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Who owns nature? About the rights of nature*

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Abstract: Property rights are often seen as a gateway to the destruction of nature. In view of the ecological crisis, criticism of property rights is therefore becoming louder and louder. On the one hand, rightly so, since global warming, resource depletion, global pollution and the loss of species have been made possible by the private ownership of natural assets. On the other hand, the criticism falls short. Even common and public property does not protect natural assets from being overexploited, resources depleted, and values extracted. Moreover, it is questionable whether nature would actually be better off today without any property regulation. A new understanding of property that does justice to natural goods is therefore needed. The article considers the rights of nature as a way to rethink property in this sense and explores reasons to give rights of nature a general validity.

Key words: nature, rights of nature, philosophy, ecological crisis

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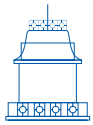

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¿A quién pertenece la naturaleza? Sobre los derechos de la naturaleza

Resumen: Los derechos de propiedad se consideran a menudo como la puerta de entrada a la destrucción de la naturaleza. Ante la crisis ecológica, las críticas a los derechos de propiedad son cada vez más fuertes. Por un lado, con razón, ya que el calentamiento global, el agotamiento de los recursos, la contaminación global y la pérdida de especies han sido posibles gracias a la propiedad privada de los bienes naturales. Por otro lado, la crítica se queda corta. Ni siquiera la propiedad común y pública protege los bienes naturales de la sobreexplotación, el agotamiento de los recursos y la extracción de valores. Además, es cuestionable si la naturaleza estaría mejor hoy en día sin ninguna regulación de la propiedad. Por lo tanto, es necesaria una nueva comprensión de la propiedad que haga justicia a los bienes naturales. El artículo considera los derechos de la naturaleza como una forma de repensar la propiedad en este sentido y explora las razones para dar a los derechos de la naturaleza una validez general.

Palabras clave: naturaleza, derechos de la naturaleza, filosofía, crisis ecológica

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The fear of nature has always been a strong driving force for enlightenment, science, and emancipation. Natural forces, natural cycles, and natural wonders appeared to people as forces of fate on whose whims their own survival depended. Escaping from them and gaining control over one's own survival conditions brought a gain in freedom that no one would want to do without, even today. In the age of global warming, however, this new freedom turns into its opposite, where the question of survival arises anew. Such a regression happens because freedom was thought of as domination over nature. Human beings liberate themselves from nature by ruling over it. Domination over nature is exercised in three ways: through technology, nature is tamed, controlled, and imitated. In economics, nature is exploited as a supposedly free good and desertless profit. And in law, nature is made available, especially through property. This material dominion is exercised in the form of arbitrary freedom, according to which natural goods, like any other thing, may be used by their owners "at will" (§ 903 BGB *Bürgerliches Gesetzbuch*). Property rights authorize the free use and consumption of natural goods, but are to be tamed by environmental rights.

However, this legal limitation remains a toothless tiger as long as nature conservation does not enjoy the same status as fundamental rights, including the fundamental right to property (Article 14 GG *Grundgesetz*).[1] As a rule, the right to property trumps nature conservation. This imbalance is the main reason for the sobering lack of results and harmlessness of all efforts to protect nature to date. Legal measures against global warming, resource depletion, global pollution and species extinction are only promising if the protection of nature is at least put on an equal footing with property rights. Both must have the same rank of fundamental rights. This idea gets its special twist only by the fact that property rights are not weakened or even abolished, but on the contrary are to be extended and transferred to nature. By extending property rights to nature, it is given a legal subjectivity that protects it in the long term. Accordingly, nature possesses rights and, in particular, property rights to its resources. To this extent, ownership of nature is put in bounds by transferring it to nature. Property is thus applied to nature precisely to save it from him.

The rights of nature are now recognized in a growing number of jurisdictions.[2] Courts in India and Bangladesh have granted rights to the Ganges River and other ecosystems. Rights of nature have been amended by legislatures in Bolivia and Uganda at the national level, and in the U.S. and Brazil at the local level. In New Zealand and Colombia, certain rivers and landscapes even have property rights. And in Ecuador, the

1 Jens Kersten (2020a) examines this primacy of constitutional legal subjectivity over nature conservation, which lacks this legal subjectivity in the Basic Law, on the basis of Article 20a GG.

2 A good overview of the historical development is provided by Boyd (2018) and of the current status by the website of the Center for Democratic and Environmental Rights: www.centerforenvironmentalrights.org/ (last accessed 04/15/2021). The development in German jurisprudence regarding the ecological proprietary rights idea (*Idee des ökologischen Eigenrechts*) and its potential for development is outlined in: Schröter & Bosselmann (2018).

rights of nature have been elevated to the status of a constitutional right.[3] There are two lessons to be learned in particular from this constitutional guarantee of nature's rights in Latin America: first, the simple fact that nature's legal subjectivity can be cast in constitutional law; and second, the connection between nature's value creation and its rights. The culture of Pachamama is based on the notion of the fertility of the earth and thus of nature's value creation for the good life ("buen vivir"). Natural goods provide so-called ecosystem services such as pollinating plants, filtering water, regulating erosion, stabilizing weather, forming humus, providing medicinal substances, energy sources, and building materials, etc. Natural goods are therefore not worthless things that may be used by humans without any consideration. Those who use them also commit themselves to the sustainability of their use.

But that is where the similarities end. The ultimately religious concept of the pachamama cannot be transferred to the secular constitutions of Western states. Its validity depends on a certainty of faith and is limited to a specific religious community. Those who do not share their faith do not have to recognize the rights of nature. There is therefore a need for a secular justification of the rights of nature, the recognition of which can be expected of every person regardless of his or her beliefs. It is true that the historically and culturally surprisingly widespread idea of a nature that is intrinsically worthy of protection expresses an almost irresistible intuition; however, giving its intuitive power a conceptual form does not succeed beyond the achievements of enlightenment, science, and especially law. The idea of a proper right of nature (*Eigenrecht der Natur)* rather results from the rationality of valid law. In this respect, the rights of nature merely make explicit what is already recognized in existing law. Entirely "without metaphysical justification magic" (Assheuer, 2019), the rights of nature can be justified by deriving them from the rationality of valid property rights.

This theory of sustainable property holds that it is only through its legal subjectivity that nature is given intrinsic protection that makes it intrinsically worthy of protection. Thus, it goes beyond the common sustainability theories of utilitarianism, rational self-interest, and environmental ethics, which together stand on the foundation of anthropomorphism (1.-3.). In anthropocentrism, ecological sustainability is justified by recourse to the value nature has for humans. But neither can sustainability be justified on the basis of ecocentrism, according to which nature is not merely of value to humans, but has intrinsic value itself (4.). Ecological sustainability, however, when viewed from a legal perspective, cannot be justified by any conception of value –neither by an instrumental value of nature for humans nor by a value inherent in nature– but only in the form of rights of nature (5.). Nature does not possess an intrinsic value, but an intrinsic *right*. This proper right (*Eigenrecht*) shall be derived in the following from

3 See on legal practice in Ecuador and its cultural-religious underpinning of the Pachamama (see Gutmann 2019).

the rationality of valid property rights. Property is commonly justified as the right to ownership of the proceeds of achievements; whoever contributes to the creation of value also owns the corresponding share in it (6.). Now, nature with its ecosystem services is itself a source of value creation (7.). Against this background, it too deserves a right to ownership of its resources (8.). Accordingly, the use of natural resources also involves the use of property that belongs to nature. In turn, the protection of property dictates that other people's property must neither be destroyed nor damaged; in other words, it obliges us to deal with other people's property in a sustainable manner (9.). Anyone who uses natural goods is therefore obliged to be sustainable. The duty to ecological sustainability is thus inherent in the applicable property law itself.

1. Utilitarianism

Anthropocentrism is understood as the fact of ascribing a value to nature. Here, nature does not possess a value itself. Rather, nature is worth protecting because it is valuable to humans. It is valuable in relation to certain interests that people have. In this respect, sustainability is not good in itself, but good for people. While sustainability obligations do have some validity here, they are not sufficiently valid. Three varieties of anthropocentrism can be distinguished: utilitarian sustainability theory, rational self-interest sustainability theory, and environmental ethics.

In the utilitarian theory of sustainability, nature is given an economic value. Sustainability here is of greatest benefit to all in economic terms. It is useful for the privately organized market that provides prosperity and high standards of living (health services, education, mobility, etc.) to as many people as possible. The value of nature is in its usefulness to this form of economy. Nature is valuable because it serves as a resource for an economy that creates wealth and raises standards of living. Natural resources are exploited through the market as energy sources, food, building materials, etc., so that as many people as possible can participate in energy supply, basic security, transportation and housing infrastructures, etc. If prosperity and living standards are to be maintained or even improved, nature must therefore also be preserved. The benefit of sustainability, then, is the preservation of nature as a resource for an economy that creates wealth and raises living standards.

From a utilitarian perspective, sustainability must thereby pay off in cash terms for market participants (Broome, 2012). Its economic benefits work out as cost benefits. Cost benefits arise from sustainability when the consequences of, for example, global warming (desertification, sea-level rise, health damage, water and food shortages) lead to economic costs that exceed the costs of sustainable climate policies. Cost benefits also arise when an ecologically sustainable production conversion yields economic profits. Ecological sustainability requires economic profitability. Two measures promote such efficient sustainability: an incentive structure and market regulation.

First, incentives must be created for market actors that lead to ecological sustainability in production, consumption and trade. Sustainability must be economically rewarding; it must allow costs to be reduced and profits to be increased. One example of this is emissions trading; trading in emissions certificates is intended to create incentives to reduce pollutant emissions. Taxes on high-emission production methods and supply chains, as well as tax-financed subsidies, provide additional incentives for investment in emissions-neutral production and technologies. Such an incentive structure requires the valorization or pricing of nature. Natural resources must have a price so that the costs of their consumption can be compared with those of their conservation.

Second, the market must be effectively regulated by the legislature. One instrument for regulation is primarily the environmental law. Legal regulation of the market must ensure that costs arising from production-, consumption-, and trade-induced environmental damage cannot be externalized by market actors. Such costs must be reflected in companies' accounting. If environmental rights are broken, the penalties must far outweigh the potential profits in order for sustainability-compliant economic activity to pay off. Through regulation, the state thus prevents profits from being privatized and costs from being socialized. Environmental damage caused by private companies does not then need to be remedied by public aid measures.

The utilitarian concept of sustainability has three weaknesses. The first is that sustainability is fragmented. It is fragmented in several ways. First, species conservation is largely excluded from utilitarian sustainability. Numerous animal and plant species cannot be put into value, either because they are not exploited by the economy and thus have no economic value, or because they are fundamentally beyond pricing. What price should be put on the survival of a frog species? Its extinction would generate no or only low costs; therefore, its protection would not be worthwhile. Moreover, utilitarianism allows environmental damage to be weighed against corporate profits. If profits are higher than the cost of sustainability, it is not worthwhile. Accordingly, the utilitarian model would only create incentives to limit oneself to profitable sustainability niches. In contrast, the cost-intensive conversion to an environmentally sustainable economy is a disincentive from the point of view of profitability.

The second weakness lies in the fact that a sustainable economy is incompatible with growth, at least according to current knowledge. Proposals of Green Growth or the Green New Deal do not explain how a sustainable economy is possible without loss of wealth and loss of living standards. Even in the near future, for example, there are no technologies in sight that will decouple economy from fossil or nuclear energy sources without making production and consumption more expensive. Instead of incentives for growth for all, the social and economic framework conditions should rather be created under which personal losses of prosperity and declining living standards are fairly distributed so that they can be accepted by majorities.

The third weakness arises from the contradiction that private property favors the destruction of nature and at the same time is presupposed by utilitarian sustainability. On the one hand, the strong protection of private property is the functional requirement of a privatized economy, which is supposed to provide prosperity and living standards. To this extent, utilitarian sustainability is also based on it. On the other hand, the multiplication and protection of private property is the incentive structure par excellence of the economic form that drives global warming, global pollution, resource depletion and species extinction. Private property enjoys strong validity in a privatized economy, while sustainability obligations and corresponding state regulations have weak validity. With strong private property, the utilitarian sustainability economy presupposes the same irresistible functional requirement against which soft sustainability obligations cannot prevail. In this respect, it is doomed to ineffectiveness from the outset.

2. Rational self-interest

A widespread conception of sustainability invokes the argument that nature must be preserved as the basis of human existence. With climate, people would destroy their natural livelihood and thereby deprive themselves of their own livelihood. In this respect, sustainability is for the benefit of mankind. Nature deserves protection here because it ensures human survival. There are two types of this argument, which refers to nature as the basis of human existence: the prudential argument of rational self-interest and the moral argument of environmental ethics.

The prudential argument assumes rational self-interest in sustaining one's livelihood. Persons act sustainably out of prudence insofar as preserving their natural livelihood is to their advantage. This sustainability theory of rational self-interest yields the following picture. People have a self-interest in preserving their livelihood. Therefore, they have the willingness to give up short-term advantages for the purpose of long-term livelihood. In order to save humanity, those concerned accept personal losses of wealth. Owners, shareholders and managers, for example, accept to subordinate their profit expectations to sustainability goals that are important for survival. The failure of such willingness is due to the absence of rational self-interest here. Self-interest in saving livelihoods requires being informed about the causes and consequences of global warming and species extinction. Informed individuals voluntarily form a willingness to act sustainably. Their informedness is achieved through education that relies not only on factual knowledge but also on its appropriate communication. The people concerned reach insight into their own interests at the latest when they are made aware of the threat drastically enough. It would only be necessary to provide indisputable evidence of irreversible global warming and its deadly consequences for them to discover that they have a vested interest in sustainability.

Two objections are directed against the sustainability theory of rational self-interest. First, neither history nor the present give reason to believe in such a rationality of self-interest. If there were a rational self-interest in preserving the natural basis of life, there would no longer be an unchecked increase in anthropogenic CO2 emissions. Not only are the causes and consequences of global warming sufficiently well-known and accessible. When viewed with open eyes, phenomena such as glacier melt, desertification and biodiversity loss are unmistakable. The notion of a danger that, taken to an extreme, arouses self-interest actually serves the myth of the spear that strikes the wound, also heals it (*trosas iasetai*).

The real reason for a lack of sustainability, according to the second objection, is not that there is no rational interest, but that there is no self-interest in it. It is not a lack of information and education that is the problem, but the assumption that individual persons would have a vested interest in sustaining humanity. The idea of self-interest aligns with the gratifications (advantages) and avoidance of sanctions (disadvantages) that motivate action. Having a self-interest in something means that something is good, useful, beneficial, or advantageous to someone. If a person had a self-interest in the survival of humanity, its preservation would be good for that person. Conversely, if humanity's livelihood were destroyed along with nature, it would be bad and disadvantageous for that person. The person himself would suffer a disadvantage at present if he or she knows that his way of life contributes to destroying the natural basis of existence for future generations. Such a sustainability theory of rational self-interest necessarily presupposes a generic ethics. In it, humanity is imagined as an organism to which each individual belongs as a specimen of a genus. Each organ performs a function in an organism and, as a vital part of a whole, contributes to the maintenance of the organism. Likewise, each individual, as a specimen of a species, contributes to the survival of humanity. Each member of humanity possesses the task of contributing to its preservation. Only under this condition an individual can harm him or herself, if he or she knowingly destroys the basis of life of mankind with his actions. To this extent, a person appears as a specimen who serves the preservation of his species. The conception of mankind as an organism insofar expects a strong altruism from the individuals. Informed and enlightened individuals cannot possibly want to place their individual goals above the value of sustainability. They cannot want their own lifestyles to contribute to robbing future generations of their livelihoods. To knowingly live unsustainably is utterly impossible.

In this respect, the sustainability theory of rational self-interest turns out to be the opposite of what it appears to be. By appealing to the self-interest of each person, it gives itself the appearance of illusionless realism. If sustainability brings benefits to a person, he or she should lead an ecologically sustainable lifestyle simply out of self-interest. In fact, however, he or she is expected to be selfless in giving up individual values for the benefit of the human species. In this respect, the sustainability theory

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of rational self-interest is based on an altruistic idealization that is at odds with the claimed realism. If there should be such a thing as self-interest in the preservation of future generations at all, then probably (in the sense of neighborhood ethics) in relation to close persons such as one's own children or grandchildren. At best, the idea of their harm would trigger discomfort, pain, and grief, and cause harm to the parents themselves. In this respect, the self-interest in sustainability is limited to a social role (here: as parents) and a specific target group (here: descendants). In contrast, the generalized assumption that every enlightened person has a self-interest in the preservation of humanity is an idealization far removed from reality.

3. Environmental ethics

Environmental ethics is also based on the anthropocentric assumption that nature is worth protecting because humans need it. As the basis of human existence, nature deserves protection. The special feature of environmental ethics is that it derives the protection of nature from moral claims, whose respect humans owe to each other. In this respect, ecological duties do not exist towards nature, but only towards human beings. Nor is there in itself a claim to the preservation of nature. For duties of sustainability do not derive from specific claims to sustainability, but from moral claims that are of a general nature; from claims, for example, to physical integrity, equality and freedom. Nature deserves protection because these general claims relating to natural goods are met by sustainability duties. Environmental ethics is applied ethics in the sense that general moral claims are applied to the particular subject area of nature. It is thus justified by moral claims that people in general may expect to be respected.

The pollution of air, water and soil, anthropogenic global warming and the extinction of species endanger the natural basis of human life in many ways. Different moral claims are violated in the process. Insofar as they affect health, they violate a moral claim to bodily integrity. They also violate the moral principle of equality. People have an equal right to acquire and exercise basic capabilities (Nussbaum, 2010). Industrial societies with high standards of wealth and quality of life, but currently also high levels of natural degradation, have so far enabled their members to exercise such capabilities better than it will be possible for future generations when pollution, global warming, resource depletion, and species extinction will have reached levels that greatly reduce wealth and quality of life. Moral equality is thus violated by the polluters of global warming living at the expense of future generations who will have to live with the consequences. Finally, the principle of equal freedom is violated. Pollution, global warming, resource depletion, and species extinction will put pressure on future generations to adapt their lifestyles. This pressure to adapt reduces the possibility of determining one's own way of life. Migration forced by global warming, consumption constrained by pollution, and

poverty and debt growing due to increased health risks and rising environmental costs reduce the scope to decide how to live. Future generations will have less freedom of a self-determined life than earlier ones. In this respect, the endangerment of the natural basis of life also violates the principle of equal freedom.

On the basis of such claims, which people possess due to their moral status, persons and institutions may be obliged to sustainability. If persons or institutions contribute to pollution, global warming and the extinction of species, they may be expected to refrain from endangering the natural basis of life. Such environmental ethical demands, however, have only little force against economic functional requirements. Environmental ethics and economics form different areas of validity, each of which follows its own logic and justifies itself on its own grounds. In this respect, the conflict between economic functional requirements and environmental ethical appeals can no longer be resolved on a common basis of reasons; there is no common ground that could mediate between the two. But where a conflict of norms can no longer be resolved by reasons, it threatens to be decided by power. When reasons withdraw from conflict resolution, the resulting gap is filled by power. On the side of economic property rights, there is a power advantage in this process. Corporations can use their ownership power to exert pressure on legislators to dismantle, soften, or block environmental ethics measures. Duties to future generations, for example, therefore regularly break down at the hard core of economic property rights.

4. Ecocentrism

Ecocentrism assumes an inherent value of nature. Nature is not only of value to humans, but possesses value itself. In contrast to anthropocentrism, this assumption appears to be a consistent conclusion. Sustainability has only a soft validity, weak binding force and low penetrating power in anthropocentric theories. This circumstance explains the ineffectiveness and harmlessness of sustainability policies to date, which often have to yield to the functional requirements of the economy in particular. Its effectiveness therefore seems to increase when nature itself is worth protecting and its value no longer depends on the demands, interests and needs of people. The assumption that nature has a value for people is replaced by the idea that nature itself has a value. A value is not ascribed to nature but rather, a value peculiar to it can be discovered.

In ecocentrism, the value of nature is derived from a particular property of nature. Nature is worth protecting because it possesses a certain property such as fertility or wholeness. Its inherent value derives from a property of nature. Statements of value rely on ontological statements. In this respect, ecocentrism invokes an ontology of value. According to this, ontological assumptions about nature allow conclusions to be drawn about the worthiness of nature to be protected. This value ontology is the common denominator of different varieties of ecocentrism. Value assumptions derive

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from the following ontological assumptions: nature as a vulnerable living thing (Callicott, 1989), a wholeness or integrity of nature worthy of protection[4] —inter alia self-regulation (Jantsch, 1992; Kauffman, 1998), organism (Swimme, 1997), entropy (Kleidon, 2004), energy cycles (Volk, 2003), food chains, 'web of life' (Bohm, 1989) —, the fecundity of nature, an awe-inspiring grandeur (Schweitzer, 1991), a teleology of nature —including nature's inherent goal of flourishing (Taylor, 1986)—, the preservation of creation,[5] or nature as an unavailable 'gift' (Serres, 1994).

However, values cannot be justified with ontological assumptions. The justification deficit of ecocentrism is based on the naturalistic fallacy of wanting to derive an ought from a being. From a description of what is, no prescription of what ought to be results. The description of a wholeness, teleology or fertility of nature does not yet include an explanation of the reason why these are also worth protecting. Even if a wholeness, teleology or fertility of nature could be described, it would remain unexplained why they deserve unconditional protection. A normative reason for the protection of nature is needed, which, however, cannot be taken from one of its properties such as wholeness, teleology and fertility.

Two variants of ecocentrism can be distinguished along the lines of this unjustifiability: a religious and a scientific ecocentrism. Religious ecocentrism is based on the idea of the sacrality of nature. Here, nature has a sacred status that makes nature intrinsically worthy of protection and prohibits it from being instrumentalized for human interests. The sacred stands for the inviolability of nature and is supposed to protect it from violation, exploitation and destruction. In Ecuador, Bolivia and Colombia, for example, nature owes its worthiness of protection to the sacred conception of nature as the Pachamama ("Mother Earth"), who is revered as a life-giving deity. The Maori mythology of the sacred, in turn, provides the basis for the intrinsic value of nature in New Zealand; its principles are *whanaungatanga* ("kinship" linking all natural goods) and *kaitiakitanga* ("responsibility" toward all natural goods). In North America, animistic and pantheistic notions of the sacredness of nature in particular are invoked to defend nature's intrinsic value (Berry, 2011). In Buddhism, the sacred status of nature is manifested, among other things, through religious rituals of sacrifice; sacrifice expresses a commitment to nature that derives from its intrinsic value. Moreover, a sacredness of creation that obligates the sustainable use of nature is taught in Christian theology of creation (Francis, 2015). Finally, in the social and legal sciences, there is sometimes a view of establishing the intrinsic value of nature with the help of a New Mythology. Bruno Latour, for example, promotes it by seeking to revive the myth of Gaia, Mother Earth (Latour, 2017, 2018). And Christopher D. Stone promoted a remythologizing of

4 Relevant here is: "Something is good if it tends to preserve the integrity, stability, and beauty of the biotic community" (Leopold, 2019, p. 174).

5 The integrity of creation is interpreted by Pope Francis in the encyclical Laudato Si' in the sense of ecological ethics (see Francis, 2015).

law early on in his influential writings on environmental law.[6] In each of these different sacred conceptions of nature, nature is recognized as having a sacredness because of one of its properties, such as fertility, wholeness, or sublimity, which gives it intrinsic value and makes it worthy of protection at all costs.

Scientific ecocentrism, on the other hand, assumes that value ontology satisfies the standards of verifiable knowledge. For example, the assumption about a teleology of nature is attempted to be justified scientifically (Taylor, 1986). Apart from the fact that nature has functions rather than goals, it is assumed that its goals have normative content; that nature's goals are not bad (perishing, destruction) but good ('flourishing') and therefore worth protecting. In these chains of reasoning, it is ultimately presupposed that existence is a good worth protecting and that being deserves priority over non-being. Any notion of inherent value in nature ultimately presupposes that existence is intrinsically valuable, meaningful, or desirable. Such statements about the meaning of existence, however, constitute an axiom that cannot be proved. Occasionally, this insight breaks through in the admission by proponents of ecocentrism that ultimately no "proof" (Taylor, 1986, p. 123) can be made of the value of nature and thus of ecocentrism.

Religious ecocentrism, on the other hand, accepts this unjustifiability —the inexplicable reason for the value content of natural properties— and draws the conclusion that the notion of nature's intrinsic value is ultimately based on certainties of faith. At first, it appears as its weakness, in contrast to scientific ecocentrism, to dispense with justification and instead to invoke certainties of faith. However, if we look at it more closely, this renunciation turns out to be its strength in taking into account the unjustifiability of an ought from being. Theological and mythological figures of justification acknowledge this unjustifiability without abandoning the notion of a value of nature. However, because of its groundlessness, the religious notion of the value of nature lacks a binding validity that is binding on all persons and organizations.

5. The rights of nature

One can only escape the dilemma between anthropocentrism and ecocentrism if one succeeds in justifying the unconditional protection of nature without resorting to any natural property. The worthiness of protection of nature cannot be derived from its properties. Nature is worthy of protection in itself without a value that is supposedly derived from its properties.

An aesthetic variety of environmental ethics is supposed to offer such a way out. It rightly invokes the specificity of the aesthetic experience of nature. Nature can

6 "The time will come when these thoughts [sc. about the rights of nature] and the first changes in law [...] can be summed up –felt and understood– in a myth of man's relations with the rest of nature. [...] What is missing is a myth that captures our growing body of knowledge in the fields of geophysics, biology, and the cosmos as a whole" (Stone, 2013, p. 74f.).

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be perceived as sublime or beautiful. In these aesthetic experiences, nature is first recognized as something that is valued for its own sake. This self-worth of the aesthetic object is a general feature of all aesthetics. Both of the work of art and of nature. In the experience of nature, however, there is added the recognition of the difference in which man stands in relation to nature. In the beauty of nature, and especially in the sublimity of nature, nature is encountered as strangeness, as otherness, or as unavailability (Seel, 1997; Rosa, 2016). In these figures of difference from humans, nature appears as something that escapes instrumentalization by humans. Nature thus appears as self-value and at the same time as the Other. The strangeness, otherness, and unavailability open up as a self-value. Nature is thus recognized as a self-value that eludes instrumentalization by humans. It appears as a good worthy of protection, which may neither be consumed, defaced nor destroyed.

However, the aesthetic self-worth of nature does not result in moral obligations towards it. It is not nature that has claims, but only human beings. Aesthetic experiences of nature are worth protecting because they are important for a good life and a good life deserves to be respected. The justification of an aesthetic duty of sustainability can only be indirectly based on the moral claims people owe each other to respect. Towards human beings there is a moral duty to acknowledge their respective experiences of nature. In this respect, the aesthetic sustainability concept stands on the moral foundations of environmental ethics (see above). In this respect, it also meets the criticism that its moral sphere of validity hardly holds against that of the economy. The moral respect of aesthetic (nature) experiences has an extremely low validity in relation to the force with which economic functional requirements gain validity.

Another way out of the dilemma between anthropocentrism and ecocentrism is opened by the notion of the rights of nature. It is more promising insofar as the rights of nature allow for a robust sustainability that can hold its own against economic functional requirements. The theory of the rights of nature is based on the assumption that a value is not a sufficient reason for nature to be worthy of protection. A value can only be ascribed to nature, but not inherent in it. This value lies in the contribution that ecosystem services make to value creation. However, it does not serve as a reason why nature is worth protecting. Neither the value of ecosystem services nor a self-worth of nature provides the normative basis for nature's worthiness of protection. Nature does not deserve protection on the basis of any value, neither ascribed nor inherent.

The rights of nature elevate ecosystems such as rivers, landscapes, and animal species to the status of legal subjects, endowed with coercive rights and standing to sue.[7] As an independent legal subject, nature possesses a normative stubbornness

7 Andreas Fischer-Lescano (2018) and Jens Kersten (2020a, 2020b) examine the legal subjectivity of nature from a jurisprudential perspective. Niklas Luhmann (2008) is one of the prominent critics of the ecological proper law idea (*ökologisches Eigenrecht*), who consider the principle of reciprocity (mutual obligations and communication) as a necessary condition for legal subjectivity.

that makes it intrinsically worthy of protection. It deserves protection in itself and not only because its protection is valuable for people: because it serves as the basis of existence for humanity, for example, and people have a rational self-interest in its preservation. Its protection does not serve an interest of people but rather, as a legal subject, it is intrinsically worthy of protection. This legal subjectivity makes an effective sustainability policy enforceable. For as an independent legal subject, nature possesses a normative stubbornness that is on a par with that of humans. Therefore, nature cannot be subordinated to the claims, rights and interests of humans and be overused, damaged or destroyed for their interests. The validity of ecological sustainability must be decoupled from value concepts as well as from the concept of nature and, it is proposed, be tied to legal rationality.

6. The value theory of property

The key to such a justification of the rights of nature lies in their property-theoretical interpretation. The rights of nature can be interpreted as nature's property rights in its resources.[8] They can be justified if they emerge from the logic of recognized property rights. Their validity arises from the rationality of valid property rights. If humans have property rights, then there is no rational reason to withhold them from nature. Nature thus possesses property rights on one condition: if humans have property rights.

The argument for nature's property rights is built on three premises. The first premise is: for reasons of freedom, the rule 'value creation justifies property'. The second premise is that labor and ecosystem services are two types of value creation. The third premise is: the rule 'value creation justifies ownership' applies to any type of value creation because of its regularity. It follows that the rule 'value creation justifies property' also applies to nature. Accordingly, nature is entitled to the ownership of its resources.

First to the first premise, according to which, for reasons of freedom, the rule 'creation of value justifies property' applies. Freedom forms the normative content of property. Because freedom is exercised in relation to external goods in the form of property and freedom is a norm worthy of protection, property deserves protection. In this context,

8 A similar proposal to concretize the rights of nature as their property rights is made by Christopher D. Stone. However, while I am concerned with the grounding of nature's rights from existing property law, for Stone property rights serve to bioeconomically tie natural goods to a price. "Wherever the legal system derives and develops rights from 'property,' it is concerned with working out the value expressed in money: For example, an author's literary work would have minimal monetary value if anyone could reprint it at will. [...] My proposal is to treat eagles and wilderness areas like copyrighted works, patented inventions, or legally protected privacy; I propose to raise the violation of their rights to a cost, and to do so by labeling the 'piracy' perpetrated on them as an encroachment on some kind of property right. If we proceeded in this way, the net social costs faced by the polluter would no longer include only the extensive anthropocentric costs of his pollution [...] but would, in addition, include the costs of the environment per se" (Stone, 2013, p. 40f).

freedom takes the form of material self-determination. Freedom is concretized on an economic level in relation to external goods. Property is the legalization of this material self-determination. Material self-determination empowers people to provide themselves with goods by their own efforts, free of dirigiste allocations. Here, people earn their living free from a patronizing provider and breadwinner who gives his own what they need. Thus they can form and publicly represent a will free from fear of sanctions. Material self-determination is now guaranteed by the general right to property. The right to property guarantees that persons can provide themselves with goods that are relevant to life, regardless of social position, origin, reputation, attitude or gender. It thus liberates from feudal, paternalistic, and hegemonic dependencies. Material self-determination is historically also referred to as 'bourgeois self-reliance', although this implies a preliminary decision. In bourgeois society, material self-determination is exercised predominantly or even exclusively in the form of private property. Against this, it is to be objected that it is guaranteed in relation to certain goods - for example natural goods –also by common or public property.[9]

Ownership of the proceeds of one's own labor enables a self-determined supply of goods and thus realizes freedom on a material level. If freedom is a norm worthy of protection and if freedom is realized through the right to ownership of the proceeds of labor, then the right to ownership of the proceeds of labor is also considered worthy of protection. For with the help of such property, material self-determination and thus freedom is (partially) realized. Freedom is therefore a reason for the right to ownership of the yield of one's own activity. In this respect, the value-theoretical rule 'value creation entitles to property' applies.

7. Ecosystem services

According to the second premise, labor and ecosystem services are two types of value creation. Besides natural resource processing, ecosystem services are a source of value creation. However, the value creation of nature should not be thought of as if nature itself were a kind of actor, as if it itself created value or did something valuable. Nature is a subject of law, but not a subject of action. It does not act, for it lacks the will and reasoning capacity presupposed by actions such as labor. Ecosystem services are understood as "the direct and indirect contributions of ecosystems to human well-being" (UNEP, 2010, p. 19). While work and nature are sources of value creation, they each possess different grammars. For nature, the passive – 'value is added or contributed to by natural resources'– is more appropriate than the active

9 The assumption that freedom is not only exercised as private property but also in the form of common and public property is elaborated in (Wesche, 2014).

– 'labor contributes to value creation'. Nature is a source of value creation rather in the passive sense of ecosystem services contributing to value creation. In this context, it is not nature that feeds value into value creation, but it is fed in via its human processing.

Ecosystem services include not only substances such as carbon compounds or qualities such as combustibility, but also processes such as solar radiation, food cycles, and eco-balances. Four types of ecosystem services are distinguished (World Wide Fund for Nature, 2016, p. 16; Boyd & Banzhaf, 2007). 1. provisioning services such as soil formation, photosynthesis, and nutrient cycling are processes that enable the production of goods essential for survival in the first place. 2. regulatory services such as water purification, pollination (Karfyllis, 2018), and regulation of pests, erosion, climate, and air quality stabilize an environment in which human life can thrive. 3. aesthetic and health benefits promote human well-being and welfare by allowing nature to be used for recreation, creativity, and meditation. 4. basic services such as raw materials, medicines, and food make goods available to people that are necessary for their survival and good life.

These properties are not produced by humans, but are produced by nature. In contrast to processing by humans, ecosystem services constitute the value component of natural resources that is not made by humans. They are resources insofar as they serve to satisfy needs; meanwhile, they are natural resources insofar as they are not something made. Although they are not man-made, they are used by man. Natural resources arise from biological, chemical, and physical (long-term) processes. These 'natural' processes are ecosystem services: 'nature' means, first of all, that which is not man-made but arises nonetheless. What is not man-made, but nevertheless emerges, is something that produces itself. Nature therefore means more precisely the 'naturalness', according to which something is brought forth by itself. The cause for something real lies here not in the human action, but in this real itself. The (long-term) processes from which natural resources emerge are thus processes of self-causation; they are natural, that is, self-caused processes. It is through these self-caused processes that value is added. These self-caused processes are called ecosystem services. Ecosystem services thus contribute to value creation, which comes from nature. Nature is thus also a source of value creation that cannot be offset against human labor (Anderson, 1993; Körg, 2015).

8. Natural resources (also) belong to nature.

The third premise is that the rule 'value creation justifies property' applies equally to any kind of value creation because of its regularity. Accordingly, it is based on the idea of the lawfulness that a rule possesses: lawfulness is the distinctive feature that makes a

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rule a rule, and that allows a general rule to be applied equally to each particular case.[10] The regularity of a rule has the form 'Whenever a, then b'. For example, whenever value is contributed to, a right to ownership of the value produced follows. This rule 'Value creation justifies ownership' has a regularity as a rule, according to which it applies to every case of value creation and thus also to ecosystem services.

Because of this regularity, the rule 'value creation justifies ownership' is extended to nature. The rule is thus determined starting from human labor and then transferred to ecosystem services. Its transfer takes place in three steps. First, the rule applies in terms of labor returns. Whenever free beings contribute to value creation through labor, the right to ownership of the value produced applies. Thus, starting from labor, the rule 'value creation justifies ownership' is established. Second, this rule is applied to natural resources by applying to their processing. Processing is a form of labor and therefore, people acquire a (proportional) ownership of natural resources by processing them. Third, the rule 'value creation justifies ownership' also applies to nature because it is a case of value creation that falls under the rule. This is because if processing is considered labor that entitles to ownership of its proceeds, then the sphere of validity of this rule is extended to natural resources. Now, insofar as natural resources fall within the sphere of validity of the rule, it applies, by virtue of its legality, to every instance of value creation in that sphere of validity and, to that extent, also to the value creation of nature. To put it negatively, if with the processing of natural resources, no claim is made to the ownership of the resulting values, then the sphere of validity of the rule would not be extended to natural resources and thus the rule would not apply to the value creation of nature. Thus, if in the case of natural resources, the rule 'value creation justifies ownership' applies to people and their labor, then by its legality it must also apply to ecosystem services. Because its regularity allows it to be generalized to all cases of value creation, and because nature is a source of value creation, it also applies to nature. Ecosystem services are thus accompanied by a right to ownership of the value created.

9. Sustainable ownership

People do have a right to proportionate ownership of natural resources by virtue of their processing. However, natural resources are also alien property to them. They do not own them, for they are equally the property of nature. In using, exploiting and transferring natural resources, they always use, exploit and transfer alien property. Alien property, however, imposes certain obligations on its users by virtue of property

10 The regularity of a rule is explained by Ernst Tugendhat (1993, pp. 133-135).

protection. Through property protection, goods that belong to one are protected from threats by individual or collective interests of others. Therefore, anyone who uses another's property may neither damage nor destroy it. For example, tenants are obliged to use their apartment carefully because it is another's property. People are therefore allowed to use, exploit and transfer natural resources because they are co-owners of them. However, they are obligated to use, exploit, and transfer in a manner that does not threaten natural resources. For reasons of property protection, natural resources are to be respected as the property of others and used in a sustainable manner accordingly. Thus, the same property right that guarantees their use includes property protection that in turn limits that use.

Property protection obligates users of another's property to preserve it, that is, to neither damage nor destroy it through its use. This duty to preserve property is synonymous with the duty to use it in a sustainable manner. The duty to preserve natural resources is thus a sustainability duty inherent in the very idea of property. Because natural resources are also alien property to humans and property protection obligates them to deal with alien property in a sustainable manner, therefore humans are obligated to deal with natural resources in a sustainable manner for reasons inherent in the property idea itself.

Ownership of natural resources in this respect obligates their users to be sustainable. It can therefore be called *sustainable property*. Only apparently are ownership and sustainability mutually exclusive.[11] This is because free property power over natural resources is limited by sustainability obligations inherent in the very idea of property. Sustainability is not something external to property, but arises from the logic of property itself. Property, then, is an argument not against but for sustainability. To develop an argument for sustainability, therefore, the defenders of freehold property need not be convinced of anything other than what can be read from their own lips.

Sustainable property now enables robust sustainability that holds up against economic functional requirements.[12] By deriving the sustainability obligation from property rights themselves, it is possible from the outset to bring the two into a coherent relationship; their scopes do not have to be corrected afterwards, as in environmental ethics. Economic functional requirements are limited here by sustainability obligations before they gain a strong validity. In this respect, these sustainability obligations have a robust validity that can assert itself against economic functional requirements.

11 Kai Bosselmann (2011) and Peter D. Burdon (2014) make a similar suggestion from a jurisprudential perspective on how to reconcile ownership and sustainability.

12 See on the concept of strong sustainability: Ott & Döring (2008); Bosselmann (2016).

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