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READING RECOMMENDATION

ANTHROPOCENTRISM IN EUROPEAN PRIVATE LAW AND THE CASE OF BEN NEVIS

December 14, 2017

It is a truth universally acknowledged that a constitutional state in possession of democratic institutions must have been made by humans. Law more generally is a human construction. Law is considered by some to be even problematically anthropocentric, that is, it would be overtly focused at human interests and thereby neglect the interests of animals and other forms of life on the planet.[1] Yet, in national legal systems across the globe, more and more *natural entities* get assigned legal personality: rivers, woods, mountains, even Mother Earth herself. This fascinating movement has entered the sphere of European private law, now the Scottish *Muir Trust Foundation* considers to endow its property, the mountain Ben Nevis, with legal personality.[2] Key questions here are whether such a move would diminish anthropocentrism in the law and whether it would lead to better environmental protection.

Anthropocentrism

Many agree that the legitimacy of *democratic* laws follows from the idea that all those who have to abide by them have a voice in its construction.[3] This is very close to *the principle of all affected interests*, stipulating that all interests touched upon by a certain law should be considered in the process of law-making.[4] Yet the entities who have a voice in the law-making process typically are human beings, mostly inclined to defend human

interests, which can lead to the problem of the law to be anthropocentric. The results are clear: Even though international consensus exists on the necessity to act upon – for instance – climate change, governments find great difficulties to implement environmental measures. In the world of today, many species are endangered or actually die out, rivers are polluted and entire islands disappear below sea level. Human wealth and technology thrive more than ever.

Legal personality

‘Legal personality’ is a status the law can assign to an entity; it refers to the ability to bear legal rights and duties and to defend those in court. Interestingly, legal systems do consider not only human beings to be legal persons, but also corporations and institutions such as municipalities, States, or churches. Animals and other natural entities normally have no legal status – for the law, they are mere ‘things’. This is to say that people may have responsibilities towards them, but normally these natural entities cannot defend their rights in court rooms, let alone articulate their voice, or vote in the political process.

Legal personality for natural entities

Yet in 2008, Ecuador was the first country on the world to include in its constitution rights of nature, *Pachamama*. Furthermore, in 2010, Bolivia proclaimed its *Ley de Derechos de la Madre Tierra* (the law on the rights of Mother Earth) – making the Earth a legal person in the Bolivian legal system. In Argentina a similar proposal is made. Last summer, in Columbia and India, courts recognized certain rivers to have legal personality;^[5] in New Zealand, the same was done by legislation for a river and a forest.

Environmental protection

In India and New Zealand, the reasons for endowing these rivers with legal personality were mostly religious – people in these countries consider the rivers to be divine entities. The Bolivian, Columbian and Ecuadorian moves, in contrast, were inspired by more environmental reasons. The Scottish Muir Trust Foundation is a conservation charity dedicated to protecting and enhancing wild places in the UK.^[6] Its reasons for giving the Ben Nevis – the highest mountain in the UK – the status of a legal person is purely environmental: nature and wild life should be protected. Lawyers working for the Muir Trust Foundation call themselves ‘wildlife lawyers’.

Balancing rights in private law

The question now becomes, of course, whether endowing a natural entity with legal personality indeed leads to better environmental protection. To be a legal person and thus, to be able to defend one’s rights in court does not automatically mean one’s interests prevail in a private law conflict. On the contrary, in private law the rights and interests of two parties are typically balanced against each other. Outcomes can be a compromise or an outright loss for one party. Imagine some corporation (= a legal person) would litigate about its factory situated close to the legal person the Ben Nevis. The interests of this hypothetical factory could very well prevail against the interests of the mountain in private law litigation. Therefore, possibly stronger environmental

protection could be obtained if governments simply declared natural entities to be national parks, or official 'wild life areas' that merit absolute protection against industrial interests.

Power of private law and the role of judges

For that last option, however, governments have to be willing to do so, whereas the core of problem 'democratic laws are anthropocentric' is precisely that environmental measures prove to be unpopular. The force of private law, now, is its bottom-up nature: a private foundation, such as Muir Trust, can decide to transform its property, a mountain, into a legal person. Judges have a particularly important role to play here for it is for them to either acknowledge this legal personality and allow the natural entity standing in court to dismiss the whole construction as ridiculous.

Judges for Utopia

Judges applying European private law should not be too proud, nor too prejudiced towards legal persons for natural entities. Certainly, legal personality is a mere legal status – a fiction, so to say – which does not lead to any better environmental protection as such. In this vein, Nick Mount remarked about the Columbian river with legal personality: "The Atrato River in general, and Rio Quito in particular, serve as a stark reminder that awarding environmental rights is not the same as realising them."^[7] Yet we should not forget the symbolic power of fiction that may lead us closer to a Utopia in the positive sense of the word. In political philosophy, calls are made to include animal voices in the democratic process,^[8] or even 'things'.^[9] The rivers with legal personality and the Ben Nevis cannot vote for the elections (nor corporations, nor churches for that matter). Yet to consider not only humans and their corporations, but also natural entities to be persons, legally speaking, might be a first step to turn the anthropocentric tide of our legal system.

[1] Cf eg Stephen M. Gardiner *Debating Climate Ethics* Oxford University Press (Oxford: 2016), pp 32-37

[2] https://www.johnmuirtrust.org/assets/000/002/678/John_Muir_Trust_Journal_63_Autumn_2017_original.pdf 1508494702 and also <https://www.ukela.org/content/page/6379/ben%20nevis.pdf>

[3] Cf eg Jürgen Habermas *Faktizität und Geltung; Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* Suhrkamp Verlag (Frankfurt: 1998), p 14

[4] Robert Goodin explains very clearly why this principle reflects the essence of democracy in 'Enfranchising All Affected Interests, and Its Alternatives' 35 *Philosophy & Public Affairs* 1 (2016), pp 40-6

[5] In India, this order is however stayed by the Supreme Court – we have to await how this is eventually

going to be decided.

[6] <https://www.johnmuirtrust.org/>

[7] Nick Mount 'Can a river have legal rights? I visited the jungles of Colombia to find out' *The Conversat* 6 October 2017

[8] Sue Donaldson & Will Kymlicka *Zoopolis, a Political Theory of Animal Rights* Oxford University Press (Oxford: 2011); Eva Meijer *Political Animal Voices* PhD Thesis Univeristy of Amsterdam (Amsterdam: 2017) accessible through <https://pure.uva.nl/ws/files/15946241/Thesis.pdf>

[9] Bruno Latour has called for a 'parliament of things' to be established in *We have never been modern* Harvard Univeristy Press (Harvard: 1993) pp 142-145 and, later, again in *Facing Gaia* Polity Press (Cambridge: 2017). In 2015, students set up a parliament of things to negotiate a new climate agreement the same time as the conference of the parties of the United Nations Framework Convention on Climate Change, the latter of which resulted in the Paris Agreement, which is celebrated for its ambition. It turned out that the students, amongst whom not only representatives of countries, but also of, for instance, oceans were included, came up with an even more ambitious agreement. This enormous experiment was caught on film by David Bornstein in the movie *Making it Work*, which can be watched online for free. For further artistic experiments with this idea, see also

<https://www.youtube.com/watch?v=oxG0ZWNpe1s>

By *Laura Burgers*

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