[82] Kelemen, *The Rules of Federalism*, supra note 79 at 1-2, passim.
[83] ibid. at 161-162.
[84] ibid. at 166.
[85] Hofmann, supra note 5.
[86] ibid.

vital role in maintaining the EU legal order as "ordinary courts" of Union law in the area of environmental protection.[87]

Kelemen argues that EU administrative policy is increasingly defined and enforced through litigation. Empowering non-governmental litigants enables EU federalism to succeed without the large administrative apparatus of other federal systems. His point of departure is Robert Kagan's well-known book *Adversarial Legalism: The American Way of Law*. This book, first published in 2001, described American policy making and implementation and the resolution of policy disputes as being characterized by "detailed, prescriptive rules often containing strict transparency and disclosure requirements, legalistic and adversarial approaches to regulatory enforcement and dispute resolution, costly legal contestation and multifaceted lawyering techniques, active judicial review of administrative decisions and practices, and frequent judicial intervention, [and] frequent private litigation concerning regulatory policies."[88] The benefits of this system are of course transparency and the ability of individuals (or in the case of public interest litigation, groups of individuals) to effect and affect policy.[89] It has the potential to make the legal system more responsive to individual claims.[90] Legal certainty may be increased if litigation leads to the law being enforced.[91] But the downside to this system of regulation is that the ease and scope of litigation can lead to regulatory paralysis in which nothing can be accomplished due to potentially endless litigation possibilities.[92] It can also inhibit non-litigious agreement between parties when further litigation with additional legal arguments or by additional parties is possible.[93] Another criticism of leveled by Kagan is the legal uncertainty that can arise when policy is contested in courts, and scientific questions are decided by judges based on conflicting scientific arguments introduced by litigants.[94] Kagan argues that litigious implementation of environmental protection is particularly problematic in terms of legal certainty because environmental law tends to be exceptionally complex and exceptionally vague, which in turn frequently lead to "surprising" judgments.[95]

Kelemen demonstrates that a sort of European variant of American style adversarial legalism is now taking hold in the EU. The EU enacts a lot of

[87] Sanja Bogojevíc, 'Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity' 34:1 *Yearbook of European Law* 5, 6-7 (2015), citing Case T-219-95R, Danielsson v. Commission, EU:T:1995:219 (1995) para. 77.
[88] Kelemen, *Eurolegalism*, supra note 8 at 6.
[89] Kagan, supra note 10 at 3.
[90] Although there may be equally good non-adversarial means for the rule of law to be upheld. ibid. at 3.
[91] Kagan, supra note 10 at 18.
[92] ibid.
[93] ibid. at 27.
[94] ibid at 9.
[95] ibid. at 218.

legislation, but has very limited administrative and enforcement apparatus to carry it out.[96] It also has fragmented political decision makers, but a strong judiciary that has the ability to declare what EU laws mean.[97] Non-governmental litigants play a large role in ensuring the enforcement and development of EU law through litigation in the member states, with the potential for review and further interpretation in the EU court. The result resembles the adversarial legalism that has long been the hallmark of the US, though mediated and motivated through the goal of European integration.

Kelemen's argument is centered on how rights are used to effect EU policy. The EU protects an individual's ability to fight to vindicate their EU law given rights in court, and thereby give effect to EU law through the Member States' own organs. In the recent book Governing (Through) Rights, the author demonstrates that individual rights are used not only—or not even necessarily—to vindicate the rights of individuals, but also as a technology that enables EU governance.[98] Even without individual rights at stake, however, I find that the argument that increased litigation opportunities have supported the expansion of EU environmental law holds true.[99] Despite his claim that EU policy would be interpreted and applied through litigation, Kelemen argued that entrenched legal cultures and institutions may "tame" the expansion of adversarial legalism in Europe. In Sweden however, there has been a rapid change to those legal institutions and cultures as rules on standing have become more liberal and lawyers and organizations step in to advocate the public interest in Swedish courts. And even with only the public interest at stake, the EU has enabled litigants to use the adversarial process to implement its policy making.[100] Eurolegalism has the potential to be more encompassing than Kelemen anticipated.

I argue that the evolution of Swedish wolf policy over the past several years can be explained as an example of the movement towards European adversarial legalism and the hollowing out of state regulatory power through litigation. EU environmental law constitutes a minimum level of environmental protection that must be achieved by the Member States. The Member States have competence to protect at a more stringent level than this minimum or not.[101] When imprecise terms are used in EU law—such as favourable conservation status—it is not clear where this minimum level lies, and thus how much discretion remains for the Member States. Courts help delineate the Member States' discretion in response to litigation. The legal protec-

[96] Kelemen, *Eurolegalism*, supra note 8 at 8.
[97] ibid. at 26-27.
[98] Bal Sokhi-Bulley, *Governing (Through) Rights* (Bloomsbury 2016), 18.
[99] Kelemen predicted this expansion through NGO litigation in *The Rules of Federalism*, supra note 79.
[100] For example, Cichowski, supra note 14 at 166, illustrates that NGO litigation in national courts facilitated the increasing scope and enforcement of EU environmental law.
[101] TFEU art. 193.

tion of wolves is a technology that facilitates EU integration through the harmonization game.

5. Overview and Conclusions

In this section, I discuss the conclusions reached in my articles and how they support my overarching argument that the intersection of eco-knowledge and European adversarial legalism creates a mechanism for the extension of EU law in the Member States. This argument is made using issues important to the controversies over wolf protection in Sweden to explicate the changing roles and responsibilities of different actors in protecting species. The first of these articles, *The Habitats Directive and Bern Convention: Synergy and Dysfunction in Public International and EU Law* (article I) provides a background for understanding the primary legal instruments driving the protection of wolves in the EU. It also makes arguments about the roles of EU and international law in the protection of species relative to each other and to other state and non-governmental actors.

In *Synergy and Dysfunction*, I set out the history of the Bern Convention and Habitats Directive, and the evolving relationship between the two. The EU enacted the Habitats Directive to effectuate its obligations as a signatory to the Bern Convention. In the years since, the EU's capacity to steer all aspects of policy making and administration of the Bern Convention have increased for several reasons: the EU comprises a majority of signatories to the Bern Convention, EU Member States vote as a block within the Bern Convention's governing body, budget cuts to the Bern Convention make it more dependent on EU funding, and the EU itself has become more active in species protection policy. As a result, little can be done through the Bern Convention apparatus without the consent of the EU. Additionally, the transparency and opportunities for public participation that had been hallmarks of the Bern Convention have been reduced through EU block voting. Thus, control over species protection policy and action has moved away from international institutional actors (the Bern Convention bodies) and away from state actors (both EU Member States who can no longer act according to their own interests within the Bern Convention bodies and non-EU Member States who cannot influence any decision without the EU's agreement) and away from individuals and organizations. In each of these cases, influence has shifted towards the EU.

The use of experts and technical requirements is a means by which governments govern.[102] This intersection of expertise and authority termed power-knowledge by Foucault has been called eco-knowledge in the environmen-

[102] Miller & Rose, supra note 72 at 68-69.

tality context.[103] Eco-knowledge enables states (and supra-states) to delineate what falls within their competence by defining or organizing ecological reality.[104] Favourable conservation status and the attendant apparatus to interpret, measure and enforce it are examples of eco-knowledge. In its key provision, the Habitats Directive directs the Member States to achieve and maintain the favourable conservation status of habitats and species entitled to the Directive's protections. The creation of this open textured concept leaves space for enforcement action and harmonization.

In articles II and III, I demonstrate how room for policy making can be concealed in apparently neutral scientific terms using favourable conservation status as a case study. In doing so, I make arguments about what margin of discretion is retained by the member states in determining whether species have this status. I additionally take a normative position on how courts should interpret this term at the margins in light of EU law and ecological factors.

In *A Legal-Ecological Understanding of Favourable Conservation Status for Species in Europe* (article II), my conservation scientist co-authors José Vicente López-Bao and Guillaume Chapron and I aimed to put forward a legally and ecologically coherent understanding of favourable conservation status. Using an interdisciplinary approach, we analyzed several contested aspects of the term to create a tool utilizable by conservation professionals as well as policymakers and lawyers when evaluating species' conservation status.

Favourable conservation status is one of many quasi-scientific terms used in environmental law. It is a term that does not have a scientific meaning independent of the law, yet cannot be understood without reference to the natural sciences and determination of scientific facts. Determination of these facts in turn often requires value judgements. When these judgments have not been made with clarity by lawmakers, they may be made by judges who have to determine what the terms mean when deciding cases. One example that we focus on is the concept of viability. To be at favourable conservation status, a species must be, amongst other requirements, "maintaining itself on a long-term basis as a viable component of its natural habitats." A determination of whether a species is viable requires both a factual evaluation of the species' demographic and genetic health, and a value judgement of what risk to its future existence over what time period is acceptable.

Several other contested aspects of favourable conservation status are similarly examined. The first of these is whether conservation status should be measured at the species, population, or national level. At minimum, favourable conservation status is to be measured and achieved at the EU level, but we argue that Member States also have an individual obligation to evaluate

[103] Luke, supra note 73 at 138-139.
[104] ibid. at 134.

and seek to attain or maintain it at both the national level and within each biogeographical region in which it occurs. The second aspect examined is what it means for a species to be a component of its natural habitat. We conclude that the species must play a role in the environment it inhabits, that is to say, it must have ecological viability in addition to demographic viability. The next aspect examined is how long constitutes a "long-term basis." Since the Habitats Directive is intended to conserve species for future generations, we argue that species should remain viable indefinitely. This requires that they have enough genetic variation to adapt and evolve into the future, known as genetic and evolutionary viability. The fourth question taken up, what it means for a species to "maintain itself," is primarily one of EU statutory interpretation rather than interdisciplinary analysis. Based on an examination of other language versions and other terms in the in the Directive, I conclude that some human management may be permitted, but that the level of human assistance required should be limited. The fifth aspect is whether favourable conservation status should be measured as a distance from extinction, or from carrying capacity, the maximum number of individual animals a habitat can support. No binding authority governs this question, which means the member states may determine how they approach it. However, for reasons outlined in the article, it is more logically consistent to measure favourability in reference to a more favourable state than from extinction. Lastly, it was considered whether a species population must approach historical levels in order to be at favourable conservation status and concluded that while it is a good management practice to consider historical population levels, it is not mandated. If parties disagree about whether any of these elements are met, and the methods and values for resolving the disagreement have not been indicated by the lawmaker, the court will determine the answer, though perhaps implicitly, in judging whether a species has favourable conservation status.

In *Favourable Conservation Status for Species: Examining the Habitats Directive's Key Concept through a Case Study of the Swedish Wolf* (article III), I use the above conclusions to evaluate the conservation status of wolves in Sweden. Because whether or not a species has favourable conservation status is relevant to determining in what circumstances members of the species may be killed, this question has been a topic of fierce debate. I argue that the Swedish Government and the Swedish Environmental Protection Agency erred in their determinations that Swedish wolves have this status. This determination, first made in 2013, was based on an analysis of the population's viability that did not consider the genetic health or evolutionary potential of the wolf population. Two years later, the Swedish Environmental Protection Agency again concluded that wolves' conservation status was favourable, but changed its reasoning. It accepted the need for genetic viability, but considered that the Swedish wolves had it because they are part of a larger population that included not only the wolves in Sweden

but also the wolves in Finland, Norway, Russia, Poland and other Baltic States. It stated that Sweden needed to host only a portion of this population, and one naturally immigrating wolf per generation, and concluded that these requirements had been fulfilled, despite the fact that there is virtually no genetic connectivity between the wolves of Sweden and Norway and those outside the Scandinavian Peninsula. While it is true that wolves have wandered into northern Sweden from Finland on a regular basis, they have very rarely successfully bred in Sweden due to being killed. This article argues that it is clearly inappropriate to consider wolf populations in other countries if there is no regular connectivity when determining genetic viability.

So if the Swedish wolf is to have genetic viability, it will be dependent on human management to facilitate regular genetic exchange unless natural connectivity through immigration can be established. It is therefore questionable whether the wolf can be said to be "maintaining itself" as required for favourable conservation status. As argued above, a species' conservation status can be considered favourable even if some human management is required, for instance in the maintenance of a corridor or other habitat. However, here I argue that the human assistance necessary to maintain a genetically viable population without natural immigration precludes the Swedish wolf from being at favourable conservation status. Capturing and moving protected animals is itself a violation of the Habitats Directive, though a less severe one than killing them. If continually violating the Habitats Directive through capture and movement is necessary to maintain the genetic viability of the population, the population should not be considered to be maintaining itself within the meaning of the Directive.

The increased availability of public interest environmental litigation in Sweden has opened up opportunities for courts to shape policy by interpreting terms such as favourable conservation status. In its 2016 decision, the Supreme Administrative Court heard arguments from NGOs and government actors on whether wolves had favourable conservation status in Sweden and declined to overturn the Government's and Swedish Environmental Protection Agency's determinations that they did. However, the court's decision was limited to the 2016 hunting season which had been granted in light of the expectation that certain immigrating wolves would breed in Sweden, although it was known at the time of the judicial decision that the immigrating wolves had in fact been killed.[105] As connectivity has proved a chimera, future legal battles are all but assured.

This sort of legal contestation over scientific claims and concepts has been a hallmark of American adversarial legalism. The American regulatory style has been described as distinguished "primarily by its emphasis on enforcing legal norms through transparent legal rules and procedures and broad access

[105] HFD 2016 ref. 89 at 16.

to justice, empowering private actors to assert their legal rights."[106] In the following articles, I show how this regulatory style has increasing impact on Swedish wolf policy and management, and facilitated the implementation of the EU nature directives. The first of these articles, *The Wild Has No Words: Environmental NGOs Empowered to Speak for Protected Species as Swedish Courts Apply EU and International Environmental Law* (article IV), is a case commentary written with my advisor Jan Darpö that expands on a concrete example of the impact of public interest standing to litigate the enforcement of EU species protection laws. We focus on a series of cases culminating in a May 2013 decision of the Stockholm Administrative Court that held that Sweden's wolf management was inconsistent with the Habitats Directive. This case was important both because it interpreted controversial provisions of the Habitats Directive and because it demonstrated the growing influence of EU law on national procedural law. It was one of the first cases in which national courts were able to review a decision allowing wolf hunting because standing to bring public interest lawsuits for the protection of species had previously been very limited. Under traditional Swedish procedural law, only environmental authorities had the right to represent the public interest in court. In the wolf hunting cases, Swedish administrative courts finally applied to hunting decisions the Court of Justice's holding in *Slovak Brown Bear*. In that case, the ECJ held that national procedural law must be interpreted to the extent possible so as to allow environmental NGOs to challenge administrative decisions that might contravene EU environmental law.

As is a common theme throughout the articles of this dissertation, numerous extra-national legal norms affect the Swedish wolf. These include not only substantive norms, such as the ban on hunting, but also procedural norms that help ensure that the substantive norms are given effect. Sweden and the EU are parties to the Aarhus Convention on access to information, participation and litigation in environmental matters. Many of the Aarhus Convention's requirements have been implemented in EU law, however, Article 9.3, which requires that members of the public must have access to administrative or judicial procedures to challenge alleged violations of environmental law, has not. Nevertheless, Member States have an obligation under EU law, as well as under the Aarhus Convention, to meet their Convention obligations as the EU's membership means that the convention is also a part of the EU legal order.

In the Stockholm Administrative Court case, the court acknowledged that NGOs had standing to challenge a decision by the Swedish Environmental Protection Agency that authorized a licensed hunting season with a bag limit of 16 wolves. The court went on to consider the merits of the case, and held that the hunt was impermissible under the Habitats Directive because it did not meet the preconditions for allowing the killing of an individual member

[106] Kelemen, *Eurolegalism*, supra note 8 at 6.

of a protected species that did not have favourable conservation status, namely that there were alternate solutions available for achieving the stated goal of reducing inbreeding, and further that the bag limit was higher than would be allowed even if the preconditions were met. In this article, Darpö and I conclude that the court was largely correct in its interpretation and application of EU law, but also criticize the court's decision not to request a preliminary ruling from the Court of Justice despite the fact that controversial questions of EU law were at stake. The Swedish court applied EU law, but preferred not to cede control over how that law was interpreted.

In *Killing Wolves to Save Them? Legal Responses to "Tolerance" Hunting in the European Union and United States* (article V), I continue to analyze the impact of the availability of public interest litigation on substantive hunting law. This analysis is focused around a single question: why has the justification for hunting protected species which argues that allowing hunting benefits the hunted species by increasing social tolerance for that species been rejected in the US but continued to be used in some parts of the EU? It has been argued by some responsible for wildlife management in both the US and Sweden that authorizing hunting seasons leads to greater tolerance for species, thus reducing illegal killing and in turn increasing the number of individual members of the species that can survive in a particular region or habitat. While the science behind this claim is in controversy, recent research suggests the opposite, that allowing legal killing may lead to an increase in illegal killing.[107] I do not take a position on the question of whether legal hunting in fact reduces poaching, but start from the position that there is little scientific support for the claim. I then comparatively analyze how this claim by wildlife authorities that has not been backed by scientific evidence has been treated by American courts under the Endangered Species Act, and how it has been and should be treated under the Habitats Directive. American state and federal wildlife officials have sought in the past to allow hunting or culling of members of protected species with a stated goal of "enhancing the propagation or survival" of the species by way of reducing illegal killing. Courts have repeatedly rejected this justification as scientifically unsupported and logically unsound. The same justification has been used in Sweden and Finland. Like the Endangered Species Act, the Habitats Directive allows Member States to permit the killing of members of protected species in certain circumstances if doing so would improve the conservation of the species. However, when there is scientific uncertainty, the burden of proof lies with the Member State wishing to derogate from strict protection. As there is little evidence that tolerance hunting in fact improves conservation outcomes, it is doubtful this burden could be met. I argue that the reason

[107]Guillaume Chapron & Adrian Treves, 'Blood Does Not Buy Goodwill: Allowing Culling Increases Poaching of a Large Carnivore' 283 *Proceedings of the Royal Society B* 20152939 (2016).

that the claim has been rejected as nonsensical by American courts, while it continues to be used by wildlife officials in parts of Europe has little to do with differences in the substantive requirements of the protective laws. Rather, the reason the issue has been settled in the US and not in the EU is that it has been much easier for members of the public to bring controversial questions of interpretation of the Endangered Species Act to federal court than it has been for members of the public in the EU to obtain judicial interpretation of similar questions of EU law, a situation that has only recently changed in Sweden. Tolerance hunting has now been addressed by Swedish courts in several cases challenging the 2016 hunting season. While some lower courts rejected this justification for hunting, the final instance accepted it in the above-mentioned Supreme Administrative Court case from December 2016. Although the authorities that allowed the hunting season had the burden of proof to show that it was justified, the high court did not analyze their evidence. It simply stated that it had no reason to question the authorities' determination that hunting can increase the acceptance of wolves. Because the court declined to seek a preliminary ruling, the EU judiciary will not have the opportunity to weigh in this time.

The fact that Swedish courts have been able to consider whether Swedish wolves are at favourable conservation status and whether Swedish wolf policy complies with EU law is of course thanks to the legal developments described in *The Wild Has No Words*. Authoritative resolution at the EU level however is still out of reach. The different result than in the US may be due to the more limited standing possibilities in the EU. These contrasting situations illustrate a positive side of dispute resolution through adversarial legalism—the potential for more responsive law and government.[108] As Kagan argues however, this result is far from guaranteed.

In this book's concluding article, *Through the Eyes of the Wolf: Adversarial Legalism, Federalism, and Biodiversity Protection in the United States and European Union* (article VI), I continue my comparative analysis of species protection in the US and the EU. I compare three aspects of the Habitats Directive and Endangered Species Act that have been important to the wolf litigation: the legislative goals, how the laws are amended, and how they are enforced. I analyze what competences or responsibilities federal, state and non-governmental actors have in those legal areas, and how these competences and responsibilities have been impacted by litigation. This actor analysis is then used to draw some conclusions about the evolving federal relationship between the EU and its Member States.

The article first returns to the concept of favourable conservation status and compares it with its functional equivalent in the Endangered Species Act, recovery. Recovery is defined as a situation in which a species is not

[108] Kagan, supra note 10 at 19.

endangered or threatened, that is, not in danger of extinction throughout all or a significant portion of its range, or likely to be so in the foreseeable future. While federal agencies are tasked with determining whether a species has recovered, the concept of recovery has been profoundly shaped by courts in response to litigation. Federal administrative agencies in the US have wide discretion to interpret the law, and their interpretations are presumed valid. Only if a reviewing court finds that the agency's actions have been arbitrary and capricious, or an abuse of discretion, will the court overturn them. The courts have found just that many times with regard to administrative decisions that wolves had recovered, resulting in a continued high level of protection for wolves. A recent 2017 appeals court decision however deferred to an agency determination that Wyoming wolves has recovered and therefore could be removed from federal protection.

The interpretation of the Habitats Directive's goal of favourable conservation status has also been controversial, as analyzed above. It was a factor in several judicial decisions not to allow hunting of wolves. The Supreme Administrative Court however accepted the Swedish Environmental Protection Agency's determination that wolves do have favourable conservation status, despite ongoing disagreement from the European Commission.

The article next examines how the laws are changed. In the United States, NGO litigation clearly impacts whether the federal government or the states have competence to protect species. The stakes in the litigation over whether wolves had recovered were whether wolves would be entitled to continued federal protection, or whether management would revert to the states. NGOs do not have this ability to litigate whether a species is protected by the EU. However, the imprecise concept of favourable conservation status is one of several that allows for litigation over how much discretion Member States have over the management of a particular species, thus changing the scope of Member State competence.

As illustrated, public interest litigation has been important to the enforcement of both the Habitats Directive and Endangered Species Act. This enforcement is the third aspect of the species protection laws compared in the article. The right to litigate has been built into the Endangered Species Act, which, with some limitations by the courts, allows "any person" to sue "any person," including the federal government, for violating it. The reason for this is to increase the enforcement of federal law; public interest litigants are often referred to as "private attorney generals." As discussed in *The Wild Has No Words* and *Killing Wolves to Save Them*, public interest litigation has an increasingly important role in the enforcement of the Habitats Directive. While procedural law is theoretically the prerogative of the Member States, Sweden has been forced to open its legal system to allow standing for NGOs, with the result that NGOs have been able to and have successfully challenged several of Sweden's decisions to allow hunting of wolves. As Kelemen argued, litigation is encouraged by the EU in order to facilitate

European integration. This article concludes that changes to standing requirements allowed NGOs to have even more impact than Kelemen predicted in the management of Swedish wolves.

When courts interpret unclear terms like favourable conservation status in an expansive or stringent way, they limit Member State discretion to a greater degree than had been previously apparent. This limitation on Member State discretion in favor of the EU has occurred in the Court of Justice when the European Commission plays the harmonization game. A similar game is also played in the EU's ordinary courts. In this way, control over species protection policy is centralized at the EU level through the decentralization of enforcement. Litigation to enforce federal law has led to the greater protection of wolves in the EU as well as the US. However, environmentalists should be cautious in cheering for this game: the observed trends of greater protection through litigation in the US and EU have been called into question by recent court decisions. This illustrates the presence of one of the drawbacks of adversarial legalism: uncertainty.

The danger of limiting state's role in species protection in a litigious system was recognized by J.B. Ruhl in his chapter *Cooperative Federalism and the Endangered Species Act*.[109] As the American states have relatively little control over species protection, they tend to have weak state species protection laws.[110] This draws little attention when there is strong federal protection, however, federal protection can be undone by a court (or by a congress). Because the states' role is limited, there would be little law left in place to protect species.[111] Further, according to Ruhl, conflict between federal and state governments over species protection has led to resentment towards species protection in general and attacks on the federal law.[112] These concerns are equally valid in the EU.

The idea that European adversarial legalism would facilitate an "ever closer union"[113] or greater enforcement of EU environmental law has been challenged by recent events. Political scientist Viviane Gravey found that while the EU continues to expand in some environmental policy areas, EU environmental policy is being dismantled in others.[114] Although a formal attempt to "overhaul" and weaken the nature protection directives by the

[109] In Kaush Arha & Barton H. Thompson, Jr., *The Endangered Species Act and Federalism: Effective Conservation through Greater State Commitment* (RFF Press 2011), 35.
[110] ibid. at 44-45.
[111] ibid. at 45.
[112] ibid. at 45-46.
[113] TEU art. 1.
[114] Viviane Gravey, *Does the European Union have a Reverse Gear? Environmental Policy Dismantling, 1992-2014* (University of East Anglia 2016); Viviane Gravey & Andrew Jordan, 'Does the European Union Have a Reverse Gear? Policy Dismantling in a Hyperconsensual Polity' 23 *Journal of European Public Policy* 1180 (2016).

Juncker administration failed,[115] the European Commission continues to take no action to enforce its interpretation of EU environmental law in the Swedish wolf matter.[116] Meanwhile, the Supreme Administrative Court has, as noted earlier, interpreted EU law to allow the hunting of wolves in Sweden, a position contrary to that of the European Commission. If the EU ceases to push for environmental policy expansion, the Member States may be left not with Kelemen's Eurolegalism, but something closer to American adversarial legalism, which has been criticized as particularly uncertain and inefficient in solving environmental problems.[117] The future of ever closer union through private litigation remains unclear, as does the future of Swedish wolves.

[115] Arie Trouwborst et al., 'Europe's Biodiversity Avoids Fatal Setback', 355 *Science* 140 (2017).
[116] Darpö, supra note 5.
[117] Kagan, supra note 10 at 207-228.

Sammanfattning

Detta är en sammanläggningsavhandling som bygger på sex artiklar. I avhandlingen används det rättsliga skyddet av vargen som ett exempel för att belysa EUs och dess medlemsstaters skyldigheter när det gäller de internationella förpliktelserna om artskydd. Fokus i avhandlingen är hur de olika rättsreglerna har tolkats och tillämpats i praktiken. I studien jämförs den rättsliga situationen kring skyddet av vargar i Sverige med den motsvarande situationen för skydd av vargar i USA.

Den första artikeln *The Habitats Directive and Bern Convention: Synergy and Dysfunction in Public International and EU Law* utgör bakgrund och avser att skapa en förståelse för de viktigaste rättsliga instrumenten om artskyddet i Europa. I artikeln diskuteras EU:s roll och betydelsen av internationell rätt på området, dels i förhållande till de olika rättsliga instrumenten, dels i relationen mellan de rättsliga instrumenten och medlemsstaterna samt den berörda allmänheten och dess organisationer (”miljöorganisationerna”).

De primära rättsliga instrumenten är Europarådets Bernkonvention och EU:s art- och habitatdirektiv. Direktivet implementerar Bernkonventionen i Unionen. Det har en starkare genomförandemekanism än Bernkonventionen, men omfattar en mindre geografisk yta. Genom samarbete mellan konventionens sekretariat och EU:s institutioner har dock de båda instrumenten haft möjlighet att kompensera för sina respektive svagheter och brister. Det dynamiska samspelet mellan rättssystemen har i de flesta fall varit framgångsrikt i arbetet för att nå målen för skyddet av arterna, särskilt när det gäller genomförande, bidrag och uppbyggnad av kapacitet.

Allt eftersom EU har vuxit i omfattning och kompetens har man fått ökade möjligheter att påverka Bernkonventionen direkt. Utvecklingen har medfört en utmaning för den institutionella synergin mellan de båda rättsliga instrumenten, bland annat när det gäller Bernkonventionens möjligheter att fungera självständigt. De ställningstaganden som arbetas fram under Bernkonventionen kan numera påverkas av de ställningstaganden som utvecklas inom EU, bland annat på grund av dess medlemsstater röstar som ett block.

Transperensen och möjligheterna för allmänheten att påverka Bernkonventionens arbete har försämrats på grund av dessa institutionella förändringar. Mot denna bakgrund kan det hävdas att kontrollen över artskyddet har förskjutits från den internationella Bernkonventionen till Unionen, vilket har minskat miljöorganisationernas och de enskilda ländernas inflytande.

En annan tendens är emellertid att EU-rätten stärker miljöorganisationernas möjligheter att värna naturskyddet i förhållande till medlemsstaterna. Ett exempel är den ökande tillgången till rättslig prövning av administrativa beslut om vargskyddet. En av de kontroversiella frågorna i det sammanhanget rör hur begreppet ”gynnsam bevarandestatus” ska tolkas och tillämpas, då art- och habitatdirektivet ställer krav på att medlemsstaterna vidtar åtgärder för att bibehålla eller återställa denna status. I artikel II och III görs normativa ställningstaganden om hur domstolarna bör tolka begreppet i ljuset av EU-lagstiftningen och ekologiska faktorer.

Artikel II, *A Legal- Ecological Understanding of Favourable Conservation Status for Species in Europe*, är samförfattad med två naturvetenskapliga forskare. I artikeln utförs en interdisciplinär analys av begreppet gynnsam bevarandestatus. Begreppet är ett av många rättsligt-naturvetenskapliga standarder som används inom miljörätten. Det har inte någon självständig naturvetenskaplig betydelse, men kan inte heller förstås utan referenser till naturvetenskapliga fakta. Vid bestämningen av dessa fakta krävs bedömningar som delvis bygger på värderingar. Ett sådant exempel som jag fokuserar på i avhandlingen är begreppet livskraftighet. För att en gynnsam bevarandestatus ska anses vara uppnådd måste en arts population under en lång tidsperiod kunna upprätthållas som en livskraftig komponent i sin naturliga livsmiljö. Bedömningen av om en art är livskraftig kräver både vetenskaplig utvärdering av dess demografiska och genetiska hälsa, samt en värdering av vilka framtida risker och möjligheter som finns för populationens fortsatta existens. Andra aspekter av begreppet gynnsam bevarandestatus som behandlas i avhandlingen är vad som avses med att en art upprätthåller sig själv, och om bevarandestatusen ska bedömas med utgångspunkt från risken för utrotning eller nivån för överlevnad.

I artikel III, *Favourable Conservation Status for Species: Examining the Habitat’s Directive’s Key Concept through a Case Study of the Swedish Wolf*, används slutsatserna från artikel II för att utvärdera bevarandestatusen för vargpopulationen i Skandinavien (Sverige och Norge). I artikeln argumenterar jag för att den svenska regeringen och Naturvårdsverket drog felaktiga slutsatser om bevarandestatusen för vargpopulationen när grunden för den nuvarande vargpolitiken lades 2013. Denna slutsats baserades på en analys av populationens livskraftighet som inte tog hänsyn till genetisk hälsa eller evolutionär potential. Två år senare bedömde Naturvårdsverket att populationen visserligen hade uppnått gynnsam bevarandestatus, men att det fanns ett behov av fortgående genetisk förstärkning. Man ansåg ändå att vargpopulationen uppnått genetisk livskraftighet på grund av att den är en del av en större population, som inkluderar vargarna i Finland, Norge, Ryssland, Polen och andra baltiska stater. Sverige behövde bara vara värd för en del av denna population under förutsättning att den naturliga migrationen från övriga delar av populationen upprätthölls med en individ per varggeneration (5 år). Mot denna bakgrund ansåg Naturvårdsverket att Sverige har

uppfyllt sina skyldigheter enligt Bernkonventionen och EU-rätten, trots att det praktiskt taget inte finns någon genetisk förstärkning av populationen i Sverige-och Norge från den utanför Skandinavien. Det stämmer visserligen att enstaka vargar regelbundet vandrar in i norra Sverige från Finland, men faktum är att de sällan får möjligheten att föröka sig eftersom de dödas eller försvinner. I artikeln argumenterar jag för att det är olämpligt att ta hänsyn till vargpopulationer i andra länder vid bestämningen av genetisk livskraftighet hos den Skandinaviska populationen om det inte finns någon regelbunden kontakt dem emellan.

Miljöorganisationernas ökade möjligheter till rättslig prövning av vargbeslut i Sverige har öppnat möjligheten för domstolarna att skapa vägledningar i tolkningen av de vetenskapliga begrepp som finns i art- och habitatdirektivet. Som ett resultat av detta tog Högsta förvaltningsdomstolen (HFD) i december 2016 för första gången ställning till frågan om vargen har uppnått gynnsam bevarandestatus i Sverige, varvid man godtog regeringens och Naturvårdsverkets bedömning. Domstolens beslut grundade sig på de fakta som presenterades av de klagande miljöorganisationerna och myndigheterna, och beslutet grundades på vad som var känt vid tiden för det överklagade beslutet. Det innebar att licensjakten på varg tilläts med hänsyn till att ett nytt vargpar som hade lokaliserats i Mellan-Sverige förväntades fortplanta sig. Vid tidpunkten för HFDs avgörande stod det emellertid klart att detta inte hade lyckats. Den genetiska förstärkningen från öster har visat sig vara ytterst osäker och framtiden får utvisa hur frågan om fortsatt licensjakt på varg kommer att avgöras.

De följande tre artiklarna undersöker hur genomdrivandet av EU:s art- och habitatdirektiv genom den ökade tillgången till rättslig prövning har påverkat vargpolitiken och förvaltningen av varg. Det här sättet att rättsligt utmana vetenskapliga påståenden och begrepp har varit kännetecknande för det amerikanska systemet och rättsutvecklingen av motsvarigheten till artskyddsreglerna i EU, nämligen Endangered Species Act (ESA). Det amerikanska rättssystemet utmärks särskilt av en stark betoning på att genomdriva rättsliga normer genom transparanta regler och processer samt en vid tillgång till rättslig prövning som ger enskilda möjlighet att hävda sina rättigheter. [118] Mina artiklar visar hur denna typ av rättssystem har fått allt större inverkan på den svenska vargförvaltningen. Artikel IV, *The Wild Has No Words: Environmental NGOs Empowered to Speak for Protected Species as Swedish Courts Apply EU and International Environmental Law*, är en rättsfallskommentar skriven tillsammans med min handledare Jan Darpö som undersöker ett konkret exempel på hur tillgången till rättslig prövning påverkade genomdrivandet av EU:s regelverk om artskydd. Artikeln berättar om en serie avgöranden som mynnade ut i en dom från maj 2013 från Förvaltningsrätten i Stockholm, där det årets beslut om licensjakt på varg ansågs

[118] Kelemen, *Eurolegalism* s. 6.

vara oförenlig med art- och habitatdirektivet. Fallet är viktigt både för att domstolen tolkar kontroversiella bestämmelser i art- och habitatdirektivet och för att det visar på det växande inflytandet av EU-rätten över nationell rätt. Fallet var det första i Sverige där en domstol gavs möjlighet att överpröva ett beslut om att tillåta vargjakt, då allmänhetens tillgång till rättslig prövning traditionellt varit mycket begränsat. Den öppnade klagorätten följde av ett beslut av HFD under sommaren 2012, då man slutligen tog till sig EU-domstolens slutsatser i den *Slovakiska brunbjörnen*, nämligen att de nationella processrättsreglerna måste tolkas i den utsträckning det är möjligt för att miljöorganisationer ska ges möjlighet att klaga på administrativa beslut som kan strida mot EU:s miljölagstiftning.

I artikel V, *Killing Wolves to Save Them? Legal Responses to 'Tolerance Hunting' in the European Union and United States*, fortsätter analysen av effekten på den materiella jaktlagstiftningen till följd av tillgången till rättslig prövning för miljöorganisationerna. Analysen kretsar kring frågeställningen om varför social acceptans som skäl för vargjakt – d.v.s. att hotade arter gynnas av jakt genom att den ökar den sociala acceptansen för artens existens – underkänts i USA men godtagits i Sverige och Finland. Grunden för inställningen är påståendet att tillåten jakt ger minskad illegal jakt och därmed ökar antalet individer av arten som kan överleva i en viss region eller livsmiljö. Vetenskapen bakom detta påstående är emellertid motstridig, och ny forskning tyder på det motsatta, dvs. att legal jakt kan leda till en ökning av illegal jakt. Jag tar i min artikel inte ställning till frågan om legal jakt faktiskt reducerar tjuvjakt, men utgångspunkten är att det saknas övertygande vetenskapliga belägg för påståendet. I artikeln jämförs sedan hur detta påstående från viltvårdande myndigheter har hanterats av federala domstolar i USA under the ESA samt hur det har och borde ha hanterats under art- och habitatdirektivet. Amerikanska statliga och federala viltförvaltare har historiskt försökt tillåta dödande av skyddade arter i syfte att ”öka utbredningen eller överlevnaden” med motiveringen att den illegala jakten därmed skulle minska. Domstolarna har återkommande förkastat denna argumentation som vetenskapligt ogrundad och logiskt osund. Liknande motiveringar för licensjakt har också använts i Sverige och Finland. Liksom ESA ger nämligen art- och habitatdirektivet utrymme för medlemsstater att tillåta dödande av skyddade arter under vissa omständigheter om det skulle förbättra artens bevarande. När det råder vetenskaplig osäkerhet ligger emellertid bevisbördan på den myndighet som vill göra undantag från det strikta skyddet. Eftersom det finns få tecken på att ”toleransjakt” skulle förbättra bevarandet av arter, är det givetvis tveksamt om myndigheten kan visa det. I artikeln hävdar jag att orsaken till att argumentationen har avvisats som absurd av amerikanska domstolar, men fortsätter att användas av viltförvaltare i delar av Europa, har lite att göra med materiella skillnader i lagstiftningen. Orsaken till att frågan har lösts *olika* i USA och i EU är snarare att det har varit lättare för allmänheten att få kontroversiella tolkningar av ESA prövade av domstol än mot-

svarande möjligheter inom EU eftersom det nyligen blivit möjligt med rättslig prövning av de administrativa besluten. Dessutom har detta skäl för licensjakt - ökad tolerans - kommit till användning inom EU först på senare tid. Flera fall där toleransjakten har ifrågasatts har nu prövats av förvaltningsdomstolarna i Sverige. Även om de lägre instanserna avvisade den här argumentationen för att tillåta licensjakt, har nu HFD accepterade den genom 2016 års beslut om licensjakten. Det bör emellertid anmärkas att domstolen inte begärde förhandsbesked av EU-domstolen i frågan, vilket får sägas vara anmärkningsvärt mot bakgrund av det pågående överträdelseärendet från EU-kommissionen. Mot denna bakgrund får alltså sägas att frågan ännu inte är avgjord enligt EU-rätten.

Det faktum att svenska domstolar nu kan komma att pröva om vargpopulationen har gynnsam bevarandestatus och om vargpolitiken är förenlig med EU-rätten är givetvis ett resultat av den ökade klagorätten för miljöorganisationerna som beskrivits ovan. I den avslutande artikeln fortsätter den komparativa analysen av skillnaderna i ESA respektive art- och habitatsdirektivet. I artikel VI, *Through the Eyes of the Wolf: Biodiversity Protection and Federalism in the United States and European Union through the Conservation of a Controversial Carnivore* (opublicerad), jämförs vissa materiella aspekter av de båda regelverken, liksom vissa processuella sådana, och hur politiken kan ha påverkats till följd av tillgången till rättslig prövning av vargbesluten. Jag återvänder först till begreppet ”gynnsam bevarandestatus”. Detet jämförs med den funktionella motsvarigheten i ESA – ”recovery” (återhämtning) – vilket definierar en situation då en art inte är starkt hotad (”endangered”) eller hotad (”threathened”), dvs. att den inte är nära utrotning inom hela eller en betydande del av sitt utbredningsområde, eller inte sannolikt kommer att vara så inom en överskådlig framtid. Även om federala myndigheter har till uppgift att avgöra statusen för en art, har begreppet ”återhämtning” väsentligen kommit att utformas av domstolarna i samband med rättstvister. Federala administrativa myndigheter i USA har ett ganska fritt skön att tolka lagen, och deras tolkningar presumeras vara korrekta. Det är bara om domstolen kan konstatera att myndighetens agerande har varit godtyckligt och nyckfullt, eller ett uttryck för missbruk av handlingsutrymmet, som en sådan tolkning förkastas. Det är alltså just det som de federala domstolarna gjort många gånger med administrativa beslut om att vargen har återhämtat sig.

Tolkningen av art- och habitatdirektivets mål om gynnsam bevarandestatus har också varit kontroversiell, vilket har redogjorts för ovan. Som har visats genom hela avhandlingen har miljöorganisationer varit viktiga för den effektiva förvaltningen och genomdrivandet av lagstiftningen om skydd för arter både i USA och i EU. Även om den berörda allmänhetens tillgång till rättslig prövning har varit ett mycket betydelsefullt element för skydd av arter i båda systemen, finns det viktiga skillnader i användningen och resultaten av processerna. Klagorätten som redogörs för i *The Wild Has No Words* och *Killing Wolves to Save Them* är kanske den mest intressanta

skillnaden. Först bör noteras att centrala myndigheter är viktiga parter i processen i båda systemen. Det primära ansvaret för att driva igenom ESA ligger hos de federala myndigheterna. EU:s medlemsstater har det primära ansvaret för att genomföra art- och habitatdirektivet inom sina territorier, och om de misslyckas kan de bli föremål för överträdelseförfarande och fördragsbrottstalan efter initiativ av Europeiska kommissionen. Som redan har redogjorts för, har allmänhetens processförande spelat en viktig roll i genomdrivandet av ESA, och denna möjlighet har också fått en ökad betydelse för genomförandet av art- och habitatdirektivet. Även om medlemsstaterna har processuell autonomi har länder som Sverige tvingats anpassa sitt rättssystem med en vidare klagorätt för miljöorganisationer, med följd att de har kunnat framgångsrikt utmana flera av Sveriges beslut om att tillåta jakt på varg.

Statsvetaren Daniel Kelemen har betonat den växande betydelsen av processföring av enskilda och grupper för förståelsen och genomdrivandet av EU-rätt. Inom EU underlättar tillgången till rättslig prövning inte bara miljöskydd i enlighet med EU:s lagstiftning. Genom att mobilisera medlemsstaternas domstolar och miljöorganisationer vidgas EU:s roll utöver vad dess förvaltning och genomdrivandekapacitet annars skulle ha tillåtit. Kelemens förutsägelse att ett öppet rättssystem skulle komma att fortsätta expandera och forma den europeiska rättsliga terrängen, som det har format den amerikanska, har visat sig stämma, kanske till och med bortom hans förväntningar. Kelemen hävdade att europeiska rättsliga kulturer, institutioner och traditioner kunde resultera i en tamare version av det amerikanska systemet. Det svenska exemplet visar dock att tidigare befästa rättsliga institutioner, som begränsningar i klagorätten, och rättsliga kulturer motsträviga till processförande som ett sätta att lösa rättsliga tvister börjar ge vika. Som kontroverserna kring vargens vara eller inte i Sverige illustrerar, har förvaltningen och genomdrivandet av EU-rätten till viss del decentraliserats till intressegrupper. Jag menar att dessa grupper hittills framgångsrikt har bidragit till att vidga EU-rättens räckvidd. Genom miljöprocesserna har miljöorganisationerna bistått EU i att avgränsa medlemsstaternas möjligheter att fritt förvalta vilt inom sina gränser.

Det är också oklart om det finns politisk vilja på EU-nivå att driva igenom EU:s miljölagstiftning – det antagandet har ifrågasatts i litteraturen mot bakgrund av den senaste tidens utveckling. Statsvetaren Viviane Gravey har funnit att medan EU-rätten fortsätter att expandera inom vissa miljöpolitiska områden, demonteras EU-rätten på andra.[119] Även om ett formellt försök av Junckeradministrationen att ”se över” och försvaga naturvårdsdirektiven

[119] Viviane Gravey, *Does the European Union have a Reverse Gear? Environmental Policy Dismantling, 1992-2014* (University of East Anglia 2016); Viviane Gravey & Andrew Jordan, ‘Does the European Union Have a Reverse Gear? Policy Dismantling in a Hyperconsensual Polity’ 23 *Journal of European Public Policy* 1180 (2016).

misslyckades,[120] fortsätter EU-kommissionen att avstå från att vidta åtgärder för att driva igenom sin tolkning av EU:s miljörätt i det svenska vargärendet.[121] Framtiden om en allt närmare union genom allmänhetens tillgång till rättslig prövning framstår fortfarande som oklar, liksom framtiden för den svenska vargen.

[120] Arie Trouwborst et al., 'Europe's Biodiversity Avoids Fatal Setback', 355 *Science* 140 (2017).
[121] Jan Darpö, 'The Commission: A Sheep in Wolf's Clothing? On Infringement Proceedings as a Legal Device for the Enforcement of EU Law on the Environment, Using Swedish Wolf Management as an Example' 13 *Journal for Environmental & Planning Law* 270 (2016).

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