ALL THE EARTH'S LEGAL CHILDREN

SOME SCEPTICAL COMMENTS ABOUT NATURE'S LEGAL PERSONHOOD

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Some sceptical comments about Nature's legal personhood

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ABSTRACT
This essay aims to provide an introductory account of Earth Jurisprudence as a legal theory and to examine its claims regarding rights of nature. First, two versions of Earth Jurisprudence *qua* legal theory are identified: a stronger and a moderate version, respectively. Then, the theory's claims regarding the rights of nature are examined from the perspective of the general theory of rights. The idea of ascribing legal rights to Nature *tout court* is rejected, while it is acknowledged that sentient animals could be considered persons in law. Finally, the author suggests that instead of rejecting anthropocentrism, as Earth Jurisprudence proposes, the preservation of nature requires that more emphasis is put on human obligations in this respect.

KEYWORDS
Earth jurisprudence, legal personhood, rights theory, rights of nature

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Natura habet sua iura.
Hominum causa omne ius constitutum sit.

1. *Introduction*

Earth Jurisprudence (herein: EJ) is one of the new kids on the block as far as rights theories are concerned. With animal rights projects already well-established[1] – albeit thus far scarcely effective in legal practice – it now seems that the time is ripe for the mainstream appearance of theoretical enterprises advocating for the legal recognition of rights to nature as such or to its smaller parts (herein: Nature)[2]. It should be pointed out, however, that EJ is much more than just a rights-for-nature jurisprudential project. Indeed, it is a holistic philosophical undertaking that argues for a radically new ethics and a transformation of our political institutions, public policies, legal regulation, as well as collective and individual practices. Nevertheless, while EJ refers to a complex set of multidisciplinary arguments, in this essay I focus exclusively on its legal dimension.

My aim in this essay is two-fold: first, to provide a brief – and at best sketchy – introduction to EJ as a legal theory; second, to examine the legal philosophy of EJ from the perspective of legal rights theory and provide a few critical comments with regard. In particular, I will focus on some of the conceptual issues that EJ must confront on its quest for legal recognition of rights to Nature[3]. The essay proceeds as follows. After this Introduction, I present EJ as a legal theory (2.). Of the two presented articulations of EJ as a legal theory, I reject the stronger version as incompatible with our contemporary understanding of the law. I therefore focus on the second, more moderate articulation, and show what are some of the relevant arguments it ought to engage with should it wish to successfully argue for Nature's legal personhood (3.). I demonstrate that EJ is ultimately unable to satisfy the argumentative burden imposed on it. I conclude (4.) by discussing the relation between rights policy and societal openness for the extension of legal recognition to new entities. I also argue that future work in environmental protection through law should not reject anthropocentrism, but rather strengthen its focus on it, thus acknowledging that both the problem as well as the solution ultimately lay with mankind.

[1] Cfr. STUCKI 2020 as just the latest example of such proposals.

[2] In this essay, I do not strictly distinguish between "a *person* in law" (a legal *person*) and "a *subject* of law" (a legal *subject*), expect if explicitly stated. These two categories, however, are not necessarily conceptually synonymous: see PIETRZYKOWSKI 2017.

[3] I presuppose that these questions have to be addressed within the institutional context of the contemporary Constitutional State. For an introduction into its relevant structural characteristics, see, for example, CELANO 2018 (part IV), FERRAJOLI 2017, Vol. I (Part III).

2. *Earth Jurisprudence: "a single integral community"*

The significance of man's impact on Nature in the last few centuries is a well-established fact. Whether or not this impact amounts to a new geological era (the so-called Anthropocene) is a more contested issue[4]. Regardless, there is almost unanimous agreement that profound changes must be made to our economic, political and legal systems if we are to evade a "no return" scenario. EJ is a relatively recent philosophical project that addresses the contemporary environmental crisis and proposes a radical restructuring of man's relationship with the broader Earth community in ethical, economic, political, and legal terms. Thomas Berry, the author of *The Great Work* – EJ's founding document of sorts and the source of inspiration for its future elaborations – identifies the root cause of today's environmental crisis in *anthropocentrism* – «a mode of consciousness that has established a radical discontinuity between the human and other modes of being»[5].

Contemporary law, as a fundamental mechanism for regulating social relations, is as well deeply permeated with the anthropocentric worldview. Pietrzykowski presents this outlook in the following terms:

> «Contemporary Western legal systems are based on a set of philosophical assumptions that include the anthropocentric image of the world in which human beings occupy an exceptional position. Our species is distinguished from nature by a sharp metaphysical divide. Namely, we are endowed with reason and dignity that elevate us above all other creatures. Legal systems are exclusively human creations and should solely serve the human good. This results not only from the brute fact that legal rules are laid down by human beings, but also, or even more so, from the inherent moral value of a human creature as an end in itself»[6].

A law that so sharply distinguishes between humans and the rest of nature, and bestows legal recognition exclusively to the former while reducing "other-than-human" life to instrumental status, is – from the perspective of EJ – one of the major causes of the current environmental situation. As Berry argues: «[o]ur present legal system throughout the world is supporting the devastation of the nature rather than protecting it». It follows that «[s]ince the continuation of our present industrial processes depends directly on the legal system, we must reconsider our present legal system in its deepest foundations»[7].

The rejection of anthropocentrism and adoption of an "Earth-centred" worldview, should therefore be at the basis of radically different legal systems. This view requires the understanding that

> «[i]n reality there is a single integral community of the Earth that includes all its component members whether human or other than human. In this community every being has its own role to fulfil, its own dignity, its inner spontaneity. Every being has its own voice. Every being declares itself to the entire universe. Every being enters into communion with other beings. This capacity for relatedness, for presence to other beings, for spontaneity in action, is a capacity possessed by every mode of being throughout the entire universe»[8].

[4] Without entering into this debate, for the purposes of this essay, I accept that the idea of Anthropocene is a well-established concept at the center of a growing scientific, philosophical as well as legal debate.

[5] BERRY 1999, 4. Berry traces the origins of the anthropocentric view of the world «in the Greek cultural tradition, the biblical-Christian religious tradition, the English political-legal tradition, and the economic tradition associated with the new vigor of the merchant class».

[6] PIETRZYKOWSKI 2017, 49.

[7] BERRY 2011, 227.

[8] BERRY 1999, 4.

This declaration reveals a few of EJ's key philosophical principles: first, *the principle of wholeness*, i.e. the idea that all forms of life on Earth (and beyond) are fundamentally interdependent[9]. This interdependence of all things is the result of an "intimate connection" between the natural laws governing all creatures. These physical laws (i.e. laws of physics) are static and discoverable by humans. From the already givenness of these natural laws follows the requirement that human beings discover them and live by them[10]. This *principle of lawfulness* is the second overarching principle of EJ. Lastly, *the principle of care* refers specifically to human beings. Given man's unique ability among Earth's creatures to modify his surroundings, «[t]he principle of care directs human action to benefit the wider Earth community in the interests of the whole»[11]. This means that men, in all of their activities, ought to work towards preserving or improving the environment in which they function.

EJ argues that one fundamental way of doing this is through the recognition of rights to Nature. Berry argues that the interdependence between all elements of the Earth community, «requires humans to recognise that every living being has rights that are derived from existence itself»[12]. On this basis, he formulates a declaration of the basic principles regarding the rights of Nature[13]:

(1) The natural world on the planet Earth has rights, which come with existence. These rights come from the same source from which humans receive their rights, from the universe that brought them into being.
(2) Every component of the Earth community has three rights: the right to be, the right to habitat, and the right to fulfil its role in the ever-renewing processes of the Earth community.
(3) All rights are specific and limited. Rivers have river rights. Birds have bird rights. Insects have insect rights. Humans have human rights. Difference in rights is qualitative, not quantitative. The rights of an insect would be of no value to a tree or a fish.
(4) Human rights do not cancel out the rights of other modes of being to exist in their natural state. Human property rights are not absolute. Property rights are simply a special relationship between a particular human 'owner' and a particular piece of 'property' so that both might fulfil their rules in the great community of existence.
(5) Since species exist only in the form of individuals, rights refer to individuals and to those natural groupings of individuals into flocks, herds, packs, not simply in a general way to species.

Berry believed that these principles should form the foundation of a new, non-anthropocentric global legal system. However, he never developed a detailed legal theory of EJ and his account is replete with ambiguities and indeterminacies. Three related problems are particularly relevant for our discussion, namely: how the law is to be perceived within this radically different legal theory; what notion of rights does it accommodate; and who ought to be recognized as the subject of law within EJ theory.

In the next two sub-sections, I examine two possible constructions of EJ as a legal theory: first, a radical version, more faithful to Berry's account (2.1.); second, and a moderate account, which seems more appropriate for the existing institutional context (2.2.).

2.1. *Great Jurisprudence: a strong claim for Nature's subjectivity*

Cormac Cullinan's *Wild Law* represents an early attempt at translating EJ's philosophy into a

[9] MASON 2011, 36.
[10] MASON 2011, 37.
[11] MASON 2011, 37.
[12] BERRY 2011, 228.
[13] BERRY 2011, 229 (see also BERRY 2001). Herein, I only list the first five points, since the last one provides an account of the philosophical basis of the former points which we already discussed above.

theory of law[14]. It represents, what I believe to be, a radical elaboration of EJ as a legal theory. In the following, I sketch out its main claims and then provide some critical comments with respect.

Cullinan foremost distinguishes between the Great Jurisprudence (GJ) and Earth Jurisprudence (EJ)[15]. On the one hand, GJ is understood as the fundamental ontological category – a system of timeless laws of (the physical) nature that govern the functioning of the universe (an "Is"). As such, the GJ is «inherent in all things by virtue of the fact that they are part of the universal whole». On the other hand, GJ is also a fundamental normative category, representing the origin, the focal point and the normative framework of EJ *qua* legal theory (an "Ought"). EJ, for its part, is a set of legal philosophies for the development of human governance systems – thus, not already a system of human laws, but rather their philosophical framework. Seeing how GJ stands superior to EJ, the latter, in its various manifestations of specific human laws, must always move within the limits determined by GJ[16]. In turn, in relation to specific legal systems, EJ similarly determines the types of laws that can and ought to be adopted in pursuance of the ultimate goal of EJ, namely the promotion of «human behaviour that contributes to the health and integrity not only of that human society, but also of the wider ecological communities, and of Earth itself»[17]. In this sense, Cullinan argues that EJ «can be seen as functioning like the spirit of the law»[18]. One crucial consequence of the hierarchical subordination of human laws to the laws of nature is that the human legislators are not at liberty to promulgate just any kind of laws they see fit. Instead, their prerogative is curtailed by the laws of the natural environment and the above-mentioned goal of "maintaining the whole".

These basic principles also inform the understanding of rights in the EJ philosophy. Accordingly, EJ proposes a radically different understanding of rights as is customary in our legal theory and (human) rights doctrine[19]. First of all, rights are not seen as human artefacts, but rather as a natural fact, deriving from Nature itself. Secondly, according to Berry, rights are not perceived to be legal instruments for the protection of some especially valuable human interests – rather, they regard the «freedom of humans to fulfil their duties, responsibilities and essential nature and by analogy, the principle that other natural entities are entitled to fulfil their role within the Earth Community»[20]. The descriptive-prescriptive (Is-Ought) character of GJ mentioned above is visible also here: rights are, on the one hand, a descriptive category ("Humans and all other natural beings *are,* as a matter of fact, free to fulfil their natural roles.") and, on the other hand, a normative category ("Humans and all other natural beings *ought to be* free to fulfil their natural roles."). Thirdly, this definition of rights is also indicative of the set of possible subjects of rights. On the basis of the principle of interconnectedness, all living members of the Earth Community can be (and are) holders of rights[21]. This includes, first and foremost, the Earth itself. Indeed, given Earth's fundamental importance as the "community of communities" for the survival and well-being of all other beings, Cullinan argues that «the first principle of Earth jurisprudence must be to give precedence to the survival, health and prospering of the whole Community over the inter-

[14] Cullinan 2003.

[15] Note that throughout this essay, I use the term EJ in a wider sense that covers the whole of the general philosophical project, whereas Cullinan here uses the term in a narrower, legal-technical sense.

[16] I.e. «human jurisprudence and the constitutions and laws that give expression to it, must be subordinate in that they must conform to the Great Jurisprudence. To the extent that they do not, they must be regarded as illegitimate and so powers exercised under them could be regarded as acts that are treated as ultra vires in national legal systems» (Cullinan 2003, 112).

[17] Cullinan 2003, 82 f.

[18] Cullinan 2003, 111.

[19] Cfr. Raz 1986; Kramer 2001a; Wenar 2020 and others.

[20] Berry in Cullinan 2003, 97.

[21] For a brief overview of different types of ethics in reference to the categories of rights-holders, see Sajeva 2018, chp. 1.

ests of any individual or human society»[22]. It follows that the relations among members of the Earth Community are not relationships «between equals but between the whole [i.e. the Earth] and a part. Accordingly, while the needs of the part must be respected, attempting to balance them against the rights of the whole is inappropriate»[23].

This brief and sketchy presentation of EJ's legal philosophy allows for several critical observations to be made in reference to its basic tenets. First, in reference to the purported nature of rights. It appears to me somewhat contentious to speak of rights, indeed freedoms, whose function is to allow some predetermined purpose of an entity to be fulfilled. Customarily, we understand freedoms as allowing the freedom-holder certain choices with regard to performing, or not, of some action. EJ-rights, on the other hand, "grant" the freedom to do something that appears to be an inevitability. On this view, for instance, a tree has a right to grow, a river the right to flow and a bird the right to fly. More broadly speaking, it seems odd to speak of purposes of certain natural entities, especially sentient animals, save in some religious context (e.g. "the purpose of man is to do good and worship God"). Man-made objects are more comprehensibly spoken in such terms, but even they may be used for purposes unrelated to the one envisaged by the author (e.g. a knife can equally be used to cut food as well as for shaving a beard). But the reason why EJ is able to speak of rights and natural objects in such deterministic terms is that it confounds the Is and the Ought, the descriptive and the normative. Thus, from the physical fact that rivers flow, EJ deduces that they ought to flow and, in the final instance, that they have a right to flow. This, however, is quite clearly a case of the naturalistic fallacy[24]. There is yet another curiosity with EJ-rights worth mentioning. Namely, it should be noted that the nature of *human* rights on this account is quite different from the nature of the rights of all other rights-holders. While all other natural entities are holders exclusively of freedoms, humans are the only ones who are duty-bearers as well. Against what Berry claimed (see point 3, above), human rights seem to be the only kind of limited rights, opposed to rights of other subjects that seem unlimited. It also follows that while other natural entities hold their rights against human beings (but not against each other), the latter can only hold their rights in their mutual relations, but not against other natural entities.

Secondly, with regard to the class of rights-holders, EJ subscribes to an extensive granting of rights to all individual instances of natural entities (e.g. individual birds, wolves, humans, rivers etc.), natural groupings thereof (e.g. flocks of birds, packs of wolves etc.), as well as to the Earth itself (a collective of collectives). On the other hand, it seems to reject the possibility of species holding these same rights[25]. This selective mix of potential rights-holders and the hierarchical structuring of their rights may cause certain problems for human law-makers and law-appliers. For instance, refusing species-rights greatly reduces the capacity of legal systems to regulate in advance and *in abstracto* permissible human behaviour in relation to the environment. Laws have the greatest impact when they deal with abstract and general categories (such as, for instance, animals, the bear population, freshwater fishes etc.), not with individualized, specific instances thereof. Moreover, taking seriously the primacy of Earth's rights, would make adjudication in concrete cases a Herculean task. Consider, for instance, that a proposal for building a dam on a river in Italy is challenged in an Italian court of law for purportedly violating the well-being of the Earth community as such. The sitting judge would have to consider all possible effects such a

[22] CULLINAN 2003, 100.

[23] CULLINAN 2003, 100.

[24] Cfr. BURDON 2020, 313. The naturalistic fallacy is often also called Hume's Law. See HUME 2000 [1740], Part III.1, Sect. 1.

[25] Among other problems related to this is the question whether EJ allows for the eradication of invasive species from a certain territory if that would promote the well-being of the whole of the biotic community on that territory. See SAJEVA 2018, 18 ff.

spatially circumscribed interference into the ecosystem would have for the biosphere in general. It seems hardly plausible that a single individual would possess sufficient information to perform such a balancing act in an informed manner. Thus, it seems that in real-life, non-ideal circumstances, decision-making concerning the well-being of the entire Earth community is either destined to become a one-way affair with an *ex ante* predictable result, i.e. the well-being of the Earth would always prevail; or we have to accept that fallible individuals will render sub-optimal decisions, potentially failing to provide sufficient legal protection for the environment.

Finally, it is unclear what the scope of EJ-informed law in legal systems ought to be. If EJ is limited to the sphere of environment-related laws, the problem is that it gives rise to cohabitation of two utterly different systems of governance: one arguing for the legal primacy of Earth-centred considerations, another based on the premise of the supremacy of the constitution. On crucial problem in this regard is that there appears to be no criterion that would determine which system's "rule of recognition" would (have to) prevail should the two clash. On the other hand, if EJ principles are to pervade all areas of legal regulation, I struggle to see how certain exclusively human affairs could ever be guided by a system that primarily derives its normative conclusions from observation of physical laws of nature. Indeed, practical coordination problems (e.g. rules of traffic), which usually require an arbitrary solution to be agreed upon, could not find guide in the laws of nature.

The above said leads me to conclude that the radical version of EJ as a legal theory is not a viable model for the legal systems in the Constitutional State. Its radically different understanding of the concepts of law, rights etc. makes it, in the final instance, incompatible with the basic precepts of our existing governance models. It is therefore excluded from my further considerations in this essay.

2.2. *A moderate proposal for Nature's subjectivity*

That a rights-for-nature project could function within the limits of contemporary legal systems has perhaps most famously been argued by Christopher Stone in his seminal paper *Should Trees Have Standing*[26] in which he develops a theory of procedural rights for all kinds of natural entities. More recently, Peter Burdon and other authors have presented arguments that seem to bring EJ closer to contemporary law than Cullinan's project.

Burdon bases his reading of EJ on the same fundamental distinction between the Great Law (GL) and the Human Law (HL) as we have seen above. GL is perceived as hierarchically superior to HL and independent from it, representing the latter's bedrock value and substantive limit. On the other hand, HL is defined as «*rules*, *supported by the Great Law, which are articulated by human authorities for the common good of the comprehensive whole*»[27]. If HL is to be considered law in the relevant sense of the word, it must be created and interpreted in a way that is consistent with GL. HL, however, is not merely automatically deduced from GL – rather, Burdon admits that there will likely be different ways of satisfying the requirements of GL, thus allowing a certain discretionary space for human legislators. Integration of EJ principles into positive law is particularly important at the constitutional level. Burdon, for example, argues that should principles of EJ be integrated at the constitutional level, «legislators would be required to have appropriate regard of them when articulating Human Law»[28]. Rühs and Jones emphasize that implementing EJ through constitutional law would be beneficial, as it could «be used to provide a much stronger degree of protection for the environment, by creating substantive rights "of"

[26] STONE 1972.
[27] BURDON 2012, 47. (Italics are in the original.)
[28] BURDON 2012, 51.

nature, and not merely substantive human rights "to" a healthy environment»[29]. Bosselmann goes a step further and argues for the introduction of an environmental basic norm into legal systems. Such an environmental Grundnorm would «underpin and guide the interpretation of existing law and the creation of new laws»[30]. Its substance would be provided by the principle of sustainability, which would, if properly implemented at all levels of law-making and law-application, set limits to, for instance, the use of environmental resources and, more broadly, promote a culture of self-restraint[31]. Kotzé, for his part, has argued that sustainable development could have a decisive role in supporting «the rule of law for nature» if it is given proper constitutional recognition[32]. On his examination, sustainable development as a constitutional principle (in South Africa) incorporates both «the procedural aspects of the rule of law for nature» – providing a standard for the creation and implementation of legislative and administrative measures «that must aim to protect the environment for the present and future generations» – and substantive standards – according to which all legislative and administrative measures ought to achieve certain substantive objectives like the protection of the environment[33].

This version of EJ's greater compatibility with existing legal frameworks is also visible from how incompatibilities between specific human laws and the GL are to be treated. While EJ is obviously based in natural law theory, human laws that do not conform to the requirements of GL are not automatically considered non-law and thus deprived of legal validity[34]. Rather, such laws – on the condition that they are adopted by the appropriate authority in the prescribed manner – remain legally valid, and thus obligatory for their addressees. However, they are not considered – by proponents of EJ – law in the "true" sense of the word. What this actually means is that such law loses its moral authority[35]. In consequence, only when inconsistency between HL and GL would be grave enough could civil disobedience be warranted on the part of the citizenry. On the other hand, if EJ principles would be properly integrated into a country's constitutional law, a law «inconsistent with the principles of Earth democracy would be open to legal challenge and under current principles of Constitutional law could be rendered invalid»[36]. On this reading of EJ, then, HL is, from the legal point of view, foremost subordinate to superior legal acts, i.e. the constitution, and only in the second instance to the precepts of GL.

Still another issue in which this version of EJ differs from the former account is the explicit acknowledgement that its scope is limited: EJ, on this view, does not seek to provide guidance for numerous areas of law (e.g. contract law), nor does it enter ethical debates such as on gay marriage, abortion, euthanasia etc. Instead, argues Brudon, «Earth Jurisprudence is concerned specifically with matters concerning human interaction and modification of the environment»[37]. In this sense, EJ will apply to property law, environmental law, natural resource management etc., but not to traffic rules, family law, or work safety regulations. Note also that this strand of EJ does not fall victim to the problem of the "cohabitation" of two systems both claiming (legal) superiority mentioned above[38]. As I have just shown, in this version of EJ, human laws (i.e. constitutional law) normally take precedence over GL.

[29] Rühs, Jones 2016, 8.
[30] Bosselmann 2013, 83.
[31] Cfr. Bosselmann 2013, 86 f.
[32] Kotzé 2013, 131.
[33] Kotzé 2013, 138
[34] Cfr. Kelsen 2006 [1949], 411.
[35] Burdon 2012, 55ff.
[36] Burdon 2012, 51; cfr. Kotzé 2013, 134.
[37] Burdon 2012, 49.
[38] On the other hand, Bosselmann (2013, 90) argues for the idea of an eco-constitutional state, where, it seems, the principle of the rule of law – focused on human well-being, and the principle of environmental protection, co-exist side by side. Indeed, Bosselmann argues that «both must be seen as mutually reinforcing and together defining the state».

To sum up, Burdon and others have attempted to show that it is possible to construct an EJ legal theory which is not incompatible with the main precepts of contemporary legal systems. Their fundamental move in doing this is to integrate and subordinate EJ-inspired law to the positive law. In this light, it is interesting to note that Burdon has recently argued that EJ's basic claim for rights of Nature is the wrong strategy for combating the environmental crisis. Rather, Burdon argues that we should focus on establishing robust human obligations towards the environment. The bases for this claim are provided by the thinking that if human beings are the cause of the current environmental crisis, it is there that the solutions to it should be sought. In reference to the best approach to combat the ongoing ecological disasters, he argues that

> «[l]egal rights are ill-suited to this task. Rights enable us to externalise the problem and project concepts onto nature. But the problem is not "out there". The problem is with us and we need to place human power at the centre of our legal and ethical frameworks. One way to do this is through obligations»[39].

Burdon also claims that obligations are prior to rights. Although he does not specify in what sense (logical, moral, some other?), his further discussion leads us to conclude that this priority is moral. While I am personally convinced by his understanding of the root causes of the problem, as well as his argument for a human-centred solution, his argument from obligations does not address, let alone resolve, the conceptual problems of this strand of EJ with the set of viable rights-holders. Thus, it is unclear whether this version of EJ deviates from the former one as potential rights-holders are concerned. Another fundamental conceptual question that remains unaddressed in Burdon's account is whether he subscribes to the idea that natural entities have rights-claims (as would follow from his argument that humans have, or ought to have, duties in their confront) or merely liberties. I emphasize the importance of this and other conceptual issues for a viable EJ legal theory in the next section.

3. *Earth Jurisprudence meets rights theory*

A legal-theoretical project seeking to establish a convincing argument for the rights of X (X being a certain type of entities, like human foetuses, artificial intelligence, animals, Nature etc.) ought first to establish that such rights are a conceptual possibility. Put simply, it ought to be able to respond positively to the question "Can X have legal rights?"[40]. The answer to this question will usually require, first, showing how the rights of X are structurally possible; second, establishing that rights can play an important role (function) for X and that it therefore makes sense to ascribe rights to X. In the case before us, the question that needs to be answered is "Can Nature have legal rights?". Below, I address some key questions regarding EJ's claim for the rights of Nature and see whether the claim can be upheld.

Above, I already pointed to the rather ambiguous manner in which rights-claims are presented in EJ (see 2.). Arguably, the most wildly used conceptual tool for confronting such ambiguities in this context is Hohfeld's analysis of legal relations[41]. I presuppose that readers of this essay are familiar with the basic tenets of this analysis and the fundamental legal positions it builds upon (i.e. claims, privileges/liberties, powers and immunities – and their conceptual opposites of duties, no-claims, liabilities and disabilities). I will therefore skip the traditional presentation of the basic mechanisms of Hohfeld's analysis and go straight to the point.

What kind of rights are claimed for Nature by EJ? Berry explicitly lists three: the right to ex-

[39] BURDON 2020, 311. In reference to the mentioned anthropomorphization of Nature, see PERRA 2020 in this volume.
[40] Cfr. STUCKI 2020.
[41] See HOHFELD 1923.

istence, the right to habitat and the right to fulfil one's role. In my view, the right to existence (i.e. to life) and the right to habitat can be translated into Hohfeldian *claims*. For instance, the right to existence is a claim not to be killed, which means that all other (people) are duty-bound not to kill the claim-holder. On the other hand, the right to fulfil one's role in the Earth Community is most sensibly seen as a *liberty*[42]. As we have seen above, these two legal positions are also at the centre of Burdon's account of EJ (2.2.).

Let us first examine the situation with liberties. An individual has a (Hohfeldian) liberty to φ if, and only if, she has no duty towards someone else not to φ. For example, I am at liberty to visit my father at his home, if I am not duty-bound not to visit him. I have already commented on the curious nature of EJ-rights: EJ seems to demand a right (the freedom, in this specific case) for doing something that is an inevitable characteristic of natural entities. Thus, for example, EJ calls for a river's liberty to flow or a bird's freedom to fly. In a recent article regarding animal rights, Saskia Stucki calls such a liberty "natural" or "naked" i.e. a liberty to move freely, unbound by a duty not to move around[43]. Affirming the liberty of animals to roam around is of itself redundant, argues Stucki, as it does «nothing more than affirm an already and invariably existing natural condition of dutylessness»[44]. Practically, such a liberty is useless as it does not protect animals against interferences by others with the exercise of their freedom. If this freedom is to make sense, what is needed is the transformation of "natural liberties" into legally protected ones that would prevent certain interferences against them. As Stuck argues «it seems sensible to think of "natural liberties" as constituting legal rights only when embedded in a "protective perimeter" of *claim rights* and correlative duties within which such liberties may meaningfully exist and be exercised»[45]. In substance, then, any sensible discourse on animal rights is reduced to the question of claim-rights. Sucki continues by claiming – and convincingly demonstrating – that sentient animals can be ascribed with claims and, in consequence, be considered persons in law. For the purposes of this essay, at least, I therefore accept that one part of the natural entities for which EJ promotes the attribution of rights – i.e. sentient animals – are, indeed, viable candidates for legal personhood. What remains suspended, is the question whether non-animal living beings can hold rights and be considered persons in law.

To answer this question, let us now turn to claims. One has a (legal) claim to φ if, and only if, someone else is under a legal duty to φ. Following EJ, some natural entity (a river, a forest, a flock of birds etc.) has a claim not to be killed, whenever other natural entities – in reality only human beings – have a duty not to kill them. We can see from this that a specific feature of Hohfeldian duties *qua* their logical correlatives of claims is that they are "owed to" the claim-holder[46]. This, in other terms, means that whatever the content of the duty, its performance must always be beneficial to the claim-holder, or (what amount largely to the same) protect or advance an interest of the same. This brings us to the question of the function of rights. This problem is traditionally the province of the will theories and the interest theories of rights[47]. Very briefly, will theories hold that «the function of a right is to give its holder control over another's duty»[48]. Thus, for will theories, the essence of holding a right is in having the opportunity to make choices and to control the other person's du-

[42] This much can be gathered from Cullinan, who argues that the fundamental river equivalent of a human right would be the river's right to flow, seeing how flowing is the essence of a river. See CULLINAN 2003, 104.

[43] The distinction between a naked and a vested right (liberty) is originally Bentham's. See HART 1982, 172.

[44] STUCKI 2020, 538. Note that a liberty proper is an active right, whose exercise depends on the holder's own actions. This excludes non-human entities from being considered possible holders of such rights. Claims, on the other hand, as we will shortly see, are passive rights as they primarily regard the actions of others. Cr. WENAR 2020, 2.1.7.

[45] STUCKI 2020, 538 f. Stucki argues that this «protective perimeter consists of some general duties (arising *not from the liberty itself*, *but from other claim rights*, such as the right to life and physical integrity)». All italics are mine.

[46] Cfr. WENAR 2020, 2.1.2.

[47] For a brief overview, see WENAR 2020, 2.2.

[48] WENAR 2020, 2.2.

ty. For instance, if someone promises that she will do something to (or for) me, then I have a right against this person because I have the power to waive her duty to keep the promise. Given their focus on active performances of rights-holders, will theories are often criticized for being incapable of lending themselves to arguments for rights of those entities that do not possess sufficient cognitive abilities to actively make the relevant choices[49]. If even human infants and sentient animals are excluded from consideration as rights-holders, the same doubtlessly *a fortiori* applies to non-animal beings. As it is incapable of accommodating for the rights-claims of these entities, the will theory of rights will here not be further considered.

The interest theory, on the other hand, holds that «the essence of a right consists in the normative protection of some aspect(s) of the right-holder's well-being» or interests[50]. To take the example of a promise again, from the perspective of the interest theory, the point of the right is not in the choice of whether or not to require the fulfilment of a promise, but, for instance, in the fact that the promisee will gain some benefit from the promise being fulfilled. More controversial is the question, what exactly does having an interest entails, as well as what are the conditions for having interests in the first place. Views on the matter can be pretty extreme, as, for instance, is Kramer's, according to whom «any being B has interests if and only if B's situation can be enhanced or worsened. Under that conception of interests, the occurrence of some event *e* is in the interest of B if the occurrence of *e* will either improve B's situation or avert a worsening of it»[51]. On this view, interests can be held by humans, animals, rivers and trees, but also by buildings or paintings. On the other hand, much more contained proposals tie the capacity for interest-holding with *sentience*. Sentience is crucial for having interests because «sentient beings do have a stake in their own well-being. It matters to sentient beings how you treat them»[52]. This, of course, doesn't mean that non-sentient beings can be maltreated just because they have no stake in their well-being. There are different reasons for treating non-sentient beings well – «these reasons», however, «do not refer to their own interests. For without conscious awareness, beings cannot have interests»[53]. Or, as Kramer emphasizes, «there are sundry inanimate phenomena toward which we should undoubtedly show great respect and care; but we respect them and care for them as objects rather than as subjects». Thus, eventual legal duties in relation to these objects «*pertain* to the objects but are not *owed* to them»[54]. An original Van Gogh painting, for instance, surely has no interest of its own to be treated well, but there are nevertheless important reasons related to the preservation of our cultural heritage for why we should treat it with care. Applied to the case of rivers, forests, and other living but non-sentient beings, this means that there may be good reasons why we should have laws preventing pollution of rivers or massive deforestation, for instance. Such laws would surely contribute to the preservation of the environment or to some other similar lofty goal. These reasons and goals, however, are not related to the well-being of the rivers and forests themselves. This, in the final instance, means that non-animal beings cannot be ascribed interests and, in consequence, cannot be considered claim-holders on the interest theory of rights.

4. *Conclusion. "It's all about us, silly"*

In this short essay, I presented and then commented upon several claims and proposals made by EJ, conceived as a theory of law. First, I presented two elaborations of EJ *qua* legal theory – one

[49] See, for instance, MacCormick 1979; Kramer 2001a.
[50] Kramer 2001, 29.
[51] Kramer 2017, 137.
[52] Steinbock 2011, 11
[53] Steinbock 2011, xiv.
[54] Kramer 2001a, 34 f.

more radical, another somewhat more modest. I rejected the first as incompatible with the structure and content of contemporary legal systems. The second elaboration, on the other hand, seems more plausible in the contemporary legal context. Then, I attempted to elaborate a set of issues that a theory of rights-for-Nature such as EJ must address should it wish to provide a convincing defence of its claims.

The problem of "who is law for", i.e. who can be a rights-holding person in law, can be addressed on different levels. From a purely legal-technical point of view of the legislator, there seems to be very little, if any, non-legal reasons preventing the legislator from ascribing rights to whichever type of entity, be it natural or fictional. As Dayan vividly argues, at the hands of the legislator the law can become a magic-like instrument for changing the world: «Once the word "legal" is attached to words such as conscience, intellect, or choice» Dayan argues, «they no longer mean what we thought they meant. It is as if whenever "legal" is used, it erodes not just the customary and normal but the very facts of existence»[55]. However, neither legal theory, nor legal practice will easily admit what some argue, namely that «anything goes, anything or anyone can be endowed with rights and so become a legal person, as long as it is compatible with the purpose of any particular law»[56]. At the theoretical level, as we have seen, it is necessary that – among other things – the entity in question can sensibly be ascribed interests[57]. At the practical level, the problem of a radical and hasty expansion of legal personhood to new entities could risk a societal backlash. As Pietrzykowski notes, equal recognition of personhood has been a long and painful process even in reference to human beings[58]. The expansion of legal recognition to new entities should therefore always tread carefully and rather than being a trailblazing activity should follow in the footsteps of scientific discovery, theoretical arguments and societal acceptance[59]. As far as welcoming sentient animals into the family of persons is concerned, there is increasing scientific evidence showing their cognitive similarity to some already recognized persons; there are also solid legal theoretical arguments supporting rights-attribution; finally, Western societies seem to be increasingly receptive of the idea as well. On the other hand, all of the above is lacking in relation to the question of extending legal personhood to non-animal living entities, i.e. Nature. The conclusion of this essay is, thus, that EJ fails to establish itself as a viable theory of rights for Nature. This, however, doesn't mean that we are given a free pass in how we should treat the environment. This brings me to the last point I wish to make here.

As we have seen, EJ moves from the argument that anthropocentrism is at the root of the ecological disaster we are experiencing. In consequence, it argues that our ethics, legal regulation and political practice ought to be informed by a non-anthropocentric, Eco-centric point of view. The curious thing about these proposals is that they are in their very nature quite anthropocentric: they tell us how we should change *our* laws, *our* political institutions, *our* way of life, how *we* should treat Nature[60]. Implicitly, then, it seems that EJ already recognizes what seems to be an obvious fact: that the problem begins and ends with us. As Burdon notes, the existence of the Anthropocene itself is proof of the uniquely human capacity to influence the environment in a profound manner. If man is the only one to blame for the current crisis, then man also can be its cure. To conclude with Burdon: «Rather than retreat into an ecological worldview and notions of inherent value and legal rights, I contend that the Anthropocene encourages us to develop environmental ethics and law that begin from and are ordered around human beings»[61].

[55] DAYAN 2011, 150 f.

[56] NAFFINE 2009, 21.

[57] For a more comprehensive treatment of the argument why not anything can be a person in law, see KURKI 2019, 131 ff.

[58] PIETRZYKOWSKI 2017a, 65.

[59] In light of this, it should come as no surprise that the countries in which cases of personhood recognition to animal and non-animal beings has already occurred are the ones in which indigenous communities have had an important socio-cultural impact. Cfr. PERRA 2020. Similarly, MÍGUEZ NÚÑEZ 2020.

[60] Cfr BURDON 2020a.

[61] BURDON 2020, 319.

References

Berry T. 1999. *The Great Work. Our Way into the Future*, Bell Tower.

Berry T. 2001. *The Origin, Differentiation and Role of Rights*. Paper presented at the Earth Jurisprudence Conference, 21–24 April 2001 at the Airlie Centre, Warrenton, Virginia (USA).

Berry T. 2011. *Rights of the Earth: We Need a New Legal Framework Which Recognises the Rights of All Living Beings*, in Burdon P. (ed.), *Exploring Wild Law: The philosophy of earth jurisprudence*, Wakefield Press, 227 ff.

Bosselmann K. 2013. *Grounding the Rule of Law*, in Voigt C. (ed.), *Rule of Law for Nature. New Dimensions and Ideas in Environmental Law*, Cambridge University Press, 75 ff.

Burdon P. 2012. *A Theory of Earth Jurisprudence*, in «Australian Journal of Legal Philosophy», 37, 2012, 28 ff.

Burdon P. 2020. *Obligations in the Anthropocene*, in «Law and Critique», 31, 2020, 309 ff.

Burdon P. 2020a. *Ecological law in the Anthropocene*, in «Transnational Legal Theory», 2020.

Celano B. 2018. *Lezioni di filosofia del diritto*, Giappichelli.

Cullinan C. 2003. *Wild Law: A Manifesto for Earth Justice*, UIT Cambridge.

Dayan C. 2011. *The Law is a White Dog. How Legal Rituals Make and Unmake Persons*, Princeton University Press.

Ferrajoli L. 2007. *Principia Iuris. Vol. I. Teoria del diritto*, Laterza.

Hart H.L.A. 1982. *Essays on Bentham: Studies in Jurisprudence and Political Theory*, Clarendon Press.

Hohfeld W.N. 1923. *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (ed. Walter W. Cook), Yale University Press.

Hume D. 2000 [1740]. *A Treatise of Human Nature* (eds. David F. Norton, Mary J. Norton), Oxford University Press.

Kelsen H. 2006 [1949]. *Natural Law Doctrine and Legal Positivism*, in Id. *General Theory of Law and State*, Transaction Publishers, 391 ff.

Kotzé L.J. 2013. *Sustainable Development and the Rule of Law for Nature. A Constitutional Rreading*, in Voigt C. (ed.), *Rule of Law for Nature. New Dimensions and Ideas in Environmental Law*, Cambridge University Press, 130 ff.

Kramer M. 2001. *Do Animals and Dead People Have Legal Rights?*, in «Canadian Journal of Law and Jurisprudence», XIV, l, 2001, 29 ff.

Kramer M. 2001a. *Getting Rights Right*, in Id. (ed.), *Rights, Wrongs and Responsibilities*, Palgrave, 28 ff.

Kramer M. 2017. *Liberalism with Excellence*, Oxford University Press.

Kurki V.A.J. 2019. *A Theory of Legal Personhood*, Oxford University Press.

MacCormick N. 1976. *Children's Rights: A Test-Case for Theories of Right*, in «ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy», 62, 3, 1976, 305 ff.

Mason I. 2011. *One in All: Principles and Characteristics of Earth Jurisprudence*, in Burdon P. (ed), *Exploring Wild Law: The philosophy of earth jurisprudence*, Wakefield Press, 35 ff.

Míguez Núñez R. 2020. *Soggettività giuridica e natura. Spunti per una riflessione civilistica*, in «Diritto & Questioni Pubbliche», 20, 2, 2020, 29 ff.

NAFFINE N. 2009. *Law's Meaning of Life. Philosophy, Religion, Darwin and the Legal Person*, Hart Publishing.

PERRA L. 2020. *L'antropomorfizzazione giuridica*, in «Diritto & Questioni Pubbliche», 20, 2, 2020, 47 ff.

PIETRZYKOWSKI T. 2017. *The Idea of Non-personal Subjects of Law*, in KURKI V.A.J., PIETRZYKOWSKI T. (eds.), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, Springer, 49 ff.

PIETRZYKOWSKI T. 2017a. *Towards Modest Naturalization of Personhood in Law*, in «Revus – Journal for Constitutional Theory and Philosophy of Law», 32, 2017, 59 ff.

RAZ J. 1986. *The Nature of Rights*, in ID. *The Morality of Freedom*, Oxford University Press, 165 ff.

RÜHS N., JONES A. 2016. *The Implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature*, in «Sustainability», 8, 2016, 174 ff.

SAJEVA G. 2018. *When Rights Embrace Responsibilities. Biocultural Rights and the Conservation of Environment*, Oxford University Press.

STEINBOCK B. 2011. *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses* (2nd ed.), Oxford University Press.

STONE C. 1972. *Should Trees Have Standing? Towards Legal Rights for Natural Objects*, in «Southern California Law Review», 45, 1972, 450 ff.

STUCKI S. 2020. *Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights*, in «Oxford Journal of Legal Studies», 40, 3, 2020, 533 ff.

WENAR L. 2020. *Rights*, in ZALTA E.N. (ed.), *The Stanford Encyclopedia of Philosophy*. Available at: https://plato.stanford.edu/entries/rights/ (last accessed December 2020).