Chapter II: Rights Meet Nature
A Brief History

Origin stories are important. On the face of it, they reveal where something comes from. But that is not their main function; instead, they embed concepts and events within a narrative that gives them an overarching meaning, and therefore a particular direction. Origin stories manipulate how we view the thing under discussion, attempting thus to control how it may evolve.

The rights of nature are no exception to this. It makes sense to start their investigation with their history, but immediately a problem arises: which history? Is it the case that they only have one history, as more or less all commentators so far have implied? And if only one, which one? How can that be decided? Is a history synonymous with the *earliest* appearance of something, or with the form that most endures? These are questions that cannot be immediately answered. I raise them in order to begin this investigation grounded in the lucidity of the choices ahead. By recounting the history of rights for nature, I cannot claim to be recounting the only veridical history. Instead, I am necessarily selecting among predecessors in order to make a greater point.

Slowly, a standard history of rights of nature has become orthodoxy. I am well placed to know this particular history, as I have contributed to making it orthodoxy (Tănăsescu 2016). After recounting it, I want to turn to other versions that will inevitably complicate a simple origin story, adding to the layers that current theory and practice cannot but inherit. What I want to show is that they have multiple and competing histories, and what we choose to highlight has to be interpreted as a wider move of signification, and not

simply as recounting the historical truth. After presenting multiple versions of their genesis, I will turn to the question of whether or not granting rights to nature was, in some sense, and despite all possible histories, inevitable. The chapter will therefore end with an investigation of the seemingly fateful collision of rights with nature.

Cristopher Stone and Legal Standing

The standard version of the history of rights of nature starts with the work of legal scholar Cristopher Stone. In a 1972 article titled Should Trees Have Standing? - Toward Legal Rights for Natural Objects (Stone 1972), Stone explicitly argued that the environment could enjoy legal rights.[1] He developed this line of thinking further in his 2010 book *Should Trees Have Standing? Law, Morality and the Environment*. Stone's arguments are still extremely influential, so it makes sense to pause and look at them closely.

What occasioned Stone's thinking was a lawsuit, brought by the Sierra Club.[2] In *Sierra Club v Morton*, "the U.S. Forest Service had granted a permit to Walt Disney Enterprises, Inc. to 'develop' Mineral King Valley, a wilderness area in California's Sierra Nevada Mountains, by the construction of a $35 million complex of motels, restaurants, and recreational facilities. The Sierra Club, maintaining that the project would adversely affect the area's aesthetic and ecological balance, brought suit for an injunction" (Stone 2010: xiii). However, the Ninth Circuit ruled that the Sierra Club did not have

1 Any claim to an "earliest" version of something – here, the rights of nature – should be treated with care. Chances are that, if one looks more closely, one finds predecessor that only vary by degree from the supposed origin of an idea. For example, Nash (1989, p.127) quotes a 1964 essay by Clarence Morris that specifically dealt with "nature's legal rights". Surely, there were predecessors for that as well! The point is that nothing can be settled by finding the earliest version; historical and intellectual threads are living and themselves respond to present tugging and wrangling.

2 One of the most influential environmental organizations in the Unites States of America. See https://www.sierraclub.org

legal standing to bring the suit. An appeal arrived in front of the Supreme Court, which ended up agreeing with the Ninth Circuit, though Justice Douglas penned a now famous dissent based on Stone's legal argumentation.

Stone's basic argument was simple: Sierra Club did not sue on behalf of Mineral King Valley because they were interested in protecting their own aesthetic interests; they were interested in protecting the integrity of the place itself! However, the US doctrine of legal standing did not allow them to sue because they could not show that they would be directly impacted by the proposed construction. There was no place in US law for suing on behalf of an environment *itself*, irrespective of damage to the person suing. To have standing, then, means to have the right to bring a lawsuit in front of a judge, because you are considered an injured party. Why not, then, allow standing to apply directly to the natural entities that the Sierra Club was trying to protect?[3]

Stone shows convincingly that organizations like the Sierra Club have had to retort to all sorts of subterfuges in order to gain legal standing (things like claiming 'aesthetic injury'). It would be much simpler if the law legitimized their motives to begin with, by granting standing to the natural entities themselves. The dissent that Justice Douglas wrote was based on Stone's paper and argued that "public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation" (quoted in Stone, 2010: xiv). In his work, Stone was careful to show that this is much less radical than it first appears. In fact, there are many non-human and even non-animate entities that do enjoy legal standing, for example ships and corporations. These last ones are of particular interest,

3 It is important to realize that the doctrine of standing is not the same everywhere. Stone was specifically reacting to the US version of standing, whereas in other jurisdictions – say, Finland or New Zealand – individuals or groups not directly affected can still sue on behalf of an environment, claiming that they are defending the common good or interest (Kurki 2019). This is an important contextual element in understanding the genesis of the standing argument in rights of nature advocacy.

and I will come back to them throughout the book. For now, it suffices to show that the particular history of rights of nature rooted in Stone's work starts with a concern for achieving legal standing. This concern makes sense for the legal system of the United States but is obviated by public interest environmental legal standing in other jurisdictions around the world.

There is no problem with conferring legal standing on anything at all. The only limiting factor, as it were, is what people empowered to confer such standing consider deserving of it, for pragmatic reasons. In order to make this case, it helps to show that having legal standing comes with the creation of a legal personality: whoever or whatever has legal standing becomes, because of that, a 'person' in front of the law. Legal personality and legal standing are a package; you cannot have one without the other.

According to several influential legal scholars (Naffine 2003, 2009, 2011 Grear 2013), legal personality is granted by the law in a highly fluid and malleable fashion. This means that a legal person is that entity that the law declares to be a legal person; it's that simple. The interesting question is *why* certain entities are deemed, by the law, to enjoy legal personality, and others are not. And that is precisely the terrain on which the rights of nature develop. Both in terms of advocacy and theory, rights of nature advocates have insisted for a long time that there are no valid apriori reasons to use the construct of legal personality for some entities, but not for nature.

For Stone, as well as for many of his followers, the question of legal standing for nature is intrinsically tied to its moral standing: nature should have legal standing because it is morally worthy of such. This argument is borrowed from the sister discourse of animal rights, where the moral status of an animal is deemed one of the most important features for determining its legal status. The conflation of legal and moral personality leads to the belief that the world is experiencing, to paraphrase Peter Singer (1973), a growing circle of moral concern.[4] In Stone's language, "there is something of

4 Peter Singer is the most visible contemporary advocate of this position, but the idea of an expanding circle of ethical concern is much older than his work,

a seamless web involved: there will be resistance to giving the thing 'rights' until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it 'rights' — which is almost inevitably going to sound inconceivable to a large group of people" (Stone 1972: 456).

This makes it seem as if moral and legal personality are related in a vectored fashion: if something has moral standing, then it is apt for getting legal standing; conversely, granting legal standing should soften the moral imagination of an increasing number of people. As comforting as this thought may be, it is not supported by legal practice, nor by the way in which moral considerations tend to work. This is not to say that some entities that are morally considerable do not receive legal status on that account. Nor is it to say that the law has no bearing on how morality develops. But it is to say that there is no automatic relationship between the two.

The easiest way to see this is to think about the countless entities that enjoy legal standing without also enjoying, on that account, moral standing. Retrieving the examples of ships and corporations, it seems clear that neither of these two enjoy moral standing just because they have the legal kind. Conversely, many cultures extend moral standing to ancestors and spirits, but without this translating into any kind of legal status akin to the Western concept of 'legal person'. The point is that, though the two kinds of standing are entangled within the rights of nature from the beginning of their history, this entanglement itself should be actively questioned rather than simply assumed. It is just not the case that extending legal rights to the environment is uniquely a response to this latter's moral standing, nor that it would automatically lead to moral improvement.

There will be ample opportunity later on to engage this point further. Now, I want to point out that in the history of rights of nature that starts with Stone, the main concern seems to be with the notion of legal standing, which is often interpreted to respond to a kind of moral status that the law has previously failed to recognize. But this association between legal and moral standing is neither

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going back at least to the philosophy of Jeremy Bentham (one of the major influences on Singer's work).

central, nor unique, to Stone. In fact, his work is that of a pragmatist, interested in reaching towards whatever conceptual tools are at hand that may solve a perceived problem. Though Stone certainly speaks about legal and moral standing in analogous ways, he does not develop the connection to great length, nor does he seem – on my reading – to be primarily interested in it. Though the pragmatist orientation is pronounced in his work, this does not mean that it is equally pronounced in rights of nature scholarship more broadly, even that which claims Stone as a fundamental inspiration. In fact, the moral-legal standing equivocation that Stone inherits wholesale and neither questions nor makes central became a persistent strand within the history of the rights of nature, so much so that we find it, in much starker terms, if we switch the origin story altogether.

Godofredo Stutzin, Thomas Berry, and the Theology of Rights

Around the same time that Stone was writing his famous legal article, Godofredo Stutzin was putting the bases of environmental advocacy in Chile. The son of German immigrants, Stutzin was a lawyer with a deep and abiding love for all things natural. Writing in Spanish, his work travelled much less than that of Stone, simply because English became the dominant language of liberal ideology in the 20th century. But the fact remains that, as early as 1973,[5] Stutzin penned articles calling for the rights of nature. His arguments were like Stone's but also contained a different emphasis that continues to haunt[6] rights of nature theory and practice today.

It may be no surprise that the history of rights for nature in the Southern parts of the American continent is much more consciously influenced by Stutzin, though references to Stone still abound. A big

5 See Stutzin (1984) recounting the history of his own argumentation, as well as Simon (2019: 310).

6 Haunt because it is largely unconscious, as very few people actually cite Stutzin. For example, Stutzin's kind of rights of nature are very well exemplified by Boyd (2017), who doesn't cite him at all.

part of that influence is seen through the argument that these rights represent an ecocentric turn in the history of law. Stutzin himself saw them as responding to what he called an "ecological imperative". He argued that granting nature rights logically "implies overcoming the anthropocentric bias of law" (in Estupiñán Achury et al 2019: 41). This apparently simple formulation has had far-reaching consequences for the way in which rights of nature are understood, and therefore also for the way in which legal provisions are written. The implication of Stutzin's argument (a fundamental shift towards ecocentrism) is that it is through granting nature rights that environmental problems can be fixed.

"Every day it becomes more obvious", he wrote, "that if we want sustainable and long-lasting solutions to the ecological problems we have created, we cannot continue ignoring the existence of a nature with its own interests"[7] (Stutzin 1984: 97). This means that nature's rights are formulated as *recognized*, not invented or granted by humans. The role of the human here is not of creating a legal mechanism, but rather of using legal mechanisms to translate what is already the case. For Stutzin, as well as for his followers, the moral standing of nature obviously demands legal standing, the two being inseparable. Furthermore, once the law catches up with the supposedly obvious fact of nature's moral standing, ecological problems can be solved, *because of* this alignment of the law with moral sensibility. This belief is succinctly summarized in the subtitle of an influential book on the rights of nature (Boyd 2017): "a legal revolution that could save the world".

This general outline of advocacy and theory is a very durable and potent one. I would even argue that Stutzin's influence on the rights of nature, though much less acknowledged than Stone's, has so far been more potent. It has, to be sure, had a great influence on one of the first codifications of these rights, in Ecuador's 2008 constitution (see Chapter 3 for an extended discussion). Whereas for Stone granting rights to nature was mostly about the pragmatism of legal standing, for Stutzin it was about righting a wrong. The concept of right itself approaches here the older idea of natural right, that

7 Own translation.

is to say the correct form of something, and its correct treatment, as dictated by nature itself. Whereas for Stone legal standing pragmatically led to formatting nature as legal personality, for Stutzin it is the literal personality of nature that demands we recognize its rights (notice how, in the quote above, Stutzin refers to nature's *interests*).

The idea of legal personality, as I have argued above, goes together with that of standing, but it also brings its own flavor to the discussion. Stutzin's insistence on the imbrication of legal and moral standing accomplishes a similar imbrication of legal and moral personality. The legal person, in strictly legal terms, is a fiction that can be granted to many kinds of entities inasmuch as the law deems it necessary (O'Donnell 2021, Naffine 2017). But the very terms legal *person* or *personality* already point towards the moral traces that are etched within this legal concept (Grear 2013, Naffine 2003, 2011). Stutzin doesn't speak of the possibility of formatting nature as a legal *entity*, but rather of the – to him – obvious personal qualities of nature that demand a recognition of its rights.[8]

The kind of argumentation that Stutzin employs found many hires, not least in a spiritualist tradition that theologizes the recognition of nature's inherent value through the concept of rights. The most influential early proponent of a specifically *ecotheological* take on nature's potential rights was Thomas Berry, though he was himself building on a long tradition that theologized the idea of rights, rooted in the concept of natural right. In his turn, Berry decisively influenced the work of Cormac Cullinan, which became – through his book *Wild Law* (2011) – an important foundation for rights of nature scholarship and practice. Thomas Berry was a cultural historian and theologian that focused much of his work on the idea

8 In legal theory, there is another salient distinction between legal *subject* and legal person, with the subject encompassing, potentially, a more agnostic view of the entity thus created. For the purposes of this book, I will use legal person, as I think it reflects better its use in rights of nature so far, and contrast it with legal entity, which is also supported by some extant cases. See Tănăsescu (2020).

that the way in which the world is narrated by different cultures is changing, and he wanted to participate creatively in this change by offering a new kind of story.

The story that Berry advanced is best exemplified by the title of his last book, *The Great Work* (2011). This, the culmination of his activity, reunited ideas that he had presented throughout a series of earlier publications as well as teaching and public engagement. For my purposes here, several elements of Berry's account of the Universe are relevant, especially inasmuch as they cut a channel for the rights of nature to travel through that becomes increasingly moralist.

The first thing that deserves pointing out is that Berry's story is a grand narrative of *the Universe*. His interest in grand narratives follows directly from theology, which is quite obviously interested in the greatest possible level of explanation for observable phenomena.[9] Wishing to reconcile Christian theology with modern science, particularly cosmology and ecology, he focused on a grand narrative that explained the way in which the Universe – the greatest possible unit – came into being and evolved. To his credit, Berry took on board scientific theories, like evolution, and worked theology around them, rather than the other way around (just like his great influence, Teilhard de Chardin). So, instead of a theological universe that arranged things according to God's plan, Berry argued for an evolutionary universe created by God precisely so as to be self-generating (also see Robinson 1991).

The focus on the great totality was broken down through what Berry called the twelve principles. It is beyond my scope to go through all of them, but some are extremely useful for getting across an accurate picture of the kind of conceptions that, through Berry and Cullinan, made their way into the rights of nature. The most important aspect to discuss is succinctly summed up in

9 To be fair, there are theological interpretations of ecology that do not focus on the great totality. For example, Berry's namesake, Wendell Berry, has focused much of his impressive body of work on the specificity of place, rather than the planetary whole, though he is also decidedly Christian in his approach.

Berry's second principle, namely that the universe is a unity. This principle of unity is a way of reconciling the theological unity of creation (one creator and one creation) with the interrelatedness that ecology had been uncovering since its 19th century beginnings. The fact of interrelatedness is made to sit comfortably within the theological idea of unity by interpreting the universe as a vast community. The argument is that, given that everything is related to everything else, everything must be a participant in the great community of being (in the Great Work).

However, this is not some form of post-humanism, a radically egalitarian distribution of agency among beings (a la Bruno Latour). Because of human's privileged role within creation, it is only through human consciousness that the great community the universe is thought to be, comes to know itself. This places humans in a responsible position, as *guardians* of the great mystery. The amalgamation of the ideas of unity and community, together with the privileging of human consciousness, leads towards a picture of the world that is both hierarchical (in the theological tradition of the Great Chain of Being; see Descola 2013, 2014) and, by its own account, ecocentric. Berry complains that previous law had been anthropocentric, only valuing nature inasmuch as it served human needs. He therefore proposes ecocentric conceptions, that is, ones that would value nature for its own sake. But the theological underpinnings of his argument render the whole ecocentric – anthropocentric distinction meaningless, as it is ultimately the responsibility of humans to uphold the order of creation by refashioning their law to fit with the interrelatedness of a universal community.

The conception of ecology that Berry's work is based on is that of the early 20th century, where the greatest figure was Eugene Odum, who significantly advanced the idea of ecosystem coined by Arthur Tansley. Already in the 1970s though, precisely when Berry started his work, Odum's ecosystem ecology came under sustained attack, first in the work of Drury and Nisbet (1973), who argued that the ecosystem is a sociological import into ecology, mimicking the sociological idea of community but without a factual basis in what ecologists observed. For Drury and Nisbet, there was no such thing as a 'natural community', except as a fiction of the sociologically (or

theologically, as Berry shows) biased mind. What the ecologist observed was an endless series of variations and interactions among animals and plants, with alliances in constant flux (Drury 1998). The critique of the ecosystem concept has been very influential, in ecology, but much less so in popular understandings of this science, which continue to use the concept as if it corresponded to some naturally ordained state of things.

Berry's idea of community mimics the idea of an ecosystem in early 20th century ecology. It is an interpretation of the fact of interrelation that selectively picks ecological concepts such that they can cohere with theological commitments. But this leaves Berry's concepts condemned to a level of abstraction that cannot differentiate between genuinely different situations. If all is unity and totality, then it is only at the greatest level of analysis that law, for example, can intervene. And this is precisely how his work has been made useful for law by Cormac Cullinan.

In *Wild Law*, Cullinan extracts from Berry several different nature rights that he argues are the fundamental ones – derived, as it were, from Berry's ontology (or rather, theology). These are the right to exist, to have a habitat, and to evolve as part of the earth community. The parallels with human rights discourse are striking. Recall, for example, that Thomas Jefferson's fundamental rights were to life, liberty, and the pursuit of happiness (also see discussion of Nash below). For a legal orientation that claims to be ecocentric, the kinds of rights proposed seem to be direct imports from anthropocentric conceptions. I will explore this point in more detail below. What I want to point out here is that Cullinan's rights, as direct hires of Berry's theology, are predicated at the level of the totality and presuppose the existence of such a thing as an Earth Community. This thinking has had a profound influence on several cases of rights for nature so far. But practice has also been more diverse than theory and therefore has offered ways of thinking about rights that do not have to be grounded in ecotheology (see Chapter 4). It is only through the kind of political framework that I am proposing here that we can even see the difference.

The history of the rights of nature that goes from Stutzin to Berry to Cullinan is one that is quite different from the most popular

version of these rights as emanating from Stone's work. Stone was first and foremost a pragmatist, and his work does not give much sustained attention to the concept of nature as totality as opposed to locality, or to the kinds of things that standing could apply to. For Stone, standing can apply to anything, and if a great number of people find it necessary to speak on behalf of environments, the law can accommodate that.[10] However, the ecotheological history that I have briefly sketched doesn't seem to be primarily interested in the pragmatism of given situations, but rather in advancing a framework that subsumes any given situation under the Great Work, the totality that imposes, as if on its own, a series of 'fundamental rights' that have to be *recognized* (as opposed to granted). Cullinan uses the expression Great Jurisprudence to describe his framework, in an obvious reference to Berry.[11] This way of thinking is moralistic because it implies that anyone that does not share the fundamentally theological assumptions underlining it is not only wrong, but fails to grasp a universal *moral* truth.

In another relatively early work on the concept of rights for nature (*The Rights of Nature. A History of Environmental Ethics*, 1989), Roderick Nash analyzed how the idea of rights for nature emerged in the English-speaking world out of the earlier conceptions of natural right that were successively modified through the human rights revolutions (abolitionism and women's rights first and foremost), theories of animal rights, and eventually the rights of nature itself. What is extremely interesting for my purposes here is how Nash, though himself subscribing to an 'expanding circle of moral concern' view, nonetheless shows the fine webbing that holds together apparently disparate thinkers and traditions around the idea that rights are a *recognition* of something that is already there, and that this recognition can be expanded without limits (to eventually encompass everything).

10 In many jurisdictions it already does, without appealing to legal personality or rights at all (see Kurki 2019).

11 It may be worth pointing out that theological thinking does not present itself as a framework, but rather as a revelation of the truth (which leads to recognized, not granted, rights).

Nash also shows how theology was never far away from the earliest environmental concerns, nor from the very influential debate about the inherent value of nature. The passage from the 19th to the 20th century was a particularly fruitful period for the merging of ecology with value theories and theology. John Muir, for example, the mythical father of US national parks, was explicit in deriving the values that he saw as inhering in the natural world from the 'fact' of creation. The same Muir was a founding member of the Sierra Club that would eventually animate Stone's thinking. The particular history of the development of environmental ethics that Nash recounts draws on a variety of sources and inspirations (not only theology, to be sure), but stays firmly within dualistic conceptions of the universe. Even the idea of ecocentrism, reflected through movements such as deep ecology and often claimed by rights of nature theory and practice, does nothing to challenge binary thinking: the 'center' is simply moved from one entity (the human) to another (nature). This obsession with centrism[12] is indeed a feature of much Anglo-American environmental ethics, and one decidedly important for the rights of nature.

There will be more opportunities to parse through the various consequences of this strand of rights, as well as ponder the possibility of de-moralizing the rights of nature so as to allow for a diversity of views to take hold. But before we get there, I want to focus a bit more closely on several other elements of this history that are extremely important. First and foremost, I need to attend to the concept of nature itself.

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12 Not all environmental ethics and philosophy develops in this centric-biased way. For example, much French literature on these topics shies away from centrism. See Serres (1995), Latour (2004), Descola (2013), to mention but the most influential ones. Even more importantly, many philosophies labelled as 'indigenous' offer much richer conceptual tapestries through which to relate to the environment. One of the more important questions of this book is to what extent the concept of rights *forces* one towards the centrism of Anglo-American thought, and therefore away from relational thinking and surprising legal possibilities. For an excellent argument for relationality in law, see Macpherson (2021). Also see Tănăsescu (2021).

The Concept of Nature

The concept of nature is a baffling one, being simultaneously obvious and incredibly elusive. The obviousness comes solely from within a particular modern tradition of philosophizing that relegates nature to everything that is not culture. Perhaps the most succinct and coherent concept of nature within that tradition comes from Marxism, where nature is simply that which labor encounters (and which, therefore, it does not itself make; again, the background of human 'cultural' activity; Wark 2015). The elusiveness arises as soon as one thinks further about the distinction nature/culture, and realizes that there is no exact border to be found, but rather porosity all the way through. Anthropology compounds the problem further, having decisively shown that 'nature' is a culturally specific concept, and not at all the universal that modernity wants it to be (Descola 2013, De Castro 1996, 2014, 2019, Skafish 2016a, De la Cadena 2015, de la Bellacasa 2017).

The debate on the meaning of nature is important and vast, and I cannot survey it adequately or contribute to it in any meaningful way. But I do want to point out the cultural rootedness of the concept of nature. Second, I want to show that, based on the history sketched out so far, there are two very different ideas of nature at play within the rights of nature. Let us see what these are and the importance of their difference.

Godofredo Stutzin, in the 1984 version of his article, refers to Stone's minimalist conception of the rights of nature as dealing only with standing, but adds that in principle this can be applied to nature as such. We saw that in the work of Berry and his followers, we are always speaking about Nature (capital N), that is to say the totality, everything there is, and so on. According to Berry, this kind of Nature would not be modern at all, because it is not conceived of as mere background to human activity, which would be qualitatively different. Instead, Nature is *the* all-encompassing itself, and therefore human activity is definitionally natural. This poses a problem that is unresolved in this strand of rights for nature, namely the simultaneous use of the concept of nature as both a logical back-

ground and a kind of proxy for the good. This surreptitious moral use had already been anticipated by John Stuart Mill, whose essay *On Nature* demonstrates the incoherence of using the idea of nature as a proxy for the good.

Very briefly, Mill argues that the word nature is used to mean both what is so by its own design (and therefore is necessarily so), and what is *properly* so, therefore shifting into a moral register. However, there is no logical connection between the two. If anything, there is an inherent contradiction in using nature as both that which is so and that which *should* be so. In other words, the meaning of the word nature shifts when going from ontology (what is) to morals (what should be). On an even more basic level, Mill argues that if something is so by nature, it needs no encouragement to be so; conversely, if something is not so by nature, it needs no prohibition. In Tănăsescu (2016), I argued that Mill's argument (also see Antony 2000) implies that the supposed inherence of rights in the subject of rights (whether humans or 'nature') can be of no ethical significance. In other words, saying that rights are recognized confuses the ethical significance of rights (as proclamations) with the idea of an already moral nature. In fact, if rights were already part of nature, they would need no recognizing, just like the laws of physics operate whether they are recognized or not.

Mill's argument is, in my view, still very important to recall. But it's also worth pointing out that Nature conceived of as Totality is also hopelessly large, in such a way as to not admit of relationships that are situated at lower levels of abstraction. This is why, when Berry and his followers speak about Nature they also speak about the disturbing relationship that Humanity has had with it. Entertaining the idea that there might be such a thing as a relationship between two categories this big is an artefact of the concept of nature as Totality. No single individual, or particularly situated group (whether human or non-human) can ever enter into relationship with Nature but only, it would seem, with particular parts of its manifestations. This reliance on totality is extremely important to recognize, because it is one of the main bridges between rights of Nature and the neoliberal expansion of a particular model of development predicated on the existence of a universal Human with

universal rights (also see Chapter 6). In actual fact, the human that stands for Humanity is consistently of particular socio-economic backgrounds inextricably linked with a removal from actual environments that is the modern abstraction par excellence.

Continuing the earlier parallel with the concept of ecosystem, here we see how any particular environment is immediately formatted as derivative, as somehow subservient to the Great Totality that gives it the laws of its functioning (which, as I've already pointed out, both include and exclude humans, in an incoherent way). It would be as if, in ecology, the ecosystem concept would have led to speaking of the Ecosystem as the ultimate reality, and any particular ecosystem simply as a reflection of it. This is in fact what happened to much Odum-inspired ecology, as it postulated a natural equilibrium that natural communities supposedly tended towards, something that is yet to be observed as a verifiable and stable fact of nature.

The science of ecology has moved from a mid-century preoccupation with balance to a current focus on "disturbance" as the normal state of nature, a concept that is much better suited to an era of anthropogenic changes than the idea of an inherent equilibrium. However, the theoretical rights of nature strand I am exploring here has consistently latched onto the earlier ecological science, translating its idea of balance into a norm of harmony (Kotzé and Calzadilla 2017, Calzadilla and Kotzé 2018): inasmuch as Nature is understood to be in some form of (now disturbed) balance, then the appropriate answer is to strive towards harmony between Humans and Nature (achievable through recognizing its rights).

Just like with the doctrine of human rights, which postulates a universal Human (see Douzinas 2000) as a general repository of fundamental rights, so this particular strand of rights postulates Nature as the origin of a set of fundamental rights, which must be extremely general. On the other hand, we can also think about a concept of nature as immediate environment, what David Abram talks about as an 'environing world' (Abram 2012; also see Tănăsescu 2022). This nature is very specific and highly textured, and it also changes through time without necessarily being derivative of a greater work. Māori, for example, perceive "the universe as a Pro-

cess" (Kawharu 2010, 225). Nature as place, in other words, cannot admit of totalizing concepts but is instead focused on understanding how life is possible *here*, in this locality, under these changing conditions, with these participants. Nature as totality has no politics, only theology; nature as place is nothing but politics. Not incidentally, nature as place is also extremely well formulated in various indigenous philosophies[13] (for example, see Watts 2013), a point that I will come back to throughout.[14]

In the theoretical history of the rights of nature, Totality rules. However, in practice, nature as place has come to leave its mark within what its rights may mean. These issues are best explored through practical examples of rights for nature (see next chapter). Now, I want to attend to one last element that needs a bit of attention before moving on: the concept of rights.

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13 Usually, indigenous systems of thought are variously referred to as 'beliefs', 'cosmovisions', 'cultures', and so on. This is done even by people, and legal texts, that are very inclusive. I find this terminology to be inadequate, because if draws a sharp line between what *we* have – proper systematic thinking, and what *they* have – beliefs and visions. José Gregorio Diaz Mirabal, coordinator of the Congress of Indigenous Organizations of the Amazon Basin (COICA), was quoted by Politico to have said, apropos international conventions, that Indigenous People are invited "to present our traditions, songs and dances". This is certainly not what communities around the world want; there is plenty of multicultural sensibility already. Instead of repeating the dominant terminology, I will refer to Indigenous thinking as either that – thinking, or as philosophy, the highest form of thought of 'our' culture. I see no reason why systematic thinking everywhere and anywhere should not be recognized as philosophy.

14 Interestingly, O'Donnell (2018) shows how law itself formats the idea of nature in different ways, but which all go substantially towards great levels of generality and, in part, reproduce dualisms. Nature is repeatedly understood by law as either the background of human activity, or as a thing to be protected, or – as is the case in the present discussion – as a legal person. But in all these instances the textures of places are absent, as are the relations that these textures inspire and sustain.

The Concepts of Rights and Legal Personality

The idea of granting rights to nature cannot be properly examined unless we also take stock of the concept of rights. As with nature before, I cannot possibly present a comprehensive overview of this concept, one of the most important ones in the Western philosophical cannon. However, besides pointing readers to masterful treatments of the subject, I want to simply pause and take stock of several different elements of rights that are crucial for this examination.

What, at its most basic, is a right? Following Wesley Newcomb Hohfeld (1917), still the most influential legal theorist on the matter, a right is a kind of enforceable claim. To what? That depends on the right, but basically to something that is owed to the rights holder, as a matter of justice. This is what Hohfeld calls claim-rights, and indeed the rights of nature are of this kind. Rights, under this account, are always correlated with duties, but the duty and the right need not coincide in the same holder. So, if a non-human holds a right, the correlative duty is on the human to treat the right-holding non-human in a particular kind of way. The possessor of such rights has a verifiable claim to be owed something, and therefore someone else has a duty in respect to the rights holder.

In *Environment, Political Representation, and the Challenge of Rights*, I developed in much more detail the relationship between rights and claims. There, I argued that what we think is owed to some entity is reflected in the kinds of rights that legal processes confer upon them. The mediation between the general form of a universal subject of rights and the specific rights conferred is accomplished through the idea of legal personality, which is a legal fiction that bridges universality and concreteness (2016, p.60). However, the idea of legal personality has both moral and legal components that, as I have already intimated, are often mixed together. Morally speaking, a legal person is a subject; legally speaking, a legal person is a place holder for the capacity to enforce rights. As Hartney put it, "whatever legal authorities say is a legal right, is a legal right, whether this agrees with what philosophers would say about moral rights" (in Tănăsescu 2016).

It is no surprise then that legal rights and legal personality go together. Kurki (2019) demonstrates that the legal person is defined by jurists as the holder of legal rights. He himself disagrees with this, what he calls the orthodox view of legal personality, but the point remains that in both legal theory and practice, rights and legal personality most often travel together. They certainly do in rights of nature theory and practice, as I will show in detail when discussing the cases of Ecuador and New Zealand (see Chapters 3 and 4).

Though having enforceable claims recognized by a legal authority seems to be, strictly speaking, a matter of legal proclamation, what philosophers have to say about who or what deserves rights is still of interest.[15] In legal philosophy, there have been two dominant (and competing) ways of accounting for why something may be eligible for rights. One way of accounting has been through "will theories", that is to say theories that demand the possession of full autonomy in order to be eligible for rights. The paradigmatic case here is a mature adult human in full possession of his capacities (the maleness of this paradigmatic figure has gone unquestioned for centuries). The most philosophically influential will theory is Immanuel Kant's attribution of full personhood to those capable of rationally setting their own moral law (see Kurki 2019, p.22). This basically eliminates most, if not all, non-humans from rights. In its most extreme versions, it also eliminates humans that, for some reason or another, are not considered fully rational.

Another basis for assigning rights and legal personhood has been explored by "interest theories". These do not focus on the capacity for autonomous decision but rather on the idea of interest, namely on whether the entity in question can have its own interests. This kind of thinking has been greatly influenced by Jeremy Bentham, the father of moral utilitarianism, who famously said vis-à-vis the moral consideration of animals that the question is not whether they can reason, but whether they can suffer. Interest theories therefore rely on stretching inherited conceptions

15 I cannot possibly do justice here to a long and important debate. The interested reader should especially consult Kurki's work on legal personhood, as well as Campbell (2011).

of interest, which can now be made to apply, in principle, to many different things (from ecosystems to corporations)

The relevant will versus interest debates are interesting in and of themselves, but for the purposes of rights for nature it suffices to simply point out that nature as such does not seem to fit easily within either way of arguing for rights, and therefore borrows liberally from both. Place-based nature may fare better, though advocates also argue that landscapes, for example, are sentient and have interests or exhibit self-determination. Whether rights advocates acknowledge the pedigree of their preferred concept or not makes little difference because these kinds of debates are baked into the concept of rights and accompany it no matter what. It stands to reason then that advocates would use any portrayal of nature that may fit will or interest theories of rights. And this is exactly what happened.

Already in the 1970s, when the contemporary rights of nature idea started its multiple paths, the Earth was starting to be thought of, within Western philosophy and science, as a vast organism. The most famous elaboration of this is James Lovelock's concept of Gaia, which simply states that the planet we inhabit is a self-regulating organism. Whatever Lovelock himself meant is one thing.[16] Quite another is the way in which the figure of Gaia was immediately appropriated by the rights of nature to mean that the Earth is *one living totality*, which precisely accords both with the history of liberal rights and with the theological strand that I briefly described earlier. All of a sudden, it seemed as if science itself was lending a helping hand by characterizing the planet in organismic terms that accorded with liberal rights.

With the figure of Gaia, the supposed expanding circle of moral concern seems to have come to its logical end. Moral theorists had argued for centuries that humanity has progressively expanded its moral circle by including more and more kinds of beings. The usual

16 The concept of Gaia is much more interesting than most of its popular appropriations so far. For one of the best discussions of Lovelock's idea, see Bruno Latour's *Facing Gaia* (2017). For a contemporary development of the concept of Gaia that is decidedly anti-theological, see Stengers (2015).

story starts with an image of humans only being concerned with their immediate family, then with the tribe, the village, the clan, and so on up to, now, the Earth. Whether law drives morality, or the other way around, has never really been decided: does law follow mores, or mores follow laws? Both have been argued by radical rights proponents (from Locke to Bentham to Salt and on to contemporary rights of nature and animal rights advocates – Peter Singer and Tom Reagan the most famous of them). The idea is not to settle, once and for all, on the correct causation. Rather, it is important to keep in mind the constitutive ambiguity of moral and legal conceptions of right and their reliance on a moral evolutionism that is part and parcel of important rights of nature strands today.

This moral evolutionism has also meant that radical advocates of rights expansions have drawn stark parallels between every level of the supposed expansion of concern. All rights struggles are supposed to be part of the same great circle, so women's rights, abolitionism, animal rights and now the rights of nature are all part of the same story, made to cohere by the idea of moral evolution itself, which relies on a stark distinction between thing (and therefore rightless) and subject (and therefore worthy of rights). Rights expansion would therefore be the passage of more and more things into subjects. So, the argument goes, slaves were things before the moral law made them persons, just like nature is a resource unless the moral law makes it a moral/legal person.[17]

From within a liberal tradition, the kind of moral evolutionary story sketched above seems almost obvious. However, there is not much evidence for it. The idea that narrow-circle humans only cared about their immediate family parallels Hobbes' idea of the state of nature, both of which are based on figments of imagination that are necessary for the idea of moral progress to function at all. Anthropology, for instance, has not unproblematically shown that the circle of concern starts small. If anything, the opposite might be

17 This argument is not particularly popular with minority rights activists, that see in it traces of their animalization, often used to deny them rights. Also see Tănăsescu (2016) for a detailed discussion of the thing/property versus person/subject distinction.

true: many a-modern societies predicate the moral universe on relations with the environing world *before* even those with their own family. We will see examples of this when we discuss Māori philosophies that are crucial for understanding the legal arrangements for nature in New Zealand. The point I want to make now is that the history of rights for nature as part of a rights expansion has no basis in empirical study, but is itself an inheritance of a way of arguing about morality and the law that is quintessentially Western and quintessentially part of a liberal tradition.

This does not mean that Indigenous Peoples, for example, have had nothing to do with different instances of rights for nature.[18] But exactly how indigenous philosophies interact with rights for nature is a matter for careful analysis, precisely so as to safeguard the radical potential of such philosophies against the hegemonic drive that rights are steeped in. This is extremely important, which is why it will feature throughout the rest of the argument. I now turn to setting the basis for further analyzing the indigenous relation to rights, both in general and specifically for nature.

Liberal Rights and Indigenous Histories

As may have become clear by now, rights for nature only superficially challenge the liberal history of rights. They are not only continuous with this history, but rather can only be properly understood by placing them within the liberal milieu of rights extensions. As Roderick Nash showed (1989), the rights of nature are understood by their proponents to be part and parcel of the rights revolutions that have decisively altered how we understand radical politics today. Campbell (2011) argued, not without reason, that contemporary political struggles are only taken seriously if they are couched in the language of rights. This itself attests to the power that rights discourses wield over the political imagination.

Miriam Tola (2018, 34) makes the same point by relying on the work of Gayatri Spivak (1999), where she argues that "rights are that

18 See O'Donnell et al (2020) for a careful discussion of multiple kinds of involvement.

which we cannot not want". However, she also points out that this instrument that cannot be unwanted also comes with an extensive state apparatus that it relies on for enforcement, and therefore with a certain way of understanding the relationship between the subject of rights and the state that grants them. In the case of the Ecuadorian constitution (see Chapter 3) this is as clear as can be, as we are dealing with a document so enamored with rights that it recognizes a plethora of them, impossible to uphold simultaneously, but together working to entrench the ultimately arbitrary power of the state (also see Tănăsescu 2016).

What I have called the moral evolutionism of liberal rights has also been theorized in terms of the existence of different rights generations. Karel Vasak (1984) proposed that the first-generation human rights has had to do with political and civil claims. The second targeted economic, social, and cultural rights; while the third has been termed by Morgan-Foster (2005) solidarity rights and encompasses everything that did not fit in the first two generations. Many critical scholars (see for example Douzinas 2000) have pointed out how the expansion of human rights discourses has chocked out other ways of conceiving of radical emancipation while being quite easily incorporated within liberal and capitalist status quos. Largely because of the association between liberalism and economic neoliberalism in the second part of the 20th century (and therefore the relentless pursuit of a particular kind of "development"), rights discourses have flourished, as neoliberal regimes have learned to both accept them and thrive on their infringement (also see Tzouvala 2020).

Slavery is a good example. Though it is no longer legal anywhere, in absolute numbers there have never been more people toiling under conditions of slavery than today (Bales et al 2009). It may seem paradoxical that in an era defined by the expansion of human rights, slavery would flourish. But it does so not just despite human rights, but also in part because all claims for emancipation are forced through rights language, which poses no fundamental challenges to the mechanisms generating a need for slave labor to begin with. Instead of an expanding circle of moral concern, we instead can witness a shifting pattern of exploitation. It is not the case that

more and more people – to stick with human rights for the moment – have and enjoy full rights; it instead seems to be the case that the geography of rights and rightlessness shifts according to the needs of the global market. Rightlessness accompanies the search for ever-cheaper labor, while rightfulness extends to more and more domains of life that de facto require the perpetuation of conditions of domination (for example, things like consumer rights).

In the specific case of the rights of nature, scholars have already started to point out how they further legitimize rights discourses without any guarantee that this will actually translate into more substantive human or nature rights. Rawson and Mansfield (2018), for example, cunningly reverse the expression rights of nature in proposing that they in fact accomplish the *naturalization of rights*. It is as if the expanding circle narrative that is so central to the morality of non-human rights has become a self-fulfilling prophecy, where all efforts are put into expanding this one way of understanding relations (as claims) to every possible kind of subject. And it is on account of the expansion of moral claims to nature as such that a tenuous connection between rights for nature and indigenous philosophies is so often claimed.

It has become commonplace to present the rights of nature as either directly emanating from, or else closely approximating, indigenous philosophical and legal traditions. There is nothing within the various histories that I have so far surveyed that would warrant this claim. Why, then, is it so often made? There are, as I see it, three possible explanations: ignorance of indigenous philosophies, an unreflexive colonial inheritance, and enthusiastic belief in the power of rights discourse. These three reasons are mutually reinforcing: a superficial engagement with indigenous thought is already made possible by the still-influential inheritance of colonial ways of understanding indigeneity, and the omnipresence of rights discourses in modernity helps to further assimilate indigenous philosophies to Western ones. Nandita Sharma (2020) shows in detail how the colonial history that straddles the passage from imperial power to na-

tion building has used rights *against* colonized populations.[19] This does not simply mean that rights were withheld, but quite the opposite: rights were used to divide and conquer and to cement an enduring association between indigeneity and living close to nature.

For example, she shows how many colonial powers took it upon themselves to protect Indigenous populations by granting selective rights to particular lands, fundamentally because colonists thought of Indigenous Peoples as "people of the land". In contrast, the category of "migrant" worked to displace people and throw them within global labor fluxes that appropriated their work while denying them the ability to belong to any place (they were not Indigenous). It is striking just how much this history endures today, when we still make stark distinctions between native people, understood to belong *by nature* to a particular place, and migrants who are essentially rightless precisely because of their being thought of as unplaceable. These kinds of distinctions between rightful belonging to a place and rightless migration have always underlined colonial enterprise and have crucially outlived it in post-colonial nations as well. Modern nation sates have continued to play a fundamental role in the definition of indigeneity as somehow related to the quest for rights (Niezen 2003, 11-12). The possibility of multiple belonging, or of relating to the land outside of the institution of ownership, or of welcoming strangers as kin, are all gone. The irony is that many of these possibilities are closer to indigenous philosophies than rights can ever be.

As I have argued previously, the concept of Nature as totality is often used as a bridge between the rights of nature and Indigenous People. But that kind of concept of nature has nothing indigenous about it. In fact, indigenous philosophies are routinely steeped within very particular environments that people relate to in genealogical ways. This is to say that many indigenous philosophies, though there are of course many differences between them, think

19 The same has been shown for the sister concept of legal personality, which was selectively used to punish slaves for their actions while denying their autonomy. See Bourke (2011).

about people as being derivative of specific places that are alive in ways that *are not analogous to personhood*. Vanessa Watts (2013) calls this "Place-Thought", that is to say a system of organizing life that is not separable from the particular place of its thinking.[20] Nature (or Earth) as Mother, the cliché often attributed to indigenous thought, is nothing but the obsession with totality dressed up as indigeneity.[21] Nature as totality is featureless and abstract, the exact opposite of place-thought.

This point is supported by a vast amount of literature by and on indigenous philosophies. To take another prominent example: Marisol de la Cadena, in her book *Earth Beings* (2015), patiently develops the intimate relationship between particular places and particular communities, while pointing out consistently how these relationships are not at all analogous to Humanity – Nature relations, nor are they reliant on an idea of personhood at all. What she calls Earth Beings are not approximations of Mother Earth, but kinds of creatures that act in *their* specific way and which enter into very precise relationships with surrounding communities (which, themselves, are not mere collections of individuals). In other words, there is a vast repository of living knowledge about different ways of inhabiting lands that shares little of the fundamental assumptions of liberal modernity.

It must be extremely frustrating for Indigenous thinkers and activists to constantly see their work appropriated in Western context in fundamentally the same way. As Indigenous thinkers, writers,

20 If we manage to stop thinking about indigeneity in ethnic terms (the inheritance of colonialism), and instead think about it as the cultivation of a certain kind of relationship with the land, we also start seeing, in the very centers of colonial modernity, strands of thinking that are particularly careful to emplacement. Wendell Berry, for example, directly acknowledges, in strikingly 'indigenous' tones, his thinking as being occasioned by his particular places, and therefore not being universal or total.

21 I do not mean to say that there is no conceptualization of nature as mother in Indigenous philosophies. For example, the Māori concept of Papatuánuku is explicitly feminine.

and critical anthropologists have shown repeatedly, there is a veritable well of radical political and legal conceptions available in a-modern contexts. Yet the only way in which Western philosophers and activists seem to be able to take stock of it is by positing personhood for Nature and reading rights into it! The pragmatic (though surely, on a personal level, often unintentional) reason for this is, as I have argued above, that personhood and rights are not fundamentally threatening to dominant modes of organizing social, political, and economic life. Thinking genealogically with landscapes that make the person look insignificant – now that is something truly revolutionary.

If we consider the tremendous momentum of the rights revolutions that have accompanied the growth of liberalism until today, it may seem almost inevitable that, eventually, rights would be predicated of nature. But inevitability does not mean predestination. What I want to draw attention to is the power of a discourse to cannibalize competing ones and to accommodate itself within wider power struggles. The consumer capitalism that has been uprooting worlds for the past century, with much earlier and deeper roots (see Moore 2017, 2018, Malm 2016), has learned to live with rights, while at the same time itself depending on their continuous infringement. Whether advocates like it or not, the rights of nature based on the history recounted here cannot but participate in this same world.

The history that I have presented so far is necessarily abbreviated and selective. However, it contains the main elements that have influenced rights of nature discourses so far. As the argument turns towards actual rights for nature, it will become easier to see how the elements presented here show up in practice. But this is not simply a matter of theory applying to practice. Rather, thinking and doing are always intertwined, one making the other possible. In turning to rights of nature laws and provisions, it will become clear how thinking occasioned the doing, but also how practice offers new ways of thinking, avenues that theory on its own could not have anticipated. Unsurprisingly, it is there that the actual contribution of Indigenous People is to be found, in the subtle resistance

to rights and the equally subtle infiltration of truly novel ways of thinking about law, as well as the environing world.

The story of the rights of nature is being written, and will continue to be written for the foreseeable future. But the directions that it can evolve in are largely dependent on how theorists and practitioners reckon with the inheritance that seeps through the idea of rights for nature. I am myself committed to critiquing these rights such that they do not foreclose evolving in ways that cannot be currently anticipated. I am also committed to taking the rights of nature to task for unreflectively repeating histories of oppression. Lastly, I think it is prudent to always acknowledge one's fundamental ignorance and to let one's practice evolve in relationship with an enduringly mysterious environing world. Closely attending to practice means seeing one's ideas play out in the world. But it also means changing one's mind, as the uncertainty of the world generates new ideas.