Technics and Polemics in the Project of Non-human Rights

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I. Non-human beings and the project of rights

Can we take seriously the claim by certain animal rights advocates today that animals should no longer simply be considered 'things', property, but as subjects of law in their own right? By framing the debate through this kind of question, proponents in the field tend to make the polemical and ideological construction of right prevail over its technical and procedural limits in jurisprudence. The right that the advocate seems to want to make the animal a subject of is precisely the one that – in his or her own estimation – the current system of law fails to recognise and sometimes actively or structurally works to deny. To wrest the animal from its languishment in the legal status of 'thinghood' then, the animal rights advocate thus proposes what he or she imagines as an unprecedented step: to recognise the animal as 'person', a bearer of rights, and to support this submission on the strength of the contemporary scientific evidence of the animal's degree of agency, autonomy, self-awareness and so on.

Such at least is the programme of a group that today calls itself the Nonhuman Rights Project: a group that is in favour of the recognition of certain fundamental rights for non-human animals. The group, headed by lawyer Steven M. Wise, boasts being the first and only association which is involved in seeking to achieve what they call 'actual LEGAL rights for members of species other than our own'.[1] It describes its mission as 'to change the legal status of appropriate nonhuman animals from mere "things," which lack the capacity to possess any legal right, to "persons," who possess such fundamental rights as bodily integrity and bodily liberty.'[2] It goes about this by pursuing legal action in the United States on behalf of individual animals (currently chimpanzees, although it envisions action also for great apes more broadly, as well as cetaceans and elephants)[3] with the view

[1] Website of the Non-human Rights Project, 'What Is the Non-human Rights Project?', http://www.nonhumanrightsproject.org/overview/, accessed 12 December 2016.

[2] Website of the Non-human Rights Project, 'Missions, Goals and Values', http://www.nonhumanrightsproject.org/mission-goals-values/, accessed 12 December 2016.

[3] At the time of writing, the Non-human Rights Project has brought legal action on behalf of four chimpanzees seeking recognition of their 'personhood' and their removal from captivity to a designated chimpanzee sanctuary. Hercules and Leo are two chimpanzees owned by the New Iberia Research Centre in Louisiana and held at Stony Brook University. They are being used in scientific research to study the origins of bipedalism.

to having some of these basic liberties protected, not necessarily as the consequence of legislation that today has the purpose of protecting animal welfare, which necessarily leaves unchallenged the animal's status as 'thing' or property, but as subjective rights in themselves that are recognised for the first time for such entities with inherent moral personhood and entrenched as such in the common law.[4]

Any project of this sort tends to trace some curious contours between technics and polemics. The Nonhuman Rights Project is not content with just achieving better conditions for animals through legal means. It seeks to deliberately involve the law in a moral-philosophical question that the jurisprudence to this point seems to have studiously steered clear of. This involvement is put to work at two levels. On the one hand by a particular mobilisation of the concepts or categories of 'person' and 'thing': categories whose plasticity in the history of Western legal thought is often underestimated, and which are capable of lending themselves to the apprehension and definition of new problems of right.[5] And on the other hand, through the work of a technical jurisdictional selection aimed primarily at eliciting an imagined and pre-determined precedent on the narrowly receptive terrain of the common law.

In this article, I will analyse the relation between technics and polemics in this project of non-human rights. Rather than engage in an argument for or against the extension of personhood or fundamental rights to nonhuman animals, I would like instead to explore some of the textures – functional as well as rhetorical – to the legal terrain in which this contemporary question of personhood is fashioned and encountered. In doing so I will also draw some observations, through the work of the scholar of Roman law Yan Thomas, about what kind of meaning and function this project tends to invoke for the juridical categories of person and thing and thus what kind problem it

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Kiko is kept by residents at Niagara Falls, NY. Tommy is kept by a resident in Gloversville, NY on a used trailer lot. For the judgments so far concerning Tommy and Hercules and Leo respectively, see: *The People of the State of New York v Lavery* (2015) NY Slip Op 63277. *Matter of the Non-human Rights Project v Stanley* (2015) NY Slip Op 25257.

[4] Website of the Non-human Rights Project, 'Why We Work Through the Common Law' http://www.nonhumanrightsproject.org/why-we-work-through-the-common-law/, accessed 12 December 2016. See also Steven M. Wise, 'Legal Personhood and the Non-human Rights Project' (2010) 17(1) *Animal Law* 1; Steven M. Wise, 'Nonhuman Rights to Personhood' (2013) 30 *Pace Environmental Law Review* 1278.

[5] A significant body of contemporary theory is today devoted to understanding the continuing work of the categories of person and thing out of the context of their juridical origins. A selection of examples include: Roberto Esposito, *Persons and Things: From the Body's Point of View* (Cambridge: Polity Press, 2015); Roberto Esposito, 'Persons and Things' (2016) 39(1) *Paragraph* 26-35; Alain Pottage and Martha Mundy (eds), *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge: Cambridge University Press, 2004); Alain Pottage, 'Persons and Things: An Ethnographic Analogy' (2001) 30(1) *Economy and Society* 112-138; Miguel Tamen, *Friends of Interpretable Objects* (Cambridge, Mass. and London: Harvard University Press, 2004); Barbara Johnson, *Persons and Things* (Cambridge, Mass. and London: Harvard University Press, 2008); Jonathan Lamb, 'Persons and Things' in Adriana Craciun and Simon Schaffer (eds), *The Material Cultures of Enlightenment Arts and Sciences* (London: Palgrave Macmillan, 2016)

tends to pose for the relation between the concepts of nature and artifice in the work of law and the contemporary construction of what we might call the 'subjective right' of non-human animals.[6]

II. Sacralizing the juridical categories of person and thing

The Non-human Rights Project has a relatively unwavering position and a relatively clear goal on this set of contemporary problems. That goal is to engage the judicial system in the United States to remove what it sees as the anachronism and prejudice of treating all animals as rightless 'things' and to recognise an animal for the first time as being a person: that is, as the necessary subject (rather than just the accidental beneficiary) of at least one basic fundamental right. It is easy to miss within this form of argument – captivating as the associated moral, ethical and philosophical controversies tend to be – the distinct jurisprudential sense given to the concepts of person and thing here. Despite the 'unprecedented' move that the project imagines the recognition of a non-human animal as person to be for instance, it borrows all the same from a modern orthodoxy that tends to enclose within the concept of the 'person' both an abstract subject of rights and a concrete individual, while at the same time conflating this subject of rights with the subject itself, with all of its cognitive agency converted to the currency of a politico-legal claim. Similarly, the concept of 'thinghood', when it is taken as the simple status of a lack of rights; as the status of that which is not a subject of right, capable only of being owned, open to appropriation, alienation, exchange and so on, retains only the surface appearance of a juridical meaning. Behind it lies an attempt to convert the real technicity of the legal 'thing' to the transcendence of a moral claim. At this level, the distinct juridical categories of person, thing and subject of right tend to be carefully restricted to a meaning in which they will be capable of being shaped and put in the service of a particular agenda. No other status that non-human animals have in law appears important for the project either to note or to challenge. It is as though all the wrongs that so obviously afflict such non-human individuals structurally in law can be brought back to the persistence of a single dichotomy and to a single juridical institution which is attributed to them: that of their thinghood and lack of personhood. The project is capable in this way of imagining itself as a natural continuation of an ongoing liberal endeavour which did not end with the abolition of human slavery. Animals look like the last conscious living beings that the common law still puts on the same footing as all of those for whom 'personhood' was, in this version of history, a hard won victory.

[6] There is an emerging critical scholarship around animals and legality which has in some ways tried to go beyond the narrowness of rights discourse. My interest in this paper is more circumspect and tries to address this discourse at the level of its technical and polemical dimensions. For some of the recent critical studies, see: Irus Braverman (ed), *Animals, Biopolitics, Law: Lively Legalities* (Abingdon: Routledge, 2016); Cary Wolfe, *Before the Law: Humans and Other Animals in Biopolitical Frame* (Chicago: University of Chicago Press, 2013); Yoriko Otomo and Edward Mussawir (eds), *Law and the Question of the Animal: A Critical Jurisprudence* (Abingdon: Routledge, 2013).

Restricted to this set of commonplace co-ordinates, the categories of 'person' and 'thing' are recruited to a construction of right that offers itself more readily to polemical than technical uses. On this terrain, the project encourages us to believe that there is a direct connection between the material suffering of animals who for example scientists can tell us have a sense of themselves in time, self-conscious desires, language and communication and so on, their 'rightlessness' and the refusal of the law to recognise them as 'persons' rather than 'things', and that it is only through the effort of their own advocacy that this stronghold can be undone. What is less often acknowledged is how far this arrangement of the Western juridical categories of person and thing departs from the terrain of their traditional technical conception. It is also far from clear what may be at stake in this polemical construction for a contemporary jurisprudence in which, even today, those categories still perform an important technical work. One is left to observe that, from the rhetorical point of view, it seems to indeed require only 'one small step' for modern man in the West to imagine the intelligent non-human animal as what he imagines himself to be: the bearer of fundamental rights and liberties. And yet this same move may also still constitute one relative 'giant leap' for a jurisprudence in which the bearer of such rights and liberties, as an invention of law, was only arbitrarily and artificially grafted onto those much more enduring juridical categories such as 'person' and 'thing'.

To start with, it is useful to point out that the rubrics of person and thing that the Non-human Rights Project couches its argument in and purports to contest at the level of their legal application to non-human beings, are categories that have not necessarily stayed close to their juridical origins. In the history of Western jurisprudence, 'person' and 'thing' traditionally did not have any metaphysical or moral-theological significance to them. The effect of the juridical classification was first of all functional. It was not that of dividing the world into beings with the capacity to hold rights from those which did not: the latter being thought of as necessarily and absolutely subject to right of the former. In classical Roman law, from which the concepts of person and thing are derived, the person (*persona*) had a narrow jurisprudential and transactional meaning.[7] It was ostensibly an *operation* of legal thought which was given its unity not through the recognition of a certain living being (the concrete individual) who could be attributed the general capacity to possess rights, but rather through the invention, the crafting of a mask in which the legal relation was brought more presently to mind. The Roman *persona* was, as the Roman law scholar Yan Thomas (whose work we will return to later) reminds us, first of all a casuistic aid, a makeshift solution, a juridical expedient,

[7] See especially, Yan Thomas, 'Le sujet de droit, le personne et la nature' (1998) 100 *Le Débat* 85-107. See also Alain Pottage, 'Unitas Personae: On Legal and Biological Self-Narration' (2002) 14(2) *Law and Literature* 275-308, at 289-290.

largely concerning the management of estates and inheritance.[8] In these casuistic origins, a single concrete individual could sustain multiple *personae* in certain contexts, just as a single *persona* could sustain multiple individuals.[9] What was central was the legal relation that was able to be more precisely figured in fashioning a particular 'person'.

'Thing' on the other hand, the category given to us through the meaning of the Roman *res*, would refer specifically to litigation and to the matter or value of what was in dispute. This was considered entirely separately from the metaphysics of the subject-object relation. What the Roman law firstly calls *res* (and which Western jurisprudence incorporates into its concept of thinghood) was not a passive object of the natural or material world supposedly subject – as animal rights advocates remind us – to the fiction of a purely abstract human dominion. It would be sufficient to observe the commonplace fact that only a subset of *res* in Roman law fell into the category of things that can be owned. Many types, such as those classified as sacred (*res sacrae*), holy (*res sanctae*), religious (*res religiosae*) or public (*res publica*), were excluded from the world of ownership or exchange and thus protected from human use and exploitation precisely in their vocation as 'things'.[10] More instructive still is the fact that the *res* itself in Roman law derived its definitive identity by the litigation, the proceedings in which it was held. What was essential in other words was that the *res* must remain identical in its value in the proceedings if it is to be subject to legal judgment. Thus: 'contrary to our juridical thought which functions on a confrontation of the free will and the object,' as Thomas notes, 'Roman law doesn't envisage the *res* in its relation of opposition to the subject, but in its relation of integration to the law [*droit*].'[11] When the Roman law says that we no longer have the same 'thing' *per se*, this is not a metaphysical determination, it is only a strict juridical operation observing the necessity for it to enter a new proceedings.[12]

Persons and things weren't classifications in this way of an outside world where the freedom and agency of one could correspond to the powerless objectification of the other. They were singular techniques in juridical art. It is against this strictly technical juridical conception that one can start to

[8] Thomas, Le sujet de droit.
[9] Ibid.
[10] See Yan Thomas, 'La valeur des choses: Le droit romain hors la religion' (2002) 6 *Annales. Histoire, Sciences Sociales* 1431-1462.
[11] Yan Thomas, 'Res, chose et patrimoine (Note sure le rapport sujet-objet en droit romain)' (1980) 25 *Archives de Philosophie du Droit* 413-426, at 418.
[12] Yan Thomas, 'La valeur des choses: Le droit romain hors la religion' (2002) 6 *Annales. Histoire, Sciences Sociales* 1431-1462, 1453. Thomas demonstrates how the Roman jurists could consider a thing to be 'absent' (*rem abesse*) at the moment when its value ceased to be the same. For instance the scenario where in relation to a current or anticipated action for recovery of a certain thing that had been stolen, when the plaintiff happens to unwittingly re-purchase that thing, even if he later realises his mistake, it is considered by the law paradoxically to be absent, not because the material object was missing but because the proceedings can no longer relate to the same thing.

observe the reinvention, the 'sacralization', that the categories have undergone particularly in their Christian theological reception and which we see only entrenched further in the frame of the Non-human Rights Project. There, person and thing are no longer the modest juristic techniques in aid of conceptualising the precise question of right raised by a concrete case. They have become the essentially transcendent categories over which the whole question of right in relation those animals, raised now to the polemical level, is referred. According to this formulation, the rights of an animal cannot exist unless the animal is first granted 'personhood'. But the granting of that status, even by a common law judge, seems to amount to something more than just an ordinary judicial decision. It in effect amounts to some divine consecration: what the project itself calls an unprecedented step, a leap of faith and a 'legal transubstantiation'.[13] The categories of person and thing are only further removed here from their simple jurisprudential use. The animal rights advocate doesn't expect the judge to invent, to craft some person as a tool of juristic thinking or to handle the *res* in relation to which the matter of the animal pertains in the proceedings. The categories themselves are experienced as legal-metaphysical givens designating a whole conceptual division of the legal world, a division that can only be challenged in the name of justice for certain beings who have been wrongly consigned to one category or the other.

III. Favourable and unfavourable jurisdictions of the non-human

It is not enough however just to refashion the categories of person and thing, under the program of the Non-human Rights Project, so that particular animals such as chimpanzees can be installed as a subject of right. The whole reclassification of the animal from 'thing' to 'person' – cleverly reshaped in this way under a moral-metaphysical guise – has to be properly filed somehow for judicial determination. This is no straightforward task. The change to the common law that the Non-human Rights Project anticipates may well be clearly understood, perhaps even over-determined. What remains is the means of constructing the ideal 'test case' in which that reform will appear as the necessary solution to a particular matter. The fate of the individual chimpanzees here becomes somewhat of an accessory to the real legal aim which is ideological. The courts are invoked less for the modest purpose of protecting an interest and resolving a dispute concerning the animal than they are selected to receive an already pre-ordained doctrine that the project, backed by the testimony of countless naturalists, primatologists, behaviouralists, neuro-psychologists and so on,

[13] The project explicitly reveals its inheritance here of the Christian theological-metaphysical formulation of the person traced most famously to Boethius (c. 480-524 CE). The definition of 'person' provided in Boethius's *Liber de Persona et Duabus Naturis*, ch. 3. for example is: '*Persona est rationalis naturae individua substantia*' (The person is an individual substance of a rational nature). See e.g. Aquinas, *Summa Theologica*, 1. 29. 1-3. From these early Christian inheritances the concept of the person has been tied, whether in religion or not, to the unity of body and soul.

seeks to have ratified. To achieve this effect nonetheless, the technical jurisdictional strings have to be understood and closely manipulated. The animal plaintiffs or applicants, the individual 'persons', must be carefully chosen. The case must be pursued in a particularly favourable court and jurisdiction.[14] The procedural forms in which the action is brought must be astutely selected: the preference given to old or even obscure common law writs (*habeas corpus* and *de homine replegiando*) over statutes that will run either into the pitfall of the interpretation of 'legislative intent' or, what would be just as unhelpful, laws that protect the animal still technically under the aegis of its 'thinghood'.[15]

There is thus a particular ethic to the conduct of litigation in a project that attempts to engage the animal not just at the level of its protection under law but at the level, quite distinctly, of its *right*. The whole management of the jurisdictional limits of the action is paramount, the precision of the legal question that must be submitted for determination, not to mention the management of the risk and reward of setting precedent, the necessity not to foreclose certain legal avenues, the potential to re-file the same questions for determination with the hope, another time, of a different outcome, the tendency to celebrate the small victories along the way and to downplay the losses. These are figures that don't just mark the fate of the daily adventures of the advocates for the Non-human Rights Project in their litigation. They are figures which also mark the shape of the jurisprudential arguments when they want to make them bear on the misplaced categories of law: 'person', 'thing'. The members of the project appear willing for example to count developments on both sides of a ledger concerning the modern theory of the legal personality as victories in their campaign. On one side, the project happily celebrates any inclination from a judge toward what we would call a 'fictionalist' point of view.[16] Under this conception, the legal person has no natural external referent outside whatever the law says it is from case to case: it being described as a product of policy rather than biology. This way of thinking is warmly received by the Non-human Rights Project who emphasise the fact, after all, that since judges have, by way of legal fiction,

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[14] This particular approach to the concept of choice of forum for the Non-human Rights Project appears to be theoretically informed by an exaggerated Holmesian realism. The project for instance takes this realism as far as proposing the use of algorithms, normally applicable in commercial contexts, to understand the legal terrain in a purely predictive dimension. The idea is that these algorithms should help determine which jurisdictions the project should file suits in with the most likelihood of having their doctrine of personality given recognition in common law. See Wise, 'Non-human Rights Project' (2010) 17(1) *Animal Law* 1, at 11.

[15] On the group's selection of *habeas corpus* and *de homine replegiando* see Steven M. Wise, 'The Entitlement of Chimpanzees to the Common Law Writs of *Habeas Corpus* and *De Homine Replegiando* to Challenge Their Legal Thinghood' (2007) 37(2) *Golden Gate Law Review* 219; Blake M. Mills and Steven M. Wise, 'The Writ of *De Homine Replegiando*: A Common Law Path to Nonhuman Animal Rights' (2015) 25 *George Mason University Civil Rights Law Journal* 159

[16] See Website of the Non-human Rights Project, 'That's One Small Step for a Judge, One Giant Leap for the Non-human Rights Project', http://www.nonhumanrightsproject.org/2015/08/04/thats-one-small-step-for-a-judge-one-giant-leap-for-the-nonhuman-rights-project/, accessed 12 December 2016.

recognised anything from ships, corporations, rivers, unborn children, religious idols and so on as 'persons' in various contexts, then there is no necessary or inherent obstacle to recognising an animal such as a chimpanzee also as a person before the law regardless of the fact that it has not traditionally been considered a 'natural' person.

Curiously however, the same success seems to be claimed from the opposite (which we can call 'naturalist' or 'realist') point of view as well. Here, the development toward extending the category of the person to entities other than the merely 'human' is claimed precisely against rather than in favour of the juridical use of fiction. This becomes clear as soon as one acknowledges that the central argument in favour of personification of the animal for the Non-human Rights Project rests not so much on a discrete juristic policy, the convenience of a certain artifice of legal thinking, but on a more or less moral-scientific analogy between the animal and the 'natural' person. In short, what is really seen as fictional, according to the logic in the Non-human Rights Project, is not the juridical construct of the 'person' but in fact the *denial* of personhood to beings who in their view possess every natural attribute that would qualify them for such a vocation. Here the importance of the expert scientific evidence becomes paramount. It is important however not necessarily in terms of the work of persuasion it effects in a debate about the capabilities and moral status of the animals themselves, for instance in terms of their agency, self-consciousness, language etc. It important rather in terms of the rhetorical terrain of 'facts' to which it aims to refer the legal problematic of personhood, this time cleared of its reliance on the artifices of legal technique. What it presents is a set of criteria for an inherent *naturalness* to personhood: a personhood that, on the advocate's submission, cannot be denied by the conventions and precedents of law and which may be affirmed at the level of fact, the fact of nature and the nature of the species.

The 'fictionality' of personhood can thus not be overly celebrated without certain dangers. Eric Posner issues a challenge to the project when he points out that the fiction of legal personhood for animals is in fact nothing remarkable. He notes that it has already been achieved, with less fanfare, for a number of other animals: a palila, a marbled murrelet, a spotted owl, each of whom he says successfully 'sought to enforce their rights under the Endangered Species Act, under a provision that gives "persons" the right to bring suit'.[17] In none of these instances did 'personhood' mean granting those animals the capacity to possess rights broader than what the upholding of the Act entailed. For Wise and the project this misses the point. Contrary to Posner's position here – where the occasional personality of the animal is left to the vagaries of legislative interpretation – personhood

[17] Eric Posner, 'Stop Fussing Over Personhood', http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/12/personhood_for_corporations_and_chimpanzees_is_an_essential_legal_fiction.html, accessed 12 December 2016.

for the Non-human Rights Project is nothing if not tied more closely to the inherent existence and moral worth of the individual in the esteem of the common law itself. The figure of nature, represented by the animal, is thus lent to the outline of the legal person in order to save it from the purely abstract, artificial and ad hoc functionalism which it is liable to become reduced to in the fictionalist narrative.

At the same time that the Non-human Rights Project welcomes the fictional extension of legal personality to certain animals, as a juridical artifice, they also seek to quickly convert and restrict that extension to an exceedingly 'factual' and 'natural' terrain so as to make the right of the animal something inherent to their species, and to erase any trace of artifice from the record. It is not just as a legal right but also, at some level, as a natural right that the chimpanzee is argued to be afforded the privilege of the writ of *habeas corpus*. It is clear that what is at stake within that project of advocacy and technical argument, somewhat clouded by the immediate concerns expressed for the well-being of the animals themselves, is a concern about the proper idiom for the set of practices and privileges we call *right*. The chimpanzee becomes a figure in this sense capable of salvaging the 'nature' that the advocate, holding steadfastly to the ideological work of liberalism, wants to reinscribe into the language of right and the techniques and technologies of law.

IV. To file nature within the categories of jurisprudence

I want to focus on a somewhat narrower problem which will hopefully cast some light on the issues that I have touched on so far. The extent of what we can call the 'theologisation', 'sacrilization' and 'polemicization' to the project of non-human rights can be difficult to appreciate without a more focused consideration of the jurisprudential tradition from which it tends to depart. In this context, it may be helpful to present an alternative picture – largely drawn in the following sections from the work of the legal historian Yan Thomas – of the peculiar way in which the subject of 'nature' happened to enter the language and technique of the Roman jurists. It is the Roman jurists who tend to take the closest care for their *ius*, their right, and who also go furthest in cultivating a juridical art that, in their *jurisprudence*, continues to rival the broader habits of thought in Western philosophy, metaphysics and theology. The distinct way, more particularly, in which the jurists were able to file the concept of nature and the speculative philosophical 'state of nature' within the strict rubrics of their civil law and jurisprudence, is able to shed an important light by contrast on a modern inability to think animals as subjects of right as such other than in a distinctly rhetorical or transcendental mode.

The particular study by Thomas that I would like to discuss is one first published in 1991 under the title 'Imago Naturae: A Note on the Institutionality of Nature in Rome'.[18] Thomas purports to explain the precise way in which the concept of natural law or natural right was decidedly unbound to any form of transcendence in the thought of the Roman lawyers. It would be easy to misplace the status of the animal in Roman law if one were to focus on the brief platitudes given to it in its remarks on natural law. It is this that explains the puzzlement of someone like Wise (the president of the Non-human Rights Project) when, in his magnum opus *Rattling the Cage*, he poses a question about the legacy of Roman law concerning the lawful relation to animals. Why, he asks, when the Romans recognised a natural law which ruled over humans and animals alike – a law that did not discriminate between human and animal – did they at the same time endorse a legal institution of dominion and ownership over animals which, by their own admission, as with the institution of slavery, was contrary to it?[19] Thomas begins his essay by identifying that, even in their purely didactic works, the Roman jurists do not accord nature or natural law any overtly hierarchical, primordial or co-ordinating function over private law as it is in the Stoic and Ciceronian philosophies. Rather, he suggests, they already deliberately circumscribe it within the divisions of their civil law such that it is in fact impossible to draw any implication that the law should derive from nature or that the civil law is subject to a natural law which exceeds it.

It is true that the natural law of the Romans, their so-called *ius naturale*, was represented in those didactic works as the outermost of a set of concentric circles that included in turn the law of peoples (*ius gentium*) and the civil law (*ius civile*). Natural law was considered under its broadest sense, as the law uniting all living things, men and animals alike, essentially under the same obligation to reproduce and rear their young. Following that was a human state of nature considered in two stages: firstly as a natural state of freedom and equality in which all men enjoy equally the fruits of the earth; then what they call the *ius gentium*, the law of nations, which arrives after nature and governs peoples among themselves with the advent of war, kingdoms, trade etc. The *ius civile* finally, Thomas tells us, is only a particular version of the *ius gentium* inscribed within the limits of the city. Each city has its laws that are to an extent internally universalizable without conferring any special superiority on those which may happen to be in common with the particular laws of other cities.

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[18] Yan Thomas, 'Imago naturae. Note sur l'institutionnalité de la nature à Rome' in *Théologie et droit dans la formation de l'Etat moderne* (Collection de L'école Français de Rome 147, 1991), pp. 241-278.

[19] Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* (New York: Basic Books, 2000), pp. 32-34.

However, the Roman jurists don't just reproduce the formulas of nature and natural law borrowed from rhetoric and moral and political philosophy. In that moral philosophy, as is well-known, nature serves a pre-eminent legitimizing function: a law instituted against nature or against natural law would supposedly be no law at all. Now, rather than refuting this philosophical position, the jurists instead dissociate the formulas – borrow from them and scatter them in isolated forms, 'deprived,' in Thomas's words, 'of their organic coherence'.[20] Nowhere in the work of the jurists does nature take normative precedence over the law, yet nowhere also do we see a definite refutation of it: any negation of it. Instead, quite ingeniously, as Thomas helps to show, they recruit it in the service of and for the affirmation of an immanent science of civil law. 'We don't devote enough attention,' Thomas notes, 'to this work by which ... the jurists produce a thought independent from the borrowed texts. The juridical treatment of natural law shows that transcendence is not a dimension in which the Roman jurists inscribed their norms.'[21] Thus, nature is 'prudently assigned to the sphere of private law' and when the jurists celebrate the natural law in this circumscribed place, evoking this universality without statuses or boundaries, he says, 'the contradiction splinters into the inherent universality of this nature and the narrowness of the place that reserves it for the topic of law.'[22]

V. The 'natural liberty' of the wild animal

In the work of the Roman jurists then we see a mode of thought which is something of the reverse of the 'sacralization' of the civil legal categories which we can observe in the animal rights discourse. Far from re-investing the categories of right with a nature that will serve as a basis for a morally transcendent authority, the universality to the figure of natural law is instead placed entirely in the service of a concrete case-law centred around the functional limits of the norms and customs of the civil law. This inclination toward the subtle, pragmatic and immanent relations of the law, the rigour and care with which the jurists accommodate nature (not begrudgingly but circumspectly) within their institutional jurisprudence, the tendency to see the law emerge less from the truth of nature than from the singularity of cases, has much to offer as well as much to caution the contemporary project of non-human rights.

Allow me to focus on one example from Thomas's essay. The example is one concerning the capture of wild animals in the law of acquisitive prescription. Thomas explains here how the concept of a state of nature, under the figure of primitive indivision, where property is unknown and goods are

[20] Yan Thomas, Imago naturae, p. 203. All quotations from the text are the author's own translation of the French original.
[21] Yan Thomas, Imago naturae, p. 209.
[22] Yan Thomas, Imago naturae, p. 210.

'common to all according to natural right', is maintained as a vestige not for a theory of the origin of laws but in the service of an immediate practical casuistry. It enters the picture when the jurist wants to outline a particular form of acquiring possession: specifically that form which goes under the title '*pro suo*', as one's own. *Pro suo* applied specifically to two instances: alluvial accretion to land and the capture of wild animals. What was understood by it was the relation of acquiring something, some good or some right of possession, through no other recognised means than as one's own. Thomas paints a brief picture of the technical theory of acquisitive prescription which he says governs the whole doctrine of Roman *possessio* and in which this problem was situated. When someone had acquired a good from someone who happened not to be the owner, the defect in the title was able to be overcome through usucapion: the passage of time being enough for this person's possession to become ownership. However, it was also necessary to invoke one of a discrete list of recognised modes of acquisition under the guise of which the good was received: for example, *pro emptores* (as buyer), *pro herede* (as inherited – i.e. where one believed one was the legitimate heir), *pro donato* (as gift), *pro dote* (as dowry) etc. In all of these titles, the subject possesses by virtue of having received it, under the pretext of one of a number of valid relations, from another. However, in relation to this list the title *pro suo* (as one's own) stands out. To acquire *pro suo*, such as with the capture of a wild animal '[t]he possessor who claims for himself invokes no juridical relation with another'.[23] He claims it only in the sense of an originary 'taking'.

Under this classical formulation, the jurists make an appeal to the figure of nature and natural law. However it enters the scene precisely circumscribed within the legitimate forms of possession that the civil law recognises. A whole casuistry of relations of possession is developed around animals exemplified for instance by the need to isolate the precise instant of 'capture' – is it enough for a hunter to have it within his visual field? – to have injured it and be in pursuit? – or it is necessary for the animal to be physically in custody? The juridical opinions vary. There is a case recounted by Pomponius however which is instructive on the point. A farmer was the owner of some pigs. A wolf snatched one of the pigs and dragged it away. A neighbour of the farmer who had some fierce dogs went in pursuit and recovered the pig. The opinion of the great jurist Q Mucius Scaevola was that just as wild animals that we have captured cease to be ours when they regain their natural liberty, animals that we own that have been taken by sea or land creatures cease to be ours when they escape from our pursuit and will belong instead to the first occupant.[24] Under these examples the figure of nature clearly particularises animals and wild animals over which it tells us there can only be a qualified form of possession: a provisional form characterised by the primitiveness of the 'state

[23] Yan Thomas, Imago naturae, p. 216.
[24] Yan Thomas, Imago naturae, p. 217-218. The example is from Ulpian, *Edict, book 19* in *Digest* 41, 1, 44.

of nature' to which the animal is associated. The same mode of acquisition that is thought to be primary in relation to all the others – the mode of acquiring by seizing as one's own – is at the same time maintained only as a relic, narrowly ascribed to the capture of animals whose very nature is to flee, who occasionally have the 'intention' of returning and so on. It is as if, Thomas says, 'in order to think the originary title *pro suo*, the law had to try to reconcile two contrary autonomies of the subject and of nature considered also as subject, since, in its primitive status, the animal can always recover itself, "escape from our custody and recover its natural freedom".'[25]

If there is a lesson here for our immediate concern, it emerges less through the content of the doctrine than the uniqueness of its method of coming to the topic of nature and the 'right' of the animal. It is not that the work of the jurists provides a workable authority or rhetorical example that could easily be added to the argumentative dossier of the Non-human Rights Project. But at the same time, it does seem to allow one to question the peculiarly salvific idiom that its practice of advocacy tends to express. Far from merely consigning the animal to the status of 'thing' and entrenching this in the history of the Western legal imagination, the Roman law in fact thinks the freedom and the autonomy of the animal as subject of right with a remarkable precision within its jurisprudential context. This is all the more so when this 'natural right' becomes singularly relieved of the transcendent value (the higher order) with which, according to the philosophical commonplace, it is necessarily invested and to which the institutions of civil law are meant to conform. Nature is rather, as Thomas suggests, only an 'image': a workable outline through which the artifice and institutionality of the law is able to be reflected, moulded and extended further. Upon the image of the natural right of the wild animal, its primordial autonomy and freedom, the Roman law unexpectedly constructs an important part to its technical theory of possession. In this context, it is given a very unique jurisprudential meaning, far from the transcendent position accorded to it in the philosophical discourse and far from the vulgarisation to which it is sometimes left in the polemical construction. The jurisprudences of the animal take precedence, in other words, over any sacralization of its status as subject of rights.

VI. The truth of nature cannot be hidden by its image

The Non-human Rights Project finds itself caught between the technics and the polemics of right. From the polemical point of view, it is convinced absolutely of the truth, the logic and the necessity of its argument. From the technical point of view it has set itself the pragmatic task of finding the right juridical envelope in which to make that argument enter the logic and reasoning of the common law. At the polemical level it wants to convince us of what it sees as a great moral problem

[25] Yan Thomas, Imago naturae, p. 217. The quote is from Gaius, *Institutes* 2, 67.

of our age: the slavery to which the non-human animal is still legally consigned. At the technical level it invites a new mobilisation and redeployment of the juridical categories of person and thing. Its polemic consists in maintaining that the right and legal subjectivity of the non-human animal – to this point in its long history – has been nothing but denied. Its technique however is, through the image of the intelligent animal, to more directly refer the substance of right to a 'nature' and to the truth of a nature which bears more overtly the insignia of liberation.

A critique of this project should not consist in merely highlighting the contradictions which beset it. To the extent that these contradictions also highlight important predicaments within modern legal reasoning, they deserve a more earnest encounter. At the heart of them apparently lies an uncertainty about the relation between truth and artifice and their place in the construction of laws. If personhood is a concept that must be extended to certain non-human animals, is this extension modelled on the truth of a nature that has so far only been concealed by the fictions and artifices of law? Or is it in fact itself a convenient fiction – admittedly petitioned for – but necessary to adequately extend the law (by artifice) to new ethical sensibilities? If the categories of person and thing represent artefacts available to us for the construction of our legal art and technique in other words, to what extent has that legal technique become beholden to the image and the imitation of nature? To what extent have those categories become ossified, finally, to the structure of a legal world divided between what one sees as the natural opposition between subject and object and which we are thus able to confront only in our moral-political imagination? As long as one is content to have the law follow a truth that exists outside of it, a justice that transcends it and a process of reform which – in the name of progress – goes on more or less unabated, then we will not be troubled if our language of right becomes occasionally or even typically polemical. But if one still has a concern – which I think is not completely foreign to that of the Non-human Rights Project – for making do with technical legal categories which, because they do not have any reference outside of themselves, can be moulded to the requirements of very diverse species of life and modes of existence, then this same polemical construction will appear as a serious impediment.

Allow me to close this brief analysis by drawing upon one final example from the essay by Thomas. Having shown the narrow and technical jurisprudential place that the Roman jurists were capable of reserving for their concept of nature, Thomas adds a further piece of evidence. The example concerns the Roman law of adoption. Adoption, in the Roman tradition, is an institution said precisely to be forged from an 'imitation of nature'.[26] This formulation appears to be driven by a more general Aristotelian maxim that art (including the art and fiction of law) imitates nature, a

[26] Thomas, Imago naturae, p. 222. The quote comes from Justinian, *Institutes* 1, 11, 4.

recurring theme in the jurisprudential material.[27] The idea is that if law is a work of creation – the creative act for example by which the jurist or the legislator is able to craft such a thing as a legal person and, in Ernst Kantorowicz's words 'endow it with a truth and life of its own' – then this work of creation of law is supposed to find its model in nothing other than that of the truth and essence of nature. Thomas attempts however, as before, to send this philosophical question down toward its casuistic roots in the Roman jurisprudence. There he finds that nature is again more of a makeshift image than a transcendent truth. What did the suggestion that 'adoption imitates nature' mean for the Roman jurists? First of all, says Thomas, it meant a set of practical institutional limits put upon the right of adoption. The adopter had to be of an age for example that meant that he could be the actual father of his adopted son, as if that son had been born of the adopter and his legitimate wife. But, this 'wife' was at the same time purely conjectural: it wasn't necessary that the adopter had an actual wife or had ever had a wife.[28] What was necessary was to specify that the filiation on which adoption (as a legal institution) was to be constructed was that of the filiation otherwise instituted as legitimate in law where, for instance, the 'true' father is none other than the one designated by marriage.[29] 'Imitation' in this way did not mean the relation that appearance has to essence, likeness to reality. 'Nature' after all, i.e. legitimate filiation, was itself nothing but institutional in Rome. Rather imitation meant the relation that the artifice and pretence of law had to what is actually true or supposed by law to be true.[30] 'Juridical art,' Thomas notes, 'widens as much as possible the gap between the model and the institution which imitates it.'[31] What were placed together in this way were not an absolute truth as against the mere appearance of the institution, but rather two institutional images: the one which is extended by fiction and the one from which that extension is modelled.

Thomas's analysis is taken one step further. An adage from the jurist Papinian states that 'the truth cannot be obscured by an imitation of nature'.[32] Thomas pays attention to the practical legal problem that this rule was developed to try to resolve. A son is first disinherited by his father. Afterwards the father emancipates him. Finally, he adopts him (either as a son or a grandson) through *adrogation*. The question is whether the original disinherison still applies to this son after he has been brought back under the power of his father by adoption. Is he like a new adoptive son

[27] For a detailed discussion of this in relation to the theory of art see Ernst H. Kantorowicz, 'The Sovereignty of the Artist: A Note on Legal Maxims and Renaissance Theories of Art' in *Selected Studies* (Augustin, 1965), pp 352-365.
[28] Thomas, Imago naturae, p. 223.
[29] Ibid.
[30] Ibid.
[31] Thomas, Imago naturae, p. 225.
[32] Ibid. See *Digest* 28, 2, 23.

who – with the pretence of the juridical act of adoption – is installed with all the rights of inheritance like at birth, or is he to be considered as the same son who simply returns as though he had never been emancipated with all the legal baggage so to speak of his previous existence, restored to his original 'natural' right? In Papinian's solution, the two institutional acts (emancipation and then adoption) are not added to one another but are rather annulled in returning the son to the more basic original position. The initial disinherison still applies, since in the words of the jurist: 'a son is never to be regarded as an adoptive son of his true father lest the truth be obscured through an imitation of nature'.[33] What the example demonstrates is the 'truth' or the 'nature' of which the maxim speaks is far from a state of affairs that exceeds or lies outside the strict institutionality of the law. It refers in fact only to the arrangement of instituted rights by which the father originally had the power to disinherit his son. We see then, in Thomas's analysis, the extent to which this nature is nothing but itself a kind of institutional plan from which the thought of law can proceed in its construction. And we also see why the distance that separates the 'truth of nature' from the juridical institution of right does not allow the intervention of a purely rhetorical or polemical perspective to take hold.

There is an insight here that, to bring this brief discussion to a close, I think may be helpful if one wants to engage with the challenge laid down by the contemporary interest in the right of the 'non-human' and especially the attempts to think the legal personality of non-human animals characteristic of the Non-human Rights Project. The challenge which this kind of project tends to pose on moral-philosophical grounds and which it couches in the language of the technical juridical categories of 'person' and 'thing', is still in search of a foothold in jurisprudence. To obtain that foothold, we will no doubt be unable to leave undisturbed the limits of nature to which juridical art, including the artifice and flexibility to the category of 'person', are tied. It will also not leave undisturbed the meaning of a 'nature' in which the subject and object of right have come to be inscribed. If there are some lessons, as I have suggested here, to be drawn from the work of the late Yan Thomas, it is because his remarkable study of Roman law shows us the degree to which – foreign to the tendencies of modern rights discourse – this tradition of law not only avoided turning its technical categories into self-evident rhetorical or metaphysical givens but also was able to go as far, when borrowing from the very terms of philosophical universalism, as converting these terms to the narrow technical and casuistic currency that its science of civil law demanded.

[33] *Digest* 28, 2, 23.