Can Legal Rights be assigned to "Natural Objects" such as (Plants and) Animals?

Prof. D.F.M. Strauss

Samevatting

Suider-Afrika is tans gekonfronteer met die problematiek van te veel olifante (beide in die Kruger wildtuin en in Botswana). Geplaas teen die agtergrond van 'n jagtersgeskiedenis in Afrika wat aan geen maat of perk gebonde was nie, is dit begryplik dat daar vandag stemme opgaan oor die vermeende regte van (plante en) diere. Hierdie problematiek word krities behandel in die lig van die universele skopus van die etiese aspek van die werklikheid, die aard van etiese subjek-subjek en etiese subjek-objek relasies (plante en diere is etiese objekte en hoef nie gepromoveer te word tot mede etiese subjekte indien aan hulle gegee word wat hulle regtens toekom nie), die onderskeiding tussen reg en moraal, die aard van juridiese en etiese beginsels, asook die uniekheid van subjektiewe regsbelange van die mens wat so nou aan die menslike subjektiwiteit verbonde is dat dit nie geobjektiveer kan word nie. Die sin van geregtigheid, as omvattende aanduiding van die verdiepte regsetiese beginsel van die juridiese moraal, verg dat alles in die skepping hul regmatige deel ("due") ontvang – 'n kern-element wat deurlopend in die erfenis van juridiese besinning aanwesig is en wat treffend in die Engelse aanduiding "retribution" tot openbaring kom – gee aan elke skepsel wat daardie skepsel toekom (die "tribute"-gedeelte van "retribution").

1. Introduction

Local newspapers in South Africa are constantly engaged in the on-going controversy surrounding the culling of elephants in diverse game reserves. For example, hardliners claim that the *Kruger National Park* can only accommodate 8 000 elephants if the 'rights' of other animals (and the ecosystem) are not being threatened. But since the culling program was terminated in 1994 the elephant population in the *Kruger National Park* increased to its current number of 12 000. Steve Smit, the chair-person of

Justice for Animals, nonetheless holds that it is a *myth* that the elephant population is exploding (*Volksblad*, 2005: 21). Michelle Henley supports this view by emphasizing that there is no "scientific proof" that the size of the *Kruger National Park* can only accommodate 8 000 elephants. She contends that problems are due to managerial mistakes dating back to the sixties of the previous century. For example, by closing some of the artificially created water-points the ecology is recovering and at the same time a change in the movement patterns of the elephants is already observed (*Volksblad*, 2005: 21).[1]

A general misconception prevails that elephants are "living bulldozers" that destroy the natural environment in which they live. But in fact they have a tremendous positive influence and effect on their bio-milieu (ecosystem) as a whole.

MacKenzie notes that "as much as 80 percent of what elephants consumed is returned to the soil as barely digested highly fertile manure:

- Elephants provide a vital role in the ecosystem they inhabit.
- They modify their habitat by converting Savannah and woodlands to grasslands.
- Elephants can provide water for other species by digging water holes in dry riverbeds.
- The depressions created by their footprints and their bodies trap rainfall.
- Elephants act as seed dispersers by their fecal matter. It is often carried below ground by dung beetles and termites causing the soil to become more aerated and further distributing the nutrients.
- Their paths act as firebreaks and rain water conduits.
- An elephant's journey through the high grass provides food for birds by disturbing small reptiles, amphibians or insects" (MacKenzie, 2005).

The plans made and the actions envisaged for a meaningful management of plant and animal life in a case like that of the *Kruger National Park* surely is only possible because such a large conservation area was established in the first place.[2] In the meantime the human factor

1 Photo obtained from: http://www.veganism.com/books.html (accessed on 30-07-2005).

2 The Park was established by President Paul Kruger in 1898 and it covers 8000 square miles (or: 21000 square kilometers – an area of about 320 x 80 kilometers). It consists of a variation of open field with its sandy flats as well as of brush and forests. Here the well-known *acacia*, *marula* and *combretum* species (to name but a few) provide a habitat to an enormous diversity of African animals (such as elephants, lions, leopards, cheetahs, buffalo, rhinos etc).

complicated the scene further: The *Mail & Guardian* reports that up to March 2005 the South African government received a total of 37 land claims in respect of the *Kruger National Park*. It further states that at least a quarter of the land in the *Kruger National Park* is claimed by African communities (including its "headquarters at Skukuza and prime tourist attractions such as Letaba and Pretoriuskop" – *Mail & Guardian*, 2005: 6). The heading of this report highlights the serious issue at stake: "Land claims 'could kill Kruger'."

This picture may be broadened by now looking at animal life in Africa in general and at the history of the way in which humankind interfered with the flora and fauna of this continent.[3] Already during the previous centuries (since the 17th century) the firearm enabled hunters to kill animals far beyond any reasonable measure (of course co-determined by the economic value of the ivory and skins). To provide some examples: during the seventies of the 19th century a hunting party of three shot down 10 elephants only in one single day (see the account given in Selous, 1985: 40 - 41).

A.C. White records the case where Prince Alfred of Britain visited South Africa in the year 1860. As the Prince arrived at Bloemfontein on the 21st of August, his party entered into "an impromptu hare-hunt" (where the old Town Hall stood). But the truly shameful event concerns "probably the largest big game hunt ever staged in South Africa," which was arranged on the farm of Mr. Bain, the person after which *Bainsvlei* is named:

> Thirty thousand head of game were surrounded by many hundreds of natives. Although the Royal party and friends shot 1,000 head, 5,000 head of game were killed, mostly by the natives. The hunt became in fact a massacre, and the slaughter one for which Bloemfontein must have been ashamed (White, 1949: 69).

Although it was not certain that the existence of wild animals sustained the presence of the *Tsetse fly*, it led to an extensive destruction of wild animals. Brian Vesey-Fitzgerald writes as follows:

> The recent very heavy destruction of wild animals in those African territories which owe allegiance in one form or

3 A quotation from Douglas Chadwick (in his work on "The Fate of the Elephant") reads: "Conserving elephants, then becomes much more than an issue about how to protect a single species. It is about protecting one of the forces that shapes ecosystems and helps sustain the wealth of wildlife found across much of the continent. It is about saving the creative power of nature." See the following WEB-Site: http://elephant.elehost.com/ (last accessed on 30-07-2005).

> another to the British Crown, during the course of what are termed 'Tsetse Fly Operations,' have shocked ('revolted' would, perhaps be a better word: it would in any case be impossible to find too strong a word) naturalists and animal lovers the world over. Yet the extent of the slaughter is certainly not generally realised, for the powers responsible are not eager to publish figures and the African papers (which have for the most part protested manfully) have not got huge circulations outside their own particular areas (quoted by White, 1949: 92).

The "figures for the game slaughtered in Southern Rhodesia during Tsetse Fly Operations in the period 1924 - 1945 inclusive" for 43 animal species are 293 432 (between 1924 - 1944) and 28 086 (in 1945), yielding a total of 321 518 (White, 1949: 94).

If we are indeed called not to act in total *arbitrariness* towards animals, a foundation must be found in an understanding of the nature of the *normative care* we have to exercise as human beings in relation to nature – for only within such a context will it be meaningful to assess the issue of (human and animal) *rights*. We commence with an analysis of the issue of *normativity*.

2. Moral normativity

The question concerning the 'rights' of animals (and 'plants') is derived from the emergence of the issue of *human* rights. But even before the problem of human rights can be stated properly, an account is required of the *normativitity* of (human) life – because it concerns the *interconnection* between multiple human beings and their acknowledgement of underlying *norms* or *principles* guiding human activities in the various domains of societal life. Particularly when the nature of principles (or norms) is considered, the advocated views reveal *supra-theoretical commitments*. Different world and life views diverge radically in this regard.

Modern philosophy since Descartes is impregnated by the *humanistic* idea of *human autonomy*, of the human person being as being a *law unto itself*.[4] Immanuel Kant carried this starting-point through to its ultimate rationalistic consequences when he assumed a position according to which human understanding (with its categories of understanding) actually serves as the *a priori* (formal) law-giver of nature (see Kant, 1783: 320; §

4 The collective version of this autonomy-idea (and human freedom) is found in the words of Rousseau: "freedom is obedience to a law which we prescribe to ourselves" (Rousseau, 1975:247).

36).[5] Of course the crucial problem is given in the *jump* from human *subjectivity* to the supposedly *universal validity* of these (categorical) determinations – something clearly felt by Kant when he addresses the problem in his *Critique of Pure Reason* (CPR), for there he asks the question how "subjective conditions of thought can have objective validity" (Kant, 1787-B: 122).[6]

The on-going development of philosophical reflection never escaped from an equally strong awareness of the necessity to acknowledge a *more-than-merely-individual* normativity. The words of Kuhlen directed at the distinction between law and morality touches upon a facet of this insight:

> The delimitation of law and morality does not concern an arbitrary definitorial determination, but in respect of certain factual and normative starting-points it aims at a reasonable conceptual solution (Kuhlen, 1981: 223).[7]

Particularly through the immense growth in the technical mastery of nature during the past two centuries, and the unforeseen consequences for the *conditio humana* flowing from it, humankind as well as scholarly reflection find themselves currently confronted with life-sustaining issues of *normative care and control*. Given the long-standing view of the human being as a *rational-moral* creature, it should therefore not be surprising to see how the contemporary scene is flooded with concerns about the differentiated and collective responsibilities of humankind towards nature (and natural resources) and thereby towards itself.

But the fact that these concerns are constantly put into the mould of some or other kind of *ethics* demonstrates at least three issues:

(i) it continues the underlying (above-mentioned) view of the human being as a *rational-ethical being*;

(ii) as a consequence of (i) it collapses all forms of normativity into *morality*; and

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5 "der Verstand schöpft seine Gesetze (*a priori*) nicht aus der Natur, sondern schreibt sie dieser vor" ("understanding creates its laws (*a priori*) not from nature, but prescribes them to nature").

6 "Daher zeigt sich hier eine Schwierigkeit, die wir im Felde der Sinnlichkeit nicht antrafen, wie nämlich *subjective Bedingungen des Denkens* sollten *objective Gültigkeit* haben."

7 "Bei der Abgrenzung von Recht und Moral geht es ja nicht um eine willkürliche definitorische Festsetzung, sondern um eine im Hinblick auf bestimmte tatsächliche und normative Ausgangspunkte vernünftige begriffliche Lösung."

(iii) with its *human-centered* point of departure considerations focused upon the issue of plant and animal rights are suffering from a clear understanding of the coherence and difference between subject-subject and subject-object relations, which in turn depends on fundamental ontological distinctions also pertaining to the difference between what in reformational philosophy became known as the dimensions of *aspects* and (natural and social) *entities*.

3. Which entities partake in the domain of the ethical?

Within the contemporary scene wide-ranging differences of opinion regarding so-called *legal rights* for (of) plants and animals are found. One direction pursues the expansion of the scope of morality and ethical subjectivity, whereas the opposing inclination expels animals from the dimension of morality, or at least disqualify plants and animals as "moral agents."

Stone discusses the development of Roman Law where initially the father had the "power of life and death" over his children. Like in ancient Greece[8] deformed and female children were subjected to a widespread practice of infanticide. Stone quotes Maine saying that the Roman house-head (*Patria Potestas Romana* – with a *ius vitae necisque*) had a power of "uncontrolled corporeal chastisement; he can modify their personal condition at pleasure; he can give a wife to his son; he can give his daughter in marriage; he can divorce his children of either sex; he can transfer them to another family by adoption; and he can sell them" (VanDeVeer, 1998a: 148).[9]

Through a long process of legal development the assignment of rights was then broadened to encompass human beings in various capacities. It is rather amazing to note that throughout the development of law every successive extension of "rights to some new entity has been, …, a bit unthinkable": eventually it was extended to "prisoners, aliens, women (especially of the married variety), the insane, Blacks, foetuses, and Indians" (VanDeVeer, 1998a: 148). Such an expansion of the scope of

8 In ancient Greece also the aged were treated as *rightless*.

9 Stone refers to "H. Maine, Ancient Law 153 (Pollock ed. 1930)". Maine (who lived from 1822-1888) published this work initially under the title: *Ancient law: its connection with the early history of society, and its relation to modern ideas* (published by J. Murray in London). With a Foreword by Lawrence Rosen the most recent edition appeared in 1986, published by the University of Arizona Press (Tucson).

morality eventually somehow aimed at incorporating plants and animals into the domain of "moral agents" – given in the attempt to portray them as bearers of legal rights.

On the basis of the shared capacity of animals and humans to 'suffer' the next step is, for example, to argue with Tom Regan "that the same essential psychological properties – desires, memory, intelligence, and so on – link all animals with humans and thereby give us all equal intrinsic value upon which equal rights are founded. These rights are inalienable and cannot be forfeited" (quoted by Pojman, 2000: 396). Singer also refers to *moral equality*: "A liberation movement demands an expansion of our moral horizons and an extension of the basic moral principle of equality" (Singer, in: Pojman, 2000: 400).

However, Pojman himself, by contrast, questions the *moral accountability* of animals because they "cannot make moral decisions" and because animals are not "members of the moral community." In order to substantiate his claim he refers to the 'contractualist' Hobbesian tradition which holds that for their lack of communicative abilities animals can never enter into a *contract* (Pojman, 2000: 396). Another way is to mirror these duties in the sense that our moral duties towards animals are nothing but *indirect duties* towards humanity – a position taken already by Immanuel Kant. The essential element in this view is continued by Martin Buber in his work *Ich und Du* (1923) and we even find it back (via the Dutch scholar in theological ethics, Aalders) in the thought of the South African philosopher, Stoker, and the theologian, Heyns.

Stoker and Heyns restrict the domain of ethics to *inter-human* (subject-subject) relations. Applied to human action towards animals this view argues that the meaning of morality is found in 'person-care' ("persoonsbehartiging"). This immediately raises the question whether or not human love for animals, plants and the land fall *outside* the domain of morality? Heyns explicitly says that a *mere love for nature* does not reveal the ethical or moral dimension since the latter only occurs when the former is viewed in the light of "persoonsliefde" ('person-love') (Heyns, s.a.: 9). In order to explain his intention Heyns gives the example of torturing an animal. Such an act is not immoral because it is an *animal* that is tortured, for it is immoral because a *human being* performs the act. By torturing an animal the human being displays a lack of *self-love* and in doing that does not fulfill the calling we have as human beings to rule over creation (Heyns, s.a.: 9).

It is striking that Heyns distinguishes between love that is *non-moral* in nature, namely love for entities in nature (things, plants and animals). This

is a logical consequence of his restriction of the moral domain to the care found between *persons* ("persoonsbehartiging"). Since animals are not *persons* by definition they fall *outside* the *ethical domain*.

When Warren argues that although animals do "not have *rights*, we are, nevertheless, obligated not to be cruel to them" (Warren, 2000: 450), the overall picture increasingly becomes one in which the status of moral agents and their relation to non-moral entities need elucidation.

4. Ethical subject-subject and subject-object relations

One of the merits of the legacy of reformational philosophy is that it developed an account of subject-subject and subject-object relations based upon the theory of *modal aspects* displaying a truly *ontic* universality. This insight entails the difference between two kinds of laws: *modal laws* and *typical laws* (type-laws). The former kind holds universally in an *unspecified* sense for all possible entities and processes, whereas the latter kind evinces a specified universality, holding for a limited *type* of entities only. The modal universality of the moral aspect entails that nothing in the universe escapes from the scope of this modal function. This holds in particular for entities in nature, although this does not mean that natural entities – things, plants and animals – ought to be appreciated as moral *subjects*. In order to discover a connection between plants and animals and the ethical aspect there is no need for expanding the scope of ethical subjectivity. It is sufficient merely to acknowledge what Dooyeweerd calls the latent object-functions of natural entities. Of course this theory of subject-object relations does not deny the original *subject-functions* of natural entities (and processes). Modern Humanism has such a strong appreciation of the human subject that it appreciates all non-human entities as 'objects'. Just consider the widespread practice to speak about *physical objects*. The theory of subject-object relations suggests that insofar as material things are *physical* they are not objects but *subjects*, and insofar as they are *objects* they are not physical, for in the latter case they ought to be understood in accordance with their *non-physical* properties (*object-functions*). Likewise, plants and animals in the first place are (biotical) and (sensitive) *subjects*, and only in the second place ought to be considered according to their relevant *object-functions*.

From a systematic perspective the distinction required to elucidate the ethical subject-object relation is that between law-side/norm-side and factual side. Initially both Dooyeweerd and Vollenhoven referred to the latter as the *subject*-side. This caused an ambiguity, because at the subject-side they discerned subject-subject and subject-object relations – implying

that the term "subject" acquired an ambiguous meaning.[10] From a systematic perspective the most general approach is to differentiate between law-side or norm-side and factual side – where the latter then comprises factual subject-subject and subject-object relations.

This implies that natural entities and natural processes in a *structural sense* display *possible* (latent) moral object-functions and that the latter can only be *disclosed* or made *patent* through the activities of human beings (albeit as *individuals* or within the context of *societal collectivities*). The normative ethical demands of *caring* for nature embraces both ethical subjects and ethical objects – but the moral aspect should not be viewed in isolation from other aspects of reality, not the least so if one wants to understand what the true meaning of *rights* is. Since the concept of a *right* – such as in the expression "human rights" – is best known (but the latter should be distinguished from *subjective rights*) as a *juridical* term, a discussion of the nature of "animal rights" is dependent upon an account of the relationship between *law* and *morality*. In view of the fact that the current debate about animal rights is normally phrased in terms of *moral* categories, this issue indeed justifies an investigation of this basic relation.

5. The distinction between law and morality

Understanding *rights* requires an insight into the nature of the *jural* aspect of reality, of the *state* as a public legal institution, of the international (global) concern for the environment and also of the nature and place of *rights* within human society (beyond the state). The emphasis on environmental ethics, in turn, requires a view on the relationship between *law* and *morality*. But these relationships cannot be treated in isolation, because both the meaning of the jural and that of the ethical reveals itself only in an interconnectedness between these aspects and all other facets of reality.

The first step towards a meaningful differentiation between law and morality is given in a fundamental questioning of the 'basket' view of morality in terms of which every form of normativity is placed within the domain of morality. *The Philosophy of the Cosmonomic Idea* questioned the immense simplification of this prevailing view from the outset.

10 Vollenhoven did use different accents to distinguish between law and its correlate on the one hand and subject in the sense of being correlated with an object-function on the other.

Dooyeweerd pointed out that the logical principle of (non-)contradiction serves as the foundation for the presence of normative contraries within all the post-sensitive modal aspects (Dooyeweerd, 1997-II: 36 ff.). The scope of the logical principles of identity and (non-)contradiction applies to the human ability to *conceive* and to *argue*.[11] Russell and Cassirer both used as examples of a logical contradiction an explanation already found in Kant's thought. Kant mentions the *illogical concept* of a "square circle" (see Kant 1783: 341; § 52b). Establishing that this concept is *illogical* entails that a *normative standard* has been applied and that the said concept does not *conform* to this logical (and not *ethical*!) requirement of *ought to be* inherent in this normative standard. It is contradictory not to distinguish between a square and a circle. Phrased in a different way one can say that confusing two *spatial figures* violates the demands for *identifying* and *distinguishing* properly – a square is a square (logically correct *identification*) and a square is not a non-square (such as a circle – logically correct *distinguishing*).

However, thinking in a logically antinormative way, i.e., thinking *illogically*, remains bound to the structure of *logicality* and does not turn into something *a-logical* (non-logical), such as the economic, the moral or the jural. Although one may call these (non-logical) facets of our experience *a-logical* they are not *illogical*. In fact they also have room for contraries *similar* (or analogous) to the contrary between logical and illogical, namely *economic* and *uneconomic*, *moral* and *immoral* and *legal* and *illegal*. The logical contrary actually lies at the *foundation* of all these other instances of normative contraries – the latter *analogically reflect* within their own domains the meaning of logical analysis (identification and distinguishing).

This perspective uproots the above-mentioned long-standing legacy of identifying the domain of *normativity* with *morality*. All kinds of norms, principles and 'values' cannot be identified with the moral. Moreover, without an acknowledgement of (God-given) *ontic normativity* the esclipse of a solipsistic subjectivism seems to be *unavoidable*.

During the transition from the medieval era to the early modern period *nominalism* postulated a *despotic arbitrariness* on behalf of God (*potestas Dei absoluta*) which actually subjected God to His Law for creation, for only when a normative standard is present can one meaningfully speak

11 Copi states a generally accepted conviction when he says that the "principle of contradiction asserts that *no statement can be both true and false*" (Copi, 1994:372).

about *arbitrariness*. The influence of this nominalistic view is found in the following argumentation of Heyns. He believes that the prohibitions contained in the Ten Commandments for *human beings* are not prohibitions for God. For example, the "inter-trinitarian essence" of God entails that what is forbidden for a human being is allowed in the case of God, because Father, Son and Holy Spirit are "in front" of each other (they therefore have "other Gods" in front of them). He places every one of the Ten Commandments in this perspective and then concludes that what God is allowed to do is forbidden for human beings. For example, when human beings commit adultery it is sin, but when God demands that husband and wife should love Him more than each other, God indeed turns out to be the big "Adulterer" (Heyns, 1970: 88). His remark that God's adultery is not *sin* camouflages the real problem, for within the *ethical* meaning of adultery as such the jural meaning of *unlawfulness* is *presupposed*. Therefore, if adultery inherently is *immoral* (i.e., *sinful*) then the defence that as the great *Adulterer* God does not sin boils down to the following contradiction: when God commits adultery (i.e., when God *sins*) He does not *sin*! This argumentation in fact subjects God to His own creational law.

A similar problem is found in modern Roman Catholic moral philosophy which defends the conviction that from the moral law (the 'decalogue') rules of "natural law" may be derived. Thomas Aquinas holds that derivations such as these could be made by using commandments like "Thou shalt not murder," "Thou shalt not commit adultery," and "Thou shalt not steal." What he did not realize is that the concepts *murder*, *adultery* and *stealing* already presuppose unlawfulness in a *jural* sense. The prohibition of murder requires that one ought not to show such a lack of love and care towards one's neighbour that the desire intentionally to slay such a person arises. But when it is attempted to reduce the moral meaning of this commandment to the jural an antinomy appears, since the meaning of morality presupposes the jural sense of *unlawfulness*. In order to side-step this antinomy, Victor Cathrein suggested that it is forbidden to murder *unlawfully* (Cathrein, 1909: 223 – see also Dooyeweerd, 1997-II: 162). However, since the concept 'murder' already presupposes the *jural* element of unlawfulness (murder = unlawful killing), this escape-route remains *antinomic*. The possibility of an unlawful 'murder' entails that its opposite is also possible: "lawful murdering." But since murder = unlawful killing the construction of "lawful murdering" boils down to the following implied contradiction: "lawful unlawful killing"!

In his work on *The Meaning of Retribution* (Vol. 1, 1921) Polak, a Dutch legal scholar, defined retribution as the core meaning of the jural as

follows: "retribution is an objective, trans-egoistic, harmonization of interests." The term 'objective' here has the meaning of *not being limited to any particular person*, i.e., it is employed in the sense of what is *universal*. Does it say anything distinctive about the jural? Not at all, because every aspect of reality shares in this feature of *universality*. The term "trans-egoistic" derives its meaning from *moral love* where it is demanded that a person ought not to be self-centered. Therefore this element of the given definition also does not at all touch on the *jural* meaning of retribution. 'Harmonization' represents the meaning of the *aesthetic* aspect and therefore also sidesteps the core meaning of the jural. Finally, the term 'interests' is multivocal – people may have economic interests, aesthetic interests, legal interests, and so on. This means that *interests* cannot reveal the unique or core meaning of the jural, because it can take on many different qualifications. What Polak has done is to use non-jural terms in his attempted definition of the jural, which resulted in a formulation totally bypassing the core meaning of the jural. In his (as yet still unpublished *Encyclopedia of the Science of Law*, Vol. III: 10-11), Dooyeweerd justifiably concludes: "The result is a general concept fully lacking any delimitation. It could just as well be seen as a moral rule regarding the distribution of alms." The meaning-nucleus of an aspect is not only unique and irreducible but also *indefinable*. When the term *retribution* is employed to designate this core meaning of the jural, alongside the term love designating the core meaning of the ethical, then it must not be confused with *revenge*. It is based on the insight that what rightfully belongs to a person ought not to be taken away from that person – and if it happens, the meaning of the jural aspect entails that it ought to be given back to that person (*re*-tribution). The classical Roman jurists (Ulpianus and others) captured this meaning with their time-honoured phrase: give every person his or her due (*ius suum quique tribuere*). The crux of this formulation is given in the positive meaning of "tribuere", "tribute" – which provides the basis for our understanding of *retribution*. What is required is to find a suitable term (word) that can designate this core meaning – and the same applies to the way in which the meaning nuclei of all the other aspects are captured as well. "Giving a person his or her due" is simply synonymous with the "tribution" part of retribution. An *infringement* or a *violation of* that which rightfully belongs to a person gives rise to the *restoration* captured by the term "*retribution.*"

Since the jural aspect is *foundational* to the moral aspect within the cosmic order of aspects, it is possible that its meaning may still be closed in respect of the ethical aspect of moral love. A system of penal law in which the meaning of the jural is not yet disclosed will still display all the

constitutive meaning moments within the jural aspect. What is particularly striking in an undifferentiated society with an undisclosed jural awareness is the dominance of a form of accountability that functions only on the basis of the *effects* of an action (in German known as 'Erfolgshaftung'). A person is held liable for the effects (consequences) of a deed without taking into account the intentions of the actor – the well-known *lex talionis* applied the proportionality of an *eye for an eye* and a *tooth for a tooth*. On the one hand this measure established a certain jural *balance*, because one is not entitled to take a *head* for an *eye*. In undifferentiated societies this configuration is intertwined with a collective accountability – which is also found in the Old Testament (see Deut. 5: 9). Instances of 'Erfolgshaftung' in the Old Testament are found in Gen. 9: 6 and Lev. 24: 16 - 21. The legal stipulations of the Old Testament oftentimes instantiate the *lex talionis* – an undisclosed principle of penal law already found in the law books of Hammurabi (almost verbally repeated in die Old Testament). Later on in the Old Testament we do read about cities giving shelter to someone who wanted to escape from revenge – once safely within such a city no revenge was allowed. Yet this did not cancel the revenge, because the moment such a person would leave the city no protection was given (see Num. 35: 9 - 29 and Num. 35: 11, 15 and 27).

It is only when the jural awareness of a society and its jural order is regulatively deepened under the guidance of the aspect of moral love that it is possible to account for the moral disposition of the perpetrator, for the subjective intentions of the person who committed the deed. Only now do the (disclosed) principles of jural morality come into play, such as the *fault principle* – in its two forms: *dolus* (intent) and *culpa* (culpability). In Dutch and German we find the term 'schuld' which is normally translated as either fault or guilt. Alan Cameron points out that in English-speaking Common Law jurisdictions 'fault' is usually reserved for civil wrongs (torts) and 'guilt' for criminal wrongs, but that Dooyeweerd "uses 'schuld' in [this essay] to refer to both types of wrong (i.e. to both civil and criminal delicts)." Therefore it can be "translated as 'fault' used in a broader sense not specific to any particular category of legal wrong."

Aristotle already had an exceptional understanding of another deepened (morally disclosed) jural principle, namely *equity*. He does distinguish between justice and equity, but ascribes to the latter a higher value (cf. *Nicomachean Ethics*, Book V, Chapter 10). Although equity is just, it is not the justice of (statutory) *law*. Enacting a law necessarily entails a general statement that cannot possibly foresee all particular unique circumstances that may pertain in the future and therefore it cannot

exclude the possibility of error. Applying equity as an effect of the occurrence of an exception to the rule essentially just amounts to a rectification of the law. This modified statement should be what the lawgiver would have done if the special circumstances had been known. Everything cannot be regulated by law – and when the applicable law, in fact, would effectuate an injustice, the original law-statement ought to be rectified *ex equitate*, that is, on behalf of equity

All the deepened principles of *jural morality* – such as the *fault principle*, the *principle of equity*, that of *good faith* (*bona fides*), and so on – are therefore actually *principles of justice*.

6. Can animals (and plants) be bearers of subjective rights?

Perhaps one of the most important contributions of Dooyeweerd's legal philosophy is given in his systematic account of the nature of a *subjective right*. First of all he realized that both the notion of a subjective right and that of a juridical object (legal object) are not thing concepts but *modal functional* concepts (see Dooyeweerd, 1997-II: 405 ff.). Most importantly it should be realized that the juridical subject-object relation constitutes the framework within which both these notions ought to be analyzed (namely that of subjective rights and of a legal object). Once this is acknowledged the meaningless construction of absolute and inalienable human rights found in modern humanistic natural law is unmasked as untenable. A subjective right is always correlated with a legal object and the subjective competence of disposing over a legal object must be distinguished from the competence to do away with a legal object (for instance by *selling* it).

But human subjectivity as such cannot be objectified in a juridical sense. One cannot sell your freedom or the biotical integrity of your body. Therefore the so-called rights on the human body and life are not truly *subjective rights*. Dooyeweerd correctly points out that at most they constitute "subjective legal interests which are so closely connected to human legal subjectivity that they do not qualify to be objectified over against a legal subject. It is not possible to dispose over these interests in a juridical sense" (Dooyeweerd, unpublished Systematic Volume III of the Encyclopedia of the Science of Law, page 207 – in the original Dutch text, page 208).

Animals (and plants) lack a *normative accountability* because they do not function as subjects within the post-sensitive aspects – including the jural and the moral aspects. Therefore they are neither "moral agents" nor "legal subjects." Recalling the example of a "square circle" it is note-

worthy that Bernard Rensch mentions the fact that experimentalists in Münster have tried for half a year to teach chimpanzees to copy a given drawing of a square or triangle, but without any success (Rensch, 1968: 148). The crucial question is: if these animals are not even able to *draw* these figures, how are we going to be convinced that they truly have the *concept* of a square or the *concept* of a triangle? We must remember that a concept is something different from a *sensory picture* which can be associated with something else (cf. Overhage, 1972: 252) – as is the case in the so-called 'name-giving' mentioned by Leakey. The decisive point, however, in showing that animals dispose over these concepts would be to show that they can think illogically by forming, for example, the self-contradictory concept of a "triangular square" or a "square triangle"! This has never been shown by any of the experiments referred to by the mentioned authors. In other words, animals are simply not able to function subjectively in the analytical aspect of reality. Consequently, it should not be surprising that they are unable to think – be it in a logically correct way or illogically.

Stone approaches the status of natural things from the angle of the current "rightlessness of natural objects" and by asking the question what is entailed when something is a *holder of legal rights*? For the latter "something more is needed than that some authoritative body" because according to him a "holder of legal rights" must satisfy "each of three additional criteria." The underlying question is what makes a thing jurally count? The three criteria are: "They are, firstly, that the thing can institute legal actions *at its behest;* secondly, that in determining the granting of legal relief, the court must take *injury to it* into account; and, thirdly, that relief must run to the *benefit of it*...." (Stone, 1998a: 150). The objection that streams and forests cannot *speak* is not sound, for Stone argues: "Corporations cannot speak either; nor can states, estates; infants, incompetents, municipalities or universities. Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems" (Stone, 1998a: 150). With reference to incompetent people requiring a *guardian* he holds that "[N]atural objects *can* communicate their wants (needs) to us, and in ways that are not terribly ambiguous," for one can judge with more certainty and meaningfulness whether and when my lawn wants (needs) water" than whether or not the judge can decide when the "United States wants (needs) to take an appeal from an adverse judgment by a lower court" " (Stone, 1998a: 152).

Stone's overall aim is to make a plea for the protection of the rights of unborn generations. "Indeed, one way – the homocentric way – to view

what I am proposing so far, is to view the guardian of the natural object as the guardian of unborn generations, as well as of the otherwise unrepresented, but distantly injured, contemporary humans" (Stone, 1998a: 152).

However, when grass 'says' that it is 'dry' and needs 'water' it requires a human being to *interpret* these *signs* correctly – just like in the last quote the decisive element is the role of the *guardian* of *natural objects*. Outside the structural context of normatively qualified subject-object relations the realm of plants is unable to obtain the *care* it 'needs'. It is therefore from the perspective of ontic normativity[12] that we can escape from the impasse enclosed in all humanistic attempts to find a foundation for universal and constant principles with an appeal merely to human *subjectivity* (compare the above-mentioned dilemma of Kant).

This dilemma is intensified through the relativizing effect of postmodernism, evident in its denial of every form of universality and constancy (of course with the exception of the implicit universal validity assumed for its own view). When Regan attempts to account for "the ideal moral judgment" he mentions elements such as *conceptual clarity*, *information*, *rationality*, *impartiality*, *coolness*, and the *validity* of *moral principles* (Regan, 1997: 126 - 130). He then posits criteria for the evaluation of moral principles, such as consistency, adequacy of scope, precision, and conformity with our institutions (Regan, 1997: 131 - 136). He does not realize that these terms used by him stem from diverse irreducible modal domains – *consistency* resides in the logical aspect (non-contradiction); *adequacy of scope* is equivalent to (specified or unspecified) *universality* which reflects the *spatial* meaning of everywhere; *precision* comes from the domain of non-umbiguous linguistic meaning; and *conformity with our institutions* makes an appeal to a particular form of social interaction of individuals within societal collectivities.

As a complex basic concept of any discipline it is indeed only possible to articulate the meaning of a norm or principle by 'borrowing' terms from every (constitutive) modal aspect. Without arguing it in detail, the following brief description of a principle will demonstrate this point.

> A principle is a universal and constant point of departure which can only be made valid through the actions of a competent organ (person or institution) disposing over an accountable (responsible) free will enabling a normative or

12 That is, when the supra-individual and supra-arbitrary nature of God's creation order is recognized.

> antinormative application of the principle concerned relative to the challenge of a proper interpretation of the unique historical circumstances in which it has to take place.[13]

The cultural task of caring for nature differentiates in various contexts. The universal scope of all the normative aspects makes it impossible for human beings to withdraw from this normative appeal, although the *typical* way in which particular social entities (coordinational relationships, communal relationships and collective relationships) function within the normative aspects does *specify* the meaning of the implied universal modal norms.

7. Concluding remark

It is neither meaningful to restrict morality to ethical subject-subject relations nor correct to expand the domain of *normative subjectivity* such that the ('discloseable') object-functions of natural entities (such as animals) and processes are transformed into normative *subject-functions*. However, the human calling to care for nature is not merely enclosed in the 'basket' of moral normativity, since in its richly varied diversity it is 'spread' over all the normative modal aspects and the normative calling of all coordinational, communal and collective relationships. Only an analysis of the structural principles of the latter will open up the required scope within which *local societies* and the *global village* can account for their responsibilities in keeping up the Genesis appeal of *building* and *conserving*. Governments may benefit from a deepened perspective on the requirements of a public justice in which the legal interests of societal institutions and environmental needs are harmonized. Only within such a broad context will it be possible to do justice also to the cause of the elephants of (South) Africa.

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13 Notice that this formulation implicitly uses the gateway of various modal of aspects – which indicates that the term *principle* is a complex or compound fundamental scientific concept – in distinction from the elementary basic concepts in the various disciplines which only appeal to a single particular analogy within the structure of an aspect of reality. The nature of modal analogies, viewed within the context of a distinction between law-/norm-side and factual side, opens up the possibility of a philosophical analysis of *modal principles*. Every analogy on the law-side of a normative aspect provides us with a *fundamental modal principle*.

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