Environment, Political Representation, and the Challenge of Rights

Speaking for Nature

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Introduction: *Voicing*

When speaking for others, what is it that we do? Why should others even be spoken for? There is an arrogance to speaking that inheres in the voice itself, and nowhere is this clearer than when one speaks for an-other. In voicing a claim, the speaker substitutes herself for the one she speaks for, as if she knew, with any amount of certainty, what *they* would say. Does it matter whether what they would say is what she says? Perhaps not, but speaking *for* raises the possibility of disjunction and thus reveals the distance, the conceit, and the silencing at its core.

Nowhere are the mechanisms of speaking for better revealed than when human beings speak for non-human ones. Indeed, in our times, claims in the name of voiceless beings are routine, and it is often hard to put order in the cacophony of voices vying for attention. This book will attempt to bring some clarity to the human/non-human ventriloquism of today. In the first instance, I focus on the concept that houses the kind of speaking I am after: representation. Characterized as primarily a claim-making activity, the concept of representation can help us understand a very important part of what goes on when voicing other's interests and concerns. In a second step, I investigate a concept that enjoys hegemonic power over our political imagination and that, perhaps because of its unprecedented power, often becomes part of what we claim in the name of others: rights. Rights are claimed, by political representatives of non-humans, in many different cases, and the fundamental question is what rights predicated of voiceless beings might mean.

In this connection it is instructive to see what human beings, acting as non-humans' representatives, have actually said and done in several cases. The kind of case that allows me to best draw out the imbroglios of representation and rights is one that speaks for distant non-humans in the language of rights. Nothing better here than the *rights of nature*.

The concepts that form this expression – rights, nature and, hidden in the background, representation – are striking when put together. The usual responses to this formulation are predictable: scorn, or passionate activism. The one response that is needed, however, is also the most conspicuously absent: an honest effort to understand, contextualize, and evaluate. This is the space that the present book tries to fill, by resisting the default responses and instead engaging in conceptual analysis (Part I) and applying it to the rights of nature that exist, in practice, to date (Part II).

Understand. To do so, it is necessary to pick out the constituent parts of the rights of nature and treat them, at first, separately. I will therefore start with the concept of representation, without which no notion of speaking for non-humans can stand. My understanding of representation, which will be explained in detail in Chapter 1, will reveal the subjects on either side of a representative relation to be infinitely contestable and unstable beings whose very existence is predicated unto the representative process and is not, in any political sense, prior to it. Then, I will delve into the meaning of rights (Chapter 2) as well as their application to non-humans (Chapter 3), in order to understand both what rights mean, as well as how they are inserted into and connected with the process of representation that is fundamental for voicing others.

Contextualize. There can be no understanding without a well mapped out context. Conceptually, this will be done in the theoretical chapters. But part of the context is also given by the legal implementations so far. The rights of nature did not come out of nowhere: they arrived from a definite intellectual history, as well as a definite time and place and politics. Chapter 4 will investigate this context in Ecuador, the seat of the first constitutional rights of nature in history. This case, both in terms of publicity and in quite substantive ones, has become the paradigmatic rights of nature case so far. It incorporates contextual and conceptual elements that furnish an early backbone to the practice of rights for nature. So I will spend some time bringing out what nature's representatives in Ecuador have claimed in nature's name, how they managed to achieve a constitutional historical first, and what the actual rights of nature in Ecuador are. Then, Chapter 5 will look at all the other cases of the rights of nature to date, from US municipal ordinances starting in 2006 and continuing today, to Bolivia's law of Mother Earth, New Zealand's rights of personhood for the Whanganui river, and the International Declaration of the Rights of Mother Earth of 2010. These cases will allow us to anchor the theoretical work and to slowly come

to appreciate the meaning of the rights of nature and their increasing variety. Chapter 6 will discuss the cases presented from the point of view of the concepts previously developed. In the process, the context will become richer. I will be able to attend to the concept of nature itself, as well as to the subject-positions that are coalesced around it in the act of speaking.

Evaluate. A facile evaluation would be one that asks: does it work? That question, when meant in terms of what the rights of nature have so far *delivered*, misses a much more important sense in which something can be evaluated. What I am interested in is whether the rights of nature make sense, if so how and under which conditions and, pending those specifications, how they are likely to interact with the legal and political worlds in which they operate. This kind of 'evaluation' doesn't give an easy yes/no answer, but instead provides the soundest possible foundation for thinking and doing, with or against, the rights of nature. In other words, I cannot tell you, the reader, what to think. I will simply try my best to give you all the tools I find necessary for thinking the rights of nature. Chapters 6 and 7 will offer my own reflections on the intelligibility and coherence of the rights of nature, without these being meant as a verdict. In the end, I hope to have provided as honest a treatment of the theory and practice of the rights of nature as I can muster.

Part I
Theoretical Elaboration

1
Representation: Structure and Meaning

In this chapter I will describe what I see as the basic outline of non-human political representation in order to give an account of what goes on when we represent. The starting point for this reflection is given by the following issues: what is the structure of political representation, who or what is being represented, by whom, and what kinds of subjects does this activity engage? I will start with a very brief overview of these issues in classical representation,[1] juxtaposing them with environmental political thought in order to see how our political conception of representation is modified (if at all) by the inclusion within its scope of non-human beings.

Seeing how the goal of this chapter is to offer an account of non-human representation, it might seem strange to start with humans. Why, after all, not go straight to the center of the problem, and engage directly with the nature that we seek? As I hope to show, non-human representation is mostly about humans, and it is there that we must continually return if we are to keep any kind of footing in an otherwise complex and confusing activity. Furthermore, the borders between animality and humanity, or humanity and the natural (understood as the not human-made), are notoriously porous, and have routinely functioned as mechanisms of human exclusion (Bourke, 2011). These shifting borders, and their inherent lack of clarity, give important insights into a theory of representation, by bringing some clarity to the process: when we speak for others, we might just be – unknowingly or otherwise – consolidating ourselves. That is yet to be shown. For now it suffices to say that an investigation into the representation of non-humans has to start with, and continually return to, those fidgety political animals that, having become a geological force, find it necessary to endow animals and nature with political being.[2]

1.1 Classical representation

As Urbinati and Warren (2008) present it, the 'standard model' of representation has four key features: representation is a principal–agent relation; it opens up the space where state power and the sovereignty of the people can be identified; it assures some level of responsiveness between representative and represented; and political equality becomes an important element brought about by the extension of the franchise (Urbinati and Warren, 2008, p. 389). This model responds in a particular way to the two most fundamental questions of political representation: what is it about? and who does it? (Saward, 2008). The first question asks what representation is supposed to achieve, and the standard model proposes that representation is supposed to realize the interests and wishes of a constituency. This in turn has been interpreted as either a trustee or a delegate model: representatives can either act as trustees of the interests of the represented, or else be delegated to achieve certain outcomes.

In terms of who does the representing, a focus on the principal agent relation naturally puts forth the figure of the agent.[3] The movement between the agent, as the active party in the representational process, and the principal, which is the one providing the interests and wishes to be represented, is confined to electoral cycles. In other words, elections appear as the dominant form of *authorization* for representatives to act on behalf of their constituency. *Accountability* also becomes important as another source of legitimacy for the representatives that do the work of representation. Together, the concepts of principal/agent, trustee/delegate, and authorization/accountability have for a long time been the dominant ones for a theory of representation. Others have been inserted within these dyads, and their internal relations have been complicated and contested. It can nonetheless be said that the standard model offers a particular flavor of representation that is primarily tied to elections and that conceives of this political process as a *translation of interests*, through various avenues, from the represented to the representative. There is in other words a one-to-one relation between constituency interests/preferences and the representative's intensions and actions.[4]

The above summary gave the classic answers to the questions of what representation is about, and who does it. But the idea that representation has to do with interest translation can be gaged through another lens, namely through the structure of political representation under the standard account. Pitkin noted that, no matter what kind of

representation we might be considering, it must involve the 'making present in *some sense* of something which is nevertheless *not* present literally or in fact' (Pitkin, 1967, p. 8–9). Traditionally, Pitkin's definition has been understood as requiring some sort of previous identity that could be made present, again. Yet increasingly scholars have questioned this interpretation (for example, Disch, 2011). The idea that there need to be coalesced interests and identities to be re-presented is not as obvious as it first appears. However, the point remains that the structure of representation proposed by Pitkin went unchallenged in the standard account (Urbinati and Warren, 2008) and was widely interpreted as relying on previously coalesced interests and identities that representation could 'access'. This means that, even though not exactly a straight line, the relationship between represented and representative is nonetheless one based on a kind of mirroring, with interests playing the pivotal role (Mansbridge, 1999; Disch, 2009). Let us call the view of representation that supposes a pairing of interests and actions the *referential* view, to denote the way in which the representative and the represented refer to each other in the process of representation.

This dominant, traditional understanding of representation has recently come under intense scrutiny. As Saward points out, 'among academic observers and political actors there is a widespread sense that we are facing a crisis of representation' (Saward, 2008). From many different camps, the idea that representation can and should function as a vectored relation between political actors and constituencies has been questioned: new empirical observations that do not fit the standard model have worked to undermine it. For instance, this model cannot sufficiently account for how representation can work in international arenas (Held, 1995; Dryzek, 2000), or generally in explaining issues that are extraterritorial (Douzinas, 2000; Benhabib, 2004; Gould, 2004; Bohman, 2007). The standard model functioned under the (not unreasonable) assumption that constituencies are territorially based, but in today's world many of the salient issues are no longer defined by their territorial belonging. For instance, environmental issues such as pollution are notoriously global, as smog clouds tend to be indifferent to territorial delineations (Dobson, 1996). Furthermore, many different actors that have not been authorized through elections claim to and do indeed function as representatives. Social movements and citizen assemblies, non-governmental organizations and social networks, as well as interest groups and civil society organizations (Warren, 2001; Anheier, 2004; Saward, 2006a; Strolovitch, 2006) have become increasingly important. And most importantly for my purposes, the issue of

non-human representation has come to question most, if not all, parts of the standard model (Dobson, 1996; Goodin, 1996; Eckersley, 1999, 2011; Dobson and Eckersley, 2006).

Despite this scrutiny, the attraction to the 'present absence' paradigm lingers on even as we complicate our view of interests and identities, apparently distancing ourselves from the standard view of representation. This has real repercussions for the representation of humans and non-humans alike, and it is by focusing on the specificity of the latter kind that important aspects of representation as such are revealed. As often happens, the cases that straddle the borders of a theory are the most illuminating for the whole theory. Seeing how 'the animal' and 'the natural' have been our borders from time immemorial, functioning as that crucial delimitation which allows us to form a concept of ourselves[5] (Derrida, 2008, 2009; Bourke, 2011; Shipman, 2011), it is within the domain of non-human representation that we can most clearly see the problems of classical representation as well. But before we get there, we need to turn to some conceptual developments that hold the promise of delivering the theorist from the clutches of present absence.

1.1.1 Enlarging the view: summoning, creating, performing

One of the most promising conceptual developments away from the referential view has been the characterization of representation in terms of representative claims (Saward, 2003, 2006a, b). Saward explicitly proposes a novel way of looking at the *dynamics* of representation, as opposed to its *forms*.[6] 'Trustees, delegates, politicos, stewards, perspectival representatives – the shifting taxonomies are often illuminating, but they can distract us unduly from grasping what are the wellsprings of such roles' (Saward, 2006b, p. 298). This is another way of making the argument that, while the different forms of representation that we have briefly touched upon are important and legitimate in their own right, they too easily let a dubious conception of what representation *is* slide.[7] Saward goes on to 'argue the benefits of refocusing our work on representation around what I call "the representative claim" – seeing representation in terms of claims to be representative by a variety of political actors, rather than (as is normally the case) seeing it as an achieved, or potentially achievable, state of affairs as a result of election. We need to move away from the idea that representation is first and foremost a given, factual product of elections, rather than a precarious and curious sort of claim about a dynamic relationship' (Saward, 2006b).

It is precisely the characterization of representation as 'a precarious and curious sort of claim about a dynamic relationship' that allows

us to look at the practice of representation, and hence encourages us to think again its necessary structure. The focus on the dynamism of the relationship offers a way out of the ossified interests that are waiting to be discovered and announced. Rather, this view stresses the fact that representations themselves are the primary category in a theory of representation, and that it is through them that we can understand the being of both the represented and the representative. Said differently, representations might be the midwives of the subjectivities that dissimulate themselves as being prior to their own birth.

'There is an indispensable aesthetic moment in political representation because the represented is never just given, unambiguous, transparent' (Saward, 2006b, p. 310). The characterization of representation as a creative activity of claim-making allows the concept to travel in the direction of its family resemblances. We could call the different terrains that the concept surveys the 'territories of representation,' and even though they encompass as much diversity as a physical landscape, there is nonetheless a family resemblance (Wittgenstein, 2001). To be sure, aesthetic, religious, political, social, and cultural representations differ from one another and within their own territories, sometimes greatly, and it would be a mistake to confuse them. But it would be an equal mistake to treat them as having nothing to teach about each other. The territories of representation can be seen as the total tool-kit of the concept, with different tools and techniques called forth by particular circumstances. But just as sometimes the painter's brush is useful in putting the final touches on a sculpture, so too the tools available to political representation are often borrowed from others of its territories. It is in this sense that I think we have to understand Saward's suggestion that there is an 'indispensable aesthetic moment' in political representation.

This way of thinking political representation recasts and illuminates the 'paradox of present absence' that has been the core of representation theory. Saward employs the following example: 'the painter Paul Klee took the view that painting did not mimic or copy, or even in the first instance interpret, its referent. What it did, first and foremost, was "make visible" the referent' (Saward, 2006b, p. 313). In other words, what it did was *create* its referent, much in the same way that language creates objects that could never exist, *as presented,* in fact and, more importantly, whose factual existence is quite indifferent to the functioning of language.[8] The issues of aesthetic and linguistic representation make it possible for us to understand the motivating core of representation, which remains largely unchanged in its political guise.[9]

The question is whether the paradigm of present absence accurately describes this core.

Following Saward's suggestion that the notion of visibility can have interesting repercussions for politics as well,[10] I want to turn briefly to Merleau-Ponty, particularly to several of his ideas about the nature of painting, occasioned by his interest in the structure of perception. Commenting on the work of Cezanne in his 1945 essay *Cezanne's Doubt*, he notes the following: 'art is not imitation, nor is it something manufactured according to the wishes of instinct or good taste. It is a process of expression. Just as the function of words is to name – that is, to grasp the nature of what appears to us in a confused way and to place it before us as a recognizable object – so it is up to the painter, said Gasquet, to "objectify," "project," and "arrest." Words do not *look like* the things they designate; and a picture is not a *trompe-l'oeil*' (Merleau-Ponty, 1993, p. 68, emphases in original). He ends the paragraph with this wonderful, and for our purposes very suggestive, sentence: 'the painter recaptures and converts into visible objects what would, without him, remain walled up in the separate life of each consciousness: the vibration of appearances which is the cradle of things.' The key insight of Merleau-Ponty here is that, through painting, the maker of representations *converts* that which, without such conversion, would be simply unintelligible, because it would remain unformulated – unshaped – appearance. This is to say that what a thing is cannot be understood outside of its expression. Similarly, political representation converts what would otherwise be unintelligible, into a political subject. All this is to say that to think the problem of representation as a tit-for-tat, an (albeit complex) operation of replication, fundamentally misses the point of representations.

If the world were composed of discrete and unproblematic entities, representation would indeed be a perfect mirroring. As things stand though, even material objects are not simply mirrored by their representations, but rather made to live anew. The strange operations of representation already indicate its ontological implication. Without it, things would remain 'walled up in the separate life of each consciousness' which, for politics, means that political subjectivities are made to connect by (and in) the process of representation. Without it, there would be no political being, as opposed to other kinds of human existence. It is through and by the process of representation that political subjectivities are fashioned, distinct from, and irreducible to, existential personhood. Merleau-Ponty is here speaking of painting, but following the suggestion that representations inhabit related territories, and that

the issue of visibility is as important in politics as it is in painting, his insights are certainly applicable to the political territory that occupies us. Surely, we must not confuse aesthetic and political representations, even while they reveal their mutual implications. Aspects of the concept remain sealed into their proper terrain. As he aptly suggests in *Eye and Mind*, 'only the painter is entitled to look at everything without being obliged to appraise what he sees' (Merleau-Ponty, 1993, p. 123). The political subject does not have this luxury. In contrast to aesthetic representations, the maker of political representations must already include the appraisal, or the judgment of the object, into the way in which it is summoned into being.

There is indeed a sense in which presence and absence are intertwined in the various terrains of representation. The task of the painter is to make visible certain features that would otherwise remain 'walled up', and the task of the political representative is to make visible certain beings that would otherwise be invisible.[11] But this activity does not have to rely on a pre-defined being of the represented, nor does it have to suppose the ready existence of interests that can be plucked from the consciousness of another. Rather, the activity of making visible – of representing – is the very medium through which the things we call by the names of interests and identities come into being. The interests and identities thus summoned into existence are precarious – to appropriate one of Judith Butler's wonderful formulations, representations reveal 'the volatility of one's "place" within the community of speakers' (Butler, 1997). From this perspective, the classical paradigm of present absence is insufficient and misleading, because there is no objective being previous to the representation that could be considered 'absent'. Absence does not have to refer to physicality, but rather to the non-relevance of a latent feature, to something that *as yet* has not been articulated politically. Similarly, presence need not be taken as physically *there*, or else as an evidence (something being evidently so), but rather as the articulation of something newly relevant for politics.

As Disch (2011, p. 105) has already suggested, classical representation goes astray by interpreting the etymological roots of representation as a 'protocol of unidirectionality'. However, using Derrida's work on iterability (1967), she claims that 're-presentation' is ambiguous as to where the interpretive accent is to fall – if on making present *again*, then we are within the classical conception that we are trying to overcome. Instead, she suggests to 'put the emphasis on the *making* present, activating the "re" of repetition (iterative and active)'. This is to say that re-presenting is not *obviously* a paradox of presence and absence, where

a literal absence is made present, as it were re-captured by an agent. Rather, the prefix re- can be taken as signaling toward a repetition whose goal is to *make* present – a repetition which does not recapitulate or re-claim, but one which makes visible, makes the subject of representation available to be counted. Basing a theory of representation on this kind of analysis, though increasingly supported by empirical scholarship as well,[12] is not dependent on empirical proof, because it is descriptive in the way that an axiom is descriptive: it proposes the very rules for further description, while implicitly claiming that its axiomatic form can make most sense of what it is we do when we represent. To this end, there are many ways of grounding these reflections. Derrida's iterability can be used, as Disch does, as can Wittgenstein[13] and his methodological emphasis on cases and descriptive conceptual mapping. Earlier, I convoked Merleau-Ponty to help us visualize how becoming-visible is a work of creation akin to the work of the painter. In Section 1.1.2, I will use Badiou's work to ground the theory of representation in 'irreducible multiplicity'. My choice of Badiou has to do with the axiomatic nature of multiplicity, which is rightly emphasized in his system, and with the fact that it allows me to draw out and theorize further the relational nature of representation (as opposed to its interest-based, referential, account).

Anticipating further elaborations, I want to already offer what representation can mean under this account. *To represent is to summon a thing into being in virtue of select aspects deemed useful for further relations with similarly summoned beings*. Another way of expressing this same point is that representation is not about representing beings (human, non-human, or objects), or their interests, but rather about *representing relations*. It is in the relational, as opposed to the referential, character of representation that we can find a statement on the nature of representation that offers the possibility of explaining the proliferation of representative situations and claims.

1.1.2 Axiomatic multiplicity

So far, after briefly presenting the elements of the classical conception of representation, I have started building an alternative view. I have argued that understanding the interplay of presence and absence in quasi-physical senses is misleading, because it portrays the beings involved in representational relations, and the process itself, as fundamentally uncreative: it makes it seem as if representation is a matter of mastering the right technique. Instead, I have turned to the work of Saward to look for another way of characterizing the representative process, one

that would take stock of the creativity involved in the process. Indeed, Saward insists on the creative aspects of representation, and attempts to make these aspects conspicuous by characterizing representation as an activity of claim-making: the representative presents claims to both be representative, and to know what the represented themselves want, need, and so on. This re-characterizes the relationship of presence and absence, and inscribes the idea of summoning, or *making visible*, into the heart of the representative process. Building unto Saward's work, I offered, via the work of Merleau-Ponty, another working notion of political representation, which centers around the activity of claim-making, as well as around the concept of relation. In the remainder of this section, I want to offer an argument for why relations, as opposed to simple reference, need to be reckoned with in a theory of representation. In other words, what is meant by a 'relation'? Whose, and to whom (or what)?

In order to describe its various meanings, its foundations, and the way in which it grounds the claim-making process of representation, I will co-opt elements from the ontology of Badiou (2002, 2007). Developed in *Being and Event*, the basic idea of Badiou's ontology is that the ontological unit of analysis, that is to say that unit of analysis which can no longer be divided, is neither a one nor a zero (an idea inspired by set theory). Rather, it is infinite and irreducible multiplicity. What this means is that the bedrock of an ontological analysis (and a theory of representation is in effect a theory of political ontology) cannot be constituted by a certainty that can be repeated at a higher level, by a solid that can no longer be divided, but rather that the bedrock is itself multiple, but in such a way as to form a unity of multiples that, if divided, will only lead back to itself. Hence the concept of *irreducible multiplicity*, as that which is both multiple and indivisible, that is to say plural and unitary at the same time. The implication is that any postulation of a one or a zero, that is to say any claim of stable and given identity or its opposite, nothingness, can only be done on the horizon of a pre-existing multiple. As such, to claim presence as unproblematic and self-evident and unity of identity as primary is misleading. 'To exist as a multiple is always to belong to a multiplicity. To exist is to be an element *of*' (Badiou, 2002).

We can employ this basic scheme to further illuminate the structure of political representation: what is represented is, of necessity, a multiplicity upon which a unity can be postulated, not the other way round. To say that being is already multiple, and that unity is a further postulate, is not a proposition of phenomenology, though it might hold true there as well. Rather, it is a matter of abstract form which accords both

with the abstract form of political representation, and with the actually lived experience of individuals. So the first step in understanding what is meant by the primacy of relations in political representation is to acknowledge that whatever is represented, as well as whomever does the representing, is logically an irreducible multiplicity. Therefore, the first layer of the relation is the dynamisms of claim-making which confers a certain coherence, a *semblance of unity*, unto the irreducibly multiple. In this guise, the relation of representation signifies the summoning into political being which is accomplished by the activity of making claims. If we conceive of the objects and subjects of representation as fundamentally multiple, then the first accomplishment of a representative process, achieved via the claim-making activity that is specific to it, is the presentation of a represented and a representative as solid, coherent, unified, in possession of identities, interests, and preferences. In other words, as political *subjects*. This primary operation is a linguistic one, and it is for that reason that the term claim is apt to describe it. Political subjects appear as full-blown in the act of naming themselves, or of being named.[14] The relata on this primary level are the basic, irreducible elements of a multiplicity which, through the representative claim, are coalesced as subjects. For example, when I speak in the name of 'the women of Europe', I accomplish through the act of naming a representational transformation: all of a sudden, there is an 'I', the privileged spokesperson with privileged access to some important knowledge, and 'the women of Europe', a category that, though only emerged from my claim, seems to extend into the indefinite past as always having been the case, awaiting my speaking for it.[15] The subject (on either side of representation) is fused together through the proclamative power of the representative claim. This operation can be termed the *intra-subjective* relationality of the representative claim.

There is a second layer to this basic intra-subjective relationality: in making claims on behalf of others, the representative further relates her person, as political subject, to herself. This self-relation is not simply that of the single person to herself, but rather of the group 'us' to itself, in other words of the group which privileges her to be a representative (that is, which gives her power) to its own perception of itself. This is to say that representative claims always invoke a relation of the group with representative power[16] to itself: the relation of 'us' to 'us'. Crucially, the previous aspects of relationality double unto themselves in this mode. As a representative *of,* I unavoidably become related to myself *as* representative *via* the work of representation I have carried out. This could then be called the *self-reflective* relationality of the representative claim.

The second meaning of the relation is the constant readjustment that follows the intra-subjective step. Though political subjects seem to arrive ready-formed, the indefinite work of contestation and new claim-making will unsettle the initial relation and constantly renegotiate it. Therefore, I will have to explain how and why I can speak for the women of Europe, while some women will question the claim from every angle, all the while forming new political subjects and new fault lines. What remains constant in the flux of representations is the fundamental character of the process as a linguistic inauguration of subjects. Once coalesced, these subjects will always represent both themselves and others (inasmuch as they speak for others) as being fundamentally related to other political subjects (conflictually or otherwise). Said differently, when I claim to represent the 'interests of the women of Europe', I construct a relation between a generic 'us' (us who speak for the women of Europe) and a generic 'them' (the supposed women). This is the *inter-subjective* relationality of the representative claim.

I began the explanation of the relation by referring to Badiou's category of irreducible multiplicities. I said that this is not an existential category, but a formal one, because what grounds political theory in this perspective need not be found in introspection, but rather in the logic of political relations. I have argued that we cannot aptly describe representation as representing interests, but rather as a process whereby political subjects are summoned (intra-subjective) and enter a relation of the generic form 'us' doing this on behalf of/speaking for/warning against/fighting against, 'them' (inter-subjective). The above can also be expressed thus: the subject is both *sutured* to itself, and to the representative/represented (depending on the position occupied by the subject). Etymologically, suture designates the fiber used to stitch together parts of a living body, or the stitch itself. It also refers to a uniting of parts or the line along which two things are united. And finally it designates the line of union along an immovable articulation, such as between the bones of the skull. In psychoanalysis it is used to designate the nature of the 'I', whereas in social theory more widely it expresses the uncertainty of identities.[17] For the present purposes, we can employ the term to designate the meanings of the relation of representation: the subject is sutured to itself (it is both multiple and articulated, through discourse, around a single 'I'), to its representation (it both recognizes and contests how it is represented), and to its self-perception (that is, incorporates the other relations of representation into its identity). In this sense representation can be characterized as a complex sutured relation.

This structural analysis is entirely analytical, that is to say that in practice *all* of these relations are involved at once, in the simplest of representative claims. The claim is relational in all of these senses, and the activity of claim-making sustains and fuels these processes into the indefinite future. To sum up then, representation conceived of as a relational activity of claim-making is supposed to: embed the multiplicity of subjects at the very heart of representation; bring into focus the fact that when one speaks for another, it is not so much their interests which find political voice, but rather their political person; underline the negotiation involved in representing and being represented not as a process of honing in on elusive interests, but rather as the process of amending the political subject; show how this process implies a constant reevaluation of who 'we', the group with political power and voice, want to be – a vacuous hope, given the multiplicity of the subject and the indefinite nature of the process of representation itself. The aesthetic moment discussed earlier runs through all of these various meanings. Furthermore, any representative claim will always involve all of the aspects of relationality at once. Political representation is then the simultaneous occurrence of different relational modes through a claim-making activity.

The above scheme of the notion of relation does not exhaust all of the ways in which representation is about relations, but rather offers the coordinates within which other political (or cultural, social, aesthetic) meanings of the term can exist. For example, suppose Joe, an environmental activist, presents the following claim at a world forum on conservation and biodiversity, attended by environmental ministers the world over: 'it is our responsibility to care for nature, not just because our children have a right to enjoy its fruits, but because our only home deserves respect.' There are many different relations and claims embedded in this apparently simple statement. Joe presents himself, to a global audience,[18] as representative of nature's voice, and offers care, respect, and responsibility as guiding principles for our relations with nature, which (he suggests) can be aptly characterized as 'our home'. On the face of it, the relations of care and respect seem to take center stage – that is what Joe's claim is about, that is what it aims toward. Though that might be true in an existential, advocacy-driven, account of representation, in a general descriptive account, Joe's claims can be better located within the formal matrix I presented earlier. In postulating relations of care and respect, the representative already engaged in the process of representation the formal structure of relations and claims: he constructed the concept of nature as 'home', unified the multiplicity of what we mean

by 'nature' by referring to it in the singular, and under the auspices of a concept – the abode, the hearth – which by definition is unifying; has proposed a relation between this proclaimed unity of nature and the unity of a 'we' delimited by the ethical commitment inherent in the existential and ethical relation to nature: care and respect. All of this accomplished, finally, the delimitation of the representative group – 'we' – as the kinds of people that entertain ethical relations to nature-as-home. This hypothetical example, which in fact mirrors actual examples that will be examined in later chapters,[19] shows the use that a relational concept of representation can have, and also the ways in which it can co-exist with other meanings of the term 'relation'.

To be sure, interest-language can still be employed, but its place has switched from central to the process of representation to, in a sense, epiphenomenal. Interests and identities are predicated unto the structure given by claims and relations. This basic conceptual grounding will be further developed in relation to the concept of rights. I contend that the scheme advocated for here is not only apt for making sense of non-human representation, but also reveals important aspects of what it is to represent through rights. Now let us turn our attention specifically to non-human representation.

1.2 Imagining non-humans

Whether nature advocates have a formal dimension within which to operate (Dobson, 1996; Eckersley, 2011), whether they have ecocentric or anthropocentric ethical commitments, and whether or not they have been elected, does not impact the basic structure of representation presented so far. This contribution takes the important work done by Eckersley (1999, 2011), Dobson and Eckersley (2006), Dobson (1995, 1996, 2010), Dobson and Lucardie (1995), Goodin (1996, 2000, 2004), O'Neill (2001), and other scholars (for example Dryzek, 2000) as a point of departure, trying to take some insights further, while challenging others.

If representative claims are primarily about self and other-relations, we can no longer maintain that the represented have transparent interests and that the ecocentric moral framework is necessary for their representation. If indeed we understand representation as primarily an activity of claim-making, then we also need to understand the represented as fundamentally unknowable and changeable, that is, as summoned into being in the act of representation, and not existing, politically of course, prior to it. As I argued in Section 1.1, the structure of political representation relies on linguistic summoning-into-being, aided by ontological

claims as to the being of the other, and our own. The activity of aspect-selection (Wittgenstein, 2001) is fundamental to the process of constituting the being of the represented in the process of claim-making: the subject is always made visible *as* this or that kind of being. This inherent plurality of the structure means that if indeed the represented is summoned into a particular kind of being that edifies me and my relations to the environment, then I cannot claim to *know* what the represented is – or rather, if I do, I do so *as part of my representative claim*, and not as if I am merely pointing out the obvious. Knowledge plays an important role in this representative activity, as I will show shortly, but its role is one of the support rather than trump card – we can never gather enough knowledge about a non-human being that would tell us *how* this being is to be represented. We use knowledge to come to particular positions, but these positions vary among nature advocates, as they should. Which suggests that the structure of this representative posturing is one which includes an ethical dimension (the representative's ethical commitment), but is not identical to it. This view further suggests that the best we can do in laying out the structure of representation is remain agnostic as to what non-human subjects *are really like*.

Ethical commitments affect the content, not the structure of representative claims. Various ways of conceiving of environmental ethics have particular representative claims embedded in them. So what is broadly called ecocentrism will be more prone to making claims on behalf of non-human others, identifying themselves with – or listening to – their point of view (Taylor, 1981, 1986; Callicott, 1985, 1989, 2000; Rolston III, 1988, 1993; Goodin, 1996; Eckersley, 1999, 2006, 2011; Acosta, 2008a, 2008b, 2010, 2011; Gudynas, 2009a, 2009b, 2009c, 2010, 2011a, 2011b; Cullinan, 2011) and taking up their position even when it runs counter to perceived human interests. Anthropocentrists will be more prone to making claims that put forth a managerial outlook on nature, or perhaps will speak up for the perceived interests of humans when these are in conflict with the perceived interests of non-humans (Norton, 1984; Barry, 1999). Whatever the case, representative claims remain about preferred relations[20] to the non-human world ('this is what nature wants/needs/is telling us, and this is what we should do') and to ourselves ('because we are such and such kind of people').

1.2.1 Representation, interests, and knowledge

There are cases where classical authorization and accountability might explain some of what is going on. A seemingly good example is the parliamentary presence of the Party for the Animals (PvdD) in the

Netherlands, which has been voted into power twice already (van Holsteyn, 2010; Logtenberg and Snijders, 2011; Otjes, 2012). They ran on a platform specifically advocating the interests of non-humans, and thus come close to acting as proxies. Their voters can hold them accountable at the ballot for how they perceive the interests of non-humans to have been furthered or not. The case of the PvdD shows that formal representation can incorporate non-humans, and that classical models of accountability and authorization could go some way toward fitting these new constituencies. This does not change the fact that whatever the PvdD advances as representations of their animal constituencies are analyzable and comprehensible in terms of the relational nature of the claim. And for cases that challenge the very formalism of classical representation, like Greenpeace, these categories no longer hold. It could be argued that it is the members of the organization and those who support it financially and otherwise that authorize it and hold it accountable, but this is hardly the kind of classical electoral accountability and authorization that traditional representation was about. Instead, the existence of advocacy organizations points yet again away from the classic model and toward a different concept of representation.

Acting on behalf of non-humans supposes some degree of knowledge of their situation. This is certainly achievable, and as O'Neill rightly points out, 'those who claim to speak on behalf of those without voice do so by appeal to their having knowledge of the objective interests of those groups, often combined with special care for them' (O'Neill, 2001, p. 496). What counts as knowledge can itself be disputed – scientific and local knowledge can both be legitimate sources of knowledge (Escobar, 1999), though not all would agree. However, supposing that we can agree on a particular knowledge of the situation of a non-human, it does not follow that we therefore know its 'objective interests'. Consider that, for someone with great experiential knowledge of sled-dogs, it is in the dog's interest to be tied to their dog-house when not actively working at the sled. For someone with no such knowledge, this might seem preposterous. It is obvious that the interest of the dog is to be free! This other person would cite their own body of knowledge to support their belief, or rather what they see as their objective reading of objective interests.[21] Others would decry the whole human-dog symbiosis involved in sled-dogging as unacceptable, scoffing at the very use of the term 'symbiosis'. It appears then that knowledge by itself is powerless in resolving our representational disputes. There is no amount of evidence that, even in principle, would lay to rest the

disagreement between reasonable people claiming different interests for the sled-dogs. And in fact if we persist in understanding representation as translation of, and responsiveness to, objective interests, I think we miss the point of what we are actually doing when we make claims in the name of non-humans.

Let us look at one very minimalist formulation of interests. Dobson (1996) contends that the question is not what the interests of non-humans are, but rather how to fulfill them. At a minimum, the interest of a living creature is to stay alive. 'The interest of the species lies in being assured of the conditions to provide for its survival and its flourishing. The problem of knowledge, then, is one of knowing what the conditions for fulfilling the interests are, rather than what the interest itself is' (Dobson, 1996, p. 137). But on what grounds can we say that, for example, brown wooly monkeys (lagothrix lagotricha) prefer to be alive? We could say that they might have a preference for life, because they do not routinely commit suicide, but that does not immediately entail that they have a particular interest in being alive. Do we know of their conception of death and what that entails? Can we at least imagine the opposite preference? Or could we imagine indifference? Perhaps we can say that they have a preference for life in that life is the condition for their fulfilling their basic needs. In other words, without the quality of aliveness there are no wooly monkeys to speak of. This would resemble the capabilities approach developed by Nussbaum (2000, 2003, 2006) and Sen (1987, 1993, 2005) – the ground for the fulfillment of *any* capability is being alive, and as such we can say that the monkeys have an interest in remaining in this state. But what is extinction to the species that goes extinct? It is not at all clear if what we can accurately say is that the monkeys themselves have an interest in being alive, or that *we* have an interest in their being alive. One could argue that extinction is an impoverishment of our own reality and relations. Death represents a *negation* of their potential interests. But this does not mean that life itself is an interest.

In the passage quoted from Dobson earlier, he specifically refers to the interest of the *species* in being alive, which raises further problems: in what sense could the species be said to have a certain interest? I suppose the belief in the species' interest, as well as in the interest of a single animal, comes from the observation that when threatened, all creatures will try to survive. This indeed shows the tendency of living organisms to extend their own life when under threat, but cannot by itself be seen as a ground for political preferences. Instead, I propose that the preference for life is itself a statement about what kinds of relations we find appropriate – this is why we do not in fact talk of the preference for life of vermin or

sunflowers, because those are not the kinds of things we are tempted to assign interests to. In other words, to say that a creature has an interest in being alive, though unproblematic in a colloquial sense, has to be politically interpreted not as a statement of fact about that creature (or species) as such, but rather as a statement about the kinds of creatures that we are tempted to assign interests to, which signal the kinds of creatures that we are willing to enter into certain relations with.[22]

A similar perspective is nicely developed by Cora Diamond in her 1978 essay, *Eating Meat and Eating People*. There, she refers to a poem by Walter de la Mare, titled *Titmouse*. As the title suggests, the poem is about a titmouse, and presents the life of the tiny creature from different angles that invite thoughts of fellowship, companionship, and shared existence.[23] In Diamond's reading, de la Mare achieves the image of a fellow creature with something as potentially removed from us as a titmouse by employing the phrase 'this tiny son of life' (in Diamond, 2004, p. 100). Looking at it from the perspective of representation, let us suppose that de la Mare acts as a representative of the titmouse,[24] and take the 'tiny son of life' expression that the poet uses as part of the representative claim. Then, we would be tempted to say, the representative of the titmouse is claiming that the represented has a life. This much should be unproblematic, which is very similar to it being seen as evident that wooly monkeys, or creatures more generally (whether species or individuals), have an interest in being alive. However, what the representative claim is after is not establishing the biology of the titmouse, but rather sedimenting, imprinting onto the audience, the idea of a fellow creature, which is not a biological idea. Furthermore, it is not an idea amenable to factual checking. Diamond writes that 'it is not a *fact* that a titmouse *has a life*; if one speaks that way, it expresses a particular relation within a broadly specifiable range to titmice.' She goes on to say that 'it is no more biological than it would be a biological point should you call another person a "traveler between life and death"' (2004, p. 102). What is at stake in all of these expressions – these claims – is not anything to do with the real interests of non-humans, but rather the kinds of relations that we want to promote, and which we promote through the use of analogy to human concepts that invite care (for example, fellowship). This is the precise point of using interest-language, or claiming that something 'has a life', and not the establishment of facts about the represented.

Pat Shipman's book *The Animal Connection* (2011) makes a very compelling case for the deep implication of animals in the evolutionary history of human beings. One of the most fundamental human traits, she argues, is our ability to observe and closely pay attention to other

animals. This has made it possible for us to describe the habits of other animals, their 'ways', what they are likely to do and how they are likely to react in certain circumstances. We know that horses are skittish and dogs curious, bonobos highly social, and cats quite indifferent to social rewards. Crucially though, we use all this information to manipulate what other animals do. In other words, our ability to observe them and infer what they care about is fundamental for us being able to *do* things with them. This ability of ours to 'read' non-human others has evolved as a self-serving one, in that it has been instrumental in domestication, successful hunting, and a huge variety of later activities (relations) with animals. The point is that we have always observed and learned about animals in order to do things with them. Claiming that they have objective interests serves exactly the same purpose – to achieve certain ends, to promote certain relations that we deem desirable. Interest-language is not an automatic trump card, but rather part of the multitude of ways in which we interact with and conceptualize other creatures. Therefore, the primary question is not what their interests are (and how to fulfill them), but rather what we should do with them.

We are now in a position to sketch again the structure of non-human representation. Representation involves: the making of a claim by a (self-appointed or otherwise) representative, who contends to speak in the name of non-humans because s/he knows their situation and cares about them; this claim can be accepted or rejected by a human audience, and in any case will exist alongside other claims by other representatives with similar credentials; the representative position adopted by the representative signals to the audience a preferred relation to the subject of representation, which in the same breath constitutes the subject's being as this or that kind, and constitutes the speaker's being (and by definition that of the audience who agrees) as this or that kind. This preferred relation will in all cases justify, encourage, or condemn certain behaviors with respect to non-humans. It is to be expected that many similes and metaphors will be used in order to render these relations palpable to the audience and to convince them of their rightness. Furthermore, moral language and categories will almost certainly be employed to substantiate the speaker's preferred relations.[25]

If we understand representation as a process whereby subjectivities are created in the act of proposing preferred relations, it follows that human self-perception and self-understanding are at the center of this operation. The requirement of care that is embedded in speaking for non-humans (Eckersley, 2011) already points in this direction. To become an advocate for non-human beings implicitly states that one is

the kind of person that finds the being of said non-human important, and that one considers it a duty in general to care for these beings. This also means that, for the nature advocate, the representation of non-humans is a matter of self-definition on the one hand, and ethical injunction on the other. When claims are made that present non-humans as this or that kind of being, there is always an implied claim to different treatment, as a matter of moral duty, based on what has been presented as being the case. This is no trivial matter. Rather, it goes to the very core of what it means to represent non-humans and, indeed, for what it means to politically represent in general.

Why does this self-implication, coupled with the normative injunction that others should see non-humans as I do, go to the core of representation? Because in non-human representation we are in fact dealing with the borders of the human. The animal has always been used to define the human (Bourke, 2011), and hence the construal of the animal other *as* this or that is implicated into how we conceive of ourselves. Some examples that immediately come to mind already show this to be the case. Think for instance of what it means, in a generic Western context, to call someone a pig, or a dog, or a cow. All of these expressions are pejorative in different ways, and the fact that they are pejorative shows that they function to prop-up and support our self-definition. We are emphatically *not* pigs, or dogs, or cows. Part of the work that the nature advocate has to tackle is the changing and shifting of these expressions from pejorative to something else. And this in fact is one of the most insidious tasks for the nature representative, exactly because of how dearly we hold on to our self-definition *against* non-human others. The same thing can be seen by observing people that are observing apes in a zoo. Frans de Waal writes that 'antelopes, lions, and giraffes rarely elicit hilarity, but people who watch primates often end up hooting and yelling, scratching themselves in an exaggerated manner, and pointing at the animals […]. In my mind, the laughter reflects anthropodenial: it is a nervous reaction caused by an uncomfortable resemblance' (de Waal 2001, p. 72). The resemblance is uncomfortable because we have made it our vocation to propose various attributes that make us human, to the extent that seeing the uncanny similarity between us and chimpanzees provokes a knee-jerk laughter that, in the absence of more substantive argument, functions to maintain the artificial distance that makes us, in our own eyes, who we are. The job of the nature advocate will often run against this kinds of uncomfortable feelings. People don't like being told, with good arguments and without derision, that they are quite a lot like pigs.

This has been understood by advocates of women's rights from the very beginning. This is why the Earnest Englishwoman's famous letter[26] was titled *Are Women Animals?* (for more, see Moyn, 2010; Bourke, 2011), and relied heavily on the comparison between women and animals and on the fact that, under the law of her time, animals arguably had more legal protection than women. So if women were granted the status of animals, a huge step would have been accomplished! Many of the first anti-vivisectionists, which represent some of the first nature advocates, and certainly the first to argue for some form of animal welfare and even rights, were mostly women (Bourke, 2011; see also Chapter 3). The anxiety to separate ourselves from the 'beasts' has deep roots, and could itself be the subject of a whole library of studies. The point I want to take from it is that the representation of non-humans draws much of its charge, as well as meeting many of its challenges, because it is fundamentally implicated in how we understand and relate to ourselves.

The history of what makes us human is a continuous re-definition against the background of beings that supposedly do not have what we have. The list of things that set us apart is long, and so is the list of arguments against each and every one of them.[27] Perhaps no uniquely human attribute has been proposed that has not been shown to exist, at least to some degree, in other animals as well. Indeed, if we consider the work of biology since Darwin, we would be quite unjustified in expecting *any* traits to be *uniquely* human. But besides marching on in re-defining ourselves, we are learning more about how *animals themselves made us human*. Shipman, in *The Animal Connection* (2011), makes the case for the deep implication of animals in who and what we are from the point of view of paleoanthropology. Reviewing the latest discoveries and theories in her field, she argues persuasively that, since the advent of stone tools and the beginnings of language, animals were the primary targets of our attention, fascination, adoration, and fear. We watched them intently, talked about them incessantly, and painted them almost exclusively. It is also likely that 'the animal' functioned as much more than a recipient of our gaze – it itself turned its gaze upon us, and the image of a predator stalking a human through tall grass or dense forest is one that sends shivers down the back of any human, whether one with direct experience of being stalked or not. If animals would have only been recipients of our gaze, we would have never been able to develop relations with them. Instead, they looked back. This feature recalls Merleau-Ponty's notion of perception being reversible, which is to say that the key to understanding the operations of perception is to realize that being seen is already implied in seeing

(Merleau-Ponty, 1993). Similarly, Montaigne wonders whether 'when I play with my cat, who knows if I am not a pastime to her more than she is to me?' (Montaigne, 1958, p. 331). And Derrida testifies to the abyssal feeling that takes over him when he realizes that his cat is watching him (Derrida, 2008). This intuition as to the active and curious being of the animal has in all likelihood been with us ever since we developed the first tools to hunt animals with, possibly even before. This is true to such an extent that today we see it as a matter of course that a human is able to train a horse – and that a horse is able to train a human.

The story of clever Hans, the early 20th century horse that could count, makes this point quite well (Despret, 2004; Shipman, 2011). Hans seemed to be able to count with his hoof, doing this with astonishing accuracy. He became world famous, eliciting the curiosity of the scientific community. Could this horse really think in concepts, understand questions, and know the answers? It seemed unbelievable. And indeed, that is not what was going on. Psychologist Oskar Pfungst solved the mystery after long experimentation. He realized that there were only two situations in which the horse could *not* give the correct answer to a question: if the questioner did not herself know the answer, and if the horse could not see the body of the questioner. The conclusion was, from this point on, straightforward:

> 'unintentional minimal movements (so minimal that they had not been perceived until now) are performed by each of the humans for whom Hans had successfully answered the questions. As soon as the questioner gives a problem to the horse, he involuntarily bends his head and trunk slightly forward (to look at the foot that was supposed to begin the tapping). The tension mounts; the mounting tension results in the questioner maintaining the same position. But as soon as the desired number of taps is given, the questioner releases his tension, and involuntarily makes a slight upward jerk of the head and the trunk. The horse just keeps his right foot on the floor. Each of the questioners observed by Pfungst produced these movements. And no one among them knew they were doing so, no one among them noticed that their bodies were talking to the horse, telling him when to begin and when to stop' (Despret, 2004, p. 113).

These revelations about what Hans was doing gave us a respite from the uncomfortable, yet fascinating, idea that a horse might think conceptually and have a level of sophistication we did not entertain before. The scientific community happily chastised Hans as a hoax, a fun side-act, but one that

could not in any way unsettle our own self-perception. Looking at the case of Hans now, one is tempted to reach very different conclusions. It seems amazing that Hans was so good at reading people that he could do this without the humans having a clue as to what messages they were sending, or that they were sending them at all. In this sense, Hans was much cleverer than the humans that asked the questions. He had figured out a way to very reliably read another species, and this unbeknownst to this other species! If anything, this case shows how incredibly sophisticated, and fundamentally reciprocal, inter-species relations can be. This same point can be made with any number of animals, from parrots to ravens, cats and dogs, chimpanzees and bonobos, dolphins and whales.

This argument turns the pejorative use of animal imagery on its head, proposing instead that we owe animals a debt of gratitude, for without them there would be no us. Without the long refinement of our communicative capacities with the help of animals (both in terms of interlocutors, and as subjects of observation that we would incessantly talk about), we would likely not have the human trait we hold so dear – articulate symbolic language (Shipman, 2011). In terms of representation, what this mutual biological and cultural creation suggests is that we already sustain varied relations with non-human others, and that the basis of this is an uncanny degree of communication. Shipman suggests that we can interpret inter-species communication as establishing, or transmitting, what she calls a 'shared value' and what I would call, more simply, information – hard to pin down the exact content of, but unmistakably there. I would also add that, besides this diffuse sense of a commonality of being (which is incredible enough), we also exchange more specific information. In exchanging information with another species, we are both expressing facets of who we are. Dialogues with a horse, a dog, or a bonobo, will be very different from each other, because we are communicating with very different kinds of beings. Commonality and difference are held at once in inter-species communication, and besides establishing that we are similar enough to be able to say something to each other, and that we care enough to pay attention in order to make the process work, we are also expressing what we are like, the kinds of things that motivate us, what we are afraid of, what we are curious about, how we like to play, and what our bodily spatial requirements are.[28] This is a lot to say to each other, and we routinely succeed in doing it. To my mind, an important lesson that can be derived from this is that each and every one of our relations with other animals, whether established on the basis of communication or not, is specific and singular, sharing most of its characteristics with other relations with members of

the same species, but sharing less and less characteristics as the species diverge in evolutionary lineage. This means that our relations are by their very nature varied, and I want to signal this as a very salient point for representation. It suggests that the relations summoned by the process of representation vary enormously across different species – as should be expected given that the kind of multiplicity that grounds our representative relations itself varies with species (and within). We should therefore be suspicious of sweeping theoretical reflections that urge us to relate to animals, or to nature, as such, in a certain prescribed way.[29]

We should have the same suspicious attitude when we are urged to treat animals as such, or whole groups of animals, according to universal principles. The (arguably) dominant strand of environmental ethics today attempts to derive universal norms that can be applicable to any non-human. Even though there are many differences and shades between different proponents of this model of environmental ethics, this much they all have in common (Singer, 1975; Regan, 2004; Garner, 1993, 2010, 2011; Francione, 1995, 1996, 2000; DeGrazia, 1996; Franklin, 2005). As Hans Harbers states it, 'the standard animal-ethical argument in terms of animal welfare, animal rights and the intrinsic value of animals attempts to formulate universal principles for the way we treat animals – regardless of species and the historically and culturally different practices of human-animal relationships' (Harbers, 2010, p. 3). They do so by pointing to a number of characteristics that science can discover and that reveal how much closer we, humans, are to them, animals.[30] In terms of representation, this approach implies that I can already decide the salient representative claims without having any first-hand knowledge of the animal(s) in question: if they are, for example, sentient, then it follows that one shall act to maximize happiness, or to ensure flourishing, and so on.

From the point of view advocated here, this is a mistake in that it does not recognize the actual variety of relations, *and* the variety of non-human beings. Paradoxically, this approach objectifies and flattens animals and nature. Instead, we should focus on the fact that 'what humans are, and what animals are (person, property, machine, creature with consciousness or feeling – whatever) is not predefined but is given shape in […] interaction' (Harbers, 2010). To look upon the whole animal kingdom with an eye toward finding how to relate to it *all* seems undesirable, counterproductive, and quite near impossible. How can farm animals and wild mountain gorillas and captive bonobos and pets be held in the same sweeping gaze? As I have argued here, if we pay attention to the relations we entertain, they cannot. This particular reflection is certainly not new – the study of ethology has already incorporated a

relational attitude (see the work of de Waal for instance). But it seems to me that its implications for representation have not been adequately spelled out or fully taken into account.

We can think of the importance of maintaining varied relations in a different way. Let us recall that I defined the process of representation as one that summons subjects into being. What I mean by summoning into being is of course not the literal creation of a physicality, as if I had to clone an organism in order to define its being. Rather, this kind of summoning involves the creation of an *idea that I am invested in*, an idea which speaks of *a being whose existence as this or that edifies my own being*. The accent has to fall on the edification that this process accomplishes, which is another way of saying that each representative relation I enter into is important in defining who I am, and proposes a relation that I find existentially important. In this regard, we can in fact speak of the representation of non-humans in a way that incorporates both animals and nature. Though usually, and rightly, theorized separately, the concept of representation developed here allows a focus on the common elements of speaking for non-humans as such. From this point of view, we can think of farming relations, conservation relations, recreational relations, sport, training, companionship, partnership, and therapeutic relations, to name but a few. All of these have their history and import, and to each of their proponents they are important in defining both who they are, and who they perceive their relational partner to be. To engage in inter-species communication is important and necessary for building these kinds of relations, but what the other being tells us does not have immediately obvious *political* implications. The dimensions of knowledge and care come together here, but they are not sufficient for defining representative claims. Furthermore, 'care comes in various sorts and sizes' (Harbers, 2010, p. 23). If indeed different kinds of beings entertain different kinds of relations, it stands to reason that the knowledge about each will be different, as well as the care appropriately directed at each. 'If people wish to formulate an animal ethics of care, […] it cannot be one that is universally applicable.' Similarly, no amount of knowledge and care will be able to find the ideal representative claim. They inform the claims that representatives are prone to making, and they invest the claim with certain urgency for the maker. But the idea of political representation requires that many claims are debated and challenged. It is likely that the more general the subject of representation, the more contested the claims will be, from actors with equal knowledge and care. If I speak on behalf of nature as such, even though I might be knowledgeable and deeply invested in the natural

world, many other similarly situated subjects will disagree with my claims. If I speak for sled-dogs, other people involved in this activity will most likely agree with my claims. In other words, the more specific the subject of representation, the likelier it becomes that others with similar communicative experiences will propose similar claims. At that point, it becomes a matter of persuading others, with no such experiences, of the attractiveness of our claims and the views that they imply.

I have argued that focusing on non-humans shows at least as much about 'us' as about 'them'. In fact, the representation of non-humans reveals how little is actually left in the circles we call uniquely human or uniquely animal. Their representation thus unearths what is always at the core of our own representation – *the anxiety of slippery identities*. The issue of interests, whether my own or the other's, cannot simply (primarily) be an issue of advancement. It is rather an issue of identity, or of the definition of one's being. Interests here turn out to be closer to self-perception than to the calculation of utility. This can hold as much for non-humans as it can for humans. I can communicate with bonobos and be told by them what kind of creature they are, and thus find myself in a position of advocating for the fulfillment of what they demand. But we have to be careful here in not imagining that interest-language identifies immutable properties. Rather, interest-language signals my belief that bonobos have to be treated in this and that way, based on my experiences and dialogues with them. Similarly, women involved in feminist struggles will inevitably use interest-language to speak of the needs of women and the necessity of taking them into account. But the very contestability of these interests, by women themselves, already shows that the concept of interest in representative relations has to do primarily with self-definition. Some women will disagree that the right to abortion is in their interest, not because they do not realize that other women find that self-evident, but because they regard themselves, and by extension women, as the kinds of beings that refuse abortion on principle. By repositioning basic concepts, the representation of non-humans has important insights for representation in general.

1.2.2 'Claims' reconsidered

I want to draw out an aspect of representation conceived of as claim-making that has not been given adequate due, even though it has been present in the background of the discussion. The idea of political representation as a claims-making activity has been deservedly influential, and we are yet to see the full development of a theory of representation, whether human or non-human, based on its implications. The

reflections offered in this work are a step in that direction. Taking the claim-making structure seriously does not, however, imply a too strict analysis of the concept of 'claim'. It is fine to talk about political representation in terms of claims, but we could also talk about it in terms of an assertion, stance, posture, phrase, proposition, performance, proposal, statement, conceit, construction, creation, proclamation, or summon. All of these terms could bear the modifier 'representational' (or 'representative') as well. These are just some terms that come to mind as appropriate – no doubt others exist, and an exhaustive list is neither possible nor necessary. The point is this: every one of these terms, 'claim' included, has different connotations and appropriate contexts of use and therefore stresses one or another of representation's aspects. Yet no one of them is apt for encompassing the range that political representation possesses. Hence we should not analyze 'claim' or 'proposition' or 'conceit' too strictly, but rather keep an eye open for other expressions and words that point squarely in the direction we are seeking.

The representative claim is a particular way of talking about representation that emphasizes what I and others believe is the most salient aspect of the phenomenon. But what it emphasizes is not itself reducible to a 'claim', and focusing on the term too narrowly and technically would not give us the key to representation. In other words, grasping what it is to make a claim does not mean that we would have unlocked the mystery of representation, any more than grasping the nature of a proposition would. Rather, making claims, performing, proposing, taking stances, summoning, and so on all shed similar analytic light on representation, while differing from each other, such that it is in their combination, or their simultaneity, that the conceptual terrain of political representation is revealed – always partially, as the number of terms that would describe important aspects of the concept is, for practical purposes, infinite, while the phenomenon itself is subject to change through time.

The same applies to concepts such as congruence or responsiveness. These are ways of talking about representation that bring into relief particular features of the process, like the relationship between interests and preferences and representatives' intentions and actions. In some cases of representation, this way of construing the problem is appropriate and revelatory. Nobody is suggesting that congruence shall never be employed. But the problem is that the aspects underlined by congruence are not sufficient to understand and explain a wider process of representation, because it fails to stress the multiplicity of the process, while construing political actors unnecessarily narrowly. In contrast, using the language of claims and stances and revendications shows

features of the concept that explain political behavior better, or rather show a fuller and less bewildering phenomenon. Sometimes using the language of congruence works in making us see what political representation is about. In other cases, the language endorsed and proposed here works. This other language though, by making the fullness of the process impossible to ignore, is more apt in talking about what representing is, in terms of the structure that keeps its multiple employments nonetheless in the same conceptual terrain. Furthermore, and crucially, the fact that there can be no congruence or responsiveness in non-human representation tells us something important about understanding representation *as* congruence or responsiveness: representation is either more limited than we thought, or we cannot meaningfully predicate it of non-humans, that is, we make a mistake in calling this political operation by the name of representation. Given that I believe the concept is well employed when speaking of non-humans, it follows that claims language works better for speaking of political representation generally, because it can make sense of both its human and non-human variants.

The fact that we can speak of a general structure of representation can be illustrated by looking at representative claims on behalf of nature as such – in effect, on behalf of the paradigmatic thing itself. I have developed here the ways in which animals and humans have been intertwined, and continue to intertwine, in political and cultural discourse. The figure of the animal, though highly specific when referring to actual animals, can also function as a repository – animality, or 'the animal' (Derrida, 2008) – which is supposed to extract that which is the common essence of many kinds of animals. The fact that there can be no factual essence does not affect the concept of 'the animal', because representations are not easily unsettled by factual observation. This notion instead functions as a readily available counterpart to the equally diffuse notion of 'humanity'. The same can be said about a particular concept of 'nature', and increasingly representative efforts have focused on speaking for what we call by this name. There are many similarities between animal advocacy and nature advocacy even though, when specifying each of these concepts, the similarities should give way to nuance and difference. In the next chapters I will start to describe how the logic of representative claims in the name of animal others has been co-opted by representatives of nature, and how both are increasingly tied to a form of argumentation that inevitably leads toward rights advocacy. I now turn to an exposition of the concept of rights such that our theoretical ground be firmly laid before presenting the most important representative claims on behalf of nature's rights to date.

2
The Anatomy of Rights

Rights have an essential connection to the making of claims – to have a right, one must claim it, either for oneself or in the name of another (Douzinas, 2000; Campbell, 2006; Bourke, 2011), and a right is itself a particular kind of claim (Hohfeld, 1964; Sunstein, 1999). In other words, it is of the essence of rights to both be claimed (Wellman, 1985, 1997) and institute a new sequence of claims (Feinberg, 1966). Similarly, the mechanisms of political representation are centered around the making of claims which specify both the subject and the representative (see Chapter 1). Political subjectivity finds one possible expression in the back and forth of representation – claims are made and revised, and in the process the subjects of representation (on both sides of the relation) are fashioned.

The coming together of representation and rights is part of the intellectual history of both concepts in modernity. Though initially separated, political representation and individual rights of humans[1] have increasingly merged. Today, in late- or post-modernity, the claiming of rights has become a ready way to secure access to the process of representation, and to frame representations once access has been achieved. Though there is substantial overlap, in the case of humans distinctions between the two concepts are still significant. There is representation without rights, and not all rights lead to representation. But in the case of non-humans, the boundary between the two is ever narrower. Though there are cases where political representatives speak on behalf of animals or nature without claiming rights, the most dominant advocacy strategy today involves the claiming of fundamental rights in the process of representation. Moreover, as I will argue in the next chapter, non-human advocates are seldom outside a rights paradigm, whether they invoke the concept by name or not.

In this chapter I want to look closer at the concept of rights in order to understand its application to non-humans and its likely effect on, and deep connection with, political representations. We will discover that both concepts share a strikingly similar structure and that both are, in many senses, boundless. A version of the concept which I consider to be closest to its historical truth will be presented. Many different versions exist, and to survey them all would be of no use to this investigation. Instead, I will focus on a conception of rights understood as an *activity of claim-making* which encompasses moral, political, and legal relations, and which is rooted in the idea that the potential rights-bearer *is owed something*. As I will show, this conception can make sense of the proliferation of rights in our time, understanding the hegemony of the concept as part of its logic and not as a historical fluke. In explaining in more detail what the concept of rights is, I will briefly examine its historical origins (2.1–2.1.2), with special emphasis on its constituent parts and its process of expansion (2.1.3). I will then look at how the concept has mutated into the rights of non-humans and what the various discourses of this area of thought have been (Chapter 3). In the end, I will show how the rights of non-humans and their political representation follow a very similar conceptual logic

2.1 Historical foundations and conceptual threads

Contemporary scholarship on the concept of rights broadly understood is huge, ranging in perspectives from law, philosophy, history, anthropology, cultural studies, and many other permutations and variations. Given the sprawling nature of the subject matter of this chapter – rights – the danger of confusion is great. I therefore want to delimit at the outset precisely what I will talk about and why. I will then present a historical narrative that sets in context the major elements of the concept of rights under discussion. Whenever possible, I will use the plural, rights, to refer to the legal, philosophical, and political conception under scrutiny. This is in order to differentiate it from right, in the singular, which has a different meaning altogether, exemplified by expressions such as 'to do the right thing,' 'to be in the right' (see Campbell, 2006, pp. 24–26, for a detailed discussion). Though rights and right are related, I will focus in what follows on the former and only touch upon the latter as the argument demands.[2]

I will consider rights in their legal, political, and moral dimensions. Though an analysis that focuses exclusively, or mostly, on one of these dimensions is certainly possible,[3] it is in their simultaneity that the full

force of rights-discourses is to be found. In other words, I will employ elements from legal, political, and moral theory to suggest the kind of conception of rights that can make sense of the rights of nature, particularly as they appear in a constitutional context. Therefore, I will not speak of liberty rights or power rights, will touch briefly upon immunity rights, and discuss most extensively different kinds of claim-rights and human rights, as well as their connection to legal, social, and moral conceptions. It will become clear, in due course, what these various conceptions are.[4] For the time being, let us look at the historical background of our contemporary rights.

If we go back to the times of ancient philosophy, or what is usually termed classical natural right, we find a conception of rights that has barely any similarities with today's various meanings. 'Natural right in its classic form is connected with a teleological view of the universe. All natural beings have a natural end, a natural destiny, which determines what kind of operation is good for them' (Strauss, 1953, p. 14). Besides the fact that teleological thinking is anathema to modern sensibilities, the concept of rights that appears in the ancient world is one that cannot be attached either to the individual or to the collective, in the sense that it belongs to neither: it is not a property of something. It is, rather, a normative category of the universe. The idea of nature is indispensable to the ancient conception, signifying in effect the appropriate way of being. Raised over and above the claims of tradition, the idea of nature offered an appeal to an external standard – hard to specify, but nonetheless there and accessible to the jurist and the philosopher. Instead of property or 'humanity,' the earliest version of rights was connected to potentiality.

> The actuality is the end, and it is for the sake of this that the potentiality is acquired ... animals do not see in order that they may have sight, but they have sight that they may see ... matter exists in a potential state, just because it may come to its form; and when it exists *actually*, then it is in its form.
>
> (Aristotle, *Metaphysics* 1050a, pp. 9–17)

Natural right is the proper path of a being from its potentiality to its actuality, which closely corresponds to both nature as such, and the being's particular nature.

From this early appearance of nature and rights together, the concepts take on various lines of flight that pass through Stoic notions of equality, Roman jurisprudence, theological natural right and its scholastic developments, up to rational natural right (in the works of,

most notably, Hobbes, Locke, Descartes, and Rousseau) and on to the revolutions that inaugurate political modernity.[5] It is from this point on that the concept of rights we know today starts to coalesce around its current constituent elements: freedom and equality, universality and individuality held at once, and the claim-making activity that becomes indispensable to its functioning. Importantly, it is the modern revolutions that introduce a feature of rights that will greatly aid their hegemony. Particularly in discourses of human rights, the right to resist oppression[6] becomes fundamental, both in terms of the individual's own rights (positive rights), and that of the state (negative rights, that is an obligation *not* to oppress). I will argue that this aspect of human rights partly explains their extraordinary appeal today, as well as encouraging an understanding of positive rights as a continuous and indefinite legal recognition of individual or collective specificities.

The appearance of linearity in the history of rights is certainly illusory. As Moyn aptly suggests, 'earlier history left open diverse paths into the future, rather than paving a single road toward current ways of thinking and acting' (Moyn, 2010). However, it is equally perilous to fall in the opposite extreme: not all contemporary conceptions are unique or inexplicable through a historical lens. To achieve a balance between these two extremes requires that we understand the concept of rights today as both historically influenced and contingent, while avoiding 'the construction of precursors after the fact' (Moyn, 2010). The 'diverse paths' that earlier history left open need not have led to where we are today. Nonetheless, they did, and the best we can do is describe what conceptual elements survived, how they were transformed, and what they came to mean for us. The French and American revolutions, though themselves rooted in the historical tradition of early modern political thought, will represent for the present purposes a fictional starting point. The reasons for this are the desire to avoid an infinite historical regression and an infinite invention of precursors, together with the belief that these revolutions did in fact carve out a new array of possible directions for rights to take, some of which ended up with us today, including in the rights of nature.

2.1.1 Rights of the modern revolutions

The first extraordinary development to point out in connection to the French and American revolutions is the very meaning of 'revolution.' Whereas it used to mean the cyclical return of the same, modeled on observations of celestial bodies, revolution in the modern era comes to mean the irruption of the unprecedented, the birth of the entirely new

(Arendt, 2006; Callinicos, 2004). In political terms the word revolution, by acquiring a new meaning, puts in motion a new conceptual sequence that is able to expect the inauguration of political orders that were previously foreign. 'It was only in the course of the eighteenth-century revolutions that men began to be aware that a new beginning could be a political phenomenon' (Arendt, 2006, p. 37). It is perhaps hard to appreciate today that the idea of novelty was not part of previous uses of the term. Even in early modernity, the term was used politically to indicate the restoration of an older, and better, order, therefore remaining perfectly true to its original meaning, exemplified by Copernicus' celestial revolutions. Even the men responsible for the French and American revolutions initially considered themselves to be involved in the *restoration* of a previous order 'that had been disturbed and violated by the despotism of absolute monarchy or the abuses of colonial government' (Arendt, 2006, p. 34). The meaning of revolution as radical novelty wedded to the idea of justice is wonderfully caught by Benjamin when he describes it as 'blast[ing] open the continuum of history' (Benjamin, 1999). In his thesis XV on the philosophy of history, he goes on: 'the awareness that they are about to make the continuum of history explode is characteristic of the revolutionary classes at the moment of their action' (Benjamin, 1999, p. 253).

The appearance of revolution as a political term designating the unprecedented is a specifically modern occurrence and one with a shadow long enough to be clearly visible today. As Arendt suggests, there are obvious similarities between this conception of revolution and the term utopia, but the differences are more telling. Whereas utopia designates an impossible yet imaginable state of affairs, revolutions function under the assumption of infinite possibility: it is not a matter of trying to institute the perfect order of things, but rather of creating an entirely new political climate, seen to better serve the dictates of justice and to move toward political horizons that are unknown but believed, fervently, to be infinitely better and eminently possible. The power of this revolutionary image cannot be overstated. Though not all riots or revolts of the last century and a half have been revolutions,[7] it is a common feature of most modern political disturbances to employ the vision of a radically new and infinitely better order. This same imagery has been adopted by animal rights discourses, and the struggle to recognize non-human rights is often portrayed in revolutionary terms – quite aptly if we consider the radical novelty proposed by animal advocates.[8]

The belief in the possibility of reinventing politics – and hence, in revolution – was fueled by a new idea of freedom, one which, for the

first time in history, included *all* of humanity as potential subjects of freedom (Roshwald, 1959), as opposed to the old orders in which one either was or was not free, almost as a matter of ontology. The idea of freedom in its political meaning had existed throughout previous political regimes, but it was always circumscribed as a matter of fact to the class of people that were considered, by right, free. For all intents and purposes, this definition of freedom excluded the vast majority of beings, human or otherwise. Slaves were slaves because of their slavish nature, women were subservient to men by nature and, in the Greek city states for instance, only property-owning men were properly speaking free[9] (Arendt, 2006). Freedom in this sense was a prerequisite for political life because only the ones with enough material support to engage with other men politically were considered to partake in freedom. This also meant that freedom *only* had a political meaning – to say that one was free in any other way was simply nonsense. The life of toil that characterized existence outside the political space of freedom was entirely of the domain of necessity. It is precisely because what we would now call private life was seen to be slavish by nature that the public sphere became, by exception, identified with the exercise of freedom.

This notion changes with the modern revolutions and freedom, true to the new meaning of revolution, expands its scope in unprecedented ways. This is important because it makes possible a particular trajectory of freedom from strictly of the public sphere to – today – encompassing all particularities and 'choices' of the individual.[10] The beginnings of this idea of freedom accompanied the French revolution and was evident in the call to include in the public sphere all of those beings which had been traditionally excluded. The justification for this is crucial – the notion of *humanity* becomes the background against which the call to universal political freedom can make sense. The importance of freedom as both an attribute of human nature and liberty (to do whatever one pleases 'freely') is evident in the rights that the French revolution proclaimed through its declaration: 'liberty, property, security, and resistance to oppression' (in Freeden, 2002, p. 24). Philosophically speaking, it is the rights to liberty, security, and resistance which are telling and interesting, because they suggest a new understanding of both humans and rights.[11] Yet their radical nature is quickly understood when one realizes that the rights to property were the dominant ones (in terms of enforcement) for centuries after the revolution (Moyn, 2010).

The notion of political freedom elaborated in the modern revolutionary period was no longer dependent on the fact of subservience to bodily needs, but rather finds its anchor point in the idea of a humanity which

endows one with certain inalienable rights (Roshwald, 1959). Whereas in classical conceptions freedom and equality were received as an attribute of citizenship, modernity declared them to be attributes of birth: 'we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness' (Jefferson, 1776). In these words of the American Declaration of Independence the issue of equality, as well as freedom, is a fact of birth. It is therefore not only freedom that the revolutionaries are concerned with expanding in an unprecedented way, but also equality. The obvious objection that in fact not all humans are equal, being born with different aptitudes and inclinations, misses the point.[12] The same could be said for freedom: indeed, not all humans are free in the same way. But these proclamations are not concerned with matters of fact, but with matters of right.[13] The claim that freedom and equality are attributes of any individual is not intended to describe a state of affairs but to modify it. People are to be seen *as if* free and equal, and the rights of man inscribe these as both normative and ontological predicates: normative in the sense that these *ought* to be the case for any human, and ontological in the sense that, all things being equal, they *are* the case. This movement between the normative and the ontological seems contradictory – something either is, or ought to be the case. In what sense could it both be and not be the case? This tension could be aptly called the 'logic of proclamation',[14] and reflects the awkwardness of having a universalist discourse of rights without a theological foundation. It is because there is no universally accepted *source* of rights that modern universalist proclamations have to suppose what they declare. In effect, the notion of nature (as in something being the case by nature, and the derivation of moral norms from 'facts of nature') that natural right relied upon, is preserved, but the theology that supported it is not. Therefore, the characteristics of 'humanity' – freedom and equality – are presented as both inferred from actual humans and directed toward the modification of their lot.[15] However, the high feelings of the revolutionaries and the universalism of their declarations were not seen, in the American context, to contradict slavery or to apply to women (Dickinson, 1977; Waldron, 1987). The French did apply their universal principles to women and slaves, but the effort was short lived (Hunt, 1996; Freeden, 2002).

This is the background against which modern rights appear, and inasmuch as humans are free and equal in virtue of their humanity, they are also entitled to the same basic rights. It is not rights themselves which are the invention of revolution,[16] but 'their being *inalienable rights of man*'

(Arendt, 2006, p. 22, emphasis mine). The claim that rights are inalienable is anchored in the concept of humanity as a great universal category that can receive anyone in virtue of simple existence. Given that for most of human history the vast majority of beings were neither free, nor equal, nor part of a greater unifying concept, these truly revolutionary ideas forge a conception of rights that is fundamentally preoccupied with politics, which is to say with the only arena where freedom previously existed and that was now primed for a major expansion. The first modern rights are political rights in the sense that they are rights of resistance and revolt, and rights of freedom (see the rights of the French Revolution earlier). In turn, this creates the background for the slow development of modern individuality and subjectivity.

The declarations that accompany the two modern revolutions take these developments in rights-discourses as 'self-evident,' but that is not to be understood as a statement of fact. Indeed, there was nothing self-evident about them: positive individual rights belonging to free and equal individuals by virtue of birth could not be more counterintuitive to the pre-modern political imagination.[17] And yet modernity declares these to be self-evident truths. The nature of this declaration of self-evidence has much to show us as to the nature of modern rights – it holds the key to the most basic meaning of these rights, as well as to the notion of legal personhood that will later accompany them. 'The declarations construct a new polity under pretense of uncovering or describing it. In linguistic or "speech act" terms, they are performative statements disguised as constative' (Douzinas, 2000, p. 53). The act of *declaring* the rights of man to be universal and self-evident at once *establishes* them as such, even though it violates all previous political organization.[18] If indeed it had been the case that these rights were self-evident, then there would have been no need for a declaration.[19] In this manner, the rights appear as both constituted by and constitutive of, subjectivity and individuality.

The positive content of the rights of man is thus a consequence of its own declaration, and is not its foundation. The image of the human that is constructed by modern rights will not be extensively developed here, as in the end it is the figures of the animal and of nature that have to be understood. Yet there is one feature that both potential subjects of rights bare in common that is worth pointing out: 'the man of the Rights of Man was a mere abstraction' (Ranciere, 2004, p. 298), and this for at least two reasons. On the one hand, the concept is 'too abstract to be real', that is, it does not describe any existing person and indeed cannot do so. On the other, it is 'too concrete to be universal' (in Douzinas, 2000),

meaning that its supposed universality runs against the barriers of citizenship. As Ranciere, in agreement with Arendt, explains: 'the only real rights were the rights of citizens, the rights attached to a national community as such' (Ranciere, 2004). Or, with Agamben, we can claim that 'the so-called sacred and inalienable rights of man show themselves to lack every protection and reality at the moment in which they can no longer take the form of rights belonging to citizens of a state' (Agamben, 1998). Though proclaimed in the name of humanity in starkly moral tones, the revolutionary rights of man are in fact rights of citizenship, showing once again that the beginning of modern rights is a quintessentially political one. These rights functioned to strengthen the nation-state and only much later, well into the 20th century, is their global (that is, as opposed to nation-state) reach exploited and their premise turned upside-down. '[...] in the 19th century the often heartfelt appeal to the rights of man always went along with the propagation of national sovereignty as indispensable means, entailed precondition, and enduring accompaniment' (Moyn, 2010, p. 28–29).

Another way of looking at the meaning of these revolutionary universal rights is to point out that, though they are couched in undeniably moral language, they are devoid of any moral *content*, as such. The inalienable 'rights to life, liberty and the pursuit of happiness' (Jefferson, 1776), which come to dominate animal/nature rights discourses as *the* fundamental rights, are in fact utilitarian rights: the most fundamental rights of individuals have to do with the pursuit of happiness, not with the establishment of justice. And although the right to revolt was proclaimed as an inalienable and universal one, in truth these early rights functioned to strengthen national sovereignty (Moyn, 2010). The rhetorical flourish of humanity as the moral repository of these universal rights was in fact highly ineffectual. The slave revolt of 1789 in Haiti and the response to it show as much, as does the fact that women did not receive the right to vote for another 155 years (Bourke, 2011). In these senses, revolutionary universal rights were morally agnostic, though packaged in high moral flourish.

2.1.2 Toward universal human rights

It would have been impossible for any of the actors directly involved in the French revolution to have anticipated the global effects of their efforts. Ever since the days of the Revolution, rights-discourses have become the staple of any emancipatory struggle, and the model of the Declaration has been copied countless times, including in the Declaration of the Rights of Cetaceans (2012) or the Declaration of the

Rights of Mother Earth (2010). As Tom Campbell aptly suggested, 'there is little chance that any cause will be taken seriously in the contemporary world that cannot be expressed as a demand for the recognition or enforcement of rights of one sort or another' (in Bourke, 2011, p. 153). This is not an exaggeration, but an accurate description of the current political state of affairs. Rights-discourses have been so successful in becoming the dominant language of emancipation that they now incorporate the whole thinkable range of political subjects, from marginalized human groups to nature itself.

This has not always been the case. After the modern revolutions, rights-discourses failed to become common practice, even though they emboldened activists to claim rights for all sorts of beings that were previously unthinkable in this connection (Bourke, 2011; Moyn, 2010). The universalist language that pervaded the Declarations made their implementation highly problematic, given the makeup of societies at the time, while opening avenues of possibility for new politics of liberation and inclusion. Around the time of the revolutions, in the last decades of the 18th century, we start seeing the language of universal rights being extended – in discourse – to more and more subjects: women, slaves, and animals. The anti-vivisectionist movement is perhaps the first instance of animal rights properly speaking, and it was indeed emboldened and made possible by the emancipatory language of universal rights that was gaining momentum in those times (Herscovici, 1985).

> In spite of the remarkable decline of appeals to nature's authority, rights – including the rights of man – were the watchword of extraordinary citizen movements in modern history. Women proclaimed them immediately, and workers soon after. [...] Enslaved blacks claimed them most vividly in the once barely remembered Haitian Revolution. [...] Even animals were said, by a few, to deserve rights.
>
> (Moyn, 2010, pp. 31–32)

Yet the notion that women, slaves, and animals, were to be considered subjects of rights, remained for the next century the rallying cry of activists, unheard by legislators and unimplemented in practice. The notion that nature itself could be constructed as a subject of rights would not appear until the late 20th century. It would seem that we have a logical and linear progression from exclusion to inclusion, but this is a historical illusion. The progress is not that from exclusion to inclusion, and one need not wait for the completion of one level of inclusion in order to move to the next. Rather, the history of modern

rights is the development of a hegemonic power inherent in the universalist language of the modern declarations. The supposed linearity of the process is easy to disprove – one need only point out that for a full century after the declarations there was not a single piece of legislation that offered basic rights to women. It is only after the horrors of the Second World War that the universalist language of the revolutions is retrieved (Bourke, 2011; Morsink, 2009) and, with the UN declarations, we enter a new stage in the power of the rights discourses. It is indeed only in the 20th century that the hegemonic power inherent in the early declarations comes to fruition in the sense that, as Tom Campbell suggested above, it becomes impossible to frame emancipatory struggles in opposition to rights. The last regimes that openly did so were the communist regimes of the 20th century, and their collapse and failure sedimented, in a new and unprecedented way, the power of rights. Announcing the 'end of history' (Fukuyama, 1992) as the conclusion of the Soviet collapse was indeed another way of saying that from now on we are all liberal rights advocates.

The advent of human rights seems to both inherit a great deal from the early modern revolutionary conceptions, and innovate the concept in substantial ways.[20] Even though the language of the early modern declarations was steeped in universality, the rights of man were also, and primarily, the rights of citizens. The power of the state and the declaration of these rights were always meant to be related, and indeed became related in practice (Moyn, 2010). The UN Declaration differs greatly from the early modern revolutions in precisely this respect: it is not supposed to support state power, but rather to declare rights *against* it. As Moyn explains, 'the eternal rights of man were proclaimed in the era of the Enlightenment, but they were so profoundly different in their practical outcomes as to constitute another conception altogether' (Moyn, 2010, pp. 1–2). The similarities between the early modern and post-Second World War declarations are obvious enough, and there is no shortage of literature[21] explaining how 'the drafters of the Universal Declaration stood on the shoulders of their eighteenth-century predecessors' (Morsink, 2009, p. 18). What is of interest here though is how the UN Declaration comes to transform the discourse of human rights inherited from the enlightenment into a universalistic discourse *against* the power of the state, a move which begins a series of international efforts for the enforcement of human rights that further sediment the power of rights-discourses. For the rights of nature this is a very important point: they have to establish both a national foundation, similar to the early modern declarations, and an international foothold, similar

to the UN declaration (see Chapters 3 and 6). In the rest of this section I will explain what the notion of human rights post-1948 is, how it differs from previous rights, how it contributes to the hegemonic power of the discourse, as well as the significance of the various 'generations' of rights for an interpretation of the rights of nature.

'The Universal Declaration was adopted by the Third General Assembly of the United Nations, which met in the fall of 1948 in Paris, France' (Morsink, 2009, p. 18). The story of the genesis of the UN Declaration usually involves either the continuation of the Enlightenment, a reaction to the Holocaust, or both. As Moyn has convincingly shown, these interpretations do not withstand scrutiny, as there is a dearth of evidence suggesting either a connection to the Holocaust, or else their being central in the decades after their declaration. 'In real history, human rights were peripheral to both wartime rhetoric and postwar reconstruction, not central to their outcome' (Moyn, 2010, p. 7). As was the case with the early modern declarations, a significant amount of time would have to pass between proclamation and implementation. It was not until the 1970s that the human rights discourse rekindled by the UN Declaration starts having practical consequences, mostly in terms of international organizations devoted to their cause, as well as an increasing number of lawyers willing to teach and practice human rights law. 'There exist today some 200 human rights implementation instruments that cover most of the rights in the Universal Declaration, and this number is still growing' (Hunt, 1996, p. 160), and what is staggering about the fact is the very short period of time in which this development occurred. The first courses on international human rights at an American university were taught in 1971, by Henkin at Columbia and Sohn at Harvard. The first human rights center was inaugurated at Columbia by the same Henkin in 1978. Rawls did not use the phrase human rights in his 1971 *A Theory of Justice*, and philosophers in the liberal rights tradition did not use the phrase consistently, or analyze it in any specific way, until a decade later (Moyn, 2010). On the political scene, it was with Carter's administration that human rights acquired a public role. This points toward two interesting aspects of human rights: their genesis does not unproblematically follow from the UN Declaration, and their meaning cannot simply be that of natural or individual rights, with a slight change of terminology. After all, rights in some form or another had long existed, but no previous rights-discourse managed to capture the imagination of the world with such force. What is different about *human* rights?

From the 1970s onward, human rights have delimited their own path that differs in two fundamental respects from the rights of man

that preceded them: they are international, and they 'can be seen primarily as ethical demands' (Sen, 2012). Their internationalism is quite obvious – they originate[22] in the UN and have a spectacular effect on the development of international law. Furthermore, the rights 'that powered early modern revolutions [...] implied a politics of citizenship at home, the other [human rights] a politics of suffering abroad' (Moyn, 2010, p. 12). Whereas the rights of early modernity were the rights of man *and citizen*, the human rights of the 20th century are primarily in opposition to the state, and are seen as independent of national belonging. The fact that rights are still routinely tied to citizenship in practice does not negate this international outlook – indeed, from the point of view of human rights the practical dependence on citizenship is seen as an obstacle to be overcome. The rights of the enlightenment were not only incidentally connected to the nation state, but rather functioned as fundamental counterparts and building blocks, as has been shown in their more detailed discussion earlier (2.1.1). In contrast, '[...] the central event in human rights history is the recasting of rights as entitlements that might contradict the sovereign nation-state from above and outside rather than serve as its foundation' (Moyn, 2010, p. 13). This did not happen entirely by design – after all, the UN was meant to uphold both empire and sovereignty, and its very loose talk of human rights was not exactly meant to undermine those two basic goals of the organization. Instead, a series of historical contingencies transformed the original discourse of human rights into the internationalist ethical discourse we know today.[23]

The second characteristic of human rights is their being primarily a set of 'ethical demands.' This is connected with their internationalism, as human rights must rely on an ethical imperative in order to justify their stands in opposition to the state. Amartya Sen argues that 'human rights can be seen as primarily ethical demands. They are not principally "legal," "proto-legal" or "ideal-legal" commands. Even though human rights can, and often do, inspire legislation, this is a further fact, rather than a constitutive characteristic of human rights' (Sen, 2004, p. 319). This means that 'human rights generate reasons for action for agents who are in a position to help in the promoting or safeguarding of the underlying freedoms' (Sen, 2004). They can be construed as ethical demands because they are concerned with the safeguarding or promotion of fundamental freedoms, stated in such a way that the burden of action falls on anyone *able* to help, regardless of there being a law that sanctions such action. One can be found in violation of human rights regardless of national laws. This does not imply that there can be no

human rights legislation – indeed there is. The point is rather that legislation is a 'further fact,' and one which is not central to the *meaning* of human rights, nor necessary for their practical functioning (not always or in all cases).

Thinking of human rights as ethically loaded suggests another way of characterizing them: they are 'at the heart of the very idea of rights' (Campbell, 2006, p. 39). What the ideology of human rights recognizes is a set of common capacities and interests that take priority over everything else. Politics is therefore understood as being about safeguarding individual fulfillment by securing a set of basic rights.[24] The idea that human rights are basic, individual, and universal rights possessed in virtue of being a person has enormous ethical appeal, but is not sufficient for establishing what should count as such a right (Campbell, 2006). Implied in this ethical view is the idea of the high value and equal importance of all persons,[25] which at first glance gets closer to specifying which rights in particular safeguard this universal equality. This does not mean that, once we accept inherent value, we have no more controversy as to what shall count as a human right. In fact, this is the beginning of further controversy, because the idea of inherent and equal worth is simply another layer of the basic moral *approach* of human rights, but cannot by itself choose between different specific rights. In my view, human rights are ethical in the sense that they promote a particular view of the political predicated upon an abstract individual. Any further specification will have to go through the process of deliberation that alone is capable of granting specific content. Freeden (1991) expresses the above points succinctly and well in the following definition:

> a human right is a conceptual device, expressed in linguistic form, that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being; that is intended to serve as a protective capsule for those attributes; and that appeals for deliberate action to ensure such protection. (p. 7)

This can be expressed even more simply by saying that human rights are the quintessentially moral rights of humans.

These two points taken together – their internationalism and their being ethical demands – suggests that there is a strong element of universalism present in human rights discourses. Morsink argues that human rights present two universality theses: 'we have our human rights by virtue of our humanity alone and not by any executive, legislative,

or judicial procedures or decisions,' and 'we know by virtue of our humanity alone that we have these moral birth rights' (Morsink, 2009). This leads to what he calls the 'inherence' of human rights. 'These rights are inherent *because* people have them by nature' (p. 20).[26] Interestingly, he denies that animals have rights precisely because of the inherence thesis: '*human* rights differ from the rights other animals have because our human capacities differ in both nature and scope from the capacities they have' (p. 26). One of the major traditions in animal/nature rights also relies on a version of the inherence thesis, claiming that non-human beings have inherent value. This interpretation of the rights of nature draws inspiration from arguments similar to Morsink's, while reaching opposite conclusions. But Morsink cannot both defend an inherence thesis and deny animal/nature rights on the same basis – indeed, the basis he uses for denying such rights is differing *capacities*.[27] But if human rights are truly inherent, we cannot make recourse to capacities at all. It should not matter whether humans have different capacities from non-humans, as – in his interpretation – it is not on the basis of capacities that we assign rights to begin with. This suggests that the inherence thesis, in both human and animal/nature rights, cannot on its own provide a solid foundation. Universal rights have no solid foundation because of their inception in revolutionary speech-acts. They are *proclaimed*, not discovered.

Another way to make the above point is to draw attention to Mill's argument against using nature as a moral standard. If something, he says, is so by nature, then it hardly needs encouragement to be so. Conversely, if some property is against someone's nature, it hardly needs prohibiting.[28] Antony (2000) develops the point further, arguing that 'the fact – if it is one – that such human universals as exist are due to our *nature* as human beings is itself of no ethical importance' (p. 13). Though she focuses primarily on women's supposed natures, we can easily replace that focus with the inherence of rights in human nature more generally. The proposition 'it is in the nature of humans to have rights,' in order to be ethically significant, has to further specify that what is so by nature is good, or else necessary, or both. The trouble is that the meaning of 'nature,' if held consistently from one premise to the next, invalidates the reasoning. If it is not held consistently, the argument is also invalid. If I consider rights to belong to humans by nature, I use the word in its meaning as 'independent of any human action or desire': it is simply the case that humans have human rights. If then I say 'what is so by nature is good,' and keep the meaning the same, it is a patent absurdity, as lots of things that are so by nature are

not good. Similarly, if I keep the same sense of nature and then introduce the premise of necessity, it is also patently false: there are many things that are so by nature that can be changed.[29] To sum up then, to say that human rights inhere in human nature is not to say much at all, because nothing ethically relevant can be deduced from that statement. The ethical nature of human rights should therefore not be confused with their supposed inherence in human nature.

Human rights need not be inherent in order for them to be universal ethical demands. As with the rights of man, their power resides in the logic of the claim and the ability of what they put forth to convince, engage, and even enthrall audiences around the world. If we choose to analyze the significance of universally claimed rights from the point of view of *what* they claim, we risk not seeing the forest for the trees – their self-presentation as inhering in humanity as such (or the rights of nature inhering in nature) should not be taken as a factual statement, but rather as part and parcel of what it is to present a right to the global arena of contestation and possible acceptance. It is, in other words, in seeing rights as a case of political *representation* that we can contextualize their claims.

The distinctive characteristics of human rights that I pointed out so far (internationalism and ethical demands) achieve a new kind of global activism which immensely furthers the hegemonic role of rights-discourses that we saw as being latent in early modernity. In the beginning of the modern era natural rights signified a new tool for political emancipation and social liberation. This is why rights activism starts in the late 18th century, including animal rights activism. But the rights of man had profound limitations for emancipation, not least their intimate connection with the notion of citizenship.[30] This meant that the majority of activist movements had very little practical impact, as they had recourse to an emancipatory concept that nonetheless relied for its power and legitimation on an oppressive state. In fact, 'property protections remained by far the most persistent and important rights claim in theory and law (including constitutional law) throughout the nineteenth century and modern history' (Moyn, 2010, p. 35). From the perspective of today, it is convenient to stress the activism of the 18th and 19th centuries as precursors of international rights activism today. The truth is that those were minor movements, the vast majority of rights-discourses being relegated to domains that strengthened the sovereignty of the state.

The human rights born of the 20th century open up new possibilities. The rights activism that begins in the 1970s can appropriate a growing

number of precursors, real or imagined, because it has recourse to an instrument of emancipation that liberates them and their predecessors (post facto) from state sanction. Human rights internationalism and its accompanying morality enlist a growing number of activists and supporters that increasingly demand political emancipation through the language of rights. There are therefore two different and often confused historical trajectories: one is the emancipation effectuated by the rights of man, which could be called 'citizen emancipation,' and the one effectuated by human rights – 'human emancipation.' Part of the difficulty in keeping them separate, though historically accurate, is their coexistence in political discourses today. The rights of nature themselves exhibit both trajectories, caught as it were in-between the state and the global arena that they see as potentially freeing them from the shackles of the state. These two different and very powerful currents of political emancipation, both expressed through rights, collude to saturate the political fight for emancipation both on the national and the global political stage. Just like the rights of man, human rights depend on the power of proclamation: they were born of proclamations and whatever new rights might be included in the category have to, first and foremost, be *claimed* by someone *as* universal and inherent. This power of the claim has been, at least from a discursive point of view, highly successful, not least because rights from the enlightenment on no longer depend on a 'natural standard.' This process of becoming hegemonic also explains why more and more beings have been seen as apt candidates for rights – not because of something inherent in the moral expansion of the human psyche, but rather as a direct result of the colonization of the political imagination effectuated by the various rights revolutions. Freed from natural standards, rights can be claimed in the name of any-one or any-thing. They follow the logic of the claim that I have described for representation in Chapter 1, leading to a situation where both representation and rights have no pre-defined limits.

2.1.3 Rights expansion

The post-1945 rights explosion has brought with it myriad rights claims – most anything that could possibly be stated as a rights claim has at some point been stated as such.[31] 'The rhetoric of human rights is omnipresent in the contemporary world' (Sen, 2012). Since the 1970s, it has become commonplace to note that rights-discourses have proliferated at great speed. In terms of human rights, three different 'generations' have been proposed by Karel Vasak (1984, originally delivered in a 1979 lecture[32]) and since accepted as a way of analyzing the proliferation of

rights in the sphere of international human rights. The first generation human rights refer to civil and political rights; the second generation to economic, social, and cultural rights[33]; the third generation go beyond what can reasonably be covered under the first two generations, and have been termed 'solidarity rights' (Morgan-Foster, 2005). These later ones have been theorized by Vasak to be the right to development, a healthy environment, peace, the right to communicate, and the right of ownership in the common heritage of humanity. In the Ecuadorian constitution (see Chapter 3), we will see all of these solidarity rights, and more, throughout the document. The question for the present purposes is why these rights have to be constitutionalized, and what the rights of nature represent with respect to this paradigm. This analytic framework is applied to human rights specifically, but the issue of proliferation, as this chapter has suggested, is much greater than that.

Wellman (1999) identifies three other ways in which rights more generally understood have expanded: 'alleged moral rights,' 'real legal rights,' and the expansion of 'the language of rights in political discourse.' His analysis applies to rights as such, that is, international human rights, civil rights, property rights, animal rights, rights of nature, and in fact any other kind of rights we could think of. The point is that, since around 1970, *all* relevant areas that rights could reasonably (or not so reasonably) apply to have come to be dominated by their discourse. Alleged moral rights take advantage of the ethical component of rights-discourses, while legal rights aim at codifying in law what rights certain groups claim to have 'discovered' – moral entitlements that had previously been ignored.[34] The connection between moral and legal is therefore very tight. And all of this is achieved by an overall colonization of political discourse, where access to political power and, crucially, to political representation, is increasingly mediated by the claiming of rights.

In describing the various trajectories of universalist rights-discourses so far, I have also hinted at why rights have generally come to dominate political discourse, particularly when it comes to the power of politics to emancipate. One very tempting explanation for this hegemony is provided by the moral dimension of rights, particularly of human rights. And there is little doubt that inhabiting high ethical ground gives a certain authority to the discourse. But by itself, I find this explanation unconvincing. After all, *any* claim to political emancipation *tries* to occupy the same ground, so as to define itself in stark moral terms – either this, or else evil. I submit that several different factors combine to create the hegemony of rights. The first is, indeed, the moral appeal of these rights, combined with *internationalism*. This is very important, because their

specifically internationalist focus lends credence to a morality anchored in abstract humanity. Further reinforcing this point is the idea that human rights are claimed *against* the state. As Moyn (2010) has shown, the meaning of human rights today is very much tied to opposition to the state. But it is important to underline that this opposition is *potential*, that is it lends credence to the discourse or rights whether employed by international organizations, individuals, or states themselves. The moral claim in the name of humanity as such, over and against anything that would stand in its way, is simply part of the logic of human rights today, and these ingredients make the discourse incredibly powerful.

Given that human rights are the prototypical rights today (that is they ground the morality of all other rights), they lend their prestige to rights more generally, explaining further a proliferation that is not always internationalist or against states. Here we touch upon the really crucial element in their hegemony: the influence of human rights upon rights generally means that, whenever invoked, rights *seem apolitical*. Because opposition to the state is part of their pedigree, they seem to always be above the pettiness of politics as usual. Even when invoked by politicians, they retain the aura of political innocence. The key to this very crucial aspect is to be found in the nature of claims themselves. Because rights are primarily claims, and because they are nowadays backed by a moral internationalism, they manage to shout in indignation while elevating their recipient to great heights. The claim to universalism is confused for a claim uttered by some universal itself, thus concealing the very political nature of rights-claims. Far from being opposed to the state, rights routinely function to strengthen it, but this political nature is lost behind their apolitical facade. Finally, the forcefulness of the claim and the stark nature of its universalism make it impossible to argue a position opposed to rights without seeming heartless at best, and immoral at worst. In any case, anybody opposed to rights is surely political – and that is almost a dirty word. In the age where representative government enjoys historic levels of mistrust, it should come as no surprise that rights enjoy great levels of trust: they take over the job of representation in a concealed and much less accountable manner, having embedded their claim-making activity deeper than that of representation, behind layers and layers of seeming moral truisms.[35]

So far in this chapter we have looked at the historical and conceptual foundations of the current explosion of rights. Three different areas of rights – moral, legal, and political – have been identified, and the moral and political discussed in relation to the rights of man and to human rights. I have suggested that these discourses are the foundation of

rights in general, and of legal rights (that is actually codified rights) in particular. The framework proposed so far is entirely compatible with the appearance of animal and nature rights, and it remains to be seen how the familiar rights arguments are applied to these other categories. Before I do that, there is still another aspect of rights which will be relevant for this investigation – the legal aspect. I now turn to a classification of rights that will fill in the rest of the picture.

2.2 Types of legal rights

The universalist and internationalist discourse of the rights of man and of human rights would be entirely vacuous if it wasn't for the actual codification of rights in law. Though human rights can be said to ground most other rights (Campbell, 2006), we still have to look at what those other rights are, and how human rights look from their perspective.

It would have become clear by now that the moral, political, and legal aspects are only easily peeled off from each other analytically – in the way rights *work*, they are always found together. However, this analytic effort is worthwhile because it brings clarity to an area that is, almost by definition, muddled. In this section I want to look closer at how we can systematize the many different kinds of rights that exist not from the 'above' perspective of human rights, but rather from below. I have pointed out so far how the logic of the claim, which is crucial to political representation, is also present in the concept of rights. Now I will have further opportunity to ground the argument, and also to bring to bear another element that was crucial to the process of representation and that is also crucial to rights: the primacy of relations.

Wesley Newcomb Hohfeld has produced, almost 100 years ago, one of the definitive legal analyses of rights, quoted and used in most theories of rights since. His declared motivation in *Fundamental Legal Conceptions* for separating the different aspects that constitute a right was that 'the expression [was] used indiscriminately to refer to any kind of legal advantage' (in Wellman, 1997, p. 63). In other words, there was much confusion around the concept of rights, though when he published his 1919 study human rights did not feature prominently – a development which was to add more confusion still (Campbell, 2006). Hohfeld (1964) analyzed the concept of rights in terms of the kinds of *relations* it gives rise to. He concluded that there are four different legal conceptions: a claim, a liberty, a power, and an immunity.[36]

Claim-rights, which are dominant in rights-discourses generally (Campbell, 2006), are expressed as a legal claim of this form: party A has

a claim on party B to do x if and only if B has a legal obligation to A to do x. In less formal terms, this means that a claim-right exists when Barry has a legal claim that Joe fix his car, if and only if Joe (by having signed a contract) has an obligation to fix Barry's car. Similarly, Joe has a legal claim vis-a-vis Barry to be paid after he fixes the car. As Wellman (1997) explains, 'every legal claim is a claim that some second party perform or refrain from some specific action' (p. 64). Claim-rights are very widespread and important not least because they entail a certain equivalence between rights and duties, and are often expressed in terms of their accompanying obligations only. For instance, Campbell gives the example of the right to life being expressed as the right not to be killed, which implies the obligations of others not to kill you (2006, p. 31). In the same vein, the really interesting question for the rights of nature becomes who has the correlative duties that such a claim-right on behalf of nature imposes?

A liberty-right is expressed as the 'liberty or power to do some specific action' (Wellman, 1995, 1997), inasmuch as there is no correlative duty to refrain from performing such action. For example, I have a liberty-right to pick daisies if and only if I am not trespassing and there is no sign informing me of the obligation not to pick them. Expressed differently, liberty-rights cover what I have the liberty to do without encroaching on either other rights, or my duties and obligations toward others. The kind of relations that liberty-rights give rise to were therefore understood by Hohfeld as 'privileges' (Campbell, 2006). Yet there is a sense in which liberty-rights can impose a claim-right on others, by requiring that others do not interfere, and thus establish a duty on the part of others. Therefore, Campbell suggests, there are 'weak liberty rights,' which are barely rights at all inasmuch as they signify my liberty to perform actions that have no bearing on others and require no duties from others, and strong, or 'substantive liberty rights,' which are a sub-species of claim-rights inasmuch as they impose obligations on others not to interfere, or to actively preserve my liberty (Dworkin, 1978). For the rights of nature, the salient question is whether or not they can be interpreted as granting nature the 'liberty' to function without human intervention, in which case they would fall under the claim that nature puts upon us to preserve that liberty.

These two categories give rise to two further distinctions that much can depend on. As we have seen having a legal claim, whether through a direct relation or through a substantive liberty-right, imposes obligations on others. These obligations can be of two different types: either a *negative* obligation, in the sense of not interfering, or a *positive* obligation to help bring about the fulfillment of the claim. Nature's right to exist, taken in conjunction with its right to remediation, suggests a

possibility for both these kinds of relations. Furthermore, the positive obligation that may accompany a claim-right can either be *protective*, or *promoting* (Campbell, 2006). In the case of nature, both could apply: I am either under the positive obligation to protect nature from degradation, by stopping mining projects for instance, or else to promote its well-being by actively assisting in the 'regeneration of its natural cycles' (Art. 71) in cases where that would be called for. Interestingly, it is usually the state which is charged with protective positive rights – a situation clearly expressed in the Ecuadorian constitution (Art. 11/9, 277 see Chapter 4).

Power-rights are 'rights which, when exercised, alter the legal or moral standing of both the rights-holder and others' (Campbell, 2006). Traditionally, these have been such rights as giving consent to becoming an experimental medical subject (Wellman, 1995), marrying, voting, making a will, entering into a contract, and others that, through being exercised, change both the right-holder's and the other's rights. It is not clear how, or if, power-rights can apply to the rights of nature – if the kinds of relations that the rights of nature impose can be defined in terms of powers. The advocates of the rights of nature certainly *wish* that they alter, for instance, property relations (see Cullinan, 2011, as well as Chapters 3, 4, and 6). Whether or not this could be the case remains to be seen. What is certain though is that advocates for the rights of nature, and to some extent for animal rights, often argue that granting rights to these beings would confer upon them powers, if only in terms of altering their moral standing.

And finally, an immunity-right, as the name suggests, is the capacity of a right-holder to be exempt from the consequences of an action, if and only if another person does not have the power to impose said consequences. In other words, immunity-rights can either be exercised 'in the absence of a rule conferring the power-right on another person' (Campbell, 2006), or else can be used to explicitly forbid the granting of a power that would go against the immunity. There is therefore a tight relationship between power and immunity-rights, just like there is between claim and liberty-rights. Immunity rights can be quite useless if it is relatively easy to confer a power unto someone that goes against the supposed immunity. So if a natural reserve is granted immunity from exploitation, this is only effective if the granted immunity trumps the power granted upon the state oil company to prospect for oil.

Hohfeld thought that only claim-rights are, strictly speaking, rights. As I mentioned at the beginning of this section, he was dissatisfied with the confusion that prevails in speaking of rights, and therefore sought to put some order into the ways we speak about them. However laudable

that idea, and however excellent the resulting classification, the confusion of rights-discourses is not a shortcoming, but rather a response to their very real complexity. We might wish to find a way to perfectly separate between legal, moral, and political uses of the term, but the fact remains that they are always mingled. The Hohfeldian scheme has the advantage of granting as much clarity as possible, but even then we cannot insulate the concepts hermetically. So, as Campbell points out, the right to freedom of movement involves a former liberty-right, a substantive liberty-right or claim-right, a power right inasmuch as I can alter my resident status, and an immunity-right, 'against anyone introducing laws that prevent me traveling' (2006, p. 33). This complex web of relations, taken together with the moral and political claims already discussed, is what we mean by rights. But as the application of this concept to non-humans should make clear, the right-holder, as well as what counts as rights more generally, is always subject to change.

There is another sense in which rights are always correlated with claims. For Hohfeld, a claim-right was a very specific legal relation but, following Feinberg (1966), I wish to suggest that rights are more broadly speaking implicated with the *activity of making claims*. This should help us move closer toward a more exact description of the relation between rights and representation. As Feinberg explains, 'certain facts about rights, more easily, if not solely, expressible in the language of claims and claiming, are necessary to a full understanding of what rights are and why they are so vitally important' (Feinberg, 1966, p. 142). This is the same motivation we saw Saward (2006b) give when discussing representation, in Chapter 1, and that we will meet again in the next chapter. Using the language of claims brings about certain features of the concepts, without nullifying others, that are nonetheless important for their understanding. Feinberg distinguishes between different kinds of claims, taking stock of the ways in which we use the word and what the similarities and relevant differences in usage are. To this end, he insightfully points out the etymological connection between 'claim' and 'clamor' – suggesting the often forceful and immediate nature of the activity of claiming. Certain psychological and physical needs '"cry out," we say, for satisfaction' (p. 142). Those kinds of immediate and forceful claims are connected to the more regimented rights-claims, in the sense that they provide the moral *foundation* for certain kinds of treatment. In this reading, to have – or demand – rights, is to engage in the activity of claiming that the kind of being that you are deserves certain kinds of treatment. When this is done on behalf of non-humans, the representative-claim and the rights-claim become all but indistinguishable.

Feinberg goes on to present other kinds of claims as well, drawing a distinction between claiming against, and claiming to. Also, there are sense in which claiming does not have to do with rights at all, as in the expression claiming *that*. I can claim that such and such is the case without my claim invoking any rights or duties, just as in the case of representation not all claims are representative. Said differently, not all rights-claims are valid, and their validity will be a subject of much controversy, having mostly to do with moral reasoning and moral rights: in this connection, openness to public scrutiny and debate is of the utmost importance.

To sum up the sense in which rights are a form of claim-making, over and beyond a Hohfeldian scheme, I turn to Regan's summary of Feinberg's views:

> to make a claim is a performance; it is to assert that one is oneself entitled, or that someone else is entitled, to treatment of a certain kind and that the treatment is due or owed directly to the individual(s) in question. To make a claim thus involves both claims-to and claims-against. It involves claims-against a given individual, or many individuals, to do or forbear doing what is claimed is due, and it involves a claim-to what one is claiming is owed. Both these features of making a claim are crucial to the process of validating a claim that has been made.
>
> (Regan, 2004, p. 272)

The similarities between this and representation as claim-making are striking. But besides bringing these similarities to the fore, the benefit of characterizing rights in this way is that it makes clearer the ways in which the three dimensions of the concept (moral – political – legal) are interrelated. Another great benefit, particularly when we consider representation and rights together, is that the activity of making claims in the name of non-humans, inasmuch as it is couched in the language of *claiming what is owed*, is always about securing rights, whether the advocates use the term or not.

Having seen the formal structure of the concept of rights in its three dominant dimensions (moral – political – legal), the next chapter starts with a discussion of the 'legal person,' that is, the subject that is at the center of this complex web of claims and relations, before exploring how these notions have been applied to non-human beings.

3
Animals, Nature, Persons

3.1 Subjects and legal personalities

The moral, political, and legal aspects of the concept of rights would mean nothing at all if they weren't somehow connected to the category of the legal person. Who is the legal person? And must it be a 'person' at all? Are there, in other words, any limits to what can count as a legal person? And finally, is there a difference between the 'subject' of rights and the 'legal person'? This section will offer some answers to these questions, in the hope of elucidating how nature has come to be represented by some as pertaining to this category.

But let us start with humans, as it is there that all of these concepts originate. Intuitively, one would think that the legal person must be a person in flesh and bone – possibly what we call 'an adult,' designating by that term an ideal human type that is in full and unobstructed possession of a set of characteristics that we deem valuable, maybe even indispensable, for the exercise of rights. If we are to believe the spirit of the declarations discussed in Chapter 2, then the legal person is the embodiment of 'humanity' – someone who can, somehow, ostensibly show their humanity in order to claim their basic rights. However, this very abstract individual needs further specification in order to claim any positive rights: s/he needs to be, at least, also a citizen. This is evident in the concept of universal rights today, when the rights of sans-papiers are routinely lesser than those of citizens belonging to a national community. Or when refugees can be tossed back and forth, though their humanity is not, ostensibly, in doubt (Balibar, 2004, 2005, 2009).

So at the level of moral and political rights, what counts as a person has to do with what *counts*, that is, with how membership in the relevant community (for example, 'humanity') is handed out. Legally speaking, the

person is that entity which has a claim on someone else that is enforceable in law. But unless morals and politics first decide what counts,[1] there is little chance that legal rights will be enforced. The importance of the count is also evident in the discourse of animal rights. A moot question is always: what are the boundaries of the animal? And in a world where animals would have rights, who would be the 'refugees'?

The first step toward the legal person is therefore recognition: one must be seen, and recognized, as belonging to the class of entities that enjoy rights, and though the tendency is to give ostensive definitions, they are hardly ever clear-cut. In other words, rights are granted, or withheld, employing a logic of similarities (Douzinas, 2000; Bourke, 2011). Inasmuch as an entity is recognized as mattering, it has to also be similar enough to the ideal type proposed by the universality and abstractness of rights in order to have access to their protection. This is why, after the rights of man introduced the discourse of universal rights, women didn't enjoy them and slaves continued to be slaves: they were not considered similar enough to the humanity that the rights of man had in mind (namely, male, with full citizenship). The logic of similarity proves to be uncomfortably close to the logic of exclusion (Bourke, 2011).

The gap between the moral discourse of rights and their legal application is the gap between a highly abstract universal and a concreteness steeped in minutia of legal consideration. The legal person is the raft that crosses this gulf between abstractness and concreteness, which could not be crossed otherwise. Indeed, cases of rights-abuses in the face of high-flung moral discourse show exactly what it means to be left stranded between the two poles embodied in the concept. So the legal person is the *mediating element* that helps bring some semblance of reality to what could otherwise be pure rhetoric.

Recognition and similarity are necessary, but not sufficient, conditions for gaining legal personality. We have seen that, at the moral level, rights are thought to ground both politics and law in what ought to be the case, while at the level of law they are a set of relations centered around claims. Central to both these operations is the idea that *something is owed to the subject of rights*. This is true whether we are considering what humans in general need in order to live a flourishing life (Sen, 1987, 1993, 2005; Nussbaum, 2000, 2003, 2006), or whether we are considering someone's right-claim to have their roof tiled. In both the moral and the legal case, the issue is what some, or all, people owe other, or all other, people. At the moral level this is expressed in terms of justice, whereas at the legal level in terms of legal agreement (contract).

Politics mediates between what we consider is owed to people generally, as a matter of justice, and the various rights-claims that must inevitably translate such visions. However, in all cases involving rights a central theme must be what we think is owed, which means also that in contemplating rights we must also consider our, and other's, duties and obligations.[2] Any society will therefore have a set of social rules, but they only become rights inasmuch as they 'prescribe duties that are in some way owed to another person' (Campbell, 2006). Moral rights therefore become a mirror held up to the values of a given society in a given time – whatever is considered important enough to be 'owed something to' reflects the value that is put upon that entity.

The category of the legal person must also partake in this evaluative operation. What is due to others will feature greatly in its construction. To summarize what has been said so far, the legal person is the bridge between abstract universality and concreteness, composed of the recognition of an entity as (a) important, (b) partaking in the relevant universality, and (c) being owed something, usually specific to its nature. This is the morally biased account of the legal person, and according to it the only limit to what can become a legal person is given by the three operations above. If enough value is placed upon an entity, there is no reason why it cannot become a legal person. And it is here that the relation to the subject is to be found. The legal-person constructed by *moral* rights counts as a subject, or a person in the existential sense, because it is seen as a rightful recipient of justice. The argument from moral rights, therefore, will always center around the creation of such subjectivities. In other words, what counts as a moral subject – what is due moral considerability – is that which is taken to be apt for the kinds of rights-claims we have explored. However, this is just part of the story. The other part is the strictly legal aspect of the person.

Legally speaking, one need not be a subject in the above sense in order to count in law. Ships, corporations, trusts, and monuments enjoy the status of a legal person strictly speaking. To become a person in law, one need not be recognized as morally significant, or as partaking in the universality of a class, or as being owed strict justice. All that is needed is that the law *state* the existence of a legal right for there to be an attendant legal person. In this sense, the legal person, just like a legal right, is an act of linguistic creation – another kind of proclamation, one which immediately institutes what it proclaims. As Hartney (1990) explains, 'whatever legal authorities say is a legal right, is a legal right, whether this agrees with what philosophers would say about moral rights' (in Wellman, 1995, p. 135). In this sense, ships, corporations, trusts,

infants, monuments, the dead, and future generations, can all count as legal persons, inasmuch as the law recognize their having legal rights.[3]

Whereas the subject of rights is that entity which is commonly recognized in moral judgment as being owed justice, therefore reflecting a moral imperative, the legal person is that entity which receives, through an act of legal proclamation, a legal right. The connection between the two is tenuous at best. In fact, there need not be a connection at all. One can be a subject in the sense discussed here without that fact translating into a legal right, and hence one is left without legal personality. Conversely, an entity can be a legal person, yet for that reason it would not qualify as a subject as well. Ships and corporations suffice as examples to see why this is the case. Furthermore, when the two categories are connected, the connection can either serve, or go against, the dictates of justice. If the moral subject happens to be a white wealthy male citizen, in all likelihood his person in law will function to deliver what is morally owed to him. Yet the opposite can be true. For instance, slaves under American law in the 19th century 'were carefully constructed quasi-legal persons. Because they were "property," they could be harshly punished by their masters. But they were categorized as "persons" when it came to serious crimes' (Bourke, 2011, p. 147). In this manner, slaves were effectively property, but could be held to account as persons under the law in cases where their agency interfered with the will of the master.

The same has been true of animals. Even though before the historical time of human rights and legal personalities, the courts of the 16th century used to routinely try animals for murder or other offenses. Of course, animals were property, except in cases where they would cause injury – a logic quite similar to that applied to slaves (Evans, 1906). Which means that it is quite possible to specify legal personalities in such a way as to perpetuate injustice and domination. This is an important point because, as we will see shortly, advocates of animal rights, as well as advocates of nature's rights, routinely invoke a correspondence between subjectivity morally conceived, and legal personality. The common argument is that, once rights are recognized, the non-human entity in question is no longer considered a thing. Hence they will partake in moral treatment.[4] The problem with this is double: though moral and legal rights are intertwined, it fails to distinguish them in important respects; it further ignores the fact that thing and subject have been used for conflicting purposes, as the discussion above has shown. Though they *ought* to be mutually exclusive, in fact they are not – wrongly placed humans often count as things,[5] while inanimate objects enjoy the protection of the law.

Legal persons are amoral categories, and as such the recognition of personality under the law is not by itself a guarantee of ethical treatment. The legal person does not have a necessary relation to the subject – more precisely, personhood under the law does not imply *moral* subjectivity. The claim that one implies the other, often made by rights advocates, rests on an equivocation of legal personality with existential personhood. It is true, in existential matters the person and the subject coincide to a large extent. In legal terms this need not be the case, and indeed it is not the case in many instances. However, this also means that there are no theoretical limitations to what can become a legal person, that is, to what can have legal rights. In terms of law strictly speaking, even the quality of being alive is not crucial for having legal personality and rights. This means that the greatest stumbling-blocks to the idea of non-human rights are on the side of moral, not legal, rights. The legal problem arises inasmuch as the establishment of moral rights is seen as necessary for the recognition of legal rights.

I have presented the idea of legal personality and moral subjectivity in relation to rights conceived primarily as a claim-making *activity*. Before we continue with an application of these concepts to the case of non-humans, I need to clarify how what is due to someone has traditionally been conceived. If rights are an expression of a claim to be owed something, and hence of a correlative obligation, what exactly is it that is, generally speaking, owed, and to whom? What is the source of the moral debt that is at the core of rights?

There have traditionally been two different ways of thinking about why and what is owed to people. It stands to reason that whatever we consider as being owed to someone will depend on what we take the nature of that someone (or perhaps – something) to be. In other words, why and what is owed will depend on whether the subject is seen as primarily defined by *will,* or *interests*. If the subject is portrayed as primarily a willful one, then it is their *autonomy* which becomes important to any consideration of why and what is due. If interests are seen as primary, then the satisfaction of interests becomes the leading principle. 'According to the will theory of rights, rights are explained in terms of our capacity for choice and agency through the action of the will.' The interest theory contends that 'rights are explained in terms of the fact that human (and perhaps other) beings are capable of having interests' (Campbell, 2006, p. 43).

These two different sources of moral consideration have everything to do with the kinds of moral right-claims that we are inclined to accept as valid, and also with the kinds of claims we are prone to making.

Thinking the subject as primarily autonomous will lead to rights-claims that are primarily focused around the recognition and preservation of autonomy. The same goes for the other approach. What is of great importance though is that any one of these views, besides positively prescribing what and why is owed, also excludes whomever is not seen as partaking in the relevant moral aspect. So, for instance, Wellman (1995) argues that only moral *agents*, which are persons whose autonomy is expressed through their being willful agents, can posses rights. In this vein, small children cannot be said to possess moral rights at all.[6] Similarly, if one cannot be said to have any interests, one cannot be said to have rights, leading theorists to propose boundaries around what kinds of beings can or cannot be said to have interests. The capabilities approach (Sen, 1987, 1993, 2005; Nussbaum, 2000, 2003, 2006) is perhaps more flexible in this respect, because any creature, as long as it is animate, has capabilities coextensive with its nature, which form the basis for ascribing rights.[7]

The very understanding of what a right is, what it is for, and who can have it, will vary depending on whether we focus on will or interests. For the will theories, rights are tied to the power of the individual to enforce, demand, waive, or else *do* whatever it is that rights are capable of doing. The point is that rights are tied to individual choices, and other's obligations are obligations inasmuch as the rights-holder is able to demand their enforcement (Hart, 1982). This means that only autonomous humans can have rights, excluding non-autonomous humans and non-humans, though some can be said to make choices (Singer and Cavalieri, 1993). From the perspective of interest theories, a right is not tied to the individual's power of claiming it, but to the existence of arguably important interests. What this means is that, inasmuch as a being has interests that bind us to protect them, that being ought to have rights. This can include non-humans, though not all, as relevant interests are taken to mean those possessed by a being that we can value for its own sake, and not for the benefits it gives us (Campbell, 2006). To this end, interests are related to sentience (Singer, 1975), as a way of adjudicating between what counts as a relevant interest, and what is merely *in the interest* of something.[8]

It appears then that will theories cannot conceive of rights being applied to non-humans; it is only interest theories that can. This is, indeed, the standard account (Campbell, 2006), but one which is misleading on several counts. I have argued that the idea of owing another being something is at the very basis of rights, and it seems as if only beings who have interests can be owed something. But to consider

a being as primarily defined by will, and hence as autonomous, also demands that we respect that autonomy, effectively insisting that we owe an autonomous being respect, freedom, and so on. So whether we think of rights as founded by autonomy or interests, the idea of a moral debt is still very much present. Furthermore, animal and nature advocates often think of their preferred subjects as enjoying freedom and being autonomous in some sense, though not in the same sense as humans (Regan, 2004), using this as a basis for why they should have rights. If anything, it is interest theorists of animal rights, like Singer, who are not particularly tied to the idea of rights – though, as we shall see, this is only superficially so.

The exclusionary practices of the dominant will/interest[9] justifications are important to keep in mind as we explore non-human rights in more detail. Inasmuch as we are dealing with rights, we are also dealing with a logic of similarity to a supposed universal type, or else to a set of qualities or capacities deemed fundamentally important. This leads theorists to exclude certain beings from the possibility of having moral rights and hence from moral consideration: senile people, very young children, mentally impaired people, animals of all sorts. This kind of moral rights reasoning suggests that the reasons we treat different entities morally have to do with *their capacities*. It also suggests that unless an entity has said capacities, it cannot have moral rights, or be treated morally. It cannot, therefore, have *meaningful* legal rights either. Rights-talk always functions with these premises.[10] This is one reason why those who choose to represent non-humans outside the hegemony of rights do so without appealing to what is due *to them* at all, and therefore without appealing to characteristics and capacities, but rather to social practices and ingrained ways of moral thought (Crary, 2007, 2012). We will explore their contributions in the last chapter.

We can sum up the basic thinking of the rights paradigm, whether stemming from interests or will, by saying that it involves a kind of moral thought that is dependent upon the idea of a moral debt: we owe something to a subject, and it is because of that that it becomes a subject of rights. The idea of debt is considered in relation to a set of characteristics. We owe people in general moral treatment, and hence they have moral rights, because people are beings endowed with wills, or else with a number of interests, or else with a number of innate capacities, the frustration of which leads to suffering. In other words, rights always think of the subject as a subject in virtue of a particular list of things that we deem morally relevant. It appears that this is a kind of moral reasoning attuned to the kind of being it reasons about, but this

is doubtful, because no amount of characteristics could exhaust the subject, and it remains an open question whether in fact we treat beings morally, and ascribe moral rights to them, on the basis of characteristics at all.[11] I cannot fully answer that question here, as I am concerned with describing the assumptions of rights (see Chapters 6 and 7 for the full discussion). These can be condensed thus: rights stem from a moral debt owed to someone in virtue of their characteristics, or of a set of facts about their lives.

3.2 Non-human rights

3.2.1 Animality and humanity

The idea that animals might have rights appears at the same time as the extension of rights to other human beings previously excluded from their domain, namely women and slaves (Bourke, 2011). It is of little surprise that these would appear together if we consider that the figure of the animal has always been used to frame the figure of the human. Said differently, what counted as fully human always depended – definitionally – on a sharp contrast with 'the animal'. Women and slaves, in being denied full humanity, were therefore necessarily partaking in animal nature. The supposed emotionality of women or the bruteness of the darker skinned served precisely the purpose of relegating them to the condition of the animal, and thus to justify their very different treatment. Inasmuch as women were thought closer to 'nature' due to their role in childbirth and their putative disavowal of reason, their lot was to be considered closer to animal than to human nature. Similarly, the darker skinned were supposed to partake less in the faculty of reason than white men. Reason and rationality on the one hand, and sensibility and emotion on the other, formed in the 18th and 19th centuries the main lines of division between full humans (white men), inferior humans (women, slaves, and non-whites), and animals.[12]

The modern revolutions we discussed earlier introduced the idea of humanity as the basis of rights, but as we have already seen this – in practice as well as in theory – was not as universal as one might suppose from the text of the declarations themselves. To begin with, the French declaration was of the rights of *man* and the *citizen*, which it was understood was also male, at least inasmuch as citizenship was deeply implicated with political freedom and hence with the right to vote. Nonetheless, these early modern rights opened up the possibility of thinking humanity as such, irrespective of gender or ethnicity, as the proper basis of rights, a line of thought that reaches prominence in

the 20th century and that continues to gather power today. However, the distance between the early rights proclamations and the actual inclusion of, for instance, women in political life, was great: the French parliament approved equal voting rights for women in 1944 (Bourke, 2011).

Regardless of this big gap between theoretical possibilities and practical acceptance and application, it is indisputable that new ways of thinking and a new kind of activism was indeed made possible by the French and American declarations. Several years after the French declaration, in 1792, Mary Wollstonecraft published the *Vindication of the Rights of Woman*, where she argued that women should be given rights on the same basis as men (Wollstonecraft, 1792; Dickinson, 1977). Though it was ridiculed by most of her (male) contemporaries, it nonetheless initiated a struggle for emancipation based on rights. At around the same time, Jeremy Bentham pioneered, in *An Introduction to the Principles of Morals and Legislation* (1789), the approach known as preference utilitarianism, summed up in the often quoted: 'the question is not can they reason? Nor, can they talk, but can they suffer?' (Bentham, 1789). Though he was referring to animals, the same sentience approach will be used in proposing the emancipation of women by the anonymous author of a letter to *The Times* in April 1872 titled *Are Women Animals?*. The author called herself An Earnest Englishwoman and contended that, if women were at least considered animals, which had more protection under the law than women did, then 'there would […] be at least an equal interdict on wanton barbarity to cat, dog, or woman' (in Bourke, 2011, p. 1).[13] To appreciate just how salient her argument was, consider that the first animal protection legislation, aimed at preventing the 'improper and cruel treatment of cattle,' was passed in Britain in 1822 (Herscovici, 1985), the Society for the Prevention of Cruelty to Animals (UK) was founded in 1824,[14] the Cruelty to Animals Act passed in 1876, while the British parliament approved voting rights for women in 1928 (Bourke, 2011).

The idea that rights might be extended to animals was first systematized as such by Henry Salt in his *Animals' Rights* (1894), where he made use of all the arguments developed up to his day, giving credit to predecessors whose thought had been crucial in the early creation of modern rights regimes. He applied the concept of rights to animals, drawing inspiration from social thinkers of his day – most notably Marx and Kropotkin – and referring to animals as fellow workers as well as fellow creatures (Herscovici, 1985). The connection between humanity and animality was also being presented through the prism of slavery, Jeremy Bentham being one of the first to make use of this analogy.

Just like comparisons between animals and women, whether used to denigrate or elevate, were part of the modern rights-discourses, so were comparisons with slaves. The usual arguments in favor of slavery used the comparison, as did the arguments in favor of abolition. Animal and slave were seen by many abolitionists as almost interchangeable categories, and cruelty to one and the other was seen as marking an increase in cruelty generally.[15] The reverse of this argument was that if compassion is extended to one category, it must also be extended to the other, if only out of fear of inconsistency.

There are therefore several approaches that emanate at around the time of the French declaration and which are emboldened and inspired by the universality thesis inherent in the declaration of rights based on the fact of existence. There is the issue of sentience, which is the first argument out of the modern rights declarations to be extended to non-humans.[16] If sentience is present, then cruelty should be, at the very least, minimized. Conversely, there can be no cruelty without sentience – kicking a rock is not cruel toward the rock. The second issue is that of rights proper – if animals are similar to us in important respects, then it stands to reason that they deserve similar protections. The basic argument here was provided by the new revolutions in biology under the auspices of Darwin's work. But more importantly for our purposes, the issue of rights extended to animals as such, without reliance on the argument from sentience, already signals toward the political-philosophical landscape created by the modern revolutions, one in which emancipation becomes increasingly entangled with rights-talk.

Whereas the first animal rights movements were concerned with beasts of burden, the late 19th century saw arguments emerging against vivisection (Herscovici, 1985). The outcry against vivisection can be understood as a sign of the times – animal rights and anti-vivisection campaigns coincide not just with an overall rights expansion, but also with the increasing industrialization of the modes of production and of daily life more generally. It is therefore no coincidence that the Romantic poets, as well as Thoreau and Emerson on the American continent, emerge in the century that had seen the greatest expansion of cities within (their) living memory, and the introduction of machinery on an unprecedented scale.[17] Pauperization and the destruction of landscape, the inexorable pace of progress and the churning up of traditional ties, as well as the frontiers of freedom and emancipation opened up by the American continent and the rights declarations, all conspire to make of the 18th and 19th centuries veritable laboratories of revolutionary ideas. The origin of animal rights has to be understood

in this context, as part of the same story of Marx and Darwin, Keats and Thoreau, Bakunin and Thomas Paine. The idea of radical emancipation taken together with the romantic mood prevalent in a continent choking in smog naturally leads toward the elevation of animals to the status of potential rights-bearers.[18]

It is clear that the early idea of animal rights was modeled on the idea of the rights of man and did not simply borrow the mechanism (rights), but also the arguments. Very importantly, two different ideas come to ground calls for animal rights and, later, liberation (Singer, 1975): *use* and *suffering*. The issue of sentience, or the injunction against cruelty, as well as the comparisons with women and slaves, all rest on a foundation of moral indignation fueled by the perception of use as illegitimate and suffering as unacceptable. Furthermore, use and suffering are seen to go hand in hand; in other words, to use it to cause suffering. This line of thought has obvious affinities with a Marxist inspired social ethic, where exploitation and the resulting suffering-as-alienation is ever-present[19]. Animals, our 'fellow-workers' (Salt, 1894), are harmed by use as such, and this new sensibility parallels another set of concepts that is initially applied to humans but slips out of their exclusive ownership, namely *dignity* and *autonomy*. In other words, use is seen as an ill because, at the very minimum, it causes suffering as lost dignity and autonomy. The fellow creature which becomes a beast of burden, or a cog in the scientific machine as a subject of experimentation (good enough to learn from, but not good enough to be treated decently), looses its natural dignity and its ability to self-direct, just as the worker looses his/her dignity when used in the process of impersonal production.[20] These parallels become increasingly explicit, and though they start in the historical period discussed in this section, they come into their own in contemporary debates. This is best seen through another conceptual pair that comes out of what I have described here: the distinction between *property* and *person* – the former being seen as degrading and exploitative, while the latter as a recognition of autonomy and freedom, best achieved (as in the case of humans) through rights.

Very similar arguments are present today in both the utilitarian and rights camps – both Peter Singer and Gary Francione, or Paola Cavalieri and Tom Regan – use the arguments that slavery and the treatment of animals are fundamentally related, that use and suffering are connected, and that property and persons are fundamentally opposed categories whose contradiction can only be resolved in favor of rights-bearing persons, and against nameless objects. Throughout the last century, important developments have nonetheless emboldened and

changed, in some respects, contemporary approaches. Having been around for some time, the idea of rights in general – and animal rights in particular – has gained acceptance. It has also been reaffirmed by the UN Declaration and the era of human rights that it made possible. As their 18th century predecessors paralleled the rights of man, so contemporary animal rights (and now nature rights as well) are modeled on the human rights of the 20th century. If anything, the rights of non-humans have moved ever closer to those of humans, creating a philosophy of rights that is beginning to disregard species membership – it is now thought, by many, irrelevant. And, very importantly, the idea of rights of nature, as such, has made its global appearance.

Yet one basic fact, present in early modernity as well as today, cannot be ignored: the comparison of animal treatment with slavery and the woman's movement relies for its forcefulness on the underlying assumption that similarities matter. The same is true for all the other usual arguments presented so far and inherited by postmodern discourse: use, suffering, dignity, autonomy, freedom. In other words, moving the species barrier to include more beings is seen as reliant on similarities and differences, which in effect is the whole point of modeling animal rights on human rights. It is nonetheless strange that contemporary approaches, whose precursors we now briefly described, both uphold and deny the idea of a species boundary. If we predicate moral considerability on similarities with beings that are already treated morally (at least in theory), then we necessarily postulate *some* boundary, *somewhere*. Yet at the same time the idea of speciesism, championed by Singer[21] (1975), criticizes the very concept of a boundary mattering for moral concerns, while offering that sentience, hence a boundary, is the defining characteristic. As I already suggested at the end of Section 3.1, these tensions are in fact part of the concept of rights presented here, and the dangers of exclusion that lurk in the shadows of emancipation-by-rights remain unchanged in the case of animals. I now turn to the contemporary debates around the idea of animal rights, where I will have further opportunity to describe and explore these tensions.

3.2.2 Contemporary animal and nature rights

Contemporary animal rights are a more complex field than their 18th and 19th century predecessors. The human rights-discourses of the 20th century have emboldened animal rights in the same way that the modern revolutions had done before them, but just as the rights of humans are different today, under the regime of human rights, so the rights of animals are different from the early attempts to theorize the matter.

A possible way to survey a field that has become quite impressive in size and scope is to first take a step back and suggest that animal *rights* are a special case of *concern* for animals, one whose intellectual pedigree we have already explored. Another way to make the point is to contend that what is owed to animals, *as animals*, is the contemporary field against which animal rights take shape – their political representation is the background for any rights-discourse. But though applying rights to animals is a particular case of moral concern translated into a mode of political representation, arguments for moral considerability as such are important. So, for instance, Singer's utilitarianism (Singer, 1975) is not a direct proponent of rights, but neither is it opposed to the idea, which for our purposes means that utilitarian arguments for moral considerability can be, logically speaking, co-opted in the struggle for rights.[22]

Similarly, Nussbaum's and Sen's capabilities approach (Nussbaum, 2000, 2003, 2006; Sen, 1987, 1993, 2005) is not itself a proponent of rights, but it would also not find particular fault with them. Furthermore, the rights of nature, which appear for the first time in the 20th century and are highly influenced by the contemporary idea of animal rights, tend to collapse the kinds of distinctions that would keep animal rights separate from, for instance, arguments from sentience. And lastly, if rights are a special kind of enforceable claim (Sunstein, 1999) that gain hegemonic power in the last century, then as long as this kind of claim is made in the name of animals, or nature, we can indeed talk of rights. As I have argued throughout this chapter, inasmuch as non-humans are represented as being *directly* owed moral consideration, based on certain characteristics, they are in effect being proposed as potential subjects of rights.[23]

We can organize contemporary debates on how non-humans are best represented by adopting a three-part division: there are advocates of animal *welfare*, proponents of *rights* (for animals and nature), and various *environmentalist* perspectives (Sunstein, 1999; Anderson, 2004). We can characterize the three positions thus: welfare is concerned with 'stronger laws preventing cruelty and requiring humane treatment' (Sunstein, 2004); rights are concerned with the establishment of legally enforceable claims on behalf of animals, and propose that a highly important distinction, to which I will turn shortly, is that between property and person; environmentalism on the other hand is concerned with the maintenance and preservation of life-systems. These three perspectives emanate from slightly different sensibilities and employ different criteria for what should count in moral and political terms. In terms of criteria, welfare advocates hold sentience to be the key (Singer, 1975), rights proponents see subjecthood, or the ability to be

the subject-of-a-life, as the most important characteristic (Regan, 2004), while environmental ethics (for example, Callicott, 1985) 'holds that the criterion of moral considerability is being alive, or more generally, a system of life, especially a "natural" one as opposed to part of the human made environment' (Anderson, 2004). Following this classification, it appears that animal rights can only be properly spoken of if we also employ the criteria of subjecthood, that sentience would relegate us to welfare alone, and that environmental ethics does not have much to do with either.

However, from the point of view of representation, these distinctions become much less forceful, because what is at stake is the ways in which we choose to portray animals for political purposes and therefore the kinds of claims we make in their name. Singer's arguments from sentience are a series of representative claims that present animals as beings whose suffering must be taken into account *because* they are sentient, and therefore have a number of interests that demand our moral recognition; Regan's subject-of-a-life claim suggests we think of animals in terms of their own lives, that we make a leap of imagination and empathically identify with the vision of the animal, which imposes on us certain duties of respect; Francione's abolitionist position tries to persuade us that using animals is already treating them as things, which is in disaccord with our intuitive moral sensibilities – hence we should abolish use altogether, and the best way to do so is to grant rights, hence personhood as well, to non-humans. Seen via a theory of representation, there is in fact very little difference between welfare and rights approaches (Sunstein, 1999, 2003, 2004). The same can be said if we narrow in on the concept of rights as described in this chapter and apply it rigorously. If rights are recognized and enforceable entitlements (Campbell, 2006), then whether we choose to characterize our claims in terms of the animal's welfare or the animal's 'rights,' not much changes. The issue of suffering, inasmuch as it is presented by advocates in a convincing and politically salient way, would lead to greater enforcement of, for instance, anti-cruelty laws. Sunstein (2003, 2004) points out how, if existing animal legislation were enforced, and if private prosecution were allowed (Sunstein, 1999), then there would already be, in much of the Western world, a de facto bill of rights for animals. This is so because animals would have enforceable claims and those claims would impose active duties on persons and institutions.[24] Whether this would be achieved via rights-arguments or welfare-arguments, matters little.

Advocates of animal rights known as abolitionists choose to present their claims in much starker terms. The issue for them is that of use as

such, which they consider illegitimate and necessarily harmful. As the name abolitionists suggest, they employ the comparison with slavery and argue that the only ethical path is that of a complete secession of use, which would include the eating of animals. Gary Francione, perhaps the most prominent advocate of this position, argues for a radical egalitarian position derived from the sentience principle and hinged onto the claim that the root of our mistreatment of animals is our tendency to treat them like things (Francione, 1995, 1996, 2000, 2004), a tendency codified in our laws. To this end, he employs extensively the analogy with slavery, arguing that 'the principle of equal consideration had no meaningful application to the interests of a human whose only value was as a resource belonging to others.' He goes on to say that 'we eventually recognized that if humans were to have any morally significant interests, they could not be the resources of others and that race was not a sufficient reason to treat certain humans as property' (Francione, 2004, p. 122). Hence the idea that animals only count as property is seen as a major block in the way of animal emancipation. In order to remedy this situation, animals need to be counted as *persons*, a status which would both secure their rights, and be granted upon them by us recognizing their rights. As it was racism to consider race as morally significant, so considering species as significant constitutes speciesism.

The kinds of claims embedded in Francione's main line of argument are reliant on several factors that are already familiar, key among which is the distinction between thing, or property, and person, or subject. Another important factor to take into account is that this distinction, as in the case of every other animal advocacy position described so far, hinges on the recognition of a number of *capacities*, from which are derived interests and preferences that need respecting. In other words, it is on the basis of a biological similarity *with us* that moral concern is understood to be properly owed *to them*. I suggest that the search for a (set of) criteria to base moral and political judgments on (for example, sentience, however far one is willing to take its logical implications) stems out of a particular kind of anxiety: unless we indeed have such moral certainty, any effort at political representation is doomed to fail. Yet this is contradicted by the entire account offered so far. Representation is not about the 'real' being out there, but always and primarily about the construal of the other in ways that will convince – therefore, it is primarily about values and relations, not things. There is nothing within the concept of rights, either, that would deny its application to animals, but neither would it be denied to objects (see discussion of Stone (1972) in Section 3.3 below), which calls into question the distinction between

property and person – or rather, asks what that distinction is *for*. As Sunstein (1999) already suggested, perhaps it is thought that unless we change our lexicon vis-a-vis animals, we stand little chance of changing our attitudes. Maybe. But the point remains that, from the point of view of rights and representation, the distinction between property and person is overinflated. I will not, however, here exhaust the ways in which the dominant arguments of animal (as well as nature) emancipation are misleading (always from the point of view of representation); I will turn to the subject at length in the last chapters.

It will have been noticed that the issues discussed in relation to rights in Section 3.1 are exactly paralleled by the issues of animal rights. To be precise, the gradation from welfare to abolitionist positions corresponds with a movement from interest-based theories of moral consideration to will-based ones. Welfare advocates contend that the interests of animals are important, particularly their welfare-interests. If interests are merely considered important, but not binding in any moral way, then legal rights are not necessary – different 'humane' laws should simply be enforced. If interests are seen as morally binding – imposing duties on us – then legal rights become a de facto option (whether stated as such or not, as in Singer's case). If instead it is a will-theory that we endorse, animals are then seen as autonomous agents with powers of self-determination, a morally binding feature that would ask for strong rights (the abolitionist position). Claim-rights, according to the theory I have presented, would then move in strength from strict welfarism to strict abolitionism, depending on how we portray the beings in whose name we construct representative claims.

The logic of rights that has been presented for the case of humans holds intact in the case of non-human animals, though disagreement can exist on several different points. Few would disagree that animals have some sort of interests, though whether they are binding (and hence deserving of rights) remains a point of contention. Usually, skeptics are lured by being offered the latest scientific studies that establish yet another set of characteristics that a particular animal, or class of animals, shares with us. So the Great Ape Project, argued for by Singer and Cavalieri (1997), signals out the great apes as apt for rights because they resemble us in all important respects: they are sentient, conscious, have a highly complex social life, mourn their dead, use tools, and so on. Singer (1997) then contends that, if great apes are not deserving of rights, neither are mentally limited humans, whom in many cases have *less* capacities than an ape (known as 'the argument from marginal cases'). This, as I have argued, is a direct result of the logic of rights predicated

in virtue of capacities. Similarly, a group of scientists has recently issued a joint statement[25] declaring that animals are conscious just like us. Or, to be precise, some animals: mammals, birds, and some others that pertain to neither group, like the octopus. This is declared in the hope that such knowledge would lead to more ethical treatment. The implication is that such knowledge is fundamental to our moral lives.

The other position I have briefly described – abolitionism – conforms to the logic of rights predicated on the will, though it is a lot more controversial than claiming that animals have interests. To say that abolitionism is predicated on the will does not mean that that is its only argument. It also relies on the observation that some, if not most, animals have interests, and are conscious and sentient, but launches its appeal to rights based on the idea that we owe them their freedom, and that we ought to treat them with respect. They parallel the will theory of rights inasmuch as it argues that animals are to be conceived of as autonomous beings. It is in this respect that use becomes illegitimate, just as being treated as a means is unethical for the human person.

Regan (2004) has formulated what has become the classic case for the animal rights position in *The Case for Animal Rights*, where he argues that 'animals have certain basic moral rights, including in particular the fundamental right to be treated with the respect that, as possessors of inherent value, they are due as a matter of strict justice' (Regan, 2004, p. 329). This contains all of the crucial ingredients: *justice* is *owed to them*, in virtue of their having inherent value (as a result of certain characteristics[26]), which directly leads toward postulating moral rights which ought to be translated into legal rights. The idea of a subject-of-a-life can be seen as a different version of autonomy, but not in the sense that the subject is autonomously able to do anything with its rights, but in the sense of having a life which deserves respect and protection irrespective of anyone else's interests or utility. The fact that animals cannot by themselves initiate legal proceedings to enforce their claim-rights, which is seen by human will theorists as crucially important, is not a big issue at all for animal advocates. The idea of guardianship, which already works very well for legal persons that are not autonomous in the existential sense, could work just as well for animals. Importantly for my purposes, the idea of guardianship, which is a necessity for any rights-based approach to non-humans, establishes further the strong link between representation and rights in this area.

The issue of animal rights is therefore not primarily one of legal concepts, but one of different values. A legal system that functions with the concept of rights developed here has no fundamental obstacles to

incorporating rights for animals, or rights for anything else for that matter. Indeed, the rights of *nature* can be read as just the proof of this argument – anything, indeed, can be engulfed by this concept. As we will see in the cases presented in the next chapters, the representation of nature via this concept can be politically successful, if practically uncertain. Rights-environmentalism, unlike the welfarist, animal rightist, and abolitionist positions described in relation to animals, does not present a set of strict criteria for its claims, but rather offers an amalgamation of all of the positions and arguments we have seen so far, reuniting under the auspices of representation arguments that originate in initially separate positions.[27] Yet animals and nature are, surely, different, which would imply that their representation has to rely on radically different arguments. As I will show in the remainder of this chapter, the structure of representation and rights remains virtually unchanged, though there are ways in which the rights of nature might challenge it. A good place to start is with the two leading academic texts proposing rights for nature: Stone's *Do Trees Have Standing?* (1972, 2010) and Cullinan's *Wild Law* (2011).

3.3 The rights of nature

One of the earliest treatments of the idea of rights for nature started, by the author's own account, with an attempt to grab attention. Reaching the end of the lecture, Professor Christopher Stone sensed that his students

> needed to be lassoed back. 'So,' I wondered aloud, reading their glazing skepticisms, 'what would a radically different law-driven consciousness look like? . . . One in which Nature had rights,' I supplied my own answer. 'Yes, rivers, lakes, . . .' (warming to the idea) 'trees . . . animals . . .' (I may have ventured 'rocks;' I am not certain.) 'How would such a posture *in law* affect a community's view *of itself*?'
>
> (Stone, 2010)

Being as much surprised by his own thought as his students had been, he went on to develop it in the 1972 now-classic essay, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects* (Stone, 1972). The paper changed the fate of *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)

Initially, the Ninth Circuit ruled that, even though the Forest Service might have been wrong in granting the permit, the Sierra Club had no legal standing to bring suit, as they themselves would not be damaged. The appeal was now in front of the Supreme Court.

Professor Stone, upon hearing of the case, knew it was a perfect test for his new theory. He hastened to write the paper and, through luck and some cunning, managed to get it in front of the judges before passing judgment – and it was a partial success. Justice Douglas wrote a famous dissent supporting Stone's theory, stating 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). This emblematic first case in the history of the rights of nature already contains one of the central concerns of the concept – standing. Under jurisprudential systems that do not confer legal personality upon non-human natural entities, suit cannot be brought in the name of the entity itself and for its compensation or remediation. It is only insofar as damage to a natural entity also affects a recognized legal person that reparation can, indirectly, be had. What Stone (1972) proposed was to recognize what everyone already knew – when people engage in litigation of the *Sierra Club v Morton* type, they sue on behalf of the affected environment. Things like 'aesthetic injury' are excuses forced upon litigants by a system that has too narrow a definition of standing. The point of the suit was not injury to any human person, but rather opposition to the transformation of Mineral King Valley into a vast parking lot with 'attractions' dotted here and there. If this is the case, then Mineral King Valley should itself have standing to sue.

This idea naturally leads to the idea of rights, because by conferring rights legal personalities can be created that can have standing to sue in their own name (via guardians in the cases discussed here) and for their own benefit. The foundational paper in which these ideas were first argued for vigorously from a legal point of view employs the same analogies that are familiar from the discourse of animal rights, namely with women and slaves. The idea that thing/property and person/subject are

opposed and irreconcilable also appears in connection to the rights of nature, as does the analogy with a supposedly expanding circle of moral concern.

> There is something of 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)

However, Stone convincingly shows that our legal system is more than apt to handle the idea of rights for the environment – an argument which has been implicitly supported by the entirety of this contribution so far.

Seeing how a legal right exists inasmuch as an entity with sufficient power and authority recognizes it, and given the outlines of the concept that have been the subject-matter of this chapter, there is indeed no contradiction in assigning rights to anything, as long as we value it enough to give it this mode of representative protection. The fear that rights for the environment would be ridiculous because they are modeled on human rights – and nature cannot, say, vote – is convincingly shown by Stone to be unfounded:

> to say that the natural environment should have rights is not to say anything as silly as that no one should be allowed to cut down a tree. We say human beings have rights, but – at least as of the time of this writing – they can be executed. Corporations have rights, but they cannot plead the Fifth Amendment. *In re Gault* gave 15-year-olds certain rights in juvenile proceedings, but it did not give them the right to vote. Thus, to say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have. Nor is it to say that everything in the environment should have the same rights as every other thing in the environment.
>
> (Stone, 1972)

From a theoretical as well as practical point of view, the concept of rights can be applied to the environment as such without formal contradiction. Whether this is a representational strategy that is likely to deliver on its promise, remains to be explored in the next chapters.

What is certain is that, starting with the later part of the 20th century, the concept of rights in connection to the environment as such is increasingly (though still marginally in the big scheme of things) seen as legitimate. But if different rights must accord with the nature of different right-holders, the question becomes: which rights are apt for nature? Here we once again start moving between legal and moral rights.

As in the case of animals before, capacities, interests, and preferences come to play an important role in answering this question. Yet because nature as such is more difficult to conceptualize in a fashion similar to discreet animals, these three features become of the more abstract variety, and need the support of more explicitly metaphysical reasoning. To this end, Thomas Berry contends that 'the universe is a communion of subjects, not a collection of objects. As subjects, the component members of the universe are capable of having rights' (Berry, 1999). Inasmuch as the natural world is seen, in its entirety, as in principle capable of having rights, the specific rights of each member of the 'earth community' (Cullinan, 2011) remains to be specified as needed. However, there are three basic rights that Cullinan, following Berry, proposes: 'the right to be, the right to habitat, and the right to fulfill [one's] role in the ever-renewing process of the Earth Community' (quoted in Cullinan, 2011, p. 101). He adds that it is time 'for our human jurisprudence to recognize that the dominant cultures of our time have no right to prevent other components of the Earth Community from fulfilling their evolutionary role' (Cullinan, 2011, p. 102). Anticipating the discussion of the Ecuadorian constitution, it can be pointed out that these rights are all but exactly the ones constitutionally granted to nature in 2008. This is no coincidence, as Cullinan's work has had a great influence on the actors lobbying the Ecuadorian Constitutional Assembly (see Chapter 4).

The idea that nature has rights therefore rests on a cluster of related concepts. The foundational concept is that natural – non-human – entities should count as more than mere objects and claim, through guardians, damages *in their own name*. This, besides being generally implied by the concept of rights, is also explicitly granted in the Ecuadorian constitution under the right to remediation (Art.72). Inasmuch as a right (whether moral or legal) is fundamentally a claim, it is indeed the case that its granting secures, at least in principle, a kind of automatic representation. Going further, it is supposed that natural entities have a vested interest in existing in a particular form, usually one preferred by their representatives (it would be hard to

check whether other, 'non-representative' preferences, exist). Whether pointed out from the perspective of an earth-centered jurisprudence (Cullinan, 2011) or deep ecology (Leopold, 1949), the central concept is that natural entities – importantly, not primarily animals in this case – have a set of interests and preferences that, if we recognize their juridical existence, can be politically expressed and legally enforced. So, for instance, a river is thought to have the right to flow uninterrupted, or a forest to continue existing in its current – 'unspoiled' – form. In terms of how one is to judge such things, the answer of the nature-rights advocates seems to rest on the idea that the function of a natural entity is discernible and, once discernible, can constitute, by itself, a standard.

The last conceptual level, which in truth runs through the other ones and provides a kind of glue, is the appeal to moral considerability, which I have argued is crucial to rights as such.[28] This parallels the sentience/subject-of-a-life distinction we have already explored, with the difference that the suffering of a mountain, or the life-plan of a river, are necessarily qualified as more metaphorical than actual. Yet their moral appeal is not at all diminished by the metaphorical adaptation of the familiar animal rights arguments. If anything, I would argue it has the potential to strengthen their moral authority, precisely because they offer – quite explicitly – a radically different way of conceptualizing the natural world. Tired of the resource-dominated discourse of our times, and sensing its psychological and ethical poverty, increasing numbers of people are attracted and convinced by the personification of landscapes and other natural entities that underpins their different treatment. To put this in my preferred language, to consider a mountain as a living, majestic being is to already suggest a different relation to it. One does not feel like beheading an enthralling, mythical creature, in order to search its bowels for coal.

Stone (1972) made the case for the rights of nature as a strictly legal category. In this sense, there is no obstacle to the concept, as we have seen many times throughout this chapter. It is certainly possible to analytically separate legal rights from moral ones, but they quickly come back together. Sure, legal rights can be granted to the environment in order to resolve the issue of standing. Once the environment has such legal rights, it can sue (through guardians) in its own name, and be compensated for its own injuries. But if we are to keep a strictly legal perspective, we can't meaningfully ask in what sense injuries to the mountain are *to the mountain*. And in legal judgments themselves, this kind of moral reasoning is bound to arise. Furthermore, in order

to institute a legal right to begin with, political discourse will most likely have to be mobilized, as will be shown in the coming chapters, and representatives will present moral claims. And it is these that are much more unclear than their legal counterparts. According to the theory developed here, the rights of nature mean that justice is owed to nature as such, because of a set of characteristics that it possesses. We have seen this to be the case for humans and animals alike, and it is the same argumentative strategy, embedded in the concepts, that nature's advocates employ. Famously, Lovelock formulated in the 1960's the Gaia hypothesis, conceptualizing the planet as a living organism. This fits precisely with rights-reasoning, and advocates have made use of the image in order to justify why anything is owed to the environment as such. Similarly, indigenous and wisdom-traditions have been brought in to substantiate the claim of our moral debt to nature – if we'd only consider nature *as* a living organism, then we would see that we are bound by its claims. The idea that we are all in an ecologically interconnected web is also seen to support the idea of owing nature its own demands.

Whether or not this makes sense will be discussed in the next chapters. Here, I have described the arguments that any rights approach must have, as well as arguing that there are certain features that, if present, in fact argue for rights (whether acknowledged as such or not). From this perspective, it is no surprise that nature is portrayed as a creature, as a mother, as home – these are so many answers to the requirements of rights. I have also argued that rights have become hegemonic, and from that perspective the rights of nature were just a matter of time. They do not represent our heightened moral sensibilities as much as the ability of rights to colonize our political thinking. And finally, I have argued that rights and representation, in the arena of speaking for non-humans in particular, are very closely related. I will now conclude this chapter by expanding further on this point.

3.4 Rights and representation

As in the case of representation, rights have to be able to tell a good story – factual knowledge is not enough to convince anyone of the rightness of a relation. The portrayal of nature as a community or a great being serves precisely this purpose. It relies on a logic different from the one of similarity we have seen in the case of both human and animal rights, drawing analogies with and appealing to our higher nature, our mythological imagination, and the sense of awe and wonder

that nature often inspires. To convince anyone to treat natural entities differently, it will obviously not do to claim that a mountain is intelligent, or can use some forms of language, or wield tools. That is the line of the animal advocates. Instead, appeal is made to the sense of beauty, awe, respect, even sublime. This is the foundation of the moral claims nature's advocates want to generalize, and part of the reason why the image of the indigenous is often invoked – it appeals to the same mythological imagination and builds a story that is over and beyond the factual dryness of resource-talk. These kinds of claims on behalf of nature are, from the perspective developed here, paradigmatic representative claims. The fact that many choose to couch them in terms of rights is itself significant, a development which I have suggested is related to both the hegemony of the concept, and its intimate connection to the concept of representation itself: to have a right is to have 'automatic' representation. From this point of view, it makes sense that the representatives of speechless (in human terms, to be sure) beings would opt for representation through rights.

We cannot underestimate the appeal of moral rights in representing non-humans for the same reasons that we should not underestimate the appeal of human rights: to claim a moral right is to put oneself in a situation of moral indignation, and to scream loudly: this is wrong, this is not how X ought to be treated! There is an undeniable 'rallying cry' element to moral rights, which is often the avenue between them and legal rights: this ought to be the case, hence make it be the case, in law. In the case of non-humans, as in the case of humans for that matter, this must pass through political articulation, and hence through a process of representation.

Most anything that can be put as a politically representative claim is quickly transformed into a possible claim-right (with the necessary entanglements to the other kinds of rights that exist), though there is no necessity in this transformation. What this contingent process reveals is precisely the power of rights-discourses, particularly vis-a-vis a representative political system with historic levels of distrust. Moyn (2010) explains the success of rights-discourses by pointing toward the failure of several other models, from socialism and communism to most other types of government, including representative institutions. The rights-discourse is the only one left that sits supposedly above the pettiness of politics-as-usual, flying universalist moral norms like kites in tomorrow's sky. This is, of course, ideology pure and simple: rights-discourses are implicated into the mechanisms of representation – they frame representations as well as transform its claims into litigious

rights-claims. They are, in other words, highly political, though their appeal comes from their supposed clean hands.

And finally, there is another sense in which the two are intertwined, specifically in the case of non-humans. As I just argued, there is no necessity to the process of going from representation to rights and vice-versa, inasmuch as we represent other humans. With non-humans, however, representation is a must. Whether we want to conceptualize it as a guardian or trustee relation, which in turn reflects how we view the non-humans in question, representation nonetheless must happen. If the theory of rights here endorsed is even remotely correct, then inasmuch as a non-human is represented as having a claim on us, it is de facto asking for rights. And seeing how to represent is to present a claim in their name, usually under the form of 'you owe me such and such,' the majority of representative claims in the name of non-humans, whether presented as 'rights' or not, are in fact candidate right-claims. Or else, they are immunity-claims. However, they belong to the concept of rights. Summarily sketched, this relation can be expressed as: representing (making a claim in the name of) a non-human as itself having a claim to or against something is to employ the concept of rights. The only way in which non-humans can be represented outside the paradigm of rights is if claims in their name are not raised, strictly speaking, *in their name*. In Chapters 6 and 7, I will further develop this connection. I will then have the opportunity to take a more critical stance toward the role of rights in representative politics, and explore the work of thinkers whose non-human advocacy takes very different forms.

Now, armed with the theoretical foundations developed so far, let us look at the actual cases of rights for nature to date. It seems fitting to start with, arguably, their paradigmatic case: their inclusion in the 2008 constitution of Ecuador.

Part II
Practice and Meaning

4
The Rights of Nature in Ecuador

In this chapter I want to start discussing the practice of the rights of nature by looking at what has become its paradigmatic example to date: the 2008 constitution of Ecuador. Besides the wide publicity that the rights of nature provisions in this constitution benefitted from, they also enjoy the status of paradigmatic for being the first *constitutional* rights. So far we have analyzed the theoretical building blocks of the notion of rights predicated of nature. Here, I want to start analyzing how the theoretical foundations laid so far help us understand what goes on when people actually opt for giving nature rights. In order to achieve this goal, this chapter will detail the context and background of the 2008 constitutional rights of nature, in order to achieve several things. First, it is important to see what nature's advocates themselves claim the rights of nature are supposed to do, what they mean, and where they come from. Second, the Ecuadorian rights of nature contain elements that are not unique to the Ecuadorian experience, but rather shared by all rights of nature practice so far. This, as I will explain, is not incidental; there are deep reasons for why the rights of nature share a similar advocacy account across several implementation strategies. Lastly, in order to be able to see what the theoretical framework we have advanced reveals about the rights of nature, we have to first attend to how they are always highly dependent on political processes.

4.1 Context, oil, colonization

In 2008 Ecuador became the first country in history to guarantee constitutional rights to nature. This event was part of the rewriting of the constitution of the state. The new president, Rafael Delgado Correa, elected in 2006 and inaugurated in January 2007, called forth a Constitutional

Assembly that debated the various provisions of the new founding document throughout 2008. For reasons that I will explain in this chapter the rights of nature, an idea that had never made it into the intellectual or political mainstream before, managed to find its way into the final document, approved through referendum on 28 September 2008.

Ecuador is a presidential republic with a system of representative democracy. After a series of military rulers in the 1970s, following on the trail of decades of populist rule, the first democratic elections in its modern history were held in 1979, under the auspices of a new constitution of the state. From then until 2006 Ecuador saw several important political changes. These decades were marked by extreme political instability. For example, between 1984 and 2006, it changed eight presidents (averaging only two and a half years in office), and in its independent history it has had 20 constitutions to date. In the early 1990s, the indigenous movement consolidated its mobilization power and became a decisive electoral and political force (Beck and Mijeski, 2000, 2001; Zamosc, 2007). Partly because of the power of this movement, the presidential elections of 2006 brought Rafael Correa into office, a figure with high popularity among the indigenous and the poor. The organization that functioned as the de facto party for the election of Correa was Alianza País, a movement which continues in power today and which does not refer to itself in the terms of the traditional party form.[1] Since the election of the new president in 2006, Ecuador has enjoyed its greatest degree of political stability in recent history.

Ecuador is currently the fifth-largest oil producer in South America (Sauleo, 2009), with a history of oil exploration and exploitation that is both long and contentious. The first area in the country to come under scrutiny for its oil reserves was the province of Santa Elena, on the Ecuadorian Pacific coast. The first oil concession in the area was awarded in 1878, while the first operational well was drilled in 1911. This well, named Ancón 1, was the first in Ecuador's oil history, and inaugurated the country's oil-boom. The Santa Elena region still produces oil today (PetroEcuador, 2010) and hosts the largest oil refinery in the country, Esmeraldas. Even though the history of oil in Santa Elena is itself interesting and riddled with conflict, for reasons that I will not venture into, it was not here that the greatest environmental tensions developed.[2] Those tensions belong to the oil exploitation in the Amazon region, known in Ecuador as the Oriente. Though developed later than Santa Elena, the Oriente region is at the forefront of the current disputes between environmental and indigenous groups, and industry interests.

Unlike the Pacific coast, which has already lost the vast majority of its forests, the Oriente is a region of dense rainforest and huge biodiversity. Though these kinds of estimates are hard to calculate or verify, parts of the Oriente are said to be the most biodiverse on earth (CESR, 1994).[3] Whether that is literally true or not, it is certain that the region has a staggering amount of plant and animal life.[4] The first oil concession in this region is from 1921, given to a New York-based company and revoked 16 years later over financial disputes with the Ecuadorian government. Other concessions were given and subsequently changed hands until, in 1964, Texaco drilled the first well of the Oriente – Lago Agrio 1 – named after the frontier town not far from it.[5] This first well became active in 1967 and inaugurated a new epoch in the history of Ecuadorian oil. From here on, concessions were expanded and new fields explored and exploited, such that in 1975 extraction operations covered 35 different active fields (PetroEcuador, 2010, p. 16).[6] In 1972, the Ecuadorian State Oil Corporation (CEPE), the precursor to PetroEcuador (created in 1989), started its activity and entered into a consortium with Texaco. By 1976, the state company had become the majority partner in the consortium, owner of 62.5 per cent of shares. The partnership between CEPE and Texaco lasted until 1992, when Texaco ended its operations in accordance with its contractual obligations and passed all of its shares to PetroEcuador. At this point, PetroEcuador was in control of 90 per cent of oil production in the Oriente (CESR, 1994).

Successive Ecuadorian governments used the oil infrastructure as avenues for colonizing the region. The infrastructure that litters the Oriente, including roads, pipelines, wells, and refineries, was built by foreign investment (mostly), while the Ecuadorian government retained mineral rights (it still does). Oil companies came under contractual obligation to allow the public use of the roads they built, and farmers and settlers throughout Ecuador were given land (50ha each) in the Oriente on condition that they deforest half of it and use it for agriculture and/or livestock production. Besides the roads used for industry activities, oil companies were required to build additional, secondary roads – $20 million worth over ten years – which had little relation to oil. Instead, they were used by the government to encourage settlers from other parts of the country to populate the Oriente (Fontaine, 2007).

The government itself spent a lot of resources on building roads in the Oriente, with the explicit goal of national integration.[7] 'In 1974, 48.8 per cent of all public sector investment was spent on road construction. This amount decreased a few years later, but in 1981 it still equaled 18.2 percent' (Southgate, Wasserstrom and Reider, 2009).

The combination of new, extensive infrastructure, and the government's land policy, led to massive colonization and settlement of the region, to the great detriment of the native populations (CESR, 1994). One of the results was that Ecuador became a leader in South American deforestation rates – about *a million acres a year* in the Oriente (CESR, 1994).[8] Conflict was rife, and the first line of defense, or attack, was often murder.[9] If we take into account fuel and other subsidies which made life possible and often profitable for new settlers in the Oriente, it appears that government policy carries much of the blame for the transformation of the rainforest and the ensuing conflicts, many of which were territorial in nature (Southgate, Wasserstrom and Reider, 2009).

Besides territorial disputes, deforestation became a major issue. It is common today to blame both the territorial issues, as well as deforestation, on oil extraction and particularly on oil companies. Yet the evidence for this is questionable. As we have seen, territorial conflicts had much more to do with government policy. Similarly, deforestation rates are chiefly owed to the transformation of rainforest into agricultural land, be it for crops or livestock (Winder, 2003). Nonetheless, environmental groups and indigenous organizations have imputed all these ills (as well as pollution) on foreign oil companies, ignoring both the effects of policy and the operations of the state oil company.

That being said, the argument that oil companies had *nothing* to do with local conflicts is certainly overstated and quite disingenuous. It is often claimed that oil exploration per se need not be destructive (Southgate, Wasserstrom and Reider, 2009), but to separate it analytically from its context hides the real repercussions that it does have on the local environment. It is well-known that production practices in the Oriente were appalling (CESR, 1994), and that safer production measures, though known and viable, were not used in the Oriente. For example, Texaco had pioneered a technique of dealing with drilling water called re-injection – instead of treating, storing, or dumping the water resulting from drilling operations, it would be injected back in the well, thus helping extract more crude and solving the problem of storage. However, Texaco never used the technique in Ecuador, as the law didn't demand it. It stands to reason that, if the companies indeed had the health of the local environment on the top of their priority list, they would have used whatever means available to them to ensure best practices. They did not. What seems to me indisputable is that: deforestation rates are owed much more to agriculture than oil; the government policy encouraged and created many of the environmental problems of the Oriente; the pollution resulting from oil exploitation is

severe and mostly due to negligence and a general lack of care on the part of oil operators, whether they be international companies or the state-run one.

As far as settlements being solely the responsibility of the government, this needs some qualification too. True, successive administrations encouraged road building, required by law that infrastructure be available to the public, and otherwise incentivized settlement. It is clear that this was done in order to strengthen territorial claims in disputes with their neighbors, as well as ease population pressure elsewhere in the country. However, let us suppose that the government did not insist on oil roads being open to the public. The likely outcome would have been settlement nonetheless. To imagine that roads could have been secured in the Oriente, when in 2012 one could simply walk to a wellhead and set it ablaze if one so desired,[10] is wishful thinking. It is hard to imagine that an industry of this scale would not bring with it settlement, whether the government encouraged it or not. This is to say that the blame for Oriente's ills has to be thoroughly shared.

In 1993, a group of 30,000 Ecuadorian citizens filed a civil suit in the United States (New York), claiming environmental degradation and habitat destruction, large-scale pollution, and violation of indigenous rights, including health hazards caused by Texaco's history of oil exploitation in the region, from 1967 to 1992. In 2001, Chevron bought Texaco and inherited the law suit which, in its long history, has become one of the best publicized, longest lasting, and the carrier of the largest environmental award in history. In February 2011, the court of Lago Agrio issued a $18.2bn fine against Chevron-Texaco. The award is yet to be enforced, and the legal battle surrounding its enforceability is still ongoing.[11] Chevron denies any wrongdoing, arguing that the company has already done all of the environmental remediation it was contractually obliged to do, and that any lasting damage has been caused by PetroEcuador, who not only had the largest share of the consortium but has also been the sole operator in the region since Texaco left in the early 1990s. The plaintiffs allege that the American company did not do the remediation it was supposed to do, and it is striking the extent to which misunderstanding can run. The conflict has been so long and so bitter that no compromise whatsoever seems to be possible. This is true to such an extent that James Craig, the representative of Chevron in Ecuador, told me that the soil of the region is clay-like, which makes oil migration difficult, while Donald Moncayo, one of the plaintiffs working with the Amazon Defense Front,[12] told me the soil is sandy, which makes migration inevitable. Surely there must be a way to settle what

soil type prevails in the region. Yet a history of conflict and suspicion can lead to such jaw-dropping results.

Seeing how this conflict has been the longest one in environmental litigation to date, I will not get into the details of the story, as it is not directly relevant to the subject matter.[13] What is relevant is to note that this highly publicized and polarizing law suit has been ongoing in the Ecuadorian Oriente, home to the largest oil industry in Ecuador, and also to great environmental degradation. Behind the endless quarreling and armies of lawyers, one thing is certain – the whole north of the Oriente has become, ecologically and culturally, a radically different place from its pre-oil days. And this transformation has animated indigenous and environmental groups like nothing else in Ecuador's recent history. It is this motivational role of the Chevron case that I want to signal here.

4.2 The indigenous

The struggle to recognize rights for nature and indigenous sensibilities are often seen as intertwined. This is true beyond Ecuador – one cursory look at the internet websites where the idea is promoted immediately gives off the impression that this link is strong and fundamental.[14] The countries that have so far adopted the rights of nature also stress this connection (see Chapter 5). The way of life of many indigenous communities, or at least a particular version of it, is put forth as the bedrock of these rights. Another way of life is possible, and we do not need to imagine it ex nihilo – we rather need to listen to the ones (the indigenous) that have cultivated a holistic relation to their environment as a matter of fact. This account is so dominant today that it becomes very hard to discern exactly what the indigenous contribution to the rights of nature is. In this section I will try to do that, by looking at the dominant arguments in detail, together with the views I gathered in Ecuador and a sensitivity to the fact that 'the indigenous,' as such, do not exist (just like the 'westerners,' as such, are a useful fiction). I will present the arguments that together form the story of the indigenous intellectual origins of the rights of nature, while signaling potential problems that will be analyzed in Chapter 6.

There are six different indigenous nationalities in the Oriente region of Ecuador, ranging from the dominant Kichwa, whose language is the most widespread and who comprise the biggest population (60,000), to the Huaorani, some of whom are in voluntary isolation, to the Achuar, who only number 500 individuals.[15] Each of these nationalities has had

a tumultuous history of conquest, from the early Spanish missionaries and colonists, to warfare with their neighbors, to the rubber-boom, and on to the oil-boom with its own missionaries and government officials.

According to Alberto Acosta,[16] the intellectual origins of the idea of granting nature rights can be traced to the ancestral oral traditions of the indigenous communities (interview Alberto Acosta – 13 May 2011, Quito).[17] The Ecuadorian economy has primarily been focused on raw materials (int. AA), and this has formed the basis of decades-old popular struggles that have tried to force the government into different models of development, so far unsuccessfully. By far the biggest actors in these struggles have been the organized indigenous communities of the Andes (known as the Sierra) and the Amazon (the Oriente). In an instance of internal colonialism, the Ecuadorian government, retaining subsurface rights, has repeatedly infringed upon the ancestral territories of the indigenous communities in order to exploit the natural resources found there (interview James Craig,[18] 2 May 2011, Quito).[19] In the process, the government used the infrastructure built for resource exploitation as avenues for colonization (see Section 4.1 above). Needless to say, these territories were not empty, but they were treated by the government and the new colonizers as if they were. This angered the original nationalities and pushed them toward organized forms of resistance. The Confederation of Indigenous Nationalities of Ecuador (CONAIE), the biggest organization of indigenous communities, reuniting all nationalities living in Ecuador, gained political force and by the early 1990s were an important social actor (interview Mónica Chuji,[20] 2 May 2011, Quito).[21] Nonetheless, the exploitation and destruction of their territories continued unabated, often with the collaboration of some indigenous communities squeezed between two less than perfect options: working for a wage for the oil companies or agribusinesses and abandoning their ancestral lifestyle, or else continue living traditionally on dwindling resources, a near impossibility. Unsurprisingly, many opted to become agriculturalists or oil workers.

The root of this problem of internal colonization is two-fold: the extractive model of economic development, and the failure to recognize collective and territorial rights for the ancestral communities. The CONAIE chose to tackle these problems by leading a concerted effort for territorial recognition. In 1998 a new constitution was drafted, and for the first time collective and territorial rights were recognized for the ancestral nationalities (Asamblea Nacional Constituyente, 1998). This was a great victory in principle, but the practice of extracting natural resources from the Amazon continued, with deforestation rates that,

relative to size, are the biggest in South America (int. MC; CESR, 1994). While territorial recognition was an important step, the indigenous communities still had to secure a comprehensive system of principles and rights that would ensure the possibility of opposing development projects they did not want. Work began on finding complementary principles that would strengthen their collective rights of opposition and self-determination. In other words, a group of indigenous activists and other civil society activists began systematizing a vision of alternative development inspired by the cosmogony of indigenous life.

In the early 1990s, Alberto Acosta and Carlos Viteri Gualinga, an indigenous philosopher and scholar, travelled extensively throughout the ancestral territories of the Amazon Kichwa communities and gathered their inherited vision of life. They uncovered a principle of communal life based on cooperation rather than competition, where concepts of poverty and progress where either radically different or altogether absent (int. AA). They also discovered a system of living within the natural environment that conferred as much respect to other species as it did to members of the human community. Political decisions were always taken in democratic assemblies where the voice of non-humans was de facto included, translated as it were by the knowledge of nature that allowed them to survive in such difficult environments. The representation of nature within the community was a matter of fact and, as with representation everywhere, hinged on knowledge and care.

The cultivation of medicinal plants, the keeping of animals, the rearing of orphaned wild animals and their reintroduction to the wild, their system of medicine, their spiritual beliefs, were all part of a vision of life in which the human being was not valued as a priori above all other forms of life. This is not to say that human life was not valued or of a lesser value, but rather that the organization of societal life followed as a matter of course particular ecological imperatives that demanded non-humans be included in the life of the community. In a paper first published in 1993, Carlos Viteri Gualinga elaborated this philosophy in terms deemed understandable to the West (Viteri Gualinga, 2000). The work of gathering ancestral knowledge culminated in an alternative model of development, of indigenous origins, but no longer limited to isolated communities of the Amazon. Pondering what the best way to transmit the ecological knowledge of the ancestral communities would be, the authors settled on the idea of rights: an idea already familiar to the West and one which had the potential to realize the vision of a balanced and harmonious life (that is to say to transmit the vision of a particular way of relating to nature). This vision, in Kichwa, is called

Sumak Kawsay, translated as 'good living.' It is in fact the original idea out of which rights for nature evolved, and the other side of these rights both philosophically and constitutionally.

Technically speaking, giving rights to nature is a contradiction for the indigenous imagination, because 'good living' already involves respect for the natural environment, and ancestral beliefs were already based on the idea that nature is not a mere object but a very active and often unpredictable subject, in its totality as well as in its specific manifestations and incarnations. Nonetheless, the idea was accepted by the indigenous communities as a possibility to communicate their knowledge to an outside audience. Furthermore, they saw in this another possibility of strengthening the territorial rights that they had secured in 1998 but that were still routinely trampled. This is why, in 2008, the indigenous communities wholeheartedly supported the inclusion of the rights of nature and the 'good living' in the new constitution, as offering them further possibilities for fighting the state in its colonial momentum (int. MC).

I have asked both Pepe Acacho (the current vice-president of the CONAIE), and Mónica Chuji, about the conflicted relationship that the indigenous communities have with the idea of rights for nature, as well as the synonymous use of Pachamama and nature in the constitutional text. They both agreed that nature, as well as rights, are inexact translations of the indigenous vision. Yet the struggle of these communities needed a springboard toward an outside world that would otherwise not listen, and they found this springboard in the translation of Kichwa philosophy. Inexact as it may be, it is articulating a vision that people relying on Western classical philosophy as their cultural basis can nonetheless appreciate and encourage. The rights of nature neatly fit into a particularly Western history of rights, and are presented by the indigenous, as well as others, as the latest (and natural) development of this long history. In this sense, the rights of nature come out of the 'social periphery of the world periphery' (Viteri Gualinga, 2000) in order to inscribe themselves into the tradition that made them marginal to begin with, and change it from within.

This is, in broad lines, the standard account of how the rights of nature emerged from the indigenous way of life. In this story there are, however, two different accounts of the origin of the rights of nature in Ecuador. Both stress the indigenous contribution, but they do so differently. We could call the first account the 'strategic' one, because it stresses the idea of rights for nature as part of a wider strategy of territorial consolidation. The second account could be called the philosophic-cultural one, which explains their genesis as a natural outgrowth of the

indigenous way of life and overall philosophy. These do not necessarily contradict each other, and in fact they are often presented by the same people. To these, a third account can be added: the 'internationally strategic' one, namely the role of the rights of nature as intentionally provocative in order to publicize themselves in the international community, and thus, possibly, gather more support. This has been, if anything, the most successful aspect of the rights of nature so far, and one that I will specifically discuss in Chapters 5 and 6.

4.3 The Constitutional Assembly

Above, we have seen what the standard account of the intellectual background of the rights of nature is. I have also presented the wider socio-economic background against which the rights of nature appear as an alternative. The idea that the rights of nature constitute a radical but viable alternative to the dominant model of development is to be found in all cases of rights of nature so far (also see Chapter 5). Because of this, these rights are both part of a wider package of rights and always framed against a bigger threat. In the case of Ecuador the threat is embodied by the colonial state and the oil industry. In the cases covered in the next chapter, other enemies will provide the background. But the framing of the rights of nature *against* a menacing background is universal. Now, I want to turn to a related though separate issue, namely the way in which the rights of nature made their first constitutional appearance. In other words, how did the rights of nature end up in Ecuador's 2008 constitution?

The Constitutional Assembly, charged with writing a new constitution and presided over by Mr. Acosta,[22] was organized in various working groups (roundtables) around particular themes,[23] and civil society organizations, or simply concerned citizens, were welcome to give their opinion on any theme. The constitutional debates started toward the end of 2007, in the town of Montecristi, and a lot of effort was put into gathering views from across the country, while many offered theirs unsolicited. A number of assembly members, including Acosta himself (at the time the president of the assembly), felt themselves very close to environmental issues (int. AA), having worked on environmental themes before. At the beginning of 2008, an unsolicited group of citizens came to the assembly to suggest the incorporation in the new constitution of rights for animals. So from the very beginning of the Constitutional Assembly the representation of non-humans was being pushed by different advocates.

Mr. Acosta authored two different papers, the first one titled *Do Animals Have Rights?* (2008a), and the second *Nature as a Subject of Rights* (2008b), making the case for the rights of nature. These series of papers came out in February 2008, the latter of the two being published on the website of the Constitutional Assembly on 29 February 2008. In this paper, the case is made for rights of nature from the perspective of environmental justice, arguing that each subsequent extension of rights was unthinkable to the generations before. Just as women were not thought of as subjects until they in fact became subjects of rights, so nature does not seem amenable to rights-status until it in fact becomes a subject of rights. Ridiculing the idea or arguing that it is unthinkable in fact strengthens this line of argumentation, as the refusal to acknowledge nature as a subject is immediately seen as being reactionary and out of step with history. Using Aldo Leopold's famous formulation of the land ethic, that 'something is good if it tends to preserve the integrity, stability and beauty of the biotic community. It is bad if it tends toward the opposite' (in Acosta, 2008b, p. 3), he argues that the time has come to recognize the fundamental rights of nature to exist and, most importantly, to recognize that it has values that are inherent and independent of human use. He concludes by saying that 'it is time to stop the out of control commercialization of Nature, as it was in olden times to prohibit the buying and selling of human beings' (p. 3). The argument he presents, on the very site of the Constitutional Assembly, fits into a progressive history of rights expansions that go hand in hand with what Singer termed the 'expanding circle of moral concern' (Singer, 1981). The fact that Acosta's papers were published on the official site suggests that some discussions were going on in the assembly, albeit informally. By this date though there is no mention in the official transcripts of the constitutional debates of anything like the rights of nature.

In April the Uruguayan writer Eduardo Galeano published an essay titled *Nature is not Dumb* (2008) in which he mentioned that 'a Latin American country, Ecuador, is debating a new Constitution. And in this Constitution the possibility is open to recognize, for the first time in universal history, the rights of nature' (p. 1). The effect of Galeano's piece was to bring the issue into the official debates. The paper was published on 18 April and, already on 29 April, we find the first extensive debate of the rights of nature in the official transcripts. The Acta 040 (2008a) transcript shows that the debates of the day were to center around themes discussed in Roundtable 5 on Natural Resources and Biodiversity. This Roundtable was presided over by Mónica Chuji and the order of the day was to discuss the constitutional provisions

reunited under the theme 'Nature and Environment' (Acta 040, 2008a). The day of the debates was also the five month anniversary of the Constitutional Assembly (Acta 040, 2008a, p. 7), which shows that a significant amount of time had elapsed before the issue of the rights of nature had appeared on the *official* agenda. However, representation and advocacy had been ongoing, as evidenced by Acosta's writing and by further elements presented below.

In the plenary discussion of April, the rights of nature are part of a fundamental redesign of the playing-field itself. In the process of redefining the relationships between political society and nature, weight has to be relegated on the part of nature in order to ensure what is deemed as proper balance. In other words, the idea of rights for nature has to be understood as part of a much wider rights-strategy of political emancipation. The proposals emanating from Roundtable 5 and under discussion in late April are explicitly stated as part of a wider rights-strategy, even though it was not directly the task of this Roundtable to deal with fundamental rights (that was the task of Roundtable 1, which we will encounter shortly). 'Guaranteeing a healthy and ecologically balanced environment goes hand in hand with cultural strengthening, and that is a genuine human right that is weaved together with the right to life, to health, to work, to dignity and identity, among others. [...] It is necessary that the Constitution construct a systemic vision that obliges the State as much as the citizens to live another development, more balanced and more in accord with the principle of sumak kawsay (life in balance or good living), consecrated in this Constitution as a central part of the definition of the regime of development' (Acta 040, 2008a, p. 9). The idea of 'good living', consecrated in the constitution as a new model of development, is an indigenous vision of harmonious living. The rights of nature are supposed to be part of this comprehensive vision, as well as being strategically understood as a straightjacket. Even though citizens appear side by side with the state, it seems much more likely that the straightjacket is aimed at the state, something confirmed to me by the president of Roundtable 5, Mónica Chuji (int. MC).

Rafael Esteves, a member of the populist right, speaks exuberantly of the rights of nature while quoting Galeano's piece. It is worthwhile quoting some of his speech, as it illustrates very nicely one way in which the rights of nature gathered the vote of assembly members that had very little affinity with them – by appealing to the revolutionary nature of the document under construction, and to the sense of pride that could be taken from doing something for the first time in history. No longer marginalized, but leading, '[...]us, in these parts, are trying

to write a constitution that is advanced, progressive, revolutionary.' He goes on to say that 'we should be proud of creating a true advancement in constitutional right' and '[...] to demonstrate to Latin America that here, in this Andean country, as they call us, in this small country, we can indeed add to the evolution of international constitutional right' (Acta 040, 2008a, p. 78). Besides this appeal, he defends the rights with the same progressivist argument already encountered – the evolution of right inexorably goes from less to more inclusion, and the time of nature has come. This argument of course functions to strengthen the other, patriotic appeal. *We* can be the first ones to recognize what 'after 20 or 30 years [...] will be commonplace.' For him as well as for many other assembly members with little environmental sensibility or knowledge, the possibility of making history counted significantly. The work of persuasion that went on behind closed doors surely relied heavily on this argument,[24] and the confirmation offered by Galeano certainly helped. Mr. Esteves might have thought that nature was next in line for getting rights, but of at least equal importance was that he be there to hand them out for the first time. 'Let's open our minds and allow for real progress. I have always wanted to participate in an Assembly or Congress that could call itself revolutionary – I was waiting for it. And I, Mister President, feel like I am in the right place, at the right time […].' This is the intra-subjective relationality of the representative claim at work.

Mr. Esteves' speech illustrates very well the kinds of arguments that were likely to convince assembly members to approve the inclusion of the rights of nature in the new constitution. However, the April debate shows more opposition to the idea than support. Therefore, lobbying on behalf of nature became crucial. Natalia Greene is the 'Political Plurinationality and the Rights of Nature' coordinator at the Fundación Pachamama, one of the most influential environmental organizations in Ecuador. She is also the president of CEDENMA, Ecuador's national coordinating entity for environmental NGOs. She was one of those who lobbied the Constitutional Assembly on behalf of the rights of nature, as well as suggesting ways in which these could be written in the constitution. A de facto representative of nature, she provided documents supporting the idea, mostly relying on the argument of historical progressivism already encountered in this exposition. She also argued that the rights of nature were not a new idea, but one with an intellectual pedigree stretching back decades. According to her, the intellectual roots of the idea stem from the work of Christopher Stone[25] and Godofredo Stutzin,[26] writing in the 1970s

and 1980s. Fundación Pachamama and other environmental groups, like Acción Ecológica, used these authors to argue that the idea has a history – it is not an ad hoc pronouncement of environmentalists.[27] They encountered a lot of resistance, particularly from lawyers, and in her estimation, as well as Acosta's, most assembly members did not understand the issue, while not being necessarily hostile to it. The work of convincing assembly members mostly focused around the ones that *could* be convinced, such as the representative of the populist right, Mr. Esteves, whom we encountered earlier. Assembly member Viteri Leonardo (of the Social Christian Party – PSC), a doctor by training who had been a mayor and is currently a member of the Ecuadorian parliament for the province of Manabí, also became convinced of the benefits of the rights of nature after having been in opposition to them (int. NG). This nicely exemplifies the importance of the audience in any representative effort.

Another important tool in the work of convincing assembly members and pushing through drafts for the rights of nature was the involvement of the Community Environmental Legal Defense Fund (CELDF), 'a non-profit, public interest law firm providing free and affordable legal services to communities facing threats to their local environment, local agriculture, the local economy, and quality of life.' Their 'mission is to build sustainable communities by assisting people to assert their right to local self-government and the rights of nature.'[28] CELDF were instrumental in passing the first municipal ordinances in history to proclaim and uphold the rights of nature, in various municipalities across the US (see Chapter 5). At this point in time, they were the only organization in the world with any significant experience on the rights of nature. Fundación Pachamama invited Mari Margil (associate director) and Thomas Linzey (executive director) to come and meet with assembly members, as well as help in drafting the actual constitutional provisions granting nature rights. Mari Margil said that they met with several groups within the assembly, including indigenous delegates, and that they were very surprised to find that the elected representatives of the indigenous communities already understood the rights of nature in conjunction with territorial rights, with which they had had a much longer acquaintance (int. MM). Seeing how the CELDF representatives met with assembly members that were already considering the rights of nature for the benefits they could bring to territorial rights enforcement, the major role of the American lawyers was to help the Ecuadorian environmental groups draft provisions, based on the experience gathered with municipal ordinances in the US. Indeed, the draft

that Fundación Pachamama presented was elaborated with the help of CELDF, and Art.71 of the final constitution is very similar to their initial proposal (int. NG). Similarly, Acción Ecológica's draft is reflected in Art.74 of the final constitution (int. NG; see Section 4.5 below for the articles themselves).

The idea of the rights of nature was introduced to the Constitutional Assembly under the jurisdiction of Roundtable 5 but, despite all the lobbying efforts detailed above, it became apparent that opposition in this Roundtable was too strong (int. AA). This being the case, there was little chance of the rights of nature passing through this Roundtable, which explains why they do not appear on the official agenda in the April debate, even though many assembly members talk about them, obviously having been part of ongoing discussions. This also explains why there was a significant number of dissenting voices in that same Plenary discussion. On 6 June there is another plenary debate, this time presented by Roundtable 1 (charged with the topic of fundamental rights). The order of the day is, now explicitly, the rights of nature. The debates of June are very different from the ones of April, which suggests that the efforts of convincing assembly members and, most importantly, of finding a favorable group of individuals within a Roundtable, was beginning to pay off.

Once Roundtable 1 was identified, by Esperanza Martínez (Acosta's adviser during his time as president of the assembly, as well as the founder of Acción Ecológica and co-founder of Oilwatch) as suitable (int. AA), some informal convincing took place, while the efforts of the core group of supporters of the idea were focused on producing drafts, making sure the issue did not blow out of control (by, for example, becoming central to many debates, in which case it would have most likely not passed), and making sure that, once passed, the rights of nature were not undermined via other constitutional articles (int. AA). Mr. Leonardo exemplifies the lobbying work when he says that, during the first debates of the rights of nature in the Plenary (the April debates discussed above), he found the idea unpalatable, 'because it seemed to me a patent absurdity to give rights to nature; however, during these days of reflexion, of cohabitation with many of you and, especially, with my friends that love Pachamama, I reconsidered the issue' (Acta 058, 2008b, p. 57). He wondered how the idea of rights of nature could make sense until someone told him: 'listen, how come they give rights to companies? I remained quiet, as I had always thought that it was a pipe dream giving nature rights. But, reading Galeano, that you all have also read, I realized it is truly an interesting topic.'

This account seems to contradict the idea that the rights of nature were the result of bottom-up struggles of resistance and of indigenous consciousness breaking through into the mainstream. Quite the contrary, they seem to have been the orchestrated and dedicated work of a handful of people. From the point of view of the theory developed in Chapters 1, 2, and 3, this is no surprise: the representation of nature via rights must of necessity pass through a process of political articulation that incorporates the powerful indigenous symbol (see Tanasescu, 2015) as part of the relational nature of representation. We have now seen what nature's advocates said; let us then attend to the representative claims on behalf of nature from the perspective of our theory.

4.4 Representative claims

In Chapter 1, I argued that to speak on behalf of nature is to present a representative claim that must be analyzed in terms of its relational structure. The relations in question were, on the one hand, the intra-subjective, inter-subjective and, on the other, the relations between audience, maker, and subject of representation. The notion of rights grafts unto this relational structure and transforms it from epistemic-ontological into moral-legal. Let us explore this matrix in turn in relation to the rights of nature in Ecuador.

Nature's advocates in Ecuador de facto represented nature to the Constitutional Assembly. So the representatives were nature's advocates encountered in the above sections, and the represented was the *idea* of nature. It is important to note here that the represented – nature – does not need to have a physical referent, which is why I call it an idea. In other words, it is not amenable to an ostensive definition; there is nothing to point to that would count, once and for all, as nature. Rather, and as the constitutional articles themselves show, nature encompasses a cluster of ideas that broadly refer to a human/non-human duality. The audience which had to listen to and validate the claims on behalf of the idea of nature was composed of selected members of the assembly on the one hand, and a loosely defined international arena on the other. The assembly audience was purposefully restricted to those members that might be receptive to the idea of nature's rights. In stark contrast the second audience – the international arena – was exceedingly wide. Nature's advocates launched a claim with no real address, like a message in a bottle floating atop the oceans. Far from this being merely imprecise, it is a representational strategy that aims to extend the possible audience and to include all receptive parties into the tightly drawn

circle of moral concern that sets the makers of representative claims apart. It is also the strategy inscribed at the heart of human rights – the universal moral rights of humans.

The above already suggests how the epistemic-ontological relational matrix was set in motion. The intra-subjective relation is crucially tied with both the narrow and the wide audience. In stating that nature deserves the protection potentially afforded by rights, nature's advocates consolidated their subject-position; they counted themselves as willing and able to speak on behalf of an oppressed subject and extended the invitation to join this circle through the infinite address of their claims. This opens toward the inter-subjective nature of the claim, where relations are established between the newly minted subject-position, which includes a preferential relation of nature's representatives to nature itself: they, more than other subjects, understand nature's own subject-position (which is in fact created through the representative claim itself). This analysis can be applied to any of the claims we have seen in this chapter: moral progressivism (nature is next in line for rights), environmental justice, opposition to the state, nature as more-than-resource. However, the overarching claim that encompasses all of these and goes to the heart of the matter is that *nature is a subject*.

This basic claim about nature is nicely summarized by Mr. Acosta in one of the many articles he wrote after 2008 supporting and popularizing the ideas of the constitution: 'the liberation of Nature from the condition of a right-less subject or simple object of property demanded, and demands, a political effort that would recognize it as subject of rights. This aspect is fundamental if we accept that all living beings have the same ontological value, which does not imply that they are all the same' (Acosta, 2011). Liberation implies subjugation, which is to say that nature is presented as having been subjugated by humanity for mercantile reasons. But it is not enough to say that nature is a subject – it has to be a subject *of rights*. Otherwise, it might as well end up being a subjugated subject. The centrality of representing nature via rights is revealed in this formulation – what is needed is not a simple moral re-examination of nature, but rather the granting of *legal* ammo *to* this subject called nature, such that it can be defended against domination. Can't nature be an object, or a right-less subject, that is cared for? No, because 'all living beings have the same ontological value,' which is to say that its subject status is another way of affirming (what nature advocates claim is) the truth of its being. This claim is further substantiated by presenting the rights of nature as *recognized*, and not granted. The background against which this recognition occurs is a menacing one: a hostile state, greedy

industry, Earth in crisis. This is in fact the perfect frame for giving moral charge to the representative claims on behalf of nature, and it works wonderfully with the moral core of the concept of rights. In fact, all cases of nature rights so far (see Chapter 5) share this framing.

As was shown in Chapter 3, there are several meanings of 'subject' in relation to the concept of rights. The strength of claiming that nature is a subject comes from an equivocation of two different meanings of subjectivity. On the one hand, subjects can be legal persons, which are legal categories that define who is to count in the eyes of the law, and nothing else. On the other hand, moral subjectivity is captured by the idea that the represented subject is owed something because of the kind of being that it is. These two notions, though they often intertwine, are in fact separate and can function independently of each other. I will not here rehash the arguments of the previous chapters. What I want to point out is how the legal/moral equivocation played out in practice in Ecuador. Nature's advocates claimed nature is a moral subject and that this recognition can only be adequately carried through in the granting of legal subjectivity as well. The liberation of nature, which requires the efforts of all who consider it as more than an object, is presented as part of the modern struggle of human liberation. The language of subjection and domination already suggests as much. 'Giving Nature rights therefore means politically furthering its passage from object to subject, as part of a centuries-old process of widening the subjects of right [...]' (Acosta, 2011). This argument, which we have previously called moral progressivism and identified with Singer's 1981 book *The Expanding Circle*, is a common one among nature advocates and one that is purposefully modeled on human rights argumentation. This is why the presence of an international audience is needed, and also why the subject-positions are so effectively consolidated through the workings of the representative claim. I will explore the moral/legal slippage in more detail in Chapter 6. Now, let us see what the representational effort of nature's advocates led to.

4.5 The constitutional document

The constitutional articles dealing directly with the rights of nature and resulting from the process described in this chapter are:

> Art. 71. *Nature, or Pachamama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.*

All persons, communities, peoples and nations can demand public authorities enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

Art. 72. *Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems.*

In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.

Art. 73. *The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles.*

The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden.

Art. 74. *Persons, communities, peoples, and nationalities shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good living.*

Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State.

There is a clear continuation between the representative claims presented in this chapter and these four articles. As we have seen, the dominant representative claim presented nature as a subject, and this was codified in the constitution by granting nature the right to 'integral respect,' as well as restoration. Furthermore, and very importantly, the constitution gives the right of representation to *anybody*, irrespective of personal damage (Art. 71), a step that further reinforces the idea of nature as subject – it can now be represented *as an end in itself*. If, as

is common under current dominant legal codes, one can only contest harm to nature via harm to oneself, then nature cannot be anything other than an object of property. In contrast to this view, which we saw was directly opposed by nature's advocates, the Ecuadorian constitution grants any person the right to represent nature and defend its rights, just as any person can claim the violation of another's human rights, irrespective of damage to themselves.

Besides the direct rights *of* nature, Art.74 presents rights *to* nature, which are reinforced by Art.14 (rights to a healthy environment). In line with these, Art.12 and Art.13 give rights to water and food, both of which become fundamental human rights, confirming nature's advocates contention that human and nature rights are intertwined and complementary. Similarly, Art.74 above prohibits genetically modified organisms, a point reinforced by Art.15, which prohibits transgenics. So the four articles above are substantiated by others throughout the constitution, something which again we saw as a goal of nature's representatives.

Nature is defined by Art.71 as that 'where life is reproduced and occurs.' It is also said to have 'life cycles, structure, functions, and evolutionary processes.' A close reading of the four articles also reveals a string of apparent synonyms that might hold the key to the meaning of nature: pachamama, ecosystem, natural system, natural cycle, genetic assets, environment, natural wealth, and environmental services. Natalia Green argued that this imprecise use of the word can be a problem for the implementation of nature's rights, as judges might be confused by the proliferation of terms (int. NG). On the other hand, we can take this proliferation to indicate that, as far as nature's advocates are concerned, these terms are – if not equivalent – close enough. Abstracting from the specific meaning that each term might have in different contexts, a general outline can be discerned: nature in these four articles is close in meaning to 'the natural.' All of these different terms can be held at once if we adopt a very large view of nature and the natural. A negative definition would see nature as that which is not human-made, though this distinction is not always easy to draw. For instance, if the latest archeological evidence is correct and the Amazon basin was largely managed by pre-conquest human populations, then it is an open question whether much of the rainforest is natural (see Chapter 6). Similarly, if nature means non-human, then a farming landscape sits uncomfortably within 'the natural.'

The trouble with not having a unified definition and a single term is that the interchangeably used terms above can be used selectively

to either allow for the naturalness of a farm, or else deny it. For some, a farm might not be a 'natural system,' though it can be part of an 'ecosystem.' Mineral wealth might be portrayed as 'natural wealth,' and hence its extraction as part of a 'natural system.' And these permutations and definitional sleights of hand could go on forever. It seems then that the meaning of nature that we can confidently extract from these four articles is relegated to vagueness. This is hardly a new issue and even though, as Mrs. Green argues, the constitutional text could have been more clear, this problem can never be fully sidetracked. It is in the nature of nature to be a slippery term, something which was not taken into account in the representational process.

The rights of nature are part of a comprehensive package of rights. This was explicitly stated in the process of representation that led to their constitutional inclusion, and betrays an understanding of both what constitutions are for and, more generally, what politics is about. Under this interpretation, constitutions are dispensers of 'inalienable, non-renounceable, indivisible, interdependent, and of equal hierarchy' (Art.11/6) rights, and politics is about the negotiation that will inevitably occur between various rights. It follows that 'the greatest duty of the State consists in respecting and enforcing the respect of the rights guaranteed in the Constitution' (Art.11/9), something which could already be seen in the insistence on the state's role in Art.71–74. Political life is therefore strung between the individual and his/her rights and the state, which is both the guarantor of the individual's rights and the biggest threat to their fulfillment. The same holds true if we replace 'individual' with 'community' or even 'nature.' The citizen becomes the one responsible for holding the state accountable to its constitutional duty, the first and most important of which is respecting rights.[29] And it is the citizen, or collectivities, that have the right to resist the state inasmuch as it harms their constitutional rights, and also to ask for new rights (Art.98).

The rights of the constitution are seen as of equal hierarchy, which is to say that no one right can in principle trump any other – and this includes the rights of nature. When conflict arises between rights, the constitution says that they will be 'reconciled' (Art.85/2).[30] Without having to go into too much detail, let us take a look at what these rights are. The constitution is arranged in different Titles, Chapters, Sections, and Articles, and the regime of rights is weaved through the entirety of the text. Yet some areas have a more specific focus on rights. Title II deals specifically with rights, organized in nine Chapters. After establishing the principles of application (Chapter I), the text moves

on to establish: rights of good living (Chapter II),[31] rights of people with special needs (Chapter III), rights of communities, pueblos, and nationalities (Chapter IV),[32] rights of participation (Chapter V),[33] rights of freedom (Chapter VI),[34] rights of nature (Chapter VII),[35] rights of protection (Chapter VIII),[36] and responsibilities (Chapter IX).[37] Title III goes on to establish constitutional guarantees, while Title IV further details the regime of development, in accordance with good living. All in all, the constitutional text seems possessed of a passion for rights, and the rights of nature neatly fit inside this pattern. If political life is dominated by rights-claims, then nature becomes one more political actor, recognized in this capacity by a constitution which relegates to it what it relegates to all other political actors – rights.

The precise way in which the rights of nature fit in with the rest of the constitutional rights cannot be specified any further, as the constitutional text does not specify it any further. It remains to be seen what happens in practice, what precedents are created, what kinds of arguments become key for an interpretation of the rights of nature. I will return to this point later, when we discuss some of the applications of the rights of nature so far (see Chapter 6). The panoply of rights that the rights of nature are part of have a broader significance than that of the Ecuadorian context. This constitution, and the rights of nature, can be seen as a direct continuation of the expansion of rights-discourses. Nature's advocates in Ecuador say that the rights of nature are both of indigenous origin, and the next logical step in the story of rights and the moral enlargement that accompanies it. I have hinted at the story of indigenous origins being doubtful, a point that I will return to. The moral progressivism of rights can be seen in two different ways: either as a narrative of *moral* expansion, or as a narrative of *political ideologic* expansion (see Chapters 2 and 3). The latter would mean that the strategy of representing nature via rights is part of a history of rights that has increasingly come to dominate the arena of representation. Before we can attend to these reflections any further, let us see the other cases of the rights of nature to date and how they fall within the general pattern drawn by the Ecuadorian experience.

5
Local, National, and International Rights of Nature

We have seen so far the alleged intellectual origins of the idea of rights for nature, as well as its paradigmatic case to date. In terms of practical implementation however, Ecuador was not the first case of rights for nature in the world. That distinction goes to Tamaqua Borough, Schuylkill County, Pennsylvania, USA which, in 2006, passed a municipal ordinance recognizing nature's rights. Two years later, Ecuador became the first constitutional implementation in the world, and that further emboldened others to appropriate the rights mechanism for the representation of nature. Many more municipalities across the US have since passed ordinances that include rights for nature, Bolivia has approved a law package dealing specifically with what they call the rights of mother earth, New Zealand has granted rights of personhood to a river, and advocates have taken the right of nature to the United Nations. This chapter will look at all of these developments in turn, starting from the municipal level up. In the process, I will analyze the basic structure of representing through rights in all of these cases and show it to be fundamentally similar to the Ecuadorian one.

5.1 Grass roots

The first appearance of the rights of nature anywhere was in 2006, at the municipal level, in Tamaqua Borough, Schuylkill County, Pennsylvania, USA. CELDF, the same organization that consulted the Ecuadorian advocates during the Constitutional Assembly, was behind this first practical implementation of the concept, as well as most of the other municipal ordinances across the US. Since then, they have secured rights for nature, defined as the area of the municipality, in 'two dozen communities,' including in the city of Pittsburgh, in 2010. The Tamaqua Borough

ordinance starts with the finding that the borough had 'been rendered powerless by the state and federal government to prohibit the land application of sewage sludge by persons that comply with all applicable laws and regulations.' This, in other words, is the background against which the borough finds it necessary to adopt ordinance No.612 of 2006. The background then is one where the community feels powerless to stop certain practices (in this case the application of sewage sludge) that it would rather avoid. Corporations and the state, both federal and local, are seen as the enemies that are to be opposed with this ordinance. This is exactly the same set-up that we encountered in the previous chapter, where the opposition was also to the state and to industrial interests.

Though the ordinance prohibits the application of sewage sludge without a stringent array of testing, it gives itself another line of defense by making the nature of the borough a legal person. Here again, the rights of nature appear as a strategic tool against a state perceived as hostile and/or in thrall to private interests. As in the case of Ecuador before, granting rights to the natural environment incorporates two different kinds of claims: the largely moral claims of nature's worth, as well as the legal/strategic ones that see the rights of nature as part of a wider effort of rights consolidation, tied to the idea of local self-determination. The sections in question are 7.6 and 7.7, strengthened by 12.2. It is worth quoting all of them in full.

> 'Section 7.6: It shall be unlawful for any corporation or its directors, officers, owners, or managers to interfere with the existence and flourishing of natural communities or ecosystems, or to cause damage to those natural communities and ecosystems. The Borough of Tamaqua, along with any resident of the Borough, shall have standing to seek declaratory, injunctive, and compensatory relief for damages caused to natural communities and ecosystems within the Borough, regardless of the relation of those natural communities and ecosystems to Borough residents or the Borough itself. Borough residents, natural communities, and ecosystems shall be considered to be 'persons' for purposes of the enforcement of the civil rights of those residents, natural communities, and ecosystems.
>
> Section 7.7: All residents of Tamaqua Borough possess a fundamental and inalienable right to a healthy environment, which includes the right to unpolluted air, water, soils, flora, and fauna.
>
> Section 12.2: Any Borough resident shall have standing and authority to bring an action under this Ordinance's civil rights provisions, or under state and federal civil rights laws, for violations of the

> rights of natural communities, ecosystems, and Borough residents, as recognized by sections 7.6 and 7.7 of this Ordinance.'

As with the Constitution of Ecuador, the rights under discussion are both *of* nature and the more familiar *to* nature ones. This second kind – resident's right to a healthy environment – is supposed to be in a relationship of mutual reinforcement with the rights of nature. The underlying concept of the represented – the idea of nature – is in both cases that of a wholesome and holistic abode, a kind of hearth that by definition is pure and friendly. This same aura of safe homogeneity is also characteristic of the representatives, in this case the residents of the borough. Note that 7.6 prohibits certain individuals only ('any corporation or its directors, officers, owners, or managers') from interfering with the proclaimed rights of nature, but not a borough resident. The assumption is that a borough resident is naturally benign to nature. In fact, in the absence of this assumption the claimed affinity of the rights of nature with local self-determination, falls apart.

The central issue of standing clearly shines through the above sections. It is, in fact, sedimented multiple times. Not only do natural communities and ecosystem become protected from harm (importantly, harm that comes from certain others), but they are also explicitly listed as 'persons,' which is to say that they are explicitly given standing. This issue is then further reinforced by specifying, twice, that any resident can defend this new persons' rights. So here as well the idea that nature should have standing to sue in its own name and for its own benefit proves itself central to the project of giving nature rights. However, representing nature through rights also leads to the sharp contrast between the enemy – corporations and the state – and the good and nature-loving people of Tamaqua Borough. Though obvious, it is nonetheless important to point out that 'nature' is much more diverse than a friendly home, as is the notion of a 'people.' Whatever power dynamics might be at play in the borough residents' relations to themselves and to their environment is completely effaced in this ordinance. In other words, nature's advocates have an enormous amount of hope that the rights of nature will be applied as they wish though, as I will show later (Chapter 6, 1), there is little reason to suppose this will be the case.

The rights of nature discussed above are the earliest ones and, compared to later incarnations, they are still being worked out in this ordinance. The Ecuadorian rights discussed earlier grow out of this first experience, and the other municipal ordinances across the US

eventually come to a standardized list of rights, itself influenced by the Ecuadorian experience. Other boroughs followed: Mahanoy Township, Schuylkill County, adopted ordinance No.2 of 2008, also in response to the problem of sewage sludge. Section 7.14 repeats the Tamaqua wording almost exactly:

> Natural communities and ecosystems possess inalienable and fundamental rights to exist and flourish within the Township of Mahanoy. It shall be unlawful for any corporation or its directors, officers, owners, or managers to interfere with the existence and flourishing of natural communities or ecosystems, or to cause damage to those natural communities and ecosystems.

Nature in the township is also made a person, and any resident can sue on its behalf. Through this ordinances, nature is given a de facto right to life as well as legal standing.

In Pennsylvania, six other cases of the rights of nature exist to date. In 2010 the city of Pittsburgh became the first US city to adopt a rights of nature ordinance (see below), and in 2011 four other municipalities joined the list. If in the first two ordinances above the background was set by the fight against sludge, this time around it is natural gas extraction through hydraulic fracturing (known as fracking) that becomes the enemy. Pittsburgh's ordinance is primarily one against fracking, as are the ones of the boroughs of Baldwin, Forest Hills, West Homestead, Wilkinsburg, as well as Highland Township in 2013. In all of these cases, the fight against fracking focuses nature's rights around the issue of water, because water pollution is one of the major worries of this natural gas extraction technique. So in all of the post-2010 Pennsylvania ordinances, the following rights of nature appear (this one taken from the Pittsburgh ordinance):

> 618.03 (b) Rights of Natural Communities. Natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems, possess inalienable and fundamental rights to exist and flourish within the City of Pittsburgh. Residents of the City shall possess legal standing to enforce those rights on behalf of those natural communities and ecosystems.

This became the standard formulation of the rights of nature in US municipal ordinances so far. The key element here is the right to life, which is also expressed in terms of flourishing, therefore safeguarding

against a very narrow understanding of what it is to exist. And because of the influence of human rights on the rights of nature generally, the US municipal ordinances present the rights of 'natural communities' as inalienable and fundamental.

Together with the right to exist and flourish, there are several other rights that often, though not in all cases, accompany this part of the ordinance text. These are the right to water, the right to a sustainable energy future (Pittsburgh doesn't have this one, for instance), and the right to self-government. To exemplify – and these appear in most municipal ordinances throughout the US together with the rights of nature – the right to a sustainable energy future reads: 'all residents, natural communities, and ecosystems in West Homestead Borough possess a right to a sustainable energy future, which includes, but is not limited to, the development, production, and use of energy from renewable fuel sources.' Note that this right to a sustainable energy future is also a right *of* nature, because natural communities themselves are said to possess it. What this can possibly mean remains to be seen. What I want to point out here is that, from 2008 onward, US municipalities pass strikingly similar ordinances, as a result of the central role of CELDF and the overarching representation of nature through rights, which carries its inherent elements through various cases. We can then speak of a package that the rights of nature are part of and that different municipalities, cities, boroughs, or townships, can combine to suit their own needs and their particular representative process. The core of this package is formed by the rights of natural communities, rights to water, to a sustainable energy future, and to self-determination. To these some municipalities (see below) add other rights that are nonetheless continuous with the general spirit of the ordinances.

Besides Pennsylvania, other states adopted similar ordinances. One way to classify the totality of them would be in terms of their main enemy figures, that is in terms of who they are supposed to oppose. This method of classification suggests itself for two reasons. First, every ordinance starts with just this issue, namely a sustained exposition of who the ordinance is aimed at. Second, the moral nexus within which the rights of nature function requires an enemy figure; as we have seen, the rights of nature are always presented by nature's advocates as signifying a new kind of *human* development, away from various models that are deemed bankrupt. Whether or not prevailing models of development are bankrupt is not what this discussion is about. Rather, nature's advocates claim that the rights of nature are likely to – together with other rights – move us in a much more progressive and human-centered

development direction. This is what we ultimately seek to understand and evaluate. So far in this chapter we have seen the Pennsylvania ordinances, which are framed against sewage sludge and fracking. In other states, we find ordinances primarily focused around water (these often mingle with fracking ones), mining, as well as sustainability-based ones. Let us now see some of these latter ones.

In 2012 the city of Las Vegas, New Mexico adopted the 'Las Vegas Community Water Rights and Local Self-Government Ordinance,' combining the issue of water rights with anti-fracking advocacy. The cluster of rights-sections appears just as in the other cases discussed, with the addition of a right to water for agriculture. Also in New Mexico, Mora county adopted an ordinance in 2013 that is similarly constructed against the possibility of water pollution through certain extractive activities and that repeats the same cluster of rights. However, it also brings in other elements that recall the Ecuadorian experience and, particularly, the role of indigeneity in the rights of nature. Echoing the thought of 'good living,' Section 3.6 introduces the concept of 'La Querencia de la Tierra' and defines it as

> the loving respect which Mora County residents have towards the land and Earth, which is rooted in our indigenous worldview – the Earth is living and holy, is the habitat that sustains us, and is composed of all natural and living systems, flora and fauna – interrelated, interdependent and complementary – which share our common destiny: the right to live free from contamination.

This complex representational claim engages the entire relational apparatus: the represented is structured as a being steeped in indigeneity, which itself imparts a certain vision of the represented as whole, living, holy. The relation between these two subjects is one of 'common destiny,' which we will also encounter in the Bolivian case later in this chapter. Nature then is understood as Pachamama, Mother Earth, Gaia, and this holism is directly tied to the indigenous gaze. This achieves a remarkably tight connection between the representative and the represented; in fact – we hear the implication – it is not a matter of representation strictly speaking, but of translation, or rather of allowing nature itself to speak through the human voice that is itself part of it. This fantasy of presence does its best to conceal the very political nature of this declaration. It does so through the very idea of rights, presented as a moral imperative that must have a legal correlate. This idea is best seen to be a veiling of the representative

process when the 'right to live free from contamination' is introduced. So the motivating element for this ordinance – human worries over pollution – is placed into the subjectivity of the represented, as if it were there all along. Seeing how these particular humans – the representatives of nature – and the natural environment are closely related and share a 'common destiny,' then we should accept without question an array of rights that emanate from nature itself. It is lucky, one supposes, that nature turns out to also have an interest in living free of pollution.[1]

Section 4.7 further elaborates on the indigenous symbol, stating that

> the farm-based indigenous/mestizo (mixed blood) people who created the original Mora County culture considered the Earth to be living and holy; thus they referred to their homeland as 'La Querencia de la Tierra,' Love of the Land. This sacredness connotes an intrinsic right of the land to exist without defilement.

The question of the border between defilement and modification is not breached, and this should not be surprising: it is of the nature of representative rights claims to construct the represented in this homogenous way. As with the passage analyzed above, that which is attributed to the represented (sacredness) is then taken to automatically lead to a rights-claim, namely the right to 'exist without defilement.' As the text itself says, it is the 'sacredness' itself which 'connotes an intrinsic right.' In other words, no representation is taking place – no relations are being constructed, no interests are being advanced. Rather, nature's advocates are merely reading off nature's inherent rights and finally bringing them to light. This apolitical conceit of rights-talk, examined in Chapter 3, is nicely exemplified in the Mora county ordinance.

The more pragmatic issue of standing also makes an appearance, but with a further interesting modification: if one has the option to choose between bringing an action in the name of nature or in the name of property protection, one must choose to protect nature's rights. Section 8.4 states that 'any person or municipality who brings an action to secure or protect the rights of natural communities or ecosystems against oil and gas extraction within Mora County shall bring that action in the name of the natural community or ecosystem in a court of competent jurisdiction.' This can have real repercussions in the implementation of the ordinance, and in Chapter 6, 1, I will discuss an implementation case in Ecuador where this choice – though the constitution does not directly address it – was present.

The town of Halifax, Virginia, adopted its ordinance on the background of a history of mining and associated damages. As the 2008 ordinance states,

> Corporations engaged in mining activities in Virginia have damaged and harmed – and continue to damage and harm – people's lives, properties, livelihood, their pursuit of happiness, and their quality of life. Corporations engaged in mining have also damaged and harmed – and continue to damage and harm – ecosystems and natural communities. Those ecosystems and natural communities are essential for thriving human and natural communities, for both present and future generations.

They go on to enrich the standard package of rights we have sketched out so far with section 30–156.4, 'Right to livelihood and home,' reading: 'all residents of the Town of Halifax possess a fundamental and inalienable right to their livelihood, homes and land, and a right to enjoy those homes and land uncompromised by the removal of earth support from below.' This is obviously supposed to strengthen a resident's right to oppose the exploitation of resources (which are not owned by the resident herself) from under her property.

In terms of sustainability-driven ordinances, the city of Santa Monica, California, offers a wonderful example. Because its framework is much wider – sustainability – it also offers perhaps the best example in any ordinance so far of the logic discussed through the example of Ecuador. Particularly, the Santa Monica ordinance of 2013 presents a much more comprehensive package of rights, of which the rights of nature are but a part, similarly to the Ecuadorian constitution. Among these, there is 'the right to a sustainable natural climate unaltered by fossil fuel emissions' and 'the right to a sustainable food system that provides healthy, locally grown food to the community.' Furthermore, the ordinance shows the same kind of underlying motivation that a *constitutional* reform would have, namely the desire to change the very playing field itself. Article 4.75.020e states that 'the inadequacy of the current framework of state, national and international policies and laws necessitates re-examination of the underlying societal and legal assumptions about our relationships with the environment and a renewed focus on effectuating these rights.' In other words, a new system is needed, of which this ordinance is the beginning, that would be able to insert a list of inherent rights into the heart of its political practice. This is the same revolutionary motivation we witnessed in the Ecuadorian example.

The overall flavor of the ordinance is aptly given in the 'Purpose' (section 4.75.030):

> this Chapter is created and exists for the purpose of codifying Santa Monica's commitment to achieving sustainability by among other things: (1) restoring, protecting and preserving our natural environment and all of its components and communities including, but not limited to the air, water, soil, and climate upon which all living things depend; (2) creating and promoting sustainable systems of food production and distribution, energy production and distribution, transportation, waste disposal, and water supply; and (3) to the full extent legally possible, subordinating the short term, private, financial interests of corporations and others to the common, long-term interest of achieving environmental and economic sustainability.

Seeing how this sustainability strategy is fundamentally steeped in rights, it makes one wonder how different rights are to be squared against each other (also see Chapter 6 for more). For example, does 'restoring, protecting, and preserving' the natural environment mean evicting people – Santa Monica is a city, after all – or are their property rights stronger[2]? The rights of nature are then further specified in the same section, under (b):

> natural communities and ecosystems possess fundamental and inalienable rights to exist and flourish in the City Of Santa Monica. To effectuate those rights on behalf of the environment, residents of the City may bring actions to protect these natural communities and ecosystems, defined as: groundwater aquifers, atmospheric systems, marine waters, and native species within the boundaries of the City.

This is the same rights language we have seen in all other ordinances.

The issue of potential conflict between nature's rights and the sustainability goals of the city is a moot one. It can be imagined, for instance, that local food production would clash with nature's rights, including with the right to be restored. Alternately, would a restoration right imply that some areas of Santa Monica's nature need to be converted back into farmland? These kinds of questions are naturally not answered in an ordinance. However, they are the kinds of questions that rightly come up when encountering nature's representation through rights, especially as this is always presented as a complementary part of

a system of rights and principles that are mutually reinforcing. I want to point out yet again that the claim of the mutual reinforceability of nature and other rights is to be understood, precisely, as a claim, and not as a statement of fact.

Finally, the town of Sugar Hill, New Hampshire, adopted an ordinance in 2012 titled the 'Right to A Sustainable Energy Future, Right To Scenic Preservation and Community Self-Government Ordinance' and thus freely mixing some of the ingredients we have seen throughout this discussion. The one innovation here is a right to scenic preservation:

> all residents of the town of Sugar Hill possess a fundamental and inalienable right to protect and preserve the scenic, historic and aesthetic values of the town, including clean air, pure water, healthy soil, and unspoiled vistas that provide the foundation for tourism and economic sustainability for local businesses. Residents and local representatives have the authority to enact and enforce legislation that guarantees an exercise of local self-government that is protective of these rights.

Of course, it might be the case that the most 'scenic' landscape is also one not particularly biodiverse, or alternately that a 'historic' landscape would not be particularly scenic. There are many different permutations like this, which all point toward the fact that the potential for conflict is high. Though the ordinances want to make it seem as if there are two opposing camps – one righteous, the other evil or at least misguided – the reality is much more complex. As I have been arguing throughout, this simplification and veiling of complexity and tension is part and parcel of what it means to represent nature via rights.

It is also worth pointing out that the scenic rights above are themselves inalienable and fundamental. In this instance, the proclamative nature of rights is striking. The idea that scenic preservation would be an inalienable right in fact drives home quite well how rights are litigious categories. Inasmuch as something is inalienable and fundamental, it is also non-negotiable. It is not amenable to debate, contestation, in other words, to politics. Rights of this kind presented in the language that we have explored in detail in Chapters 2 and 3 not only appear unmediated (by the political process of representation that leads to them), but also aim to arrest the representation and contestation of politics once and for all. The only place for politics, in this view, would be to adjudicate between different rights. In other words, the only place left for politics in a world enamored with rights is in a strict identification with power.

This conclusion sits uneasily with the other element that is to be found in all of the US ordinances, namely the right to self-government and, hence, self-determination. The New Hampshire ordinance above specifically addresses the right to self-government *as* a rights to enforce rights. The sentiment of independence and the opposition to big government or corporations, though in itself understandable and even laudable, leads in these cases to some very tense and inherently contradictory formulations. This, I have argued and will continue to argue in the next chapters, is a direct result of the hegemony of rights-discourses today.

We have seen a number of US municipal ordinances that have proclaimed rights for their local environment. All in all, municipalities in Ohio, New Hampshire, Maine, New York, New Jersey, Virginia, New Mexico, Maryland, and California have adopted at least one such ordinance. In addition, the state of Colorado will vote, in 2016, on an amendment to the state constitution that would introduce state-wide rights for nature. It will be interesting to see how that plays out in practice but I have no doubt that the arguments presented here will merely repeat themselves. The rights of nature are always part of a package of rights. Ecuador offered a wonderful example of this, but the same has been visible in our discussion in this chapter so far. Now, let us keep following this line of thought through the other cases of the rights of nature to date.

5.2 Mother Earth

The other case of the rights of nature which came to international prominence after the Ecuadorian constitution was that of the 'Law of Mother Earth' in Bolivia,[3] under drafting and consideration since late 2010 and promulgated by the president on 15 October 2012.[4] Notice that the title of the law does not refer to 'nature,' but to a capitalized 'Mother Earth,' in keeping with the (also capitalized) use of Pachamama as the term for nature which already engages part of the representative relations discussed in the previous chapter. The Bolivian law accords equal rights to nature, while defining it as 'the dynamic living system formed by the indivisible community of all life systems and living beings whom are interrelated, interdependent, and complementary, which share a common destiny. Mother Earth is considered sacred in the worldview of Indigenous peoples and nations.'[5] As in the case of Ecuador, nature is presented as a personified mother, to whom respect and reverence is due (hence the bridge toward rights, which is absolutely internal to these claims), and which is unified in such a way as

to have purposes and plans – 'a common destiny.' As with the municipal ordinances above, the idea of nature here represented is devoid of any conflict, actual or potential. Presenting all living beings as having a common destiny can surely only mean that they in some sense have a fundamental stake in each other, and hence in living together, harmoniously. It is perhaps too easy to point out that this is factually untrue, but important to do so nonetheless. The factuality of representative claims is only tangentially related to their presentation and eventual success. What matters is the implicit construction of subject-positions and the relations that are inaugurated among them.

Though human rights are said to be of equal hierarchy with the rights of nature, it seems unlikely. If indeed the shared destiny of humans is to be considered within the unified destiny of 'Earth,' then the rights of humans are to be subsumed under those of the whole, as the part is of lesser importance than the personified sum total (Cullinan, 2011). Article 2.2 of the law in fact states that 'The interests of society, within the framework of the rights of Mother Earth, prevail in all human activities and any acquired right.' This is to say that individual human rights are twice subordinated: on the highest level are the rights of nature, followed by the social good, and only then followed by individual human rights. It is easy to see the good intentions behind this, particularly as we keep in mind the construction of all the rights we have encountered as *against* some enemy or other, overwhelmingly represented by industrial development. The intention is then to counter this tendency by redesigning the playing field around supposedly different values. Hence, the constitutional and legal approach, as well as the reaching for rights. The question that becomes most salient in this context – and that I will approach fully in the next chapter – is whether the mechanism of rights is apt for this task. For the moment, I want to point out that the good intentions behind these legal pronouncements are only partially implicated in the representative process. To be exact, the intentions of the representatives are part of the representative process inasmuch as they form part of the fundamental relations of representation. But the other side of representation is its infinite contestability, and here the intentions of the representatives become irrelevant. Once promulgated, these laws are not the unique possession of nature's advocates. Put differently, subordinating human rights to the rights of nature and the social good can also serve very different purposes than the ones imagined by nature's advocates.

It is in this sense that the claims on behalf of a nature with rights have an unmistakable theological flavor. I will discuss this at greater length in

the next chapter. Here I want to point out that the Bolivian law exemplifies better than all other cases discussed the theological reverence for nature that is part and parcel of its representation through rights, as well as the sheer *belief* that representing nature in this way cannot but impose a benign interpretation. Furthermore, the opposition between ownership and care that we detailed in Chapter 2 resurfaces as part of the Bolivian law. 'Neither living systems nor processes that sustain them may be commercialized, nor serve anyone's private property,' it being implied that to commercialize 'living systems' necessarily spells doom. This, again, is factually untrue, or at the very least debatable.

The Bolivian law also exemplifies perfectly well the full variety of the possible rights of nature. Under Article 7, seven different rights are granted to Mother Earth. Some are familiar, like the right to life, while others are usually human rights that are here given to nature itself: to water, clean air, freedom from pollution. As in Ecuador, nature also has the right to be restored (article 7.6). And in addition to these, nature in Bolivia has the right to the diversity of life (article 7.2), which in effect bans genetic experimentation, and the right to equilibrium (article 7.5), which reads: 'the right to maintenance or restoration of the interrelationship, interdependence, complementarity and functionality of the components of Mother Earth in a balanced way for the continuation of their cycles and reproduction of their vital processes.' This article is a wonderful exemplification of the underlying assumptions of representing nature through rights. Taken from a particular strand of ecological science,[6] the idea is that the natural state of nature is that of balance. This view is no longer scientifically supported, and it was never a proven fact, but rather an assumption, a wish as to how nature *should* be, a fantasy that works well with human ethics and the feeling of guilt at our encroachment. This last element – guilt – again indicates the theological elements of this representation of nature. The representative is penitent for having disturbed a dynamic yet balanced system. This 'recognition' then leads her to grant mother nature what has been taken away: its inherent balance.

In all the cases discussed so far a very similar structure of advocacy led to very similar results. Framed against a menacing background, nature's representation assumes a theological character that makes the moral dimension of our relation to nature central. Via this moral core representation leads to rights; the idea of owing someone something as a matter of justice, as we have seen, is what delivers the rights-claim as the only possible resolution of the moral debt. The move between the legal and the moral conceptions, which we already discussed in Chapter 3,

will be further examined in Chapter 6. Let us now turn to the last national rights of nature, in the case of New Zealand, before examining some of the advocacy of the international movement to grant nature rights.

5.3 Rights of personhood

On 30 August 2012, the Whanganui river won rights of personhood. The river flows from Mount Tongariro to the Tasman sea and is a central element in the life of the Whanganui Iwi, the indigenous community that has historically inhabited its banks, besides being the longest navigable river in the country. So here as well, the indigenous presence is important to signal, though there are some differences with the other cases that we will discuss in due course. The rights of the river in this case come through an agreement (called Tūtohu Whakatupua) between the Whanganui Iwi and the Crown, as part of a historic Treaty of Waitangi which governed relations of land ownership between the Maori and the Crown. So the agreement of 2012 is placed in the context of long-standing land disputes.[7] Instead of extractive industries furnishing the background, as in the majority of the other cases, here it is the relationship with colonial government that occasions a redesign of the indigenous/crown relation today. The Whanganui Iwi claimed that the Crown has not respected the Waitangi Treaty by granting, through section 14 of the Coalmines Amendment Act 1903, ownership of the bed of all rivers to the Crown itself. This, being done without consultation or consent, violated the terms of the Treaty. As a result, the Whanganui Iwi engaged in negotiations with the Crown to remedy this situation.

A first round of unsuccessful negotiations took place between 2002–2004, with a second round commencing in 2009. As section 1.8 of the Agreement states,

> in the context of those discussions, the vision of Whanganui Iwi for the settlement of the Whanganui River claim has been founded on two fundamental principles:
>
> 1.8.1 Te Awa Tupua mai i te Kahui Maunga ki Tangaroa – an integrated, indivisible view of Te Awa Tupua in both biophysical and metaphysical terms from the mountains to the sea; and
>
> 1.8.2 Ko au te awa, ko te awa ko au – the health and wellbeing of the Whanganui River is intrinsically interconnected with the health and wellbeing of the people.

In other words, in the context of the latest round of negotiations, the Whanganui Iwi argued that the river is *a whole*, comprising all of its elements, including the river bed, on all its length and trajectory; and that there is a deep, fundamental connection between the well-being of people and of the river itself, already pointing the way toward the personification of the river and, indeed, its legal personality. These two principles are interconnected, as the well-being of the river is understood by analogy to the well-being of a singular entity – a body, a person. So Te Awa Tupua designates both the unity of the river itself, and that of the river and the people.

The concept of Te Awa Tupua, understood as the unity of the river with itself and with people, became a central topic in the negotiations with the Crown. The Agreement of 2012 indeed only concerns this concept, and the agreement itself is but a first in a series. The 2012 document captures 'areas of agreement as further negotiations continue' (Hsiao, 2012), with the final deed of settlement still in the future. The sections of the current agreement that concern us here are 2.1, which explains that the

> Whanganui Iwi and the Crown have reached agreement on the following key elements of the Te Awa Tupua ('whole of River') arrangements which will form part of the settlement of the historical Treaty of Waitangi claims of Whanganui Iwi in relation to the Whanganui River: (2.1.1) statutory recognition of the status of the Whanganui River as Te Awa Tupua; (2.1.2) statutory recognition of Te Awa Tupua as a legal entity with standing in its own right.

Article 2.9 further specifies that this does not grant anyone property of the river. In a very real sense then, the river has been granted property of itself; indeed, the river bed itself was returned to the river (Hsiao, 2012). These sections then go to the heart of the legal motivation for non-human rights: the issue of standing. What 2.1.2 does is precisely confer standing unto the whole of the river, as a unitary being, and now counted as one person in law. The indigenous conception of the river as one, in metaphysical and ethical terms, finds a direct legal translation in the unity of the legal person.

The Agreement is itself clear about this. 2.7 spells out exactly what the creation of legal personality is intended to do: 'reflect the Whanganui Iwi view that the River is a living entity in its own right and is incapable of being "owned" in an absolute sense and; (2.7.2) enable the River to have legal standing in its own right.' The issue of ownership

appears here as well, but slightly differently than in the other cases. It is not ownership, or use, as such which is seen as a problem, but what is referred to as ownership in an 'absolute' sense. This would presumably mean owning the whole of the river (recall that the river-bed issue was the trigger for this whole Agreement), and/or transforming the whole of the river as a result of such ownership. Seeing how the river is now a legal person in its own right, it can potentially sue anyone that would transform it not according to the river's own wishes. However, ownership as such is not outlawed, and it remains to be seen how the related issues of ownership and use are settled with a river that counts as a legal person. It can be supposed that the river's guardians would consent in the river's name to certain collective ownership schemes directed at, for example, fishing. Similarly, use as such is unlikely to be opposed, but rather steered toward activities that are considered to align with what the guardians deem the interests of the river.

This issue of guardianship presents obvious difficulties, and the Agreement between the Whanganui Iwi and the Crown is brave and innovative in tackling them without reservations. To this end, the concept of Te Pou Tupua, or the guardian of the river, is presented as a solution to who will speak for the river. The Te Pou Tupua will be formed of two representatives, one appointed by the Crown and one by 'all Iwi with interests in the Whanganui river' (2.19), which are bound to act on behalf of the river and in its interests (Sections 2.8.2 and 2.18). These are further specified in terms of a mutually agreed upon set of values for the River, to be discussed and incorporated in a future full, comprehensive, Agreement (recall that this part of the Agreement is simply concerned with the river, and that the full text is in fact pending). As 2.20.2 puts it, the guardian 'will provide the human face' of the river.

In this same vein, 2.24 announces the future gathering of a Whole River Strategy, where a plan for the river can be deliberatively drawn by all interested parties. This would then have a strong bearing on the work of the Guardian. What is interesting to note here is how an attempt is made to resolve the implications of the issue of standing, many of which have to do with representation. The central question of who will represent the river is given a deliberative answer by the appointment of a Guardian which is both plural and unitary. It comprises the Crown and the Iwi, as equals, and is explicitly tasked with negotiating and deliberating a vision for the river with all interested parties, as well as defending the river's unity in the face of danger. In other words, the Guardian is tasked with the work of representation itself, and this work is understood to be political (it must be inclusive and based on

negotiation) and, if at all legitimate, must be deliberative. More than in any other case of the rights of nature so far, rights are here subordinate to representation, and therefore an entirely different effect is achieved.

The issues of negotiation, deliberation, and open contestation are held together with the avowed unity of the river, without apparent contradiction. The Whole River is in fact openly understood as a cultural construct, and therefore the conceit of the river's interests does not feel conceited at all. There is no talk here of listening to the river, but rather of listening to people that have certain hermeneutical relations with the river. The interest of the river is in fact another way of accepting and codifying, through the granting of standing, other possible meanings for the natural world, as well as alternative models of governance. We have seen this desire for alternatives to be part and parcel of all efforts of granting nature rights so far, but the New Zealand case stands, to my mind, as an exemplary one. This is so for multiple reasons. Though, as in some of the other cases we have discussed, the rights of nature are constructed to bolster indigenous territorial rights, the indigenous themselves are here much more implicated in the process than elsewhere. Furthermore, the rights in question in New Zealand are of a natural *entity*, not of nature as such. This means that they are specified in a way that even the lower-level municipal ordinances are not. And this specification is crucial, because there is no doubt as to who the legal person is.

This point is related to the way in which standing is granted. Here, standing is highly specified: it is the river – *this* river – that has standing, and *only through its guardians*. This is absolutely crucial, and differs markedly from the dominant approach of granting anyone standing to represent nature in court. For the Whanganui river, only its guardians can speak, and these are signaled out in the agreement itself. This brings much needed clarity to the process of legal representation that is necessary for any kind of implementation, and also defends against the possible abuse of the river's legal status by others acting as its guardians. In Ecuador for instance, there is no legal barrier to an oil company acting as nature's legal representative; indeed, the constitution gives standing to anyone, and oil executives might as well argue that it is in the interest of oil to be exploited. What in effect the Whanganui river case shows is how a very careful and minimal formulation of the rights principle can already solve some of the conundrums inherent in granting rights to the natural environment. By focusing on the issue of standing narrowly defined, and subordinating rights to representation, it manages a level of clarity unique in the rights of nature to date.

This, of course, does not mean it is all smooth sailing for the Whanganui river. The full agreement is still to be completed, and there is still a lot of maneuvering space for future legal interpretations. There are also tensions inherent in the concept of rights itself that no formulation can escape (see Section 5.4, as well as Chapter 6 for more). Now, in order to complete the survey of the cases of rights for nature to date, let us turn to their international aspirations.

5.4 Extraterritoriality and universality

In 2008, Ecuador became the first case of the rights of nature in constitutional history, and also the first one with international aspirations. These aspirations were made quite clear by a test-case against the oil company British Petroleum (BP), filed 26 November 2010.[8] Among the plaintiffs were Alberto Acosta, Esperanza Martínez,[9] and Vandana Shiva.[10] They cited the principle of the extraterritoriality of the law and thus drew a stark parallel with human rights, which can and should also be enforced extraterritorially (Moyn, 2010). Using Art. 71 of the Ecuadorian constitution, the plaintiffs sued British Petroleum (BP) in the Constitutional Court of Ecuador for allegedly violating the rights of nature during the dramatic and highly publicized Gulf of Mexico oil spill of 2010. Vandana Shiva was recorded by Upsidedownworld.org as saying that they

> filed this lawsuit to defend the rights of Nature, in particular the rights of the Gulf of Mexico and the sea, which were violated by the BP oil spill. It's about universal jurisdiction beyond the boundaries of Ecuador because Nature has rights everywhere, and that is why a global coalition were the first signatories to say: we as citizens of the earth have a duty to protect Nature everywhere.

And Mr. Acosta affirmed that 'it is important we understand there's only one Pachamama, rather than one in the north and one in the south, and that is why we have to join forces, to make the great changes that we want and make a new civilization.'

The idea that human rights – which are the extraterritorial rights par excellence – and the rights of nature are intertwined, is increasingly presented by activists as an important claim in the representation of nature.[11] Natalia Greene, as well as Mr. Acosta, Mrs. Chuji, and Mr. Acacho made the point during our interviews, as did Mari Margil of CELDF. For them, the rights of nature *are* extraterritorial in the same

way that human rights are, because nature is an all-pervasive subject, akin to 'humanity' as the subject of human rights. It is further argued that the rights of humans cannot be properly implemented without respect for the rights of nature, because humans are an integral part of nature and if only their rights count, in the long term they are inexorably undermined. These claims are part and parcel of the representative relations that we have discussed, and consciously part of a strategy of internationalizing the rights of nature, on the model of human rights, in order to familiarize more people with these representative claims and get more advocates to reproduce them. The audience for these claims is humanity as such, and it is in this sense that I argued earlier that the Constitutional Assembly of Ecuador was really just a small part of the audience, the advocates of nature already looking far beyond that.

The internationalism of the rights of nature, and their connection to human rights, is best exemplified by the *Universal Declaration of the Rights of Mother Earth*, of 22 April 2010. Drafted and signed in Cochabamba, Bolivia, during the 'World People's Conference on Climate Change and the Rights of Mother Earth,' it is the ultimate summary of the representative claims on behalf of nature. Presented to the UN for consideration by the Bolivian president, Evo Morales, it starts with

> We, the peoples and nations of Earth: considering that we are all part of Mother Earth, an indivisible, living community of interrelated and interdependent beings with a common destiny; gratefully acknowledging that Mother Earth is the source of life, nourishment and learning and provides everything we need to live well,

and goes on to claim that 'in an interdependent living community it is not possible to recognize the rights of only human beings without causing an imbalance within Mother Earth.' We have encountered and analyzed most of the claims embedded in these formulations, and will do so further in the next chapter. The Universal Declaration reinforces the point of the international outlook of the representative strategy on behalf of nature, and the subtle weaving of the relations of representation with those of rights. There is, however, a further point which the quote above brings into relief: the idea of balance inhering in nature is one of the anchoring principles for the rest of the representative claims. In other words, we owe something to nature not only because it is our mother, and it has a life of its own which is arguably greater than our own, but also because we have disturbed it. This penitent view suggests that our respect for nature is to be derived from a perceived balance, and

hence from *its* inherent values, while at the same time suggesting that *we* are in peril if we don't redress the lost harmony.

The Universal Declaration, in following with the inheritance of human rights discourses, proclaims the rights of nature to be inherent and inalienable: 'the inherent rights of Mother Earth are inalienable in that they arise from the same source as existence.' This is exactly the same argument that we saw Morsink (2009) defend with respect to human rights (Chapter 2), only that there he used the inherence of rights in the human person to argue against the possibility of rights for animals. Rights for nature, one would assume, seemed too much for him to even consider refuting. The representatives of nature have seized this argument and use it to reach the opposite conclusion. Once a certain kind of universalist moral language is legitimized as the dominant language of emancipation, there are indeed no limits to its application, inasmuch as the audience is willing to accept the claims made, and enough values and moral sentiments can be found to adhere to the generic symbols that are in fact represented – humanity, nature. One can imagine a world where wardrobes were thought to have particular significance, containing the spirits of all those who had once deposited clothes in them, and teaching us the virtues of patience and resilience. In such a world, wardrobes could easily be inserted into the universalism of rights, and would therefore be represented through the image of our moral debt to them, as well as further framing representations – sedimenting the moral debt – once they acquired rights.

The intellectual history which I described in Chapter 2, before arriving at the human rights of today, raised rights to the level of a universal claim with a universal address, but did not manage to liberate their meaning from the state apparatus. The rights of revolutionary modernity, as I have argued, were couched in a universalist moral language similar to today's human rights, but were nonetheless primarily rights of citizenship. This tension is also visible in the concept of rights for nature today. Though the language is precisely that used in human rights discourses, and though the overall push is toward a discourse of rights against any and all states, as it stands the rights of nature are in their own early modernity, re-enacting the tension between citizenship and universal class-membership. By the plaintiffs' own admission, the lawsuit against BP was never thought to stand a chance. Why? Because nature has to be a sort of citizen in order to be protected in any meaningful way. A cursory look at law enforcement in international waters is enough to prove the point. And if not primarily under the jurisdiction of a state, in nonetheless has to be owned, which is another way of

saying that it has to *belong*. The advocates of nature argue that this is precisely the problem, but the contradiction between their universalist language – nature is everywhere, its rights are inalienable and universal – clashes with the reality that *even where they exist*, these rights are enforced because nature is of somebody's interest, at the very least of the state. To say that nature cannot be both protected and owned is to cut the branch from under your own feet. What the history of rights and the meaning of representation teach us is that to resolve the contradiction between universality and particularity, nature has to also be a 'citizen:' it has to belong, and someone other than nature itself has to take an interest in its rights.

I do not mean to suggest that in the case of human rights this same contradiction has been resolved – far from it. The trampling of refugee's rights is a poignant case of the ongoing salience of this intellectual historical contradiction, as is the modern issue of slavery and human trafficking, as well as racial profiling, ethnic cleansing, sectarian violence, and genocide. The difference between the ideology of human rights and its practical, domestic implementation, is great.[12] Inasmuch as the same concept of rights that we find in human rights discourses operates with respect to nature, similar results should be expected: at the very least, the gulf between the moral injunction and its implementation will be great. But although the rights of nature inherit much from human rights, they also differ in important respects. Nature's advocates do not admit this point, insisting on comparisons with slavery, or women's history of emancipation, in order to build nature as a similar kind of subject. I find this argumentation weak, for reasons I have already expressed (see Chapter 3). Therefore, if nature's advocates wish to represent it via rights, the strict adherence to a human rights paradigm will impede their imagination by setting up false contradictions, like that between ownership and care. There are many ways in which nature can be owned and cared for, and rights should not be interpreted to deny this possibility. For instance, one surprising meaning of ownership is presented by Stone (2010), when he argues that by strictly protecting owls (thus giving them de facto rights under the Endangered Species Act), the forest in which they live becomes the owl's property. 'Society as a whole might value the timber of some forest acreage more highly than it values the owls that depend on it. But once the owls are "listed," the owls prevail. And note that the law is not merely protecting the endangered creatures from *harm*. The Supreme Court rejected such an argument in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, emphasizing that their habitat is protected (as are our homes

and lawns) from having *modifications* imposed upon them' (2010, p. 169, emphases in original). It is therefore premature to argue that the concepts of ownership and property are the culprits for our instrumental dealings with nature. In fact, those same concepts can be co-opted for environmental purposes, as they are not definitionally opposed to rights.

The possibilities and contradictions inherent in the rights of nature will be explored at length in the next chapter. There, I will have the opportunity to draw out the threads that this investigation has presented and be in a better position to discern what the contribution of the rights of nature to our knowledge and activism might be. And, in keeping with the spirit of this work, what better place to start than with the analysis of the only two law suits to date on behalf of nature's rights. Let us begin anew.

6
Speaking for Nature

6.1 Nature in court

Though modeled on human rights, the only successful applications of the rights of nature to-day have been domestic. There has never been a case of the rights of nature being protected against a state, and though the absence of such a case does not prove anything, nor would its existence prove that the contradiction between universality and belonging, which is inherent in rights themselves, would have disappeared. The first protection of the rights of nature in a court of law happened in Ecuador. There, the Vilcabamba river won a lawsuit against the provincial government which had approved a project of road expansion adjacent to its banks, without carrying out an environmental assessment. The flow of the river was modified by the dumping of gravel, rock, trees, and other material excavated on the site,

> narrowing its width and thereby quadrupling its flow. This caused significant erosion and flooding to the lands downriver when the spring rains came. When the provincial government began dumping anew, the landowners sued. Instead of pursuing the case on the basis of property rights, the plaintiffs invoked the recently constitutionalized rights of nature.
>
> (Daly, 2012, p. 63)

The provincial court of Loja vindicated nature's constitutional rights, and awarded damages to the river directly, together with a host of other measures, including a public apology by the culprits, to be published in a daily newspaper. There are several things to notice in this first case. The first is that the plaintiffs themselves had a direct interest

in the rights of nature being enforced – as Daly points out, they *could* have sued for damage to their property. It is significant that they did not, because what the court can award would depend greatly on whether the plaintiffs sued in their name, or in the name of nature. Suing for nature ensured that damages would go for the restoration of the river itself, which of course also benefits the plaintiffs' downriver property. Nonetheless, if they had only sued for property damage, they could have gotten compensation, and the river need not have featured as a subject of rights at all. It is also noteworthy that 'the court quoted Alberto Acosta' in its decision: 'the human being is a part of nature, and [we] must prohibit human beings from bringing about the extinction of other species or destroying the functioning of natural ecosystems' (in Daly, 2012).

Though it was the flooding that prompted the lawsuit, let us assume that it was genuine respect for the rights of nature, and a civic duty to protect a fellow's rights, which played a greater role than the damage to property itself. It nonetheless remains true that the institution of ownership, which the rights of nature supposedly go against, played a role in the enforcement of the rights. Though standing is granted to the river itself in virtue of it having rights, some form of standing also has to be decided for its guardians. After all, why not let the construction company be the guardian? In this sense, the standing of the guardians has everything to do with them knowing the true form of the river, which they were acquainted with by long cohabitation. The Ecuadorian constitution grants anyone standing in defending nature's rights, yet this case shows that standing was judged appropriate also on the basis of the human guardians owning land downstream. The first successful appeal to the rights of nature in Ecuador and, indeed, anywhere, featured an identifiable natural thing – the river – its neighbors that considered themselves part of the river community, and a state on whose territory the river flows, and which is capable of passing such laws and enforcing them. In other words, it was the quasi-citizen-river that won, and this case shows very clearly how human interests and nature's interests are not a matter of reading-off, but rather of prioritizing and judging on a case-by-case basis – they are a matter of representation.

There is something else worth pointing out in this first case. Though the indigenous have routinely been presented as the natural guardians of nature, there are no indigenous plaintiffs to speak of. Furthermore, the local community – another image beloved by nature's advocates – does not feature either. Instead, it is two American owners (Richard Wheeler

and Eleanor Geer Huddle) that are taken as representing the river's interests. Mr. Wheeler and Mrs. Huddle had been developing a 'Garden of Paradise' retreat center on their 350 ha property, which they describe as having previously been an abandoned farm. According to Mr. Wheeler,[1] the flooding carried away some of their agricultural land and he learned that, as owners, they only had one year to act before the land that had been carried away would no longer be theirs. It is lucky, I suppose, that in this case the river's interests coincided exactly with those of expatriates that, in all likelihood, would drive the price of land up in the long run and thus make life for the 'local community' more difficult. I cannot help but wonder: would anyone have sued on behalf of nature if, somehow, the road expansion would have benefitted downstream property? Of course, a counterfactual cannot be answered, but it can be raised as a flag against facile interpretations of this first implementation of nature's rights. Environmental organizations were unanimous in praising the court, though none had anything to say about how the local community related to this law-suit (did anyone there prefer the road over the 'original' river?).

Soon after the Vilcabamba case, another enforcement of the rights of nature arose, this one very different from the first and attesting to the surprising possibilities that lie within this conceptual formation. This time it was the State, via the Ministry of the Interior, which brought suit to protect the rights of nature from illegal mining activities in two northern districts of the country. The plaintiff argued that 'the illegal mining was polluting the Santiago, Bogotá, Ónzole and Cayapas rivers, thereby violating the rights of nature. Two months later, the Second Court of Criminal Guarantees of Pichincha issued the injunction "for the protection of the rights of nature and of the people"' (Daly, 2012), also ordering military personnel to descend on the area, seize, and destroy the property of the miners. So in this case the government itself invoked the rights of nature over and above the right to property. The speed with which the whole operation happened suggests that the government as plaintiff had a big impact on the judicial apparatus – so far there has been no successful lawsuit *against* the government for its oil or mining operations, though it was undoubtedly part of the motivation of nature's advocates to use the rights of nature for such purposes. This case shows even more clearly how interests do not separate themselves into neat categories, but are always a matter of construction, manipulation, and representation. For a government that has already given 12% of the national territory in mining concessions (Carter Center, 2008b) to sue on behalf of nature's rights against illegal artisanal mining is,

to say the least, intriguing. There is no question that artisanal mining is harmful to the environment, as there is no question that large-scale mining is harmful either. In line with what I have been arguing about the meaning of speaking for nature, and speaking for it via rights, even the most independent conception of nature is thoroughly involved in the construction of human interests, preferences, values, and subjectivities.

The rights of nature in practice can travel in multiple directions, as they are not the exclusive domain of the representatives that initiated them. It can easily be imagined that indigenous subjects can sometimes find themselves on the wrong end of nature's rights. Though it was part of the advocate's strategic intent to use the rights of nature against the state, it is just as possible that the state would use them as a tool against activism it does not condone. It is perhaps significant that, whereas the first case of rights for nature implementation received wide coverage on environmental outlets, the second case is yet to be publicized by anyone.

6.2 The indigenous symbol[2]

The philosophical-cultural roots of the rights of nature are presented as soaked in indigeneity. Following the analysis of representative claims, we can postulate that the indigenous roots of the rights of nature are part of the subject-formation of the representative. The claim is that, if only viewed from the indigenous perspective (it being implied that the representatives achieve this gaze), nature is obviously a subject with inherent and inalienable rights.

Let me be clear: the fact that, in a majority of the cases we have seen, the rights of nature are *supposed to* strengthen indigenous territorial rights, is not in doubt. This was indeed part of the motivation of nature's advocates, evident in Ecuador, New Zealand, several US ordinances (for example, the New Mexico ones), and Bolivia. Whether this hope has chances of success is a different question. Here I am interested in the claim that the rights of nature draw their conceptual pedigree from the indigenous perspective. And in that connection, the first thing to point out is that when the indigenous are used as a reference point for an idea, whether political or not, the immediate question should be – which indigenous? There is amazing variety among different groups, even after 500 years of colonization and destruction. If we look back at the historical and archeological record, the minuscule part that we have so far discovered already suggests an incredible variety

of views, lifestyles, customs, traditions, and yes – relations to nature. 'Native Americans' interactions with their environments were as diverse as Native Americans themselves, but they were always the product of a specific historical process' (Mann, 2005, p. 248). This is to say that speaking of an 'indigenous' attitude toward nature should best be received with skepticism.

The concept of rights itself is the biggest stumbling-block to accepting the indigenous intellectual origin of the rights of nature. As indigenous leaders themselves told me, rights are not part of their philosophical traditions (*int.* MC, PA). Yet confronted with the realities of the hegemony of rights in politics everywhere, they have successfully adopted them. This is so not just in the case of nature, but primarily in the case of human rights, whether in the fight for territorial rights, for the recognition of water as a human right, for cultural rights, and so on. These have all been adopted by organized indigenous nationalities without the concept of rights needing to emanate from their specific cultures. One might point out that the application of the concept of rights to nature surely is an indigenous contribution. After all, the harmonious relations that indigenous cultures have enjoyed with nature irrevocably leads toward these rights. Uncomfortably for this view, the first to propose the concept was an American lawyer (Stone, 1972), and the harmony of indigenous life is a highly romanticized version of a much more complex reality (Mann, 2005). This is not to say that there is no harmony (there are also pockets of harmony in 'Western' relations to nature), but simply to point out that the very idea of the indigenous as a champion of environmental sensibility is patronizing and suspect.[3] Instead, we could look at specific indigenous practices and see what works when – in other words, reclaim true ancestral knowledge, instead of sneaking into their cultural history something which has in fact very different origins.

In his comprehensive study of the history of the Americas before 1492, Charles C. Mann describes the deep roots of the tendency to regard the indigenous as enjoying a certain natural harmony with their environment. Whether 'vicious barbarians' or 'noble savages,' the indigenous have historically been denied 'what social scientists call *agency* – they were not actors in their own right, but passive recipients of whatever windfalls or disasters happenstance put in their way' (Mann, 2005, p. 12). The image of the vicious barbarian has rightly died off, but its mirror image survives with increasing potency. 'In our day, beliefs about Indians' inherent simplicity and innocence refer mainly to their putative lack of impact on the environment.

This notion dates back at least to Henry David Thoreau, who spent much time seeking 'Indian wisdom,' an indigenous way of thought that supposedly did not encompass measuring or categorizing, which he viewed as the evils that allowed human beings to change Nature' (Mann, 2005, p. 13). There are definite echoes of this in the idea that the rights of nature are an obvious outgrowth of the low impact indigenous way of life. As I suggested above, pointing this out is not the same as saying that there is nothing to be learned from indigenous practice. Quite the contrary, the point is that such innocence myths obscure what there is to be learned. For example, the latest archeological and historical scholarship suggests that what we today call the Amazon basin was much more populous before the European conquest. This is surprising enough, but what is even more surprising is the recent discovery of a land-management system in the Amazon basin that was, as far as we know, unique in the world. 'Amazonians practiced a kind of agro-forestry, farming with trees, unlike any kind of agriculture in Europe, Africa, or Asia' (Mann 2005, p. 26). This means that 'far from being the timeless, million-year-old wilderness portrayed on calendars […] today's forest is the product of a historical interaction between the environment and human beings – human beings in the form of the populous, long-lasting Indian societies described by Carvajal' (Mann, 2005, p. 285). Of the 138 species of domesticated plants known in the Amazon, more than half were trees. Native Americans practiced slash-and-burn agriculture on a very wide scale, and not only in the Amazon, but everywhere in the Americas. So widespread was this practice, that 'as many as one out of every four trees in between southeastern Canada and Georgia was a chestnut – partly the result, it would seem, of Indian burning and planting' (Mann, 2005, p. 264). In the Amazon, the chestnut is replaced by other fruiting trees, the frequencies of which suggest previous population densities unrivaled today. The irony is that, under the current conservationist and environmental wisdom, the re-invention of such practices would be frown upon. And this is so because we routinely regard the indigenous as incapable of substantially and permanently modifying their environment. Unless we revise our understanding of indigenous agency, we stand very little chance of reclaiming supremely clever ways of relating to the natural environment, instead opting for meta-theoretical arguments that hinge on inherent goodness.[4]

Far from the rights of nature being an indigenous creation, they in fact have the potential of going squarely *against* some indigenous practices. In an environment where nature has rights, and where conservation

efforts treat the forest as the quintessential wilderness, slash-and-burn practices in service of agro-forestry would be quite illegal. The rights of nature have gathered immense indigenous support not because they naturally emanate from their philosophical outlook, but rather because they tell a story that is in some superficial sense flattering, because they have the potential of working together with other rights to strengthen the indigenous position, and because they have been mostly unapplied and unenforced against indigenous practices. There is certainly *some* affinity between general indigenous conceptions and the rights of nature. But to explain these rights by reference to indigenous philosophy is misleading and historically incorrect.

The question then becomes what could be the reasons for presenting the rights of nature as quintessentially indigenous. The first one is, as mentioned earlier, the idea that the rights of nature would in fact strengthen territorial rights. Notice that this too is predicated on the myth of innocence, because the assumption is that the indigenous would be the *natural* guardians of the rights of nature. However, with the exception of New Zealand, there is nothing in the laws themselves that would insure this. And in the case of the Whanganui river, the guardians are not in fact assumed to be the indigenous, but rather a specified dual guardian with representation from both indigenous communities and the crown. This is markedly different from the cases where everyone has standing, in the hope that only some will in fact use their standing, in line with advocate's wishes. Secondly, the claim that indigenous ways of life naturally advance the rights of nature is part of the subject-position of the representatives and a concealment of the work of representation that this position is engaged in. In other words, the indigenous are the perfect symbolic subject-position, for which pachamama, as the very word suggests, is to be treated with reverence as a matter of course, an idea which easily incorporates moral indebtedness and guilt at the same time as it offers deliverance through acceptance of the representative's claims. This is why Ecuadorian assembly member Viteri Leonardo, after being convinced of the rights of nature, says he was persuaded by his friends 'that love pachamama.' In that formulation we have the whole crux of the indigenous symbol: love of nature, once recognized, imposes *by its own power* a moral debt on us, and hence 'reveals' that nature has rights. The indigenous story achieves something remarkable: it makes of the rights of nature an *automatic* kind of representation, as if there were no representatives needed at all, but simply the innocence of the loving gaze.

6.3 The idea of nature

> The crux of the problem is that, for western society and consumerist egocentrism, Nature and living species are considered as property objects or simple natural 'resources'. They do not consider Nature as a whole, but they only recognize its elements inasmuch as they have an immediate utility for profit and unlimited consumerism, which transforms everything into merchandise; wood, bananas, human organs, water, or minerals, are resources for exploitation. A similar vision reigned supreme in the traffic of slaves.
>
> (Acosta, 2008b)

The same holistic argument was developed by Cullinan (2011), discussed in Chapter 3 (3). And indeed it is a staple of representative claims on behalf of Nature. These can aptly be called holistic, inasmuch as they posit the idea of nature as a unity and refuse to acknowledge any kind of important differentiation. From this holistic approach further emanates the idea that nature can be conceived of as a subject.

The central claim in all cases discussed was that Nature is a subject,[5] in moral terms, and hence should also be a subject in legal terms. The logic of representation follows the logic of rights, and the comparison with slavery leaves no doubt on the matter. Nature-as-subject is presented as part of a rights-expansion that has marched throughout history, a moral progressivism that has seen women, slaves, and now nature become what they always inherently had been – proper subjects. In the case of nature however, the comparison seems to me more forceful than reasonable. After all, it is an injury to the dignity of persons to feature as an object of someone's property, and this reason is central to anti-slavery arguments. There, the point was not primarily that a slave cannot feature as a subject in law – this, as Bourke (2011) has shown, was *not* the case. The slave was a quasi-legal person, such that it could feature as a responsible party inasmuch as this was in the interest of the owner. The injury to the slave was primarily one of dignity. *Being owned was a harm to the slave itself.* It is not at all clear that, if I buy a piece of forest and keep it unchanged by donating it to a land trust, the forest is harmed in any way. Whereas if I buy a person that I subsequently take very good care of (in terms of food, clothing, shelter, and so on), the person is nonetheless harmed, because being owned does not square well with being an independent, autonomous agent.[6] To suggest that nature is such an agent, by comparing the owning of land to the owning of slaves, is either naively mistaken, or else

purposefully disingenuous. It does not much matter for our argument what the purpose is. What does matter is that the claim that nature is a subject in a sense that would bear comparisons with slavery frames the representative relations of maker to audience and each to themselves by the way in which it creates the represented 'subject.' That nature is presented as evidently whole and motherly should not lead us into thinking that it *is* so. From the point of view of representation, claims are best presented matter-of-factly, though this does not imply that they are factual.

This framing of the representative relations achieves two important things: it ties the representative claim to a rights-claim, and it paints the choice for the audience in terms that cannot be refused. If the premises of the argument are accepted by the audience, then it is forced into a corner, faced with a choice equivalent to the one between being a slaver or an abolitionist. Francione (1995, 1996, 2004) is just the most prominent advocate of the same position with respect to animals. There, the argument centers around the capacities of animals, whereas here the claims cannot rely on nature being sentient, and instead rely on our symbolic self-understanding, as well as a more diffuse sense of capacities – aliveness of a general, unspecified kind. It is to this later capacity that Art.71 of the Ecuadorian constitution nods when recognizing nature's right to follow its own cycles.

In some of the cases discussed – the Ecuadorian one, as well as the Santa Monica ordinance – this representation of nature is tied to the idea of sustainable development. The argument is that unless we take nature's interests into account in the way proposed by its advocates, no development could be sustainable, even in principle, because one of the subjects party to this development – nature – would have been left out. In (2008b), Acosta sums the argument up by saying that

> Nature has to be accepted as a subject of rights. The rights of Nature must be recognized starting from the identity of the human being which finds itself part of it [nature]. And from this broad and inclusive perspective, the new constitution of our country [Ecuador] will have to recognize that Nature is not only a collection of objects that could be someone's property, but also a subject for itself, with legal rights and procedural legitimacy.

Both the self-understanding and the capacities approach to rights and representative claims are implied here: the recognition of nature's subject-status comes from the human being understanding itself as part

of a greater whole, and respecting this whole and its integrity; nature, in being a subject, can be said to have a life of its own, which deserves our respect.

This implies a link between moral and legal subjectivity which we have seen, in Chapter 3, to be indeed part of the concept of rights. However, the link there was vectored, from moral to legal, whereas the advocates of nature, as well as animal advocates, present it as bidirectional. In other words, if nature is recognized as a subject of rights, then its treatment will be in accordance to its moral subjectivity. This, however, does not follow, and perhaps the comparison with slavery can here be turned on its head in order to show why this inference is false. Arguable, slavery was ended as a result of moral recognition. In this sense, moral rights preceded legal rights, and informed and motivated them. If, on the other hand, legal personality would imply moral personality, then the discriminatory treatment of colored people would have stopped the moment their personality was signed into law, which has obviously not been the case. As I have argued, legal rights are a matter of judicial decision, a kind of proclamation that has the same logic as proclamations of moral rights, but has a more restricted scope: what it initiates is a person *in law* and in law alone. Ships and corporations can be persons in law, because judicial procedure has determined that to be useful,[7] but nobody takes their hat off when passing a ship anchored in harbor, or complains that it is being unlawfully chained. Similarly, the fact that nature is a person in law does not by itself imply moral personality, or moral treatment. When the advocates of nature speak as if moral and legal personality are natural allies, they are not making a statement of fact which could easily be disproved, but rather weaving a representative story that exploits the relational nature of representation and the moral debt inscribed in the concept of rights.

The idea of the inherent and intrinsic value of nature[8] is very important to these claims, and comes to reinforce the view of nature as a kind of subject. The narrative that accompanies the idea of independent values in nature is that of a break from the natural milieu that occurred, depending on the author, anywhere between Greek antiquity and early modernity. Whatever the exact date, it is claimed that modern humans have forgotten their ancestral link to nature through the domination of instrumental reason and mechanical industrialization (Chuji, 2008). The narrative of forgetfulness therefore opens up toward the image of a primordial unity, a pre-fall communion with nature, where its value was recognized as a matter of fact, and its independent

existence respected, feared, and revered. In other words, the inherent value of nature, just like the inherence of human rights, is a matter of re-discovery, not of invention or creation: nature has always had a value independent of humans. One can, however, be skeptical as to the accuracy of these claims. As it should by now be clear, factual accuracy is not the domain of representative claims, and the ones centering around the notion of independent value are no exception. A quick glance at paleoanthropology already reveals that humans have been literally shaping nature for a very long time indeed (Mann, 2005; Shipman, 2011). If factual accuracy was needed for representation then, on the basis of evidence, claims of primordial unity could not be advanced, because in fact we have been slashing and burning forests for about as long as we have walked upright. The issue is not the metaphorical hyperbole of representation as such, but rather the complexities that it paves over. If indeed humans have always had supremely complicated relations to what we have variously called 'nature,' then claims of inherent value and primordial unity become suspect in light of what they prescribe. In other words, a falsified past is unlikely to lead to a realistic future.

The Constitution of Ecuador uses many different terms as interchangeable for nature: pachamama, ecosystem, natural system, natural cycle, genetic asset, environment, natural wealth, environmental service, while defining it as that 'where life is reproduced and occurs' (Art.71). Most US municipal ordinances use the term 'natural community,' while the Bolivian law uses mother earth, living systems, and natural processes. It is hard to grasp with any kind of accuracy what all of these have in common. The closest one can come is to use Wissenburg's formulation: 'nature is the interconnected system of all that exists and for its existence depends on everything else – in the vicinity of this planet' (Wissenburg, 1995). Or, to use John Stuart Mill's definition, 'nature means the sum of all phenomena, together with the causes which produce them; including not only all that happens, but all that is capable of happening; the unused capabilities of causes being as much a part of the idea of nature, as those which take effect' (Mill, 1874). This latter definition purposefully allows for the inclusion of 'artificial,' or human-made things, within the domain of nature – something which is not explicitly denied by the legal text of the relevant cases. Following Acosta's argument that humans are to understand themselves as part of nature and balance their rights against those of nature, advocates themselves could not deny the possibility of 'artificiality' being natural. Mill's definition is also apt because it includes potentiality within a definition

of nature, an aspect which is also conceivable within the context of our discussion.

This purposefully holistic definition of nature, by its very holism, has a difficult time incorporating the notion of moral subject. The idea of legal subjectivity is also on shaky foundations, for the same reason: the breath of the definition is staggering. The legal aspect remains to be determined in practice (see 6.1 above), but the moral one can be debated in the terms of our discussion. In what sense can something be owed to a nature this encompassing? On the one hand, it seems intuitive: as long as nature is the very fiber of my being, supporting my every function, I owe it some form of reverence, akin to the reverence one has for life. On the other hand, respect derived on this basis seems at odds with the inherent and independent value argument. If we take that thesis seriously, we must exclude ourselves from the equation, at least in terms of our evaluative powers. But in what sense can something be owed to nature irrespective of my life and my powers of judgment, and entirely in light of its own life? Does a river have a life-plan that can be thwarted, regardless of human considerations? Nature's advocates answer in the affirmative, but it would not be controversial to point out that their answer is controversial.

The holistic view of nature, as well as the myth of a fall from nature, work toward the construction of this concept around the notion of wilderness, particularly that of 'pristine' wilderness. So nature comes very close to meaning that which is untouched by humans, a notion which should not be surprising at all given the way in which the claims on behalf of the rights of nature have tended to separate us from nature in more than one way. This way of thinking our relation to nature, as pitted against each other in a millennial struggle, misses one very important point: humans are always human-nature hybrids, and nature is always a humanized hybrid. There are many examples that can show this point, from contemporary ones to pre-historic ones. Today, there are no longer any truly dark skies, anywhere (Owen, 2007). Paleolithic humans on the shores of lake Tanganyika turned dense jungle into miombo, a broad-leafed woodland much better suited to hunting antelope, and one which remains in vast tracts of Africa today. Similarly, the North American Great Plains are a result of the handiwork of indigenous ancestors (Mann, 2005; Weisman, 2008). Detwiler (2010) showed how, in Gombe national park, Tanzania, a new species of monkey was being (self-)created through hybridization in response to human population pressure outside the park. In other words, the offspring of the new hybrid monkeys of Gombe are already

defined by humanity, and humanity has added another natural entanglement to its already impressive collection. The anthropocene (more on it in 6.4 below) is older than we think – to varying degrees, nature and us have shaped each other for a very long time indeed. The fact that we continue to do so should therefore come as no surprise, and advancing the wilderness myth comes uncomfortably close to indicting interaction as such.

The view of nature suggested above, though hard to fit within a more strict understanding of rights and subjectivity, in fact supports the representative claims we have seen, because features can always be found to substantiate one claim, then another. If the Constitutional Assembly of Ecuador or the city hall of Pittsburgh had been staffed by philosophers and political scientists, this might have been a problem, though it is doubtful that such an assembly could agree on anything at all, let alone the proper basis for the rights of nature. As nature's representatives did not have this problem to contend with, their claims made perfect sense in terms of the persuasion that they were aimed at. They exemplify the ways in which representative relations are implicated in our identities, the way in which this process is sustained by what we claim the represented to be, and the way in which representative relations are increasingly merged with rights. Far from being a weird outlier, the rights of nature are the latest addition to the hegemonic power of rights.

I have argued against the moral progressivism of rights, and instead wish to offer the hegemony of rights as the explanatory mechanism for the appearance of the rights of nature. Since human rights have given new impetus and prestige to the language of moral debt (Campbell, 2006), representative claims are increasingly merged with rights claims. Thinking rights on the basis of capacities directly leads toward positing rights for certain animals whose capacities are evidently close to ours. As environmental destruction continues and the prestige of rights increases, nature itself comes to be seen as an apt candidate, and the notion of owing it something in virtue of the kind of being it is (though it is not clear that it is a 'being' at all) seems increasingly plausible.[9] Far from the rights of nature being a unique case, they represent merely the beginning. Empirically, this claim will be tested in time, though already the cases of rights for nature legislation suggest as much. I have here drawn out in more detail the idea of nature that is fashioned through a process of representation to take advantage of and fuse with the prestige and power of rights. Let us now follow the same idea in its global incarnation.

6.4 The global and the local, the one and the many

The rights of nature appear in law for the first time in the 21st century. Their theoretical history, as separate from the wider history of its concepts, is also very short, dating back to the late 20th century. One way of reading the significance of this development is to see it in conjunction with the rise, in the same historical period, of a generalized concept of nature as one whole: Earth, Gaia, Earth Community. It is also only recently that we have actually seen that the planet is whole, that is have had the visual experience of a unified earth. Photographs of the planet were taken, mostly in black-and-white, thousands of times between 1946 and 1972, but it was only on 7 December 1972 that humanity was able to see a color picture of planet earth in full view. The science of ecology also came into prominence in the 20th century – the term itself was only coined by Ernst Haeckel at the beginning of the last century. Throughout its development, ecology has repeatedly taught interconnectedness, at all levels of study. From an ecological perspective, the earth indeed can be seen as a single organism, though this does not deny either the relative unity of smaller environments, or their relative connectivity to other environments.[10] The study of *human* ecology, pioneered in Chicago in the 1920s (Park and Burgess, 1921), became a discipline in its own right in the late 1960, when the first dedicated university opened its doors.[11] This discipline places the human element squarely in the middle of the world-wide ecological web, being in effect the first serious academic reckoning with the fact of the anthropocene[12] (Crutzen and Stoermer, 2000).

Together, these developments occasion certain thoughts that become typical of the late 20th century, and continue to define both human self-perception, and the perception of nature, at the beginning of the new one. They also provide a fundamental basis for the idea of rights for nature. In other words, the reason why the rights of nature are entirely of our times, unlike animal rights, which have roots in early modernity, is because unlike animals – which had been observed as separate beings for countless millennia – the earth had never before been conceptualized *and* seen as one, while humans had never before featured in their own self-understanding as a geological force.

This new cultural milieu, where connectedness and human domination are ever-present, has rendered intelligible the metaphors of nature as mother. Though often explained by nature's advocates with reference to indigeneity and the term pachamama, the metaphor of a mother earth which is one, and a subject of rights, cannot but appear after we

have conceptualized the whole earth as *Earth*. Pachamama necessarily applied to a particular area, whereas the internationalism of the rights of nature wants it applied to the earth as such, seen as the home of humans and other creatures. It is also in this sense that the rights of nature will have to take priority over human rights, because the holistic mindset demands that the whole be protected against the part that has gone astray.[13] Cullinan (2011) does not speak of the rights of *this* environment, but rather of an earth jurisprudence. The Ecuadorian and Bolivian cases opt for the same broad vision, and the internationalism of the rights of nature has the same mindset. From one perspective, it is hard to argue with the unity of earth and the impact of a humanity which, though acting in a multitude of ways, has common effects. However, the representation of nature as a kind of unified being only holds from this global perspective. There are an infinite number of different relations between humans and nature hiding under their generic labels. It is therefore hard to describe a single relation between humanity and nature, because what we in fact have is a multitude of different practices and interactions, which always involve mutual transformation. When attempts are made to describe how Humanity interacts with Earth, it is always in apocalyptic terms, because there can be no nuance at this level of abstraction.

Nobody doubts that humanity has indeed become a geological force, on par with volcanoes and tectonic movements. The representative claims that pit Earth against Humanity are one possible response to the fact of the anthropocene (see Chapter 7 for others). The rights of nature are part of this response, and they consciously choose to focus on the global at the expense of the particular. The way the represented – nature – is created in the process of representation leads to the rights of nature always being more or less the same. We can look at the Ecuadorian constitution, the Bolivian law, the Universal Declaration, or Thomas Berry's basic rights (1999), recuperated by Cullinan (2011), and yet we always find the same set of rights: to be, to habitat, and to fulfill one's role in the 'Earth Community' (Berry, 1999). These are the rights considered to be basic because of the construction of the represented. Similarly, basic human rights are basic because of the representative construction of humanity. Here we see once again how the two discourses dovetail. Let's take Freeden's definition of rights, encountered in Chapter 2, and see how it fares with regards to nature as Earth:

> a human right is a conceptual device, expressed in linguistic form, that assigns priority to certain human or social attributes regarded

> as essential to the adequate functioning of a human being; that is intended to serve as a protective capsule for those attributes; and that appeals for deliberate action to ensure such protection
>
> (1991, p. 7)

Replacing human for nature, we get: 'a nature right is a conceptual device, expressed in linguistic form, that assigns priority to certain natural or environmental attributes regarded as essential to the adequate functioning of nature.' Putting this in the language advanced throughout this work, this means that a nature right is a representative proclamation that, in constructing the represented as a unified being, assigns priority to what has been rendered as its interests. 'It is intended to serve as a protective capsule for those attributes' – indeed, this is one meaning of rights. And 'appeals for deliberate action to ensure such protection,' which is a function of rights that remains constant throughout their various incarnations, and which I have argued has the potential of going against deliberative and representative practices.

Nature as Earth, when represented via rights, cannot but have the three basic rights given above, because of the way in which it is constructed – as a unity – and because it is so constructed on the background of an apocalyptic scenario – Earth in peril, and humanity both as murderer, and victim (in effect, of a suicide). This is why the right to be is so important, being presented as the only safeguard between us and annihilation. However, there are several problems with thinking representation as the representation of a unity, besides the ones that have been already made clear throughout. One of the major problems is that the representation of nature against humanity presupposes a system of governance within which this kind of global claim can be representative at all – can be acknowledged, debated, and eventually enforced. In other words, the global rights of nature require a global government. Another issue is that, as soon as we switch from the perspective of earth as a unity, and start thinking about the various relations that hold between various humans and various environments, the basic rights discussed above start to be a lot more problematic. One initial problem is the potential conflict between animal rights and the rights of nature. In other words, are animals nature, and if so do the rights of nature grant rights to animals as well? Whether the rights of nature are interpreted to be of animals as well or not, it remains true that humans are in the awkward position of arbitrating between nature and animals. The right to be, at this level, no longer seems universal, which then calls into question the whole inherence and inalienability

of these rights. And lastly, what we mean by the 'whole' is context-dependent. It is only within a purposefully empty context that the whole is always the planet as such. Imagine taking all local decisions that deal with the interactions of humans with their environment with the whole planet in mind.

The rights of nature in their global incarnation are the theologization of a so-far thoroughly secular concept of rights. Nature becomes a deity, and humanity a penitent (and so far impertinent) child. The trouble is that this leaves no room for nuance, and creates insolvable contradictions. There is an inherent essentialism to the rights of nature, most clearly seen in their internationalist and global ambition. The fact that we – humans *and* our environment – are already hybrids, is brushed over. Most worryingly though, what is the relationship of such a grand nature to the mechanisms of democracy? The implication of my argument so far is that the rights of nature have a strong anti-democratic potential, for several reasons: rights are a forceful representation, which leaves little room for deliberation; they require a global governance scheme that, given the nature of power in our world, cannot be truly democratic, and they can always subordinate the representation of humans to a nature which is, definitionally, always more important. This has real potential for abuse, and the second case of the implementation of the rights of nature in Ecuador already shows how their practical application might follow very different lines from the intended ones. The rights of nature, despite the claims of their advocates, do not carry their own interpretation. Though carefully framed in all of the ways we have explored, they are nonetheless available for anyone to use as they see fit, to incorporate into their own representative claims in order to serve factional interests. The irony of a moralistic representation of a global earth is that, in essentializing both nature and humanity, it creates free-floating representative claims that can serve purposes widely divergent from the ones intended.

The above comes into sharp focus when we reflect on the meaning of a global nature. But the same can be achieved by reflecting on the image of the representatives themselves. Global nature finds its voice through a global humanity, and the relation of maker-to-maker crystallizes around the personality of environmental activists that present themselves as speaking for humanity as well as nature. Both Mrs. Shiva and Mr. Acosta made it clear that they spoke 'as citizens of the Earth' – a category which makes sense by presupposing that which it is supposed to speak for (and therefore create) – the Earth. The power dynamics inherent in the consolidation of the subject-position are, as

usual with representations, veiled. The fact that to be a citizen of the earth is a privilege enjoyed by few would run counter to speaking for humanity as such, because the slum-dweller or the subsistence farmer that hunts bush-meat do not structurally feature inside humanity – a problem which, far from being resolved by these kinds of representative claims, is instead hidden from view. To speak as a citizen of the earth is to identify yourself, perhaps unwillingly, with the class that can speak in those terms. To then speak for a global nature from that perspective hides the fact that the moral universals embedded in these claims are not accessible to a majority of humans because of structural inequality, and not a failure to expand their moral horizons.

6.5 The proliferation of rights

Following others (for example, Campbell, 2006), I have argued that we are living in the era of rights. The Bolivian law does not limit itself to one right, but predicates many. The US municipal ordinances also offer a rights-package, incorporating rights to water as much as scenic ones. But from all the cases surveyed in this book, the Ecuadorian constitution stands out as the most apt example of the proliferation of rights today; it has very many rights indeed. Even the idea of third generation human rights, discussed in Chapter 2, seems to come into question – when encountering the right to honor and a good name (Art.66), or the right of access to 'diverse cultural expressions' (Art.21), it is unclear whether third generation rights are a very open category, or if we have entered the fourth generation already. Though I will not go through all of the rights of the constitution, I wish to reflect on the meaning of this array of rights, particularly on their significance for representation.

We have seen that nature's advocates, as well as others in the Constitutional Assembly, purposefully used the constitutional process for framing the subsequent political climate. This is nothing new, nor is it radical: constitutions do, by definition, provide the mark within which political, legal, and social life can develop (Sunstein, 2001a,b). In this reading of constitutionalism, this is simply what constitutions are for. In Ecuador in 2008, it was – explicitly – about setting the framework for the revolutionary transformation of the country, which is to say for the transformation of political and social life. This is, as we have seen, why the assembly was convoked to begin with. And this same hope is expressed by the Bolivian law, as well as the municipal ordinances in the US. In effect, those laws wish they were constitutions.

The constitutional text that was eventually signed into law in Ecuador reveals another feature of the understanding of constitutionalism present within the assembly: the assumption that the radical transformation sought by the regime is to be delivered through an array of rights. In other words, rights, and most importantly socio-economic and third generation rights, are at the center of the revolutionary project. This view of constitutionalism is typical of the late 20th century (Sunstein, 2001b), having been seen in Eastern Europe after the fall of the Berlin Wall, as well as in South Africa after apartheid. This idea of what a constitution is incorporates the element of rights in a positive meaning, that is the state is supposed to protect and enforce an array of rights, rather than rights being seen as protections against the state. Yet, as I have already argued in Chapter 4, this is misleading, because both negative and positive rights are present in the constitution, as indeed they must be if the founding document becomes definitionally mixed up with several rights generations. The state therefore appears both as untrustworthy – the citizenry needs rights of resistance, and absolutely trustworthy – it is being charged with the protection, guarantee, and enforcement of socio-economic and third generation rights. The state cannot be either one or the other exclusively, because even if it is charged with negative rights alone (rights of liberty strictly speaking, and rights of property), it is still through the state apparatus that these are enforced, and hence some level of trust must be placed in the good faith of the state.

The constitution of Ecuador is transformative (Sunstein, 2001b), and it is designed to safeguard against political mistakes and contingencies (Holmes, 1995). This kind of constitution, though it has a complicated relation to the state, has an even more complicated relation to politics. I want to propose that the most telling way of reading this constitutionalism of rights is via its relationship to political representation. Beyond safeguarding against the state, the multitude of constitutional rights 'ensure democratic attention to important interests that might otherwise be neglected in ordinary debate' (Sunstein, 2001b). Sunstein here is discussing the constitution of South Africa, but the same can be applied to Ecuador. He takes the above to mean that 'such rights […] do not […] preempt democratic deliberation,' but rather bolster it, by inscribing particular interests into the very rules of the political process, thus ensuring a kind of automatic deliberation. Another reading of the same phenomenon could be that the rights of the constitution frame subsequent debate, therefore limiting deliberative scope and forcing the hand of representation before claims are even made. To have these

many rights, detailing so many aspects of life, shows a very fundamental distrust of the political process and its ability to deliver. On the other hand, the array of constitutional rights given could not – even in principle – all be respected, which in a sense is setting up the political process for further failure.

Whether rights bolster or stifle deliberation is, to some extent, an empirical question. How they interact with representation, however, is a different matter. Rights, by sedimenting many different interests within the very rules of politics, demand representation (otherwise, decisions which do not take into account the representation of those interests are unconstitutional), while framing it in static interest terms. But they are also *based on* representative claims, which they conceal by their being 'recognized': presented as evident, they do not allow the representative process that led to them to shine through, thus potentially limiting the scope of deliberation by their lack of transparency. This point is also supported by the realization that the supposed interests that rights codify are, especially in terms of third-generation rights, more a matter of values. This is clearly visible in the Ecuadorian text. For example, the right to food is a socio-economic right that, on the face of it, constitutes a basic right – without food, the human person looses all of its distinguishing marks, all of its dignity, and is in threat of losing its life. But the constitution does not simply give the right to food, but to 'secure and permanent access to healthy, sufficient, and nutritious, food; preferably produced locally and in accordance with various identities and cultural traditions' (Art.12). Similarly, the right to education specifies that it will *guarantee* the *holistic* development of the human being (Art.27, emphasis mine), while the right to housing, also present in the South African constitution, is also a right to 'safe and healthy habitat, and *adequate* and *dignified* housing' (Art. 30, emphasis mine). It is one thing to argue that having food is a basic interest, and quite another to say that having locally produced food, in accordance with practices that are in our current cultural favor, is a basic interest. The proliferation of these kinds of rights weakens the argument that these transformative constitutions strengthen deliberation and democracy, because they tend to make rules out of preferences (presented as evident facts), therefore tilting the balance, by definition, in favor of the group that happens to have those preferences. It is not a matter of ecologically sound argumentation to say that locally produced food is always preferable, it is a matter of cultural and political ideology. Inasmuch as rights codify ideological preference, they frame representations and in effect side-step the representative and deliberative political

process. If I have a constitutional right to locally produced food, or to dignified housing, at what point do I have an incentive to compromise, or to even listen to other points of view?

Another aspect of the framing of representation via rights is the way in which the represented is already defined by its rights. Any representative effort on behalf of any person would already have to represent a person that has all of the rights granted by the constitution, which means a person with a hundred different 'interests' that cannot be discussed, negotiated, refined, or ignored. Similarly, nature's representatives have to represent a nature that has rights, including the right to exist and to regenerate its processes and cycles (Art.71). To exist how? Is change that allows cycles to regenerate, and processes to continue, permitted? Can a dam be built that allows the life of the river to continue, though it will flood the surrounding land and change the topography of the banks? These are all questions to be answered in the normal political process. The point is that, once nature has rights, these questions can only be addressed from that point of view, or else face charges of being unconstitutional. The likely result is that the rights of Art.71 will either be ignored, or else lead to increasingly oppositional and contentious politics, with little scope for compromise and common change of mind. As we saw above, a river has won its right to flow as it used to. On the other hand, a document commissioned by PetroEcuador for the environmental management and assessment of an enlargement operation at platforms Áuca Sur 1&2, dated July 2011, does not mention Art.71 at all.[14] It is a lengthy document detailing everything from soil and topography to prevailing winds and the relevant juridical framework, and it mentions the rights of nature, but only as Art.72 and Art.73. Oddly, Art.71 is missing. Or not oddly at all, if the analysis presented here is correct: how could one deliberate at all when nature has the right to exist as such?

6.6 The relationality of claiming

In Chapter 1, I argued that the structure of representation is best understood via the concept of representative claim (Saward, 2003, 2006a, 2006b, 2008a, 2008b), which imparts upon representation a *dynamism* and *uncertainty* that it lacked in classical accounts. The first salient feature of representation is that it is a *process* through which political subjects are fashioned. The representative that offers claims for the judgment of an audience does not merely describe the represented, but is active in their making. The ways in which the represented will

be portrayed frame subsequent representations, as well as help define who the represented are. Conversely, the representative is fashioned, qua political being, by this same process. S/he both consolidates the power position which gives her access to a privileged voice, and changes her political being in relation to the represented and to the process of representation as such. I submitted that the complex dynamics of the representative process are more easily grasped by conceiving of representation as claim-making from the vantage point of its many *relations*. The concept of the relation, which I sketched out with help from Badiou's *Being and Event* (2007) and *Ethics* (2002), underlies the fact that representation is not so much about preferences and interests as it is about identities and values. To represent, I concluded in Chapter 1, is not to represent beings at all, but to represent relations: internal to the subject, as well as inter-subjective. The relational structure of representation is what makes it so that, when representative claims are advanced, they primarily build relations and subject-positions. I argued that it is the representation of non-humans which most substantiates this view of political representation.

In Chapters 2 and 3 I presented a concept of rights that put us in a position to both take the rights of nature seriously, and understand why they appeared in the first place. I presented a narrative of how rights became the hegemonic power that we know today, and how the logic of the concept can very easily colonize the logic of representation. Rights are best understood as particular kinds of claims instituting particular kinds of relations, and though the words 'claims' and 'relations' themselves are not enough to establish a strong connection between rights and representation, I began to argue that their connection is more than a mere equivocation of terms. In the case of non-humans, almost all representative claims will be at least implicit (moral) rights claims, and almost all relations engendered by representation will coincide to a great extent with the kinds of relations typical of rights. This is why the US municipal ordinances, Ecuador, Bolivia, and New Zealand are cases to be investigated, as they take the momentum of both concepts to a logical end not seen before (certainly not in practice). I therefore presented, in Chapters 4 ad 5, the relevant details of these cases. In this chapter I have analyzed further the constitutive concepts and claims of the rights of nature, as well as showing their first legal applications. I now continue by further establishing the link between representation and rights in the case of non-humans, and showing why it is that most representative claims in their name are disguised rights-claims. I will later have the opportunity to reflect on the relative merits of this phenomenon.

Saward's analysis of the representative claim (2003, 2006a,b, 2008) can be summed up by showing the constitutive elements of the process, that without which we can no longer speak of representative claims. The maker, the relevant audience, and the represented are the three bodies of the process. The audience and the represented can coincide, though that does not mean that they are collapsed – the two functions stay distinct even if a single person (or group) is both the audience and the represented. The claim-making activity moves between these three pillars and takes the general form of 'X claims, for the consideration of Z, that Y is such-and-such,' where X is distinct from the other two, and Y may or may not be numerically identical to Z. In the case of non-humans, the audience and the represented always differ. There, the maker of representations proposes that non-humans X are such-and-such and hence deserving of such-and-such treatment, and a necessarily human audience agrees to or challenges the claim.

These are the bare bones of the representative claim. To expose their working in more detail, I proposed a particular account of the kinds of relations that underlie this structure. In Chapter 1, I did this by focusing on the ontological dimension of representation, and postulating both the represented, and the representative, as fundamentally multiple. Hence the first meaning of the relation is that of intra-subjective suturing – the internal difference from oneself paradoxically functions as a principle of unity and self-identity through the process of advancing claims. Within this self-unifying operation, the representative also consolidates her position as a member of a community that has the power of voice, and therefore also the power to count others. This then makes the transition toward the inter-subjective relation, where the representative meets the represented *within* the bounds of the proposed claim. It is in this sense that I submit that to represent is not to represent a thing or being, but rather a (set of) relation(s). This means two things: (a) whatever representative claim is advances will have the relational structure I present; and, because of (a), (b) the interests of the represented are secondary to the very formation of subject-positions and the relations between them.

I think that this structure becomes most clear when we contemplate what it means to speak for non-humans, though I also think it holds for all kinds of representation. I do not need to defend this thoroughly here, but simply want to point out that this understanding of what representation *is* can function across a striking variety of cases. Together with this understanding of representation, I also presented a history of the concept of rights that attempted to make sense of their infinite

predication. In the process, I characterized rights in ways that seem to bring them in a complex and interesting relationship with the concept of representation. As Feinberg (1966) has argued, if we resist thinking of rights in terms of one single perspective (for example, legal), then they are best characterized as an activity of claim-making, understood as a variety of positions, the most prominent of which being the presentation of claims *to* and *against*. Rights always involve the recognition of a moral debt, in the form of something being owed directly to someone (or something), which is another sense in which they involve a moral claim. And finally, rights are aptly described by the logic of proclamation, which is a powerful kind of claim that, through the act of proclaiming itself, initiates what it supposedly discovers. I have argued that this logic is typical of rights proclamations: rights are always said to be *recognized*, which means that they existed, in some sense, prior to their announcement. The power of the proclamation lies precisely in this ability to bring something about by mere stating.

This same proclamative power is present in the inauguration of subjectivities accomplished by representation. What I am interested in is to understand what happens when these two proclamative powers are fused, that is, when representative claims are presented in order to advance rights-claims. So when a nature advocate announces that nature is our mother, or our home, that very announcement inaugurates nature-as-mother. It would be nonsensical to say that nature is a mother since that exact moment when so-and-so proclaimed it to be. No – nature has *always* been a mother, and it is the nature advocate that tells us what has always been the case. Similarly, to say that nature has certain moral rights, for example to respectful treatment, inaugurates nature as a subject worthy of respect (like a mother), while implicitly stating that this representative claim is read-off, rather than created. In this basic sense of claim as proclamation, rights and representation function in the same way. 'Rights are not what belong to persons, they are what create the person' (Douzinas, 2000) can be rendered, without loss of meaning, as 'representations are not what belong to subjects, they are what create the subject.' And both become-so in the act of proclamation – a particular kind of claim in whose power it is to summon subjects into being.

When considering non-humans as amenable to rights, there are two types of rights that apply: moral, and legal. These are often intertwined, and when it comes to non-humans it is hard to imagine any case where they wouldn't be intertwined: to simply give legal rights to owls without the act being preceded by moral argumentation would be very strange indeed. So in the case of non-human representation, it is rights

in their complexity that become the salient unit of analysis. When an advocate proclaims nature as mother, or home, she also engages the moral imagination that is ordinarily connected to these terms. In other words, there are a series of relationships that are appropriate with respect to mothers and homes that the nature advocate wants to import into our relations with nature. In advancing such a claim, the advocate is inaugurating: herself as a spirited, in-touch, representative; nature as mother and home; as well as a special relation between these subject-positions. But what she also does – and this is the catch – is imply a moral debt toward nature-as-mother that transforms the representative claim into a rights-claim. This is why all cases of rights for nature that we have seen are framed against a looming threat. This transformation of one claim into another accomplishes several things: it facilitates the passage from moral to legal rights, while veiling the origins of the relevant subject-positions in representation. This last step is important because it allows the nature advocate to engage the seemingly apolitical nature of rights that we discussed at the end of Chapter 2.

There are generally speaking two ways in which a (group of) non-human(s) is said to be owed something by us, and hence is represented as, at least in principle, a candidate for rights. One either proposes certain features in virtue of which something is owed, that is, in virtue of which the represented has rights, or else has recourse to our moral imagination in terms of what kinds of people we want to be, or both.[15] In the case of animal rights, we have seen the first argument to be dominant: rights are proposed on the basis of characteristics, and there seems to be a new report on recently discovered characteristics in the media every day. Bonobos and chimpanzees have empathy and act altruistically, hence can be said to have a kind of morality (De Waal, 2013); dolphins have complex semantic structures, and can therefore be said to have language[16]; octopi can solve complicated puzzles, and therefore exhibit a kind of reason (De Waal, 2001); crows use tools to obtain other tools that will obtain a treat[17]; and so on. All of these characteristics serve as a basis for the ascription of rights, following the logic of similarity that I presented in Chapter 3. The more similar something is to us, the more deserving of rights. Alternately, sentience can count as a criterion: if something is sentient, something is owed to it in virtue of that fact, and hence it is a rights candidate. Whether it is indeed the case that we ascribe moral rights based on characteristics remains to be discussed (see Chapter 7). What I want to point out here is that inasmuch as we think the representation of non-humans *in virtue of* their characteristics, be it as minimal as sentience, we are also applying a rights paradigm that functions regardless of our

intentions. This also means that it carries with it the conundrums, and the exclusionary practices, that are typical of rights generally.

When no characteristics are readily available, the rights paradigm can still provide a foundation, as in the case of Ecuador. There, appeals to who we want to be, often disguised through a symbolic subject-position, as well as to a personified nature, provided the basis of the moral debt that grounds rights-claims. I have argued that appealing to the (alleged) characteristics of the represented is a direct way toward rights, and it would therefore seem that appealing to our conscience can forge another pathway toward rights, independently of the way the represented is characterized. But this is not so, because the appeal to our conscience is made precisely in virtue of the kind of being the referent of representation is supposed to be. It is their characteristics that impose on us the pangs of conscience, and in this way claims on behalf of nature can stay within the paradigm of rights.

I want to recuperate Badiou's ontology one last time and apply it to this discussion. We have seen that the axiom of his ontology is that what exists is multiple. Which means that 'the one is not' (Badiou, 2007). He goes on to explain the existence of the one in discourse by referring to the formula count-as-one. I find this extremely appropriate for the representation of nature, and indeed for representation more generally, as I have argued in Chapter 1. What is presented in representation as unified, as one, is in fact counted-*as*-one. The multiple that is the fact of any existence is brushed over by the operation of the count. The fact that there are different relations between humanity and nature is brushed over by the representative operation which counts the multiplicity of natures as one nature, and the multiplicity of humans as one humanity. The movement between the one and the multiple is not a dialectical one – nothing is gained or transformed – but rather a dogmatic one, where the supposed fact of unity always trumps the reality of diversity. The rights of nature, though surely despite their best intentions, reproduce this instrumental gaze of the count in political representation. From then on, everything becomes easy: the culprits are clear, the hierarchies already established, the 'order' potentially restored. All that is needed is an awakening, a moment when the truth of the representative claims in the name of nature are revealed to all. It is just a matter of time, the advocates of nature tell us, before the rights of nature will become as ubiquitous as human rights. It is a matter of time before the inevitable enlargement of human morality realizes its debt to Earth. But what if it is not time that is lacking, but a more accurate rendering of political representation and the nature of our moral life?

7
Implications and Provocations

7.1 Implications

When we started this investigation, the rights of nature seemed like an outlier, a wild idea. They confronted us with an uncanny strangeness, seeming to either deliver absurdity, or else a truly radical vision. Increasingly, they seem to shed their radical content, and what haunts us as a truly emancipatory politics is one in which representative claims are free from rights, *and* free from the hubris of our 'aesthetic' interests. In other words, a representation of non-humans that no longer contributes to the fusing of representation to rights, while not simply taking the route of the existence of human interests alone as significant. Is there an understanding of ethics and politics that does not move between these seemingly inescapable options?

Throughout Chapter 6, I have critiqued the notion of an identity of nature, and of humanity as such. I submit that nature as external, alien, and whole, is a suspect device that has everything to do with values, and very little with facts. This is a descriptive position, and shown through a variety of examples. For instance, though nature's representatives are emphatic about rights being opposed to ownership (one cannot own a subject, they say), it might be that owning a subject of rights is a truly empowering combination. The comparison to human slavery is misleading, because no harm can come to nature by the mere act of owning: it is not against its dignity in any way that I can conceive of. Owning in an unlimited sense, as in doing whatever one pleases with the thing owned, is of course to be opposed, but already the cases where such ownership applies are increasingly limited.[1] If by the rights of nature we choose to inaugurate a subject which is on par with human subjects in the sense that it can be harmed by ownership itself,

I am afraid that these rights become close to meaningless. I am not saying that it is only through ownership that rights of this sort can be enforced, but it seems unreasonable to exclude the option on ideological grounds helped along by spurious comparisons. We are too tangled with what we call 'nature' to afford these kinds of separatist notions.

The notion of a tangle points toward Latour's political ecology. In *Politics of Nature* (2004), Latour proposes a notion of political ecology understood in terms of a 'crisis of objectivity.' He rejects the dominant view that representing nature is motivated by a newfound concern for nature or a radical ethical enlargement of our consciousness, arguing instead that nature has always been present in politics, ever since Plato. The concept, in his analysis, has traditionally been used to silence political dissent and imagination – the appeal to nature, both in science and in politics, has functioned as the ultimate justification for the unchecked wielding of power. 'Our house is called politics and the other, under the name of nature, renders the first one powerless' (pp. 18–19). This is another way of rendering Mill's insight, recuperated through Antony's work earlier, that to make of nature a standard is a perilous activity, as it implies discerning that which by definition cannot be discerned, and thus is always about dissimulated power relations. Said differently, the concept of nature, ever since its invention by the Greeks, has been designed to embody unquestioned authority (Strauss, 1953; Douzinas, 2000). In Greek natural right, nature was invoked against tradition, which had featured before as the repository of authority, in order to serve as a new authoritative position. Despite the best intentions of nature's advocates, representing it as a subject with inherent and intrinsic value reproduces the dualism of nature and politics and does not, in the end, serve either. Latour's vision is aimed at redressing this duality and forging what he calls a 'single collective.' I have shown how representing nature via rights was designed, through symbolic relations, to seem evident, unproblematic, read-off . This kind of representation, which is best revealed from the point of view of claims and relations, in fact sets up a concept of nature that is remote and alien, not admitting, despite the occasional claim to the effect of us being part of nature, of a humanizing touch. In other words, it is an apolitical concept of nature which is created by representative claims centered around moral indebtedness.

The same point is visible through the moralizing angle that accompanies the representative claims presented in this work. It is ubiquitous in the literature presenting claims on behalf of nature to indict humanity for its belligerence. We are portrayed as destructive and mean,[2] it being

implied that we must reinvent ourselves if any kind of deliverance is to be had. This is at the heart of the self-relation that representative claims on behalf of nature advance. We are accused of being rapacious – by nature? – while being tempted with moral redemption, which implies the possibility of bettering ourselves.[3] There is a tension between the fatality of human evil, and the existential injunction to reinvent ourselves. We are routinely scolded for our actions, but in this process the consequences of our actions are not assumed, but cast aside as aberrant. The image of 'humanity run amok' makes it harder to feel responsible for our actions, and to therefore take responsibility. This is representation through self-flagellation, and it becomes all too tempting to watch it all go down the drain with a morally superior, all-knowing frown creasing our forehead. The claim that it is only through a change of our own character that environmental disaster is to be avoided, though intuitively tempting, is subject to a logic that has the perverse effect of making us so different from the natural, that it is impossible to move outside of a guilty, but impotent, conscience. The point is that this move is apolitical, precisely because it invokes the *individual* as the key to solving environmental puzzles, where from the point of view of politics it is always systemic thinking that counts. In other words, our relationship with nature is not inherently tragic, but is rather a contingent affair subject to a particular history and to ongoing political decisions.

It is in this sense that the concept of rights (a notion which has the individual, if not at its center, never far from it), in invading representative relations via the imagery of moral debt and its accompanying guilt, side-steps politics and therefore makes it harder to find political solutions to our very real problems. Instead, a patchwork of individual activism in the name of Mother Earth is promoted, which will see some rivers win their right to flow in a certain way, while being able to do very little to change our daily, systemic relations to our environment.

Latour (2004) emphatically opposes the ideology of limiting ourselves in the name of nature, and instead urges responsibility: do not walk away from that which you have created. He reminds us that the real sin of Dr. Frankenstein was not to create a monster, but to abandon it (Latour, 2012). The idea of responsibility is also present in the representative claims we have discussed. The imagery of Earth and Nature and the notion of respect that they entail can easily support responsibility as well. The issue is whether responsibility predicated on respect for a holistic personified nature allows us to do anything at all with a good conscience. If nature is considered as having the moral (and legal) right to exist, is

there room for *bettering* nature in certain respects? Can we continue our entanglements at all? If no, then the utopian character of the claim doesn't need pointing out. If we can indeed further our entanglements, act and modify and tinker, then it is hard to see how the moral rights of nature would not a priori indict our interactions within it.

I have presented a view of representation that is absolutely tied to relations and claims that do indeed move within the human conceptual universe. This does not mean that it is our 'interests' only that we can speak for or recognize – those are, after all, as problematic and constructed as nature's interests. As I have rejected the notion of the represented's interests as read-off and unproblematically *there*, I also reject the idea that human interests more generally can function as a ground for our representation of nature. More is at stake, and the relational view presented here has argued that the concept of representation has to do with the creation of subjectivity in a more encompassing fashion than interests would allow. Representation is always about creating subjectivities, but that does not mean that all the different subjects that it summons into being are equally meaningful. Some more accurately fit the kinds of creatures that we are. Can the view of representation presented here unbuckle itself from rights while simultaneously distancing itself from extreme anthropocentrism? That depends entirely on how it chooses to portray the subjects that it calls forth through its claims.

Latour offers the beginning of an answer, by reconsidering nature and humanity not in opposition but in a kind of partnership that sees them as fundamental to each other. He presents nature and humans as a mix of 'tangled objects,' such that values reside in their various relationships, and not in the supposed being of each term. Though it is important to keep these insights in mind, more needs to be specified. In the work of Cora Diamond we can find other elements that are useful for an alternative conception of what we can speak for, why, and how.

The moral debt relevant for representing non-humans through rights always takes this form: something is owed to X because X is *this* kind of creature, and/or has *these* capacities (in common with us, or else relevant for us). This seems entirely unproblematic – indeed, if we owe something to someone, is it not in virtue of who they are? We have seen this structure both in the case of rights, and in the case of certain representative claims which, in virtue of this structure, become rights-claims. In the following I want to argue that this is just one form of what it means to owe something to someone or something – one form of taking account of another being – and a form which is misleading as to what

we are actually doing when we extend our moral imagination and speak for others.

As I have pointed out on several occasions, animals and nature are different categories, though both are overly wide and abstract. Despite the fact that they are different, the same kind of representative argumentation is applied to both. I have also pointed out that there are various traditions in animal, as well as nature, advocacy – welfare approaches, strict rights approaches, abolitionism, environmental ethics, inherent and intrinsic value theories, ecocentrism, rights of nature. Though the differences between them are interesting, I have focused throughout on their similarities, because I find these to be much more salient for our discussion. And the major similarity, that which commits a majority of representative claims to being at least implicitly rights claims, is the way of arguing formalized above. Crary calls this 'the argument from common capacities' (2007, p. 382), and summarizes it as follows:

> an appeal to the species to which a (human or non-human) creature belongs cannot in itself be a reason for treating it one way or another, and […] any sound reason will need to mention features or capacities of the animal, independent of species membership, that some ethical principle establishes as morally relevant.

Crary here is speaking about animal advocates in particular, and we have already seen how this is indeed the case for them. But the same structure holds for nature's advocates, though the notion of capacity is stretched in order to accommodate this argumentation. It is partly the prestige of rights, and hence of their underlying argument, that compels nature's advocates to represent by appealing to capacities and characteristics. The idea of speciesism is embedded in the argument from common capacities, and it is claimed that it is akin to racism or sexism to treat species-membership as relevant for moral consideration. For nature, this means that we should not take account of the fact that a river is a river in considering it, but rather of its purpose for the wider community of life, its role in natural cycles, and so on. We have to consider the river from the point of view of its characteristics, but only inasmuch as those are not 'instrumental' characteristics, that is, things that are also directly useful for us, but only what it would be relevant for the river itself. The river as the place where I used to fish as a child cannot come into play.

Nature has been claimed to be a subject – this claim was central to the representative effort in Ecuador and Bolivia, and is indeed central to

the global movement for nature's rights. The supposed subject-status of nature, though to my way of thinking an equivocation, is presented as a fact. In other word, nature is not seen *as* a subject, it is not claimed *as if* one, but rather is defined as such as a matter of fact. It is in this way that the argument from common capacities is extended to nature: nature is a subject, just like we are a subject, and *therefore* it must be treated in the way prescribed by its representatives. What Cora Diamond calls 'the use of therefore-arguments' (2003, p. 83), which is the style of argumentation where a supposed characteristic of a being is followed by a – therefore it should be treated like this, obscures several important features. To say that nature is a subject, or that animals are persons, *just like us*, is to brush over many useful distinctions. I know what the advocates are driving at: they believe that to be a thing and to be a person are pre-defined categories that bring with them certain kinds of treatment. But this is precisely where they are mistaken, because they do not recognize that to be a thing, or a person, is not to inhabit a category, but to have a certain meaning.

The kind of advocacy that relies on the arguments described here cannot accommodate the fact that it *is* often relevant what kind of creature we are dealing with, and furthermore that to be a dog, or a pig, or a mountain, or a human, is not one thing, or a set of things, but rather a complex web of relations that are expressed through cultural practices and linguistic norms. The Sami people of Northern Europe herd their reindeer, and those reindeer are *for them, theirs*. That fact does not have to get in the way of moral consideration, and telling the Sami what kinds of capacities their reindeer have will not convince them to forego ownership and use, because they already know what kinds of creatures they are dealing with. But they know in the way that humanity has traditionally known what kinds of creatures live around us, and what kind of world surrounds us – in the manipulative way that I have described in Chapter 1 using Shipman's work. The kind of knowledge that animals' and nature's advocates employ is of a different sort, driven by a scientific gaze which is able to specify which color spectrum an animal is able to see, but not what kind of concepts it inhabits, or what position it could take in our lives. In other words, it gives us facts that are mostly irrelevant for how we live with other creatures. The knowledge that counts for communal living, and hence for politics, is one that engages with the other on the basis of their kind, and hence is 'speciesist' through and through. It therefore also has the potential of being moral.

In the Netherlands, a group of activist biologists have managed to take land (in the region of Flevoland) and transform it into what

they believe to have been a pleistocene landscape, complete with the 'original' horses and cows of Europe, though none are actually the same animals that roamed then, nor is the land on which they now graze that old – it has been recuperated from the sea. The 'park' is called Oostvaardersplassen and

> occupies fifteen thousand almost perfectly flat acres, and biologists have stocked it with the sorts of animals that would have inhabited the region in prehistoric times, had it not at that point been underwater. In many cases, the animals had been exterminated, so they had to settle for the next best thing; for example, in place of the aurochs, a large and now extinct bovine, they brought in Heck cattle, a variety specially bred by Nazi scientists.
>
> (Kolbert, 2012)

Though it seems bizarre, this approach is refreshingly honest about the ways in which we have always tinkered with the natural around us. To ask human beings to refrain from interfering in the business of nature is akin to asking dogs not to enjoy chewing, or aurochs to stop grazing. This is what we do, and it is what we have always done. Nature in the Netherlands cannot have rights, because it is not considered a subject that can be a recipient of justice, but as a malleable clay to be fashioned and refashioned for the benefit of humans and other creatures alike.

We rarely have to consider animals, or nature, or people, as such – talking about those categories falls within limited kinds of meanings. Most of the time, we speak of particular things, and animals, and creatures, which we would put under the category 'nature' only if questioned further. The nature advocate starts with the assumption that there can be such a thing as speaking for nature, because nature is taken to be a static category, when in fact it is used in many different ways that could never be brought under the same set of characteristics. The choice of subjecthood for nature is strategically clear, but mistaken from the point of view of how things we call by the name 'nature' become meaningful in actual human lives. The pachamama that is revered by the indigenous of Ecuador is not revered because it is our home, and nothing else. It is revered because it offered game animals, and plants that cure, and plentiful fish. In other words, it is revered and respected because of what it is *in our lives*.

When according moral consideration, do we do so because of certain characteristics of the thing considered? Diamond (2004) suggests that, if this were the case, there would be no difference between eating meat

and eating people. Also, a vegetarian should eat a cow that has been struck by lightning, because the cow's interests would not have been violated (2004, p. 95). Yet there is a marked difference between these cases, as there is a difference between eating a pet pig and a farm pig. This is so because the connection between morality and eating is not a matter of factual evidence: no amount of factual argumentation of the sort exemplified by nature's advocates would count as decisive in convincing someone of changing their dietary preferences. Rather, people change their preferences, and their behavior, in virtue of *being moved*.

The representative claims on behalf of nature exemplified by the cases discussed come close to heeding this insight, yet they fall short of it in presenting nature's subject-status, or intrinsic value, as a fact, and as a fact that has moral weight and that is directed toward all of humanity. Representative claims are part of our cultural formations, and it is within them that they might manage to change the definition of the things represented. If nature will become a subject for us, it will not be as a subject of rights. And if that is to happen, we need claims that invite us in, rather than point their finger in condemnation. Nature's advocates characterize people who do not heed their arguments as morally inferior – they fail to see something important. The point though is that the advocate's representative claims have the option of moral inferiority already build in, and not accepting them does not denote being insensitive or failing to grasp something important. The representative claims we are prone to making, though they will always follow the structure I described in this work, will vary depending on how accurately we understand what it means to be a human, what it means to make a claim in another's name, and what it means to exercise moral judgment. If we believe that reasons are enough fundament for moving people to action, then the kinds of claims presented here, which inexorably lead toward rights claims, will be dominant. If we believe that reasoned argumentation has little to do with why we do not poke corpses, but instead treat them with deference and respect, then we are forced into making claims that are not speaking *for* others, but rather *as* others – narratives, parables, imaginative and empathic accounts.

Nature has always been something to tinker with. That has to be taken into account, because then the problem is not *that* we tinker, but *how* we tinker, and to the latter no answer based on inherent value or nature's subject-status is possible. Similarly, pets have always featured as animals we do not eat, and pigs as animals that we do eat. To have a pet pig and then eat it is to not have had a pet at all, because 'a pet is not something to eat' (Diamond, 2004, p. 96). In the same vein, it is not in

virtue of interests and capacities that we can treat nature in the ways prescribed by its advocates, but rather by exploiting the mechanisms through which we already show deference toward natural objects. When one feels guilt in carving a name into a tree, it is not because the tree's interests have been ignored. It is because of the way in which we extend the notion of harm, as well as that of pity, or mercy, or humility, to other beings, regardless even of 'bare minimums' like sentience.[4] All of these notions have to be learned through acculturation, and here the representation of nature has to take into account its cultural and symbolic dimensions, and exploit them more fully. Claims on behalf of nature have to work toward the formation of a culture where the ways in which we already treat nature with respect can be rewarded and enhanced, promoted and encouraged. This also means that the address for these claims cannot be humanity as such. As Diamond remarks, it is a mistake to think that 'callousness cannot be condemned without reasons which are reasons for everyone, no matter how devoid of all human imagination or sympathy. Hence their emphasis on rights, on capacities, on interests, on the biologically given […]' (2004, p. 105). The representation of nature will have to better exploit the fact that everyone is already situated within relations with what we call nature, and that often meaningful relations of respect already exist. Others have no choice but to be callous, in which case representative claims won't help, but real socio-economic change will. And others yet will not be receptive to claim-making, whatever the argumentative strategy. Instead of focusing on Humanity, and Nature, political ecology should rather focus on humans and their various natures.

This is the challenge that nature brings to politics. Or rather, this is the challenge that a nature internal to ourselves, recognized as already meaningful in a variety of ways, brings to our political practices. Representing others and representing ourselves, in merging, sheds the easy option of rights-based approaches, shun the argumentative form that is intrinsic to it and that mischaracterizes the kinds of creatures we are and the representative process itself, and offers the prospect of a political ecology that can reclaim our meaningful connections to our world. Nature is our cradle sometimes, in certain contexts. In others, it is opposed to our interests. Animals are fellow creatures, unless they are vermin. They have an agency which is already recognized in our dealings with them, and when that is not the case (for example, factory farms), we already have strong emotional and moral resources to oppose such barbarity – interests and capacities will just distract. The politics of nature needs to move away from grand discourses, and instead focus on

this animal, this nature, these humans. The foundation of our already existing moral, constructive, relationships with animals and nature already exists. A politics of nature needs to learn how to encourage and keep such relationships without alienating a willing audience in the search for unanimous approval.

The rights of nature think that we can sediment representative claims once and for all. They fall short because what we speak about when we speak for nature is our own particular position in a universe eliciting countless responses. There is a certain humility that comes with this view, as well as a certain audacity – the audacity to re-wild that which until yesterday was 'tame,' together with the humility of knowing that we might, nay will, change our mind.

7.2 Provocations

In thinking of Latour's (2004) work, Dobson (2010, p. 756) says the following: 'political ecologists play nature as if it were a trump card, settling all arguments. So economic growth, for example, comes under the green political spotlight because nature (in the guise, here, of finite resources) will not allow it.' This is the problem posed by a concept of nature which is at the same time a standard for judgment and action. Unfortunately, the majority of representative claims in the name of nature share in this characteristic, which has always been an easy extension of our agenda into a concept whose supposed externality gives it unmatched authority. The concept of rights, which Dworkin (1978) famously characterized as 'trumps,' in colonizing the representative imagination, leads toward a strengthening of this ontological understanding of the nature that is to come into politics. Following Latour (2004), Dobson (2010), Diamond (2003, 2004), Crary (2007, 2012), and others that find the metaphysical imbroglios of dominant political ecology wanting, the analysis presented in this work points away from a metaphysics of nature, and back towards politics and epistemology. In other words, the focus of representing nature should not be on nature at all, but rather on what kinds of things we want to make possible through our political claims; what kinds of things *we* want to *do*, where 'we' refers to neither humans nor nature, but to naturalized humans and humanized nature. The myth of purity, or wilderness, or any other such totalizing images, are to be opposed, precisely for the sake of a politics of nature.

Latour (2004, p. 5) makes this point, in italics, thus: '*political ecology has nothing to do with nature*.' And Dobson (2010, p. 757) is right to point out that this signifies a move away from ontology, not that particular

animals, or natural formation, or what have you, literally are of no concern. To say that the representation of nature has to let go of nature is not to say that it cannot be concerned with these other beings. Quite the contrary – concern for non-human others is expressed politically by de-fetishizing them, just as concern for women's rights does not have to pass through images of Woman as the Goddess, which in fact often works to sediment oppressive relations (by, precisely, *naturalizing* them). To let go of nature means to embrace politics, with its uncertainties and necessary frustrations, because of a commitment to the representative process and real concern for both human and non-human lives.

The intentions of most nature advocates were never under question; it is solely their methods that I discussed. It is quite clear that the rights of nature are a brave and ultimately admirable effort. But anyone can fall prey to the logic of the concepts that they wield, unbeknownst to them. This is why, in order to show the logic of representation and rights to both merge, and to do so to the detriment of representation, I had to undertake a conceptual analysis that tried to find its bearing outside of the usual metaphysical commitments of political ecology. I do not want to say that there is nothing valuable in representing nature through rights. As I pointed out in Chapter 6, much depends on *what* rights, and on *which* subjects. What I do want is to draw attention to some problems that are not the usual ones to be pointed out by opponents of rights. They simply say that it is the concept itself which is inapplicable, being restricted to humans (for example, Rolston III, 1993). This is not so – there is in fact no limit to the concept of rights. What nature's advocates wanted to accomplish was an automatic representation of nature in the political process. Frustrated with a too narrow view of politics as only abut humans, they figured that rights will ensure nature will be taken into account. The trouble is that in opposing essentialism with another form of essentialism, you simply replicate the problems of a perceived duality between nature and politics.

Thought nature's representatives did not misapply the idea of rights, they did in a sense overextend it, by muddling moral and legal rights beyond the muddle already inherent in the notion of rights itself. Claiming that legal rights are a form of moral recognition which can bring about new ethical relations does not quite hold. Thinking of women's rights can again help to see the issue. It is not because now they have rights that women all of a sudden are free from the oppression that has characterized most of their history on earth. The fact that they have rights simply makes certain conduct punishable, but if something else does not change, then treatment is unlikely to change on

account of rights themselves, because enforcement itself is not predicated on having a right, but on something else. There is a whole other community of practice around it, and inasmuch as rights come out of this community of practice, they can be successful in furthering certain values. This is a big if though, and in fact it is always activism (that is, minority involvement) that pushes through certain changes to the status quo, changes that both come out of *their* communities of practice, and are aimed at delegitimizing the status quo. In other words, it is true that there is a certain educative function of the law (Stone, 2010), but there is nothing about the concept of rights itself that warrants claims of legal norms leading to moral norms. In the middle ages, animals were routinely put on trial. However, they were not otherwise treated like humans, the only other kinds of being to be put on trial.

Women are treated as human beings when it has become part of the moral life to do so, via indoctrination and education. Rights have some part to play, but mostly through the other cultural expressions that gather around rights-discourses. The success of the civil rights movement in the US (or what success has been had) does not so much have to do with punishment, as it has to do with the *movement* and all of its cultural presence. Legal rights can move toward moral inclusion in these senses, but mostly we tell stories, we build narratives, we symbolically chastise and praise. The same can be done for nature, and animals, but rights by themselves are not going to do it, and they might have the opposite effect, because if nothing else is present, they are as confrontational as rights can be – they simply prescribe what is punishable, and not how, or on what basis, respect is to be given. That will have to be provided by other aspects of the moral life (recall, in this connection, the titmouse that has a life).

From the point of view of the analysis here presented, claims on behalf of nature are always to be treated as statements about our entanglements and metaphysical convictions. When speaking for nature, we are in fact presenting the hybrid beings that we are, and hybridizing and constructing further in the act of 'speaking for.' There is no solid ontological basis for representing nature – all we can have recourse to are the various claims in play. This analysis shows that we wear our assumptions on our sleeves, and therefore makes it possible to devise representative claims that are better suited for the work of political ecology. But that is another project altogether which, though firmly rooted in the work done here, requires its own detailed elaboration.

The theoretical contributions that this work has tried to make have had non-humans as their specific target. In keeping with the spirit of

the investigation, we have spoken as much about humans as we have about non-humans. And though I have not insisted on the applicability of the theoretical reflections to humans, it must be said that many of them do indeed overflow the boundaries of their intended subjects. Thought the analysis of representation and rights in their togetherness is more appropriate for non-humans than it is for humans, that does not mean that it is inapplicable to the human case. But more importantly, the analysis of representation has important consequences for human representation as well. The case of non-humans shows that which is always already present within the human case, but is – for one reason or another – hard to see. The representation of humans and non-humans does not confront us with a difference of kind, but with one of degree. In other words, the lessons from one could be applicable to the other. The precarious nature of the subjects of representation, the role of the claim-making activity, the importance of cultural and aesthetic factors, the power dynamics embedded within representative claims, the relational nature of representation, as well as its forays into the territory of rights, are all applicable to the human case. Though a complete elaboration here is impossible, it must be pointed out that this is a further area of inquiry, dovetailing with the findings of this work.

But beyond the potential applicability to humans strictly speaking, it is my hope that the understanding of rights and representation developed here can be used to build another kind of political ecology. That work remains ahead of us, and no single contribution will be able to exhaust it.

Notes

1 Representation: Structure and Meaning

A version of the arguments presented in this chapter have previously appeared in Tanasescu, M., 2014. Rethinking representation: The challenge of non-humans, *Australian Journal of Political Science 49:1*, 40–53.

1. By classical representation I mean the representation of actually existing humans.
2. Being endowed with political being by the political animal already suggests that becoming political involves a high degree of becoming human.
3. The word itself implies that representation involves the sequestration of agency: to represent is to proclaim the power to speak in the very act of speaking, which involves the affirmation of one's agency. Whether this works to serve interests or not remains to be seen. See Sections 1.1.1 and 1.2.
4. This has led classical theories to advance the concept of congruence as a measurement of the fit between representatives and represented (Disch, 2009).
5. Or, from a Derridian perspective, the concept that, through its repetitions, fixes borders and identities that are not, in fact, previous to its repetitions. The role of the animal – the beast – cannot be overemphasized: it is involved not only in the concept 'human' but in all else that we take to be *typically* human. 'The contract at the origin of sovereignty […] excludes the beast' (Derrida, 2009, p. 46).
6. That is, its typologies, not its basic outline (which can also be referred to as a form).
7. What representation *is* is inseparable from what it *does*. In other words, I am not looking for something like the essence of representation, whatever that could be, but rather for what it always necessarily accomplishes in virtue of being a process of representation.
8. To be precise, this act of creation is not creation ex nihilo. Rather, the relationship between 'what there is' and 'what is summoned into being' by art or language (or politics for that matter) is one which is creative in the sense that it imbues the object with identifiable being. In other words, the creation refers to the grasping of an object *as* something, rather than to the making of something where nothing existed before. For more on these and other similar issues, see Wittgenstein (2001). For similar insights from a different traditions, consult the work of Derrida on representations and, more generally, on the structure of language and concepts (1973).
9. This is so because representations as such always have to do with the creation of new realities and subjectivities.
10. Visibility in artistic terms – what it means to make visible – but also in terms of what it means to count, i.e to make visible in the sense of 'give existence to', 'recognize', and 'summon'.

11. This is so whether the representative and the represented are numerically identical, i.e even when a group speaks for itself. The fundamental point is that in speaking for themselves, they make themselves visible.
12. See Disch (2011) for an overview of the ways in which the view of representation supported here can also be founded in empirical work.
13. Pitkin's approach is thoroughly Wittgensteinian, which is one reason why her classic contribution cannot be pinned down to any of its subsequent interpretations.
14. The logic of this process is nicely captured by the term 'proclamation' as well. To proclaim is to announce that which is inaugurated by the utterance as prior to its utterance. See Chapter 2, 1.1 and Chapters 5 and 6.
15. Note that this same doubling, which implies the fundamental relation I am describing, holds if I politically speak for myself, in my own name.
16. The power to speak, be heard, and count, being the most fundamental ones in terms of representation, usually go hand in hand with power more widely understood.
17. For a reading of suture in terms of Gramscian theory, see Laclau and Mouffe's *Hegemony and Socialist Strategy* (1985); for the original psychoanalytic interpretation, see Jacques-Alain Miller, *Suture elements of the logic of the signifier* (1978).
18. The audience is inferable from both the pronoun 'we', and the general term 'nature'. See Chapters 5 and 6 for more on a global audience.
19. See Chapters 4–6.
20. I employ the term 'preferred relation' as virtually interchangeable with 'relation' as I use it in the context of representation theory. When I use 'preferred', it is to underline the element of choice (often presented in ethical terms) involved in how we present the represented, as well as ourselves. In other words, there are many different ways in which the fundamental relations of representation can be given content.
21. In this vein, some advocates might be opposed to use as such, deeming *that* to be unjustifiable. See, for instance, Francione (1995, 1996, 2004), as well as Chapter 3.
22. And, as ever, the kinds of creatures that we are. The fact that even the most minimalist interest cannot be held consistently, that is, across the entirety of living things, should not be taken as a flaw of moral thought, but rather as a warning sign against thinking morality as emanating from these kinds of interest-considerations. More on this point in Chapter 7.
23. See Diamond (2004), where the poem is quoted in full.
24. Following the line of thought developed here, this is hardly a stretch of the imagination: the poet is involved in a similar operation to the politician when summoning things into visibility and being.
25. If this is even remotely correct, what non-human representation shows us is that the 'paradox' of representation is not a paradox at all. To summon into being that which is literally absent is at the very center of the most ubiquitous of human practices (e.g most linguistic constructions), representation included. Representative claims function by the same logic that many other human symbolic practices function, including make-believe activities such as certain games, many linguistic constructions, the telling of stories,

and also vivid memory. A paradox in all cases must include a contradiction (whether the contradiction is consequential for truth or not), and when we speak of the concept of representation as paradoxical what we have in mind is an apparent contradiction between presence and absence. But these are not mutually exclusive categories to begin with, as can be glimpsed throughout this whole chapter. In all of the examples of symbolic practice mentioned, how are we to choose between what is 'literally' present and absent? When I tell a story and the child listening lives all of my words, does it help in understanding what is going on to say that the child is considering what is literally absent as nonetheless present? Perhaps somewhat, but very little indeed. Instead, what I think reveals more of the process is to say that the child is creating a world in which absence and presence are easily interchangeable – a world where words acquire the power of the real. This is precisely what goes on in representation, and when we offer representative claims we do not make present someone who was absent before, but rather *we create something new* – a subjectivity which does not predate the claim, just as in a children's story the big tiger does not predate my invocation of it.

26. A discussion of this letter is found in Chapter 3, 2.1.
27. See, for instance, Singer (1981) and Regan (2004, 1–120).
28. See also Haraway (2008).
29 This point is elaborated on in Chapters 6 and 7.
30. See Chapter 3 for a discussion of the arguments and Chapters 6 and 7 for a critique.

2 The Anatomy of Rights

1. I will use the expression 'rights of humans' and its variations as distinct from 'human rights.' The former refers to any rights that have human beings as addressees, whereas the latter refers to a specific form of rights-discourse, discussed in more detail in 1.2.
2. Context will make clear when the expression 'a right,' in the singular, refers to conceptions of rights translated into a single norm.
3. For an exclusively legal analysis, the foundational text is Hohfeld (1964); also see Waldron (1989). For general surveys of rights considered from the point of view of moral and political theory, see Campbell (2006).
4. For the reader that wishes to jump ahead to the explanations, see 2.2.
5. This extremely brief summary of a very long complicated history cannot hope to be exact. Though it is not necessary for the present argument to develop this whole historical period, this is the average account of the genesis of natural right form natural law, and of positive rights from the former. However, many different versions exist, with each author emphasizing a different historical and conceptual sequence. See Ritchie (1895), Strauss (1953), Tuck (1981), Hunt (1996, 2007), Brett (1997), Douzinas (2000), Tierney (2001), Freeman (2002), Campbell (2006), Moyn (2010) for different overviews.
6. This can also be understood as a right of freedom, particularly as freedom is increasingly understood as self-determination (Freeman, 2002). See also Wellman (1997) on liberty rights.
7. For an analysis of the difference between revolt, types of riots, and latent revolution today, see Badiou (2012).

8. It suffices to think of the title of one of the best known animal advocacy books, Singer's *Animal Liberation*, to see the centrality of revolutionary language to animal activism. The most influential contemporary text advocating rights for nature bears the subtitle 'A Manifesto for Earth Justice' (Cullinan, 2011).
9. This points toward the dangers of using the concept of nature as a standard for ethical judgment. For more on this issue, see 2.1.2.
10. For a piercing and insightful study of the role of 'choice' in contemporary ideology, see Salecl (2010).
11. The tradition of natural right which predates the revolutionary period entangled rights and nature such that only an appeal to a supreme being, or at least a supreme 'order of things,' could found any rights-claim. The revolution does away with this theological foundation and, instead of loosing rights altogether, proclaims them in the name of a divine humanity – a stylized and abstract figure of the human (Strauss, 1953; Douzinas, 2000; Campbell, 2006).
12. The French were even more egalitarian in their revolutionary spirit. And although the moral nature of these proclamations renders them immune to the actual state of affairs in society, the business of governing after the Revolution quickly crashed into the realities of inequality and oppression. See Freeman (2002).
13. That is to say, with moral matters of what *ought* to be the case.
14. Giovanni Sartor, together with Governatori and Rotolo (2005), have employed the concepts of 'proclamation' and 'proclamative power' in multimodal logics and legal theory. They write:

    > a special instance of the idea of a potestative right [an enabling power intended to further the interests of the power holder] concerns the case when one person has normative ability to create a normative position (in general, to realize a normative proposition) by stating this intention. The act of stating one's intention to produce a certain normative result is what we call proclamation [...].
    >
    > In other words, they use proclamation as a kind of normative speech-act, which is an element that I import into my own use of proclamation. However, my use here is not limited to multimodal logics or computational legal theory, and is intended to be broader, and particularly to capture the logic that underlies the branches of legal theory that I find useful to discuss in these contribution, specifically human rights and the rights of non-humans.
15. For a classic discussion of the problems involved in deriving norms from an ungodly nature, see Mill (1874). For a very good feminist critique of the essentialism of nature and of appeals to human nature, see Antony (2000).
16. Indeed, rights can be said to have existed in the tradition of natural right, and certainly in the early modern period. Famously, MacIntyre (1981) argues that there was no concept resembling our usage of 'rights' before 1400. Be that as it may, Arendt's insight still holds.
17. For a masterful exposition of the pre-modern political imagination, consult Strauss (1953).
18. This is the logic of proclamation at work. See earlier.
19. This relates to the problem of arguing for rights from an appeal to nature. For more, see Mill's essay, *The Subjection of Women* (1869), as well as *Three Essays on Religion* (1874).

20. As I will argue, it is in the simultaneity of the early and late modern conception of rights that we find the elements of today's rights of non-humans. See Chapter 6.
21. See Hunt (2007) and Morsink (2009) for more.
22. This is true in terms of law, not in terms of the invention of the concept of rights acquired in virtue of humanity – we have already seen that idea to be much older than the UN.
23. For a detailed discussion of the history of human rights from the perspective assumed here, see Moyn (2010). For a classic text on international human rights, see Steiner and Alston (1996).
24. This has great affinities with a certain idea of constitutionalism that is tied to rights. This is explored in more detail in Chapter 6.
25. The issue of inherent and intrinsic worth will be very important for non-human rights, and the connection with personhood as well, both in legal and moral terms, which are assumed to be related. More on this in Chapter 3.
26. Note that this is different from the aforementioned inherent worth of all humans, understood as a foundation for equal rights. Morsink here refers to *rights themselves* being inherent.
27. Besides the inconsistency of moving from inherence to capacities in function of the desired conclusion, there is a further problem with arguing for rights from capacities. If we do so, then some humans will not possess the capacities that we deem important for rights (like the comatose, senile, or mentally insane, as well as very young children), while some animals will possess at least relevant versions of them (like apes and some marine mammals). See Diamond (2004) for a critique. Indeed, this is one way in which animal advocates argue for rights. It is known as the 'argument from marginal cases.' See Singer and Cavalieri (1993).
28. See both *The Subjection of Women* (1869) and *Three Essays on Religion* (1874) for the extended discussion.
29. I am indebted to Louise Antony for this argument. To see much more of its context in feminist theory, and its application to Nussbaum's 'Aristotelian Essentialism,' see Antony (2010).
30. Arendt shows this point forcefully both in *On Revolution* (2006) and *The Origins of Totalitarianism* (1973).
31. The possibility of using a restroom has also been suggested in terms of rights. See the website of the American Restroom Association – http://americanrestroom.org/ – for more, particularly under the Publications section. Though not being allowed, directly or indirectly, to use a toilet is surely a form of mistreatment, suggesting that one has a right to do so is questionable. However, it has the benefit of showing the availability and proliferation of rights-language quite succinctly.
32. See Morgan-Foster (2005).
33. For more on the different generations of rights, see Vasak (1984), Flinterman (1990), Donnelly (1993), Wellman (2000), Bederman (2010).
34. This can range from third generation human rights, like the right to peace, to the right to paid holiday (as art. 24 of the UN Declaration of Human Rights asserts), to the right to honor and a good reputation (Art. 66/18 of the Ecuadorian constitution).

35. See Chapters 4 and 5 for the application of this to the political process of representing nature through rights.
36. See Hohfeld (1964). Also, Wellman (1995, 1997, 1999), Freeden (2002), Campbell (2006). In truth, Hohfeld's analysis has been so influential that one can hardly pick up a text on the theory of rights without encountering it.

3 Animals, Nature, Persons

1. As I argued in Chapter 1, *what* counts, as well as *how* to count, is also part and parcel of representations – representative claims decide for the audience how the represented is counted. The political side of moral/legal rights ensures that representational activity (in its compound nature: political, cultural, aesthetic, social) underscores rights.
2. See Wellman (1995) for a detailed discussion of the difference between rights and duties. Hohfeld (1964) argued that there is no right without a correlative duty. Yet there are duties without correlative rights (Mill, 1910) and rights without duties, like formal liberty-rights (Campbell, 2006).
3. These would be claim-rights or immunity-rights, as it is hard to imagine what a power or liberty-right, strictly speaking, might be for a ship. The issue of legal guardianship of course comes into play here, but I will discuss this in relation to animals and nature in Sections 3.2 and 3.3, as well as Chapter 5.
4. For example, Francione (2004), Cullinan (2011), Gudynas (2009b, 2009c), Acosta (2008a, 2008b).
5. As Balibar (2009, p. 531) aptly suggests, many refugees, sans-papiers, stateless people, or other marginalized groups 'find themselves exactly *on the limit* where what is at stake is an actual capacity to speak and fight publicly for one's own rights, therefore a capacity to *exist* in the strong sense, which is the essential content of Arendt's notion of the political right to have rights' (emphases in original). This captures quite well the entanglements of representation and rights, that is, the fact that rights are predicated unto representative claims, as well as the importance of the count for both concepts.
6. Whether they possess legal rights, as a matter of sociological description, is thought to be a different matter, because legal rights exist inasmuch as a court of law says they do. However, will theorists will hold that small children do not therefore possess moral rights, in effect arguing that it is meaningless to ascribe to them legal rights as well. See Wellman (1995).
7. This approach continues the Aristotelian tradition of virtue ethics. The capabilities on the basis of which humans (and non-humans) can be ascribed rights are considered to be universal for the type of being in question – things like health, leisure, enjoyment, creativity, play. See Nussbaum (2000) for a comprehensive list of capabilities.
8. Though it is in the interests of plants to be watered, it does not follow that they have a binding interest to such liquid treatment. See Campbell (2006) for more.
9. There is, of course, a whole lot of literature on both the will and interest sides. The issues are a lot more complex, and many different distinctions are made in each camp. However, I do not see how preference- or welfare-interests would change my overall argument. For a more detailed overview of both positions, see Regan (2004).

10. This way of thinking about moral treatment and moral rights can lead to some truly bizarre conclusions. For instance, if it is on the basis of certain characteristics that we assign moral considerability (and possibly moral rights) to people, there is no reason why we would not eat our dead – they no longer have any capacities to speak of, and they are both nutritious and available (Diamond, 2004).
11. The idea that characteristics are *the* defining features in virtue of which we should rework our moral reasoning, and hence our ascription of rights, is clearly seen in our current cultural obsession of subjecting animals to tests that will reveal whether they also partake in some feature or another – whether they make choices, have language, use tools, etc. The assumption is always that, once we *know certain facts*, moral treatment follows. But this does not settle some glaring facts about our moral life, for example, that we eat things of whose intelligence we have no doubt (pigs and others), and fail to eat dead humans, though we might be fully secular and not think for a second that they have any characteristics left at all. Other cultures eat dogs, whom they also know to be highly social and intelligent – for a dog-stew recipe, see Safran Foer (2009) – while vegetarians refuse to eat the flesh of cows, but not to wear their skin on their feet. If we hold that characteristics are crucial to moral judgment, as the rights approach does, these facts about our lives are completely mysterious, particularly in their resistance to new 'facts.'
12. It goes without saying that they were also the most important elements in the logic of similarity – if one was not perceived as similarly endowed, one could not partake in the rights supposedly conferred by these characteristics. The required characteristics might have oscillated in time, but the underlying logic is as strong as ever.
13. The full text of the letter to the editor of *The Times*, 16 April 1872, reads: 'Sir, –

    Whether women are the equals of men has been endlessly debated; whether they have souls has been a moot point; but can it be too much to ask [for a definitive acknowledgement that at least they are animals? … Many hon. members may object to the proposed Bill enacting that, in statutes respecting the suffrage, 'wherever words occur which import the masculine gender they shall be held to include women;' but could any object to the insertion of a clause in another Act that 'whenever the word "animal" occur it shall be held to include women?' Suffer me, thorough your columns, to appeal to our 650 [parliamentary] representatives, and ask – Is there not one among you then who will introduce such a motion? There would then be at least an equal interdict on wanton barbarity to cat, dog, or woman…

    Yours respectfully,
    AN EARNEST ENGLISHWOMAN'

14. While the Vegetarian Society UK was founded in 1847.
15. More recent scholarship suggests that there is indeed a link between cruelty to animals and cruelty to human beings. See Fitzgerald, Kalof, and Dietz (2009) for more. Their research suggests that slaughterhouse employment is correlated to increased crime rates, particularly in the form of rape and sexual assault. They also note that 'the industrialization of slaughter has

the strongest adverse effects' (p. 17). In light of our discussion of the connection between women's and animal rights, these findings are highly suggestive.

16. In terms of our earlier discussion of the basis of moral rights consideration, sentience would be in the interest camp.
17. An interesting connection here – and another sign of the times – is that the novel Frankenstein (1818) was authored by the daughter of Mary Wollstonecraft (who had died in childbirth) and the wife of Shelly, the romantic poet.
18. The irony of this situation is not easily lost, as it is one all too familiar in our own century.
19. For a contemporary analysis of rights from this, decidedly Marxist, perspective, see Nibert (2002). For a broader Marxist environmental ethic, see Bellamy Foster (2000).
20. The foundation of rights in either will or interests is here combined – both are in play. Indeed, activism and advocacy rarely keeps them separate, because their purpose it to gain access to a concept (rights) which has the monopoly of emancipation. All avenues that lead to it are therefore exploited. In other words, the representational activity that underlies rights does not itself keep the distinctions of rights theories intact, because it has no interest in doing so: it is not concerned with exactness, but with convincing.
21. And, by Singer's admission, coined by Richard Ryder.
22. The way Peter Singer's work is used in the literature is very instructive for how arguments are kept separate analytically and inasmuch as each author's interest demands the separation. So, for instance, Singer is taken to be a proponent of animal welfare, as well as a proponent of rights, while he himself can be quite ambiguous, oscillating between welfare and rights. As is argued in what follows, this is also symptomatic of another problem: the difference between the two positions is quite often overemphasized.
23. So *concern* for animals, inasmuch as it takes the form of a debt owed to them, leads toward animal rights.
24. And as it has already been argued in this chapter, as well as Chapter 1, there are no conceptual boundaries to the application of rights or representation as such to animals – anything that is sufficiently important to be invested publicly with meaning can be represented, and can be represented via rights inasmuch as a direct moral duty is claimed in its name.
25. Available at: http://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf
26. For Regan, all have inherent value who can be said to fulfill the subject-of-a-life criterion, which is

> to be an individual whose life is characterized by having beliefs and desires; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference- and welfare-interests; the ability to initiate action in pursuit of their desires and goals; a psychophysical identity over time; and an individual welfare in the sense that their experiential life fares well or ill for them, logically independently of their utility for others and logically independently of their being the object of anyone else's interests
>
> (Regan, 2004, p. 243)

Note that this is entirely coherent with what I have described as the logic of rights, particularly with the belief that a set of characteristics holds the key to moral judgment. For Regan's above list, scientific probing into what animals *are really like* is highly desirable.

27. This once again shows that representative claim-making activity underlies rights-claims, and that it uses all avenues available toward the hegemonic space created by rights, which in turn seems to ensure unlimited, and compulsory, future representation.
28. Taylor's ethics of respect would disagree with this. In his (1981) paper, *The Ethics of Respect for Nature*, he argues that nature can have *legal* rights without it having moral rights, which he reserves for human persons alone. It is clear that from the perspective developed here I am suspicious of the ability to separate things in this manner. Inasmuch as something is owed directly to nature, and inasmuch as its 'interests' are morally considerable, we are in fact speaking of rights.

4 The Rights of Nature in Ecuador

A version of this chapter has previously appeared in Tanasescu, M., 2013. The Rights of Nature in Ecuador: the making of an idea. *International Journal of Environmental Studies,* 70(6), 846–861.

1. In their 2 May 2012 manifesto, Alianza País defines itself as 'a political cluster of citizens, organizations, movements, and collectives with the task of fighting for democracy, equality, sovereignty, solidarity, social justice, diversity, in order to eliminate oppression, domination, inequality, injustice, and misery. Its historical objective is the building of the Socialism of Good Living' (AP, 2012).
2. One reason for this is that the vast majority of the pre-oil landscape has already been changed.
3. This claim is to be encountered in many different sources. A routine internet search will return thousands of press and academic articles detailing the incredible amount of biodiversity in Ecuador's Oriente.
4. For its size, Ecuador is also very diverse in terms of terrain and climate (which varies with altitude). It encompasses rainforest, coastal areas, cloud forests (on the mountain slopes, at altitudes that permit tree growth and where, because of the steep rise of the mountain, clouds gather and precipitation is abundant), páramo, and high mountains and glaciers. Also, the Galapagos islands are part of Ecuador. Each area has its specific ecological diversity, and many places are home to species not found anywhere else, like the Galápagos fur seal and its famous land iguanas.
5. The name of the town is a direct translation of the company's headquarters in Texas: Sour Lake. It is known locally as Nueva Loja, though the new name of Lago Agrio is also routinely employed.
6. For more information on the active fields of the Oriente, as well as production and exploration rates, refer to http://www.eppetroecuador.ec.
7. Part of the motivation for this was a desire to homogenize the Ecuadorian territory in order to have stronger national land claims, i.e. so that its forested territory would not be annexed by its neighbors. This fear was not

unfounded – in 1941, a military invasion by Peru annexed a substantial amount of then-Ecuadorian territory. Ecuador also lost territory to Colombia and Brazil (see Uquillas, 1984).

8. Another figure, which also puts Ecuador near the top of the regional deforestation list, is an annual rate of 1.5% between 1990 and 2000, and 1.7% between 2000 and 2005, which equals 1980 square km per year (Mosandl et al., 2008; Bertzky et al., 2010). Also see the Food and Agriculture Organization of the United Nations (FAO), at www.fao.org.
9. The best-known case is the killing, in 1987, of Catholic Bishop Alejandro Labaka and Sister Inés Arango by Huaorani tribesmen. The missionaries landed in an isolated outpost of a Huaorani splinter group. They wanted to re-establish contact with this particular group, which had left the main settlement in a bid to avoid further outside contact. Though details are unclear, the two missionaries were speared to death.
10. This has been my experience. During my visit to the Oriente, I have seen many well-heads, none of which were protected in any meaningful way. The sheer size of the territory is perhaps one answer as to why this would be so. It would surely be a logistical nightmare to prohibit access from oil roads, as well as all the other oil infrastructure. The only pieces of infrastructure not openly accessible were the production stations themselves – they were fenced.
11. After the ruling, Chevron has tried to make the award unenforceable. It no longer has any assets in Ecuador, hence any enforcement of the Lago Agrio ruling would require seizure of Chevron assets elsewhere. At the time of writing, the US Supreme Court ruled in Chevron v. Naranjo, 11–1428, that a trial judge cannot ban the Ecuadorians from collecting on the judgment. On 7 November 2012, an Argentine court ordered the seizure of all Chevron assets in the country, in response to a request by the Ecuadorian plaintiffs to help with collecting the Lago Agrio award, worth $18.2 billion. There is an open case at the international arbitration tribunal in the Hague, where Chevron seeks to make the Ecuadorian judgment unenforceable. The Hague tribunal so far established that it has jurisdiction to hear the case, and is now in the merits phase of the arbitration. See www.chevron.com/ecuador for more.
12. For more on this organization, visit http://www.fda.org.ec.
13. There is a daunting amount of information available on this lawsuit. Depending on the source, very different stories can in fact be arrived at. For more, visit both Texaco's and Chevron's website, which will present, quite evidently, the defendant's part of the story. For the plaintiff's side, see http://www.texacotoxico.org/eng/. Besides these, there is a lot of press coverage available, again biased in one or the other direction. There is also a popular 'documentary', called *Crude*, which incidentally became a central piece of evidence in Chevron's efforts to prove fraud in the proceedings of the lawsuit.
14. Look at, for instance, http://www.rightsofmotherearth.com; also www.therightsofnature.org. For broader issues related to the rights of nature and indigenous communities, see www.amazonwatch.org
15. See http://conaie.nativeweb.org/map.html for more. There are an estimated 60,000 Kichwa in the Oriente, though the Andean cordillera (known as the Sierra) is home to about three million. The only other indigenous nationality that comes close to these numbers is the Shuar – 40,000 strong. The other

nationalities in the Oriente, from most numerous to least, are: Huaorani (2000), Siona-Secoya (1000), Cofán (800), Achuar (500).

16. Economist, academic (professor at FLACSO, Ecuador), and politician. He was founding member and candidate of the indigenous socialist party, Pachakutik, as well as member of Alianza País. He was energy minister from January 2007 and president of the Constitutional Assembly from October 2007 to July 2008. His latest political activity sees him as the presidential candidate from the Plurinational Left Coalition for the 2013 presidential elections. This coalition united left and indigenous parties in opposition to the current government. It did not manage to win the 2013 presidential elections, which were decisively won by Mr. Correa in the first round of voting.
17. Hereafter int. AA.
18. Chevron's spokesperson in Ecuador.
19. Hereafter int. JC.
20. Indigenous leader, politician, and academic.
21. Hereafter int. MC.
22. He did not complete his term as Assembly president, but that is not relevant to the present argument.
23. The assembly, totaling 130 members with a clear majority for Alianza País (80 members), was organized in: a Plenary, reuniting all assembly members and having the power to vote on constitutional articles and provisions; a Directive Commission, with administrative duties; 10 Roundtables organized around various themes. The roundtables were responsible for: deciding on issues within their theme; gathering information on issues via citizen participation; presenting the issues, drafts and provisions to the Plenary, where comments and recommendations could be made for further elaboration of a text, or approval through voting could happen. See *Informe Sobre la Asamblea Constituyente de la República del Ecuador*, 5 September 2008, Carter Center, Quito, Ecuador, for more details on the organization of the Constitutional Assembly.
24. Natalia Greene interview. Hereafter int. NG.
25. American professor of law who, in 1972, published the highly influential article *Do Trees Have Standing?*. See Chapter 3, 3, and Chapter 5, 4.
26. Chilean animal and nature advocate, proponent of earth jurisprudence, and winner (1990) of the United Nations Environment Program.
27. Part of this history sees the rights of nature as necessary modifiers of property law (see Cullinan, 2011). This was an implicit goal of the Ecuadorian lobby described here. The idea is that if nature has rights, it is therefore a person under the law, and persons cannot be owned like things. This is the logic behind the moral progressivism that sees the rights of nature as the latest, and natural, extension of rights. It is therefore implied that nature cannot be adequately represented if it is a mere object – it needs to be a subject, and if this is taken seriously then it cannot be property in the traditional sense. I will discuss this in detail in Section 4.6 and show how it works, or fails to, with the view of representation argued for in this work.
28. See www.celdf.org
29. Under this conception of the political, one of the main duties of the police and the army, as instruments of state power, is the protection of rights.

See Art.158. The same applies to any public body, for the same reasons. See Title III – Constitutional Guarantees.

30. This is a paradoxical situation – an extensive regime of rights seems to both trust and mistrust the state. It trusts it because it relegates to it the fundamental business of guaranteeing rights, and it mistrusts it because so many of these rights, like the rights of nature themselves, are specifically aimed at curtailing state power. The ideal state under the constitution would be powerful enough to impose respect for rights, while weak enough to cede every time an individual or collective would claim their rights have been infringed upon by the state. In terms of reconciliation, it is hard to imagine a scenario in which *all* of the constitutional rights of equal hierarchy could be, even in principle, simultaneously respected. Another way of explaining this paradox is to see three conflicting intellectual traditions at work in the constitution: one is the French revolution (see Chapter 4), which establishes constitutionality as a curtailment of state power and thus initiates first generation rights; the other is a tradition of the state taken from classical socialism (as well as communism), which sees the state as the principal actor and that which shall be unconditionally trusted by the citizenry – though this tradition distrusts the notion of right; and finally the tradition of second and third generation rights which starts in the 20th century and which is the hallmark of modern liberalism. The mixture of these three intellectual traditions accurately describes the flavor of the Ecuadorian constitution.
31. These are given in eight sections, and comprise: right to *water*, and the 'right to secure and permanent access to healthy, sufficient and nutritious food; preferably produced locally and in accord with various identities and cultural traditions. The Ecuadorian State will promote food sovereignty' (Art.12&13); rights to *communication and information*, including 'a free, intercultural, inclusive, diverse and participatory communication, [...] in their own language and with their own symbols' (Art.16); rights of *culture and science*, including 'the right to construct and maintain their own cultural identity, to decide on their belonging to one or various cultural communities and to express said choices; to aesthetic freedom; to know the historical memory of their culture and to have access to their cultural patrimony; to spread their own cultural expression and to have access to diverse cultural expressions. Culture cannot be invoked when acting against the rights recognized in the constitution' (Art.21) and 'the right to develop their [people's] creative capacity, to the dignified and sustained exercise of cultural and artistic activities, and to benefit from the protection of the moral and patrimonial rights' (Art.22), 'the right to recreation and relaxation (esparcimiento), to sports and free time' (Art.24), and 'the right to enjoy the benefits and applications of scientific progress and ancestral knowledge' (Art.25); rights of *education*, with the clarification that 'education will focus on the human being and will guarantee its holistic development, in the framework of human rights, a sustainable environment and democracy; it will be participatory, compulsory, intercultural, democratic, inclusive and diverse, of quality (calidez); it will motivate gender equality, justice, solidarity, and peace; it will stimulate critical sense, art and physical culture, individual and community initiatives, and the development of competencies and capacities to create and work. Education is indispensable for knowledge, the exercise of rights

and the construction of a sovereign country, and constitutes a strategic axis for national development' (Art. 27); rights of *habitat and housing*, including 'a right to a safe and healthy habitat, and adequate and dignified housing, independently of their social and economic situation' (Art.30) and a right to enjoy the city and its public spaces, 'under the principles of sustainability, social justice, respect for different urban cultures, and balance between the urban and the rural' (Art.31); rights of *health,* which 'is a right guaranteed by the State, whose realization is linked to the exercise of other rights, among them the right to water, food, education, physical culture, work, social security, healthy environments and others that support good living' (Art.32); and finally rights to *work and social security: '*work is a right and a social duty, and an economic right, spring of personal realization and the base of the economy' (Art.33).

32. These are defined in Art. 56 as 'the indigenous communities, pueblos and nationalities, the afroecuatorian pueblo, the montubio pueblo and the comunas form part of the Ecuadorian State, one and indivisible.' In accordance with the constitution and other international agreements, Art.57 grants the above, among others, the following rights: freely maintain, develop and strengthen their identities, sense of belonging, ancestral traditions and forms of social organization (1); not to be an object of racism or any form of discrimination based on their origin, ethnic or cultural identity (2); property of their communal lands, tax free (4); participate in the use, beneficial ownership, administration and conservation of *renewable* natural resources found in their land (6); previous, free and informed *consultation* for non-renewable resource exploitation (7); not to be displaced from their ancestral lands (11); all form of appropriation of their knowledge, innovations and practices, is prohibited (12); build and maintain organizations that represent them (15); be consulted before the adoption of any legislative measure that could affect any of their collective rights (17); the territories of the pueblos in voluntary isolation are of irreducible and untouchable ancestral possession and within them all types of extractive activity will be prohibited. The violation of these rights will constitute ethnocide, which will be specified by law (21). Art. 60 further grants that all of the above can build territorial circumscriptions for the preservation of their cultures. 'Communities with collective property of the land are recognized as an ancestral form of territorial organization.'
33. Art. 61 establishes the rights to: elect and be elected; participate in matters of public interest; present projects of normative popular initiative; be consulted; oversee/control the acts of public powers; revoke the mandate conferred upon the authorities of popular election; to perform public work and functions based on merit and capacities; to make up parties and political movements, etc.. Art. 62 establishes universal suffrage, with voting is compulsory for over 18s and elective for 16–18, the disabled, over 65s, those living abroad, as well as members of the armed forces and the national police.
34. Art. 66 confers the right to life and makes the death penalty illegal. It further confers: the right to a dignified life, which secures health, alimentation and nutrition, potable water, housing, environmental clean-up, education, work, employment, rest and leisure, physical exercise, clothing, social security and other necessary social services; the right to personal integrity; the right to

formal equality, material equality, and no discrimination; the right to the free development of personality, with no more limits than the rights of others; the right to decide on one's own sexuality; the right to honor and a good name, with the law protecting the image and the voice of the person; the right to personal and familial intimacy; the right to live in a healthy environment, ecologically balanced, free of pollution and in harmony with nature. Art.'s 67 and 68 say that marriage is between people of different sexes and that only those can adopt. Other types of unions have all other rights.

35. See Art. 71–74 above.
36. Art. 75 – free right to justice; Art. 76 – the right to due process.
37. The most interesting of which are to respect the rights of nature and to promote the common good and to put the general interest in front of the particular interest, according to good living.

5 Local, National, and International Rights of Nature

1. In this connection, consider that the Chernobyl nuclear disaster has also inaugurated a thriving natural community.
2. See Chapter 6, 1, for an example of the rights of nature trumping property rights.
3. The Bolivian Constitution of 2009 contains rights *to* nature, as well as an obligation to protect all living beings (Acosta and Martinez, 2011), but no rights of nature as such.
4. Though it has only become law since October 2012, international news outlets presented it as a fait accompli since 2010. A routine search for relevant keywords will reveal thousands of articles spanning those two years, most of them repeating the same claims we have seen in the case of Ecuador.
5. The original reads: 'La Madre Tierra es el sistema viviente dinámico conformado por la comunidad indivisible de todos los sistemas de vida y los seres vivos, interrelacionados, interdependientes y complementarios, que comparten un destino común. La Madre Tierra es considerada sagrada, desde las cosmovisiones de las naciones y pueblos indígena originario campesinos.'
6. For more on the various strands of ecology and their relation to conceptual formation outside ecology, see Borden, R. J. (2014). Ecology and Experience: Reflections from a Human Ecological Perspective. North Atlantic Books.
7. In fact, the agreement is part of the longest standing litigation in New Zealand's history, with roots traceable to 1849. See Hsiao (2012) for a detailed history of this legal battle.
8. The full text of the complaint is available here: http://www.scribd.com/doc/44369784/Lawsuit-on-behalf-of-the-rights-of-nature-under-the-principle-of-universal-jurisdiction. [Accessed 18 February 2015].
9. Environmental activist and author, member of Acción Ecológica (founder) and OilWatch (cofounder), and Acosta's adviser during his time as assembly president. Also see Chapter 3.
10. One of the most recognized public intellectuals today, she is an eco-philosopher and environmental campaigner. See http://www.navdanya.org/ for more.
11. For a legal argument in favor of this claim, see Bruckerhoff (2008).
12. See Benhabib (2004), as well as Balibar (2004, 2005, 2009), for more on this tension.

6 Speaking for Nature

1. http://www.gardenofparadise.net/Garden_of_Paradise/Garden_of_Paradise.html
2. A version of the arguments presented in this section has previously appeared in Tanasescu, M., 2015. Nature Advocacy and the Indigenous Symbol. *Environmental Values 24:1*, 105–122.
3. This tendency is as old as our interactions. Perhaps one of the most famous illustration of how we have routinely retouched the indigenous image to fit our expectations and desires is Chief Seattle, whose 1854 speech is a powerful statement of environmental values against the commercialization and destruction of nature. It has become a centerpiece of 'green' visions, and an important axis for the ideological creation of the indigenous. However, it is fake, formulated in the version often quoted in the 1970s. See http://www.synaptic.bc.ca/ejournal/wslibrry.htm for a history of the various transformations endured by a speech with no extant historical transcript.
4. The process of representation does not seem to exist for this version of the indigenous, which is akin to taking the claims of any woman to be representative of 'women,' or of any white man to be representative of 'whiteness,' by the sheer force of bodily presence. See also Callicott (2000).
5. In Chapter 3, 1, I argued that rights have been predicated either on a will-theory, or else an interest one. Here, they are both collapsed in the notion of subject. The use of both theoretical avenues is typical of representative claims, which are a form of advocacy.
6. If I say that I can both own someone, and take good care of them, a contradiction is immediately perceived. This is so because caring and owning are, for human beings, mutually exclusive categories. This is not so for other begins, where indeed the opposite is often true, as in farming relations where care is tied to economic ownership (Harbers, 2010). If nature's advocates insist on importing the owning/caring contradiction from the human case, then much more needs to be established than a comparison with slavery, predicated on equivocation, can achieve.
7. In terms of granting recognition of certain interests appended to fictional persons – but these interests are limited and specified, and only of a legal nature. Where this is not the case, as in corporations having rights to free speech through monetary donations, opposition and derision are understandably high, because something of the fictional character of legal persons of this sort, and their relegation to the law alone, has been breached.
8. There is a vast literature on the intrinsic/inherent value of nature, not all connected to representation or rights, though it follows from my argument that it can at least implicitly advocate for rights. For the classic positions, see Naess (1989), Holmes Rolston III (1988), J. Baird Callicott (1985), Leopold (1949). For the intrinsic value of animals, see Regan (2004).
9. In different terms, Escobar (1999) has made a similar point: 'it is no coincidence that the rise of […] artificial life coincide[s] with a planetary preoccupation with the fate of biological diversity' (p. 15).
10. In other words, the idea of multiplicity is also important in an ecological perspective.
11. Namely College of the Atlantic, in Bar Harbor, ME, USA. See www.coa.edu for more.

12. As it were, before its time, because the term anthropocene itself was only coined in the 21st century. However, what it describes – humans having become a geological force – has been true for a long time already. For a legal treatment of the implications of the anthropocene, see Nagan and Otvos (2010).
13. In Berry's words, the universe is 'the primary referent in the being and the activities of all derivative modes of being' (1999).
14. See http://www.eppetroecuador.ec/idc/groups/public/documents/imagenes/000719.pdf. [Accessed 27 February 2015].
15. Both pathways toward rights support the argument that rights, like representation, are primarily about values – they have to do with what we find important enough to offer the protective mechanism of rights to. However, appealing to our self-regard only leads to a rights approach inasmuch as we want to modify who we are *in light of* certain capacities.
16. http://www.speakdolphin.com/home.cfm is dedicated to decoding dolphin language so as to 'expand communication between dolphins and humans' [Accessed 27 February 2015]. The latest such study shows that dolphins might have the ability of calling each other by name: each dolphin has a particular 'name' that it, and others, know, and can use the name of others to call them. For this, see http://science.nbcnews.com/_news/2013/02/20/17031496-dolphins-call-each-other-by-name?lite. [Accessed 27 February 2015].
17. This report: http://news.bbc.co.uk/2/hi/8631486.stm details how New Caledonian crows are able to use three tools in succession in order to get to their food. Very interesting videos of the crows performing this are available at the above link [Accessed 27 February 2015].

7 Implications and Provocations

1. As I pointed out in Chapter 4, the problem is often not one of laws, but of enforcement. As Sunstein (1999, 2003, 2004) suggests, simply allowing for private suits would already do so much for animal rights. A dog, under today's legal system, is property, but that does not mean I can do anything to it. The problem is that if I do act against the dog's already existing rights, only the public prosecutor can file suit, which is one reason why enforcement is lax.
2. One of the best visual condensations of the view of humanity inherent in so much environmental discourse comes in the form of a short animation called 'Man.' It portrays us as devouring beasts, being caught in a crazed and self-deluded quest for total domination which ends up with us being kings of a garbage pile. The short is available on http://www.youtube.com/watch?v=WfGMYdalClU. [Accessed 23 February 2015].
3. This would seem to go against nature, if it is indeed by nature that we are destructive. What this confusion shows is the perils of using nature as a standard. This idea of bettering ourselves, however, has another streak built within it that is also quite telling: it is a sign of the dominant liberal culture of the individual, which sees the human person as a self-project. See Salecl (2009) for an extended discussion of this phenomenon.
4. In Chapter 3, 3.2.1, I said that 'kicking a rock is not cruel toward the rock.' Here we see that, in fact, it *could* be considered cruel, inasmuch as cruelty

applied to things like rocks. Extending concepts to things not previously under their provision can be done, but it does not depend on those things themselves as much as it depends on the kinds of life that *we* are, in the process, building. In other words, one can be cruel toward rocks in a world where that would have other implications. In ours, it doesn't, and that is why cruelty and rocks exclude each other.

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