

## FOUNDATIONS OF ECOCENTRIC LAW

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<https://doi.org/10.17589/2309-8678-2021-9-4-72-98>

*This scientific article discusses the reasons for inefficiency (“impotence”) of modern environmental law as a normative reaction to the “destruction of Nature.” The scope of the destruction of Nature has been broadening. The environmental protection law has thus not influenced the resurrection of “destroyed Nature.” The essential reasons for the current excessiveness (intemperance) of man’s interaction with Nature (the reasons for the “destruction of Nature”) and/or reasons for the inefficiency of the modern environmental law should be sought for in the dominant anthropocentric cultural paradigm of the western cultures oriented towards an un-limited material progress. If anthropocentrism (exploitativeness) as the basis of human utilitarian interaction with nature has led to the “destruction of nature,” there is no doubt that the ecological reason remaining within the anthropocentric construction of Nature can not lead to its “resurrection.” Only the setting-up of the ecocentric construction of Nature may lead to the “resurrection” of Nature. This orientation must be followed by the nomos of the western cultures. A new law of nature on the basis of the new, ecocentric ontology and ethics is therefore necessary. This article thus analyzes the foundations of new ecocentric legal philosophy. This approach is original at the global level and is important at both the theoretical and applied levels. The new ecocentric legal philosophy should become the foundation of modern environmental law.*

*Keywords: inefficiency of modern environmental law; anthropocentrism; new ecocentric legal philosophy.*

**Recommended citation:** Senko Pličanič, *Foundations of Ecocentric Law*, 9(4) Russian Law Journal 72–98 (2021).



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## Introduction

The purpose of this article is to analyze the reasons for the ineffectiveness of modern environmental law and on this basis to propose the legal and philosophical foundations of the new environmental law. The essential reasons for the current excessiveness (intemperance) of man's interaction with Nature (the reasons for the "destruction of Nature") and/or reasons for the inefficiency of the modern environmental law should be sought for in the dominant anthropocentric cultural paradigm of the western cultures oriented towards an un-limited material progress. This article thus analyzes the foundations of new ecocentric legal philosophy. This approach is original at the global level and is important at both the theoretical and applied levels. The new ecocentric legal philosophy should become the foundation of modern environmental law.



## 1. Research Methods

In this paper, the analytical method has been used as the main scientific method.

## 2. Research and Results

### 2.1. “Impotence” of the Modern Environmental Protection Law

In the past decades the awareness of the necessity to “legislate temperance”<sup>1</sup> in human (economic) interaction<sup>2</sup> with Nature has been heightened. The inefficiency and/or “impotence”<sup>3</sup> of the normative reaction to the “destruction of Nature,”<sup>4</sup> i.e. the development of the “environmental law” (9) in the second half of the 20<sup>th</sup> century is becoming increasingly evident. The scope of the destruction of Nature has been broadening. The environmental protection law has thus not influenced the resurrection of “destroyed Nature.”<sup>5</sup>

Thanks to the scientific findings in the last few centuries concerning man’s co-dependent and equi-valent centrality in the “cosmic network” of biotic natural entities,<sup>6</sup> the main levers which have brought about the destruction of Nature and

<sup>1</sup> Expression used by Garrett Hardin. See Garrett Hardin, *The Tragedy of the Commons*, 162(3859) *Science* 1243 (1968).

<sup>2</sup> The direct subject of the law is the interaction between man and Nature. The interaction is twofold: spiritual, on the one hand, and material, on the other hand, (the use of Nature and waste disposal). Within the latter, economic interaction is especially important. Economic interaction is instigated by the desire to meet man’s needs, whilst from the point of view of Nature and/or natural equilibrium it burdens the environment. It covers utilitarian interaction (to meet man’s needs, in particular, energy needs) and waste disposal (in the broader sense) and nowadays (mostly industrial waste), i.e. pollution.

<sup>3</sup> Expression used by Klaus Eder. See Klaus Eder, *The Social Construction of Nature: A Sociology of Ecological Enlightenment* (1996).

<sup>4</sup> Expression used by Carolyn Merchant. See Carolyn Merchant, *The Death of Nature* (1980).

<sup>5</sup> For increasing “destruction of Nature” in the last decades see Ian G. Simmons, *Interpreting Nature: Cultural Constructions of the Environment* (1993) and Clive Ponting, *A Green History of the World: The Environment and the Collapse of Great Civilizations* (1993).

<sup>6</sup> The findings of quantum physics (W. Heisenberg, N. Bohr, G. Chew et al.) and other nature sciences (H. Maturana, F. Varela et al.) reveal the co-dependence and equi-valence of all natural entities including man. We should call the reader’s attention to the knowledge which for millennia has been accessible to other cultures (Australia’s “aborigines,” the North-American Indians). At the same time, this knowledge could be traced back to the very threshold of the western cultures to the time before Socrates. The western civilisation needed two thousand and five hundred years to acquire the knowledge which other cultures have had since the beginning. The path to this knowledge has been paved with the destruction of Nature and the destruction of most of these “primitive” cultures. The West is increasingly aware that the tradition of these “primitive” cultures which it has been destroying with such thoroughness contains human knowledge amassed through millennia (according to the latest anthropological and archaeological research, the history of Australia’s “aborigines” has continued uninterrupted for 80,000 years – Dreamtime) of the norms of human behaviour, ensuring harmony between human needs and Nature, to which man also belongs. It is a well-known fact that one of the key characteristics of the non-European “non-civilised” cultures (one of the fundamental criteria of civilisation was the scope of “cultivation” (exploitation) of Nature) has been environmental sensibility. This knowledge must, therefore,



are at the same time the main reasons for the inefficiency and/or “impotence” of the environmental protection law have become increasingly prominent.

The essential reasons for the current excessiveness (intemperance) of man’s interaction with Nature (the reasons for the “destruction of Nature”) and/or reasons for the inefficiency of the current normative interference (i.e. the environmental protection law) should be sought for in the dominant anthropocentric cultural paradigm<sup>7</sup> of the western cultures oriented towards an un-limited material progress.

The morality “controlling” man’s interaction with Nature has remained unchanged, i.e. utilitarian.<sup>8</sup> The “ecological reason” stems from the belief that man’s exploitation of nature has gone too far and hence is in favour of limitation and prevention of nature pollution and of a more rational exploitation of nature. The implementation of the ecological reason leads therefore to a more rational exploitation; however, man’s interaction with Nature continues to remain destructive (exploitative).

The spiritual background of environmental protection law is comparable to the spiritual background of the first legal norms which limited industrial pollution (before the “environmental explosion” of the ‘60s).<sup>9</sup> The spiritual background of both is anthropocentric – there is no shift in the comprehension of Nature which continues to be understood instrumentally, i.e. as “environment” for the use of man and has to be kept clean or in some other way befitting man’s comfort and health.<sup>10</sup>

“Ecological rationality”<sup>11</sup> which has encouraged the formation of the environmental law has preserved its anthropocentric nature. The *telos* of the environmental law is not the transformation of un-limitedness (exploitativeness) of the utilitarian (and in general burdensome) interaction with nature, but merely the formation of “safety mechanisms” for the purpose of the protection of human health and comfort.

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be incorporated in human culture. To paraphrase Bacon, knowledge is power, but not the power to destroy and to dominate Nature, but power to re-introduce harmony (equilibrium) with Nature.

<sup>7</sup> The expression “paradigm” originates in the ancient Greek (“*paradeigma*”) and means a “model,” “pattern.” The notion of “paradigm” should be understood in this essay as a combination of beliefs, perceptions and values which form a certain conception of reality in science, philosophy, and in society and/or culture in general. For more detail on scientific paradigms see Thomas S. Kuhn, *The Structure of Scientific Revolutions* (1962).

<sup>8</sup> The use value of Nature is therefore quintessential: “Nature is perceived and experienced as an object of human needs.” Eder 1996, at vii.

<sup>9</sup> These are legal norms established before the creation of the environmental law at the time of the “industrial revolution.”

<sup>10</sup> The same is expounded by A. Dan Tarlock, *Earth and Other Ethics: The Institutional Issues*, 56(1) *Tenn. L. Rev.* 43 (1988); Eder 1996; Leonard Ortolano, *Environmental Regulation and Impact Assessment* (1997) and John S. Dryzek, *The Politics of the Earth: Environmental Discourses* (1997).

<sup>11</sup> This expression is used by Eder, who wishes to emphasise the rationalist (Cartesian) basis of the environmental law. “When we speak of ecological reason we mean that the exploitation of nature has gone too far and that the pollution of nature must be limited. If we were to follow only this rationality, that would indeed make our exploitative interaction with nature more rational, but it would remain an exploitative way of interacting with nature.” Eder 1996, at vii.



In terms of such premises, the “impotence” of the environmental law is logical, i.e. no improvement is noticeable in the “environment;” on the contrary, the scope of the destruction of Nature is broadening.

If anthropocentrism (exploitativeness) as the basis of human utilitarian interaction with nature has led to the “destruction of nature,” there is no doubt that the ecological reason remaining within the anthropocentric construction of Nature can not lead to its “resurrection”. Only the setting-up of the ecocentric construction of Nature may lead to the “resurrection” of Nature.

This orientation must be followed by the *nomos*<sup>12</sup> of the western cultures. A new law of nature on the basis of the new, ecocentric ontology and ethics is therefore necessary.<sup>13</sup>

## **2.2. From the Anthropocentric to the Ecocentric (Philosophical) Construction of Nature – Creation of a New (Ecocentric) “Philosophy of Nature”**

In the last decades, the issue of a redefinition of the relationship between man and Nature has become an increasingly important philosophical issue also within the western philosophy which has throughout its history been predominantly anthropocentric (and anthropomorphic).<sup>14</sup>

A “new philosophy of nature”<sup>15</sup> incorporating the ecological awareness<sup>16</sup> is arising also from the western philosophical tradition, i.e. from the pre-Socratic philosophy<sup>17</sup>

<sup>12</sup> *Nomos* is understood as a normative social system of the western cultures, whereby the rules of behaviour are characterised by the attribute of lawhood. In the western cultures *nomos* is a synonym for legal rules governing behaviour. Their content depends on the context defined by the legal and political philosophy and/or the spiritual framework of a certain culture as the “ideological” superstructure of *nomos*.

<sup>13</sup> The term “environmental law” connotes a set of legal norms governing man’s communication with other cosmic phenomena (nature) – thus determining the rules of behaviour towards other biotic communities which, together with the norms regulating human private interaction and norms regulating social interaction, i.e. norms regulating man’s social and political character, represent the “human” *nomos*, the “human formula.” Artur Kaufmann, *Uvod v filozofijo prava* [Introduction to Philosophy of Law] (1994).

<sup>14</sup> The issue of relationship between man and other natural entities received minimal attention within the established modern western philosophy. Within the framework of this essay it is not possible to examine in more detail certain exceptions. Of the modern philosophers “*stricto sensu*” we should only mention Heidegger (his philosophical ecocentrism is explored in more detail by Michael E. Zimmerman in *Contesting Earth’s Future: Radical Ecology and Postmodernity* 91–150 (1994)); considerable interest is also Lévi-Strauss’s ecocentric “practical philosophy.” See Claude Lévi-Strauss, *Oddaljeni pogled* [The View from Afar] (1985). Nietzsche in Bergson also indirectly opposed the rationalist anthropocentrism. See Zimmerman 1994, at 57–91.

<sup>15</sup> The established term is “Environmental Philosophy.”

<sup>16</sup> The “secular” awareness and not the philosophical awareness “*stricto sensu*” is meant here, created at the time of “destruction of Nature” and encouraged by the scientific findings and traditions of other cultures.

<sup>17</sup> For more detail see Andrew Belsey, *Chaos and Order, Environment and Anarchy in Philosophy and the Natural Environment* 157 (Robin Attfield & Andrew Belsey eds., 1994).



which was relegated to the “dustbin of history” with the advent of “homo mensura” and the ensuing anthropomorphizing of the western philosophical thought.

The entrapment of the western civilisation in the ontological duality of the (anthropomorphic) spirit and matter which has placed man on the pedestal, at the crown of creation, and made him the master of the universe, has not been questioned, not even by Kant, who is well known<sup>18</sup> for solving another dualist issue of the West (epistemological dichotomy between reason and experience).<sup>19</sup>

In conjunction with the new ontology and the new ethics, the “new philosophy of nature” represents one of the key starting points for the transformation of nomos, i.e. a transformation of new legal and political philosophy and thus also new (instrumentalised) law of nature.

In view of the centrality of nomos in the western cultures, its very transformation is quintessential for the enforcement of the ecocentric social construction of nature. The transformation of nomos means the transformation of the system<sup>20</sup> which regulates the behaviour of man at the everyday level, i.e. the normative legal system.

In terms of the “status of Nature,” the current “ecologisation” of nomos<sup>21</sup> connotes in particular the creation of obstacles and constraints of human interaction with Nature. The measure for human interaction with Nature is the maintenance of natural equilibrium.

The “resurrection” of environmental awareness in this century has triggered different approaches to the philosophical construction of nature.

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<sup>18</sup> When he argued that it is not possible to cognise objectivity only through the faculty of mind (on the basis of reason and senses). Reason does not cognise things “*per se*,” as they are “in reality,” but only as they “appear” through the medium of senses (experience). As senses (experience). As reason is not able to see, only sensual and experiential objects are given, i.e. “*phainomena*” of objects (objectivities). Reason may not penetrate “*noumena*,” “things in themselves,” i.e. the objectivity itself. It is not capable of “penetration” (in the sense of spiritual-intellectual gaze), but is merely the faculty of thinking the object of the sensuous gaze. It is only capable of synthesising the varied, contained in the sensuous gaze, into a notion. Reason thus processes and shapes only that which is transmitted by senses, i.e. phenomena. The cognisant use of rational notions does not refer to the reality *per se*, but to its phenomena: the objects of possible experience. There can be no a priori knowledge except of objects of possible experience. Kaufmann 1994, at 85–86. For more information see Donald Palmer, *Looking at Philosophy: The Unbearable Heaviness of Philosophy Made Lighter* 35–36 (1994).

<sup>19</sup> If we accept Kaufmann’s interpretation of the connection between the dominant orientation of philosophy with the actual (ecological) circumstances of individual periods (Kaufmann 1994, at 27–32), Kant was primarily concerned with epistemological issues, i.e. the issues of cognition of reality, because he lived in a period of transition. The fundamental philosophical issue at a “time of doubt and mistrust” (*Id.* at 28) is the following: How to arrive at the knowledge of the “external world” from my awareness? This means: How can I know anything? What is at stake here is not a thing, object, entity, but an awareness, a method. What can easily happen is what Goethe reproached Kant’s philosophy at one point, namely, that it no longer arrives at the object (*Id.* at 29).

<sup>20</sup> This is the incorporation of the systemic ecocentrism in the western cultures.

<sup>21</sup> The “ecologisation” of nomos implies the incorporation of new ontology and ethics into a legal value system.



The ecological situation at the turn of the 20<sup>th</sup> century<sup>22</sup> triggered (first in the USA) the beginning of ecological anthropocentric awareness.<sup>23</sup> The criterion adopted in this approach to the issues of the “destruction of Nature” is the criterion of human health and comfort which necessitates the cleaning of the environment and a more careful exploitation of natural resources.<sup>24</sup> The philosophical framework for this approach is still Cartesian, issuing from the anthropocentric ontology and utilitarian ethics.

This (philosophical) approach represents the baseline for the dominant political and legal construction of Nature, i.e. “environmental protection.”<sup>25</sup>

At the same time, the ecological impulse spurred (again first in the USA) the creation of the ecological ecocentric awareness,<sup>26</sup> which rejects the anthropocentric construction of nature and takes into account the new scientific developments, giving rise to a new, ecocentric ontology and ethics. From the ontological point of view, man’s place is in Nature, as an equi-valent and co-dependent part of Nature. This ecocentric ontology has also given rise to the ecocentric ethics which imposes on man a respectful interaction with other natural entities preserving the natural equilibrium.<sup>27</sup>

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<sup>22</sup> The “destruction of Nature” as a result of intense development of “industrie.” For “state of Nature” at the turn of the 20<sup>th</sup> century see John McCormick, *The Global Environmental Movement 1–20* (1995) and Ponting 1993, at 346–393.

<sup>23</sup> This is so-called “shallow ecology.” “Shallow ecology is anthropocentric, or human-centred. It views humans as above or outside of nature, as the source of all value, and ascribes only instrumental, or ‘use’ value to nature.” Fritjof Kapra, *The Web of Life: A New Scientific Understanding of Living Systems* 7 (1996).

<sup>24</sup> Whilst the approach of “cleaning up the environment” cannot be incorporated in a philosophical context, the approach of “rational” exploitation of natural resources is connected with the “conservation philosophy,” which is usually linked in literature to the name of Gifford Pinchot, a well-known forestry expert from the USA from the beginning of the 20<sup>th</sup> century.

<sup>25</sup> “Environmental protection” is an approach dealing mostly with the issues of pollution, which it approaches from the point of view of anthropocentric construction of nature. It sees man as the master of nature and the issue of “destruction of nature” as merely the issue of the pollution of his environment. Such approach does not perceive the issue of the “destruction of Nature” as a deeper problem of man’s un-limited interaction with all forms of Nature and not only man’s environment.

<sup>26</sup> This is so-called “preservation philosophy,” personified at the level of “practical philosophy” by John Muir and Aldo Leopold and at the level of philosophy “*stricto sensu*” by Henry D. Thoreau and Ralph W. Emerson. See also McCormick 1995, at 1–26 and A. Dan Tarlock, *Environmental Law, But Not Environmental Protection in Natural Resources Policy and Law: Trends and Directions* 162 (Lawrence J. MacDonnell & Sarah F. Bates eds., 1993).

<sup>27</sup> “A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.” Aldo Leopold, *A Sand County Almanac in Law and the Environment: A Multidisciplinary Reader* 4 (Robert V. Percival & Dorothy C. Alevizatos eds., 1997). Regarding the issue of ecocentric ethics, i.e. ethics which emanates from man’s co-dependence and connectedness with other biotic communities (i.e. ecocentric ontology) and commands a respectful interaction with Nature, the question of motive of the ecocentric ethics arises. Why should I show respect for other biotic communities? The motive may be heteronomous and I show respect because I realise that I endanger myself if I continue the exploitative interaction. In this case, Nature only has instrumental value. Nevertheless, this approach represents significant progress in comparison with the anthropocentric ecological ethics. Whilst only imposing the protection of man’s environment, the ecocentric ecological ethics with its heteronomous motive refers to the maintenance of the equilibrium of biotic communities,



The above approach is the departure point for the further development of ecocentric philosophy of nature.<sup>28</sup> The key philosophical orientation is the philosophy of “deep ecology.”<sup>29</sup> Together with the already mentioned ecocentric ontology<sup>30</sup> and ethics,<sup>31</sup> one of its basic premises is the “naturalness”<sup>32</sup> of man’s (material) interaction with other natural entities. However, man’s centrality in Nature and man’s co-dependence and connectedness with other natural entities demand a respect for the limitations of the natural equilibrium,<sup>33</sup> which also connotes an enframing of the current un-limitedness of human interaction with Nature and/or satisfaction of human (material) needs within the constraints of the natural equilibrium.<sup>34</sup>

The philosophy of “deep ecology” stems, therefore, from a redefinition of the progressiveness of human development, in particular, the orientation of the western cultures into un-limited material progress. It implies, therefore, a redefinition of the “functioning economy” of western cultures.<sup>35</sup>

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or Nature as a whole, that I show respect because other parts of Nature have intrinsic value – they are a value in themselves apart from the importance they carry for man.

<sup>28</sup> At the level of legal construction of nature this approach influenced the formation of the legal category of “nature values” – national parks, first in the USA at the turn of the 20<sup>th</sup> century.

<sup>29</sup> This opposes the above mentioned “shallow ecology” based in anthropocentrism. The approach was introduced by Arne Naess, a Norwegian philosopher. See Arne Naess, *The Deep Ecological Movement: Some Philosophical Aspects in Law and the Environment: A Multidisciplinary Reader*, supra note 27, at 91; Zimmerman 1994 and Arne Naess, *Sustainable Development and the Deep Ecology Movement in The Politics of Sustainable Development* 61 (Susan Baker et al. eds., 1997).

<sup>30</sup> “Human species, along with all other species, are integral elements in a system of interdependence such that the survival of each living thing, as well as its chances of faring well or poorly, is determined not only by the physical conditions of its environment but also by its relations to other living things. (...) Humans are not inherently superior to other living things, they are members of the Earth’s Community of Life in the same sense and on the same terms in which other living things are members of that Community.” Paul W. Taylor, *Respect for Nature: A Theory of Environmental Ethics* in *Foundations of Environmental Law and Policy* 29, 29–30 (Richard L. Revesz ed., 1997).

<sup>31</sup> “Human use of the environment should not be destructive but should enhance the diversity, integrity, stability, and beauty of the biotic community. Individual plants and animals used by humans should be thoughtfully selected, skilfully and humanely dispatched and carefully used so as to neither waste or degrade them.” Wendy Donner, *Inherent Value and Moral Standing in Environmental Change in Earthly Goods: Environmental Change and Social Justice* 52, 61–62 (Fen Osler Hampson & Judith Reppy eds., 1996).

<sup>32</sup> Unlike certain extreme approaches, “inspired” by Leopold’s ethics and the “state of Nature” at the beginning of the 20<sup>th</sup> century, advocating the approach “let nature be nature” or striving for extreme limitations of human interaction with Nature. For more detail, see Tarlock 1993, at 179–181.

<sup>33</sup> Natural equilibrium is defined as the limit of human interaction with other natural entities, whereby the natural equilibrium defines the equilibrium of life of all biotic communities. Such is the prevailing approach. There are, however, more radical approaches where the ecocentric ethics claims respect for individual members of other biotic communities and also – the respect for “non-life,” i.e. non-living parts of Nature. For more detail, see *Foundations of Environmental Law and Policy*, supra note 30, at 39–44.

<sup>34</sup> “Richness and diversity of kinds of living beings have intrinsic or inherent value. Humans have no right to reduce this richness and diversity except to satisfy vital human needs.” Naess 1997, at 65.

<sup>35</sup> Also cf. Hazel Henderson, *Ethical Implications of Agenda 21* in *Ethics & Agenda 21: Moral Implications of a Global Consensus* 28 (Noel J. Brown & Pierre Quiblier eds., 1994).





The new “philosophy of nature”<sup>36</sup> has been gradually gaining ground since its initial position of “counterculture,”<sup>37</sup> and has become increasingly prominent within the established western philosophy.<sup>38</sup> It represents a philosophical departure point for a new, ecocentric paradigm.<sup>39</sup> This discussion, however, stresses its political operationalisation, comprised in the concept of “sustainable development,” which is the basis for the transformation of western cultures.

### **2.3. The Concept of “Sustainable Development” and the Necessary Formation of “Systemic Ecocentrism” of the Western Cultures (Premises of Ecocentric Legal and Political Philosophy)**

The ecological situation, on the one hand, and the increasing scope of ecocentric ecological awareness, on the other hand, led to a global political agreement at the turn of the century in the form of the principle of sustainable development.<sup>40</sup>

The principle of sustainable development is understood as a political operationalisation of the ecocentric ecological awareness.<sup>41</sup> It is understood, therefore, as an approach requiring humankind to adapt their interactions in conjunction with other biotic communities to the basic “law of Nature,” i.e. inter-connectedness of all natural entities. In this context, the preservation of a balanced state of Nature (all biotic communities) is essential. With regard to the centrality of the (un-limited) material progress, the adjustment of the production process of material goods is therefore essential, i.e. the adjustment of economy. It should be emphasised that this is not the principle of “zero growth,”<sup>42</sup> but a principle of adjustment of material progress (development) to the constraints of natural equilibrium.<sup>43</sup> In reference to

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<sup>36</sup> Or the “ecosophy” (philosophy of ecological harmony). See also Slovene philosophy Tine Hribar, *Ekologija in ekozofija [Ecology and Ecosophy]*, 1-2 Glasnik slovenske Matice 11 (1991).

<sup>37</sup> See an extensive discussion on the relationship of modern “post-modern” philosophy (in particular Derrida and Foucault) towards the philosophy of “deep ecology” in Zimmerman 1994, at 91–150.

<sup>38</sup> See *Philosophy and the Natural Environment*, *supra* note 17.

<sup>39</sup> Kapra 1996, at 6.

<sup>40</sup> Declaration of the U.N. Conference on Environment and Development 1992.

<sup>41</sup> Such an approach is crucial. Dick Richardson in his in-depth study of the concept of “sustainable development” calls attention to some of his anthropocentric predecessors (Brundtland Commission Report, *Our Common Future*). “Our Common Future not only emphasised that economic growth was still an objective of human society, but also advocated a five or even tenfold increase in world manufacturing output. It accepted the Western development paradigm and profligate Western lifestyle as a model for the industrialising world. Ecological sustainability was not seen as primary in the policy-making process, but rather as only one of a number factors.” Dick Richardson, *The Politics of Sustainable Development* in *The Politics of Sustainable Development*, *supra* note 29, at 52. That is why the necessity of incorporation of the concept of “sustainable development” in ecocentric framework should be emphasised.

<sup>42</sup> This was proposed by the Club of Rome (Meadows, *Limits to Growth*).

<sup>43</sup> The implementation of the principle of sustainable development is therefore connected with the definition of the “natural equilibrium.” In Slovenian law, the natural equilibrium is defined in Article 3



the existing excessiveness of the economic interaction with Nature,<sup>44</sup> the current adjustment implies, of course, a limitation of the economy.

As an inter-national political agreement, the principle of sustainable development has a twofold meaning. Firstly, it is a political and social programme of cultural transformation of human communities all over the planet. And secondly, with regard to the actual social organisation of man (national states) it must be suitably incorporated within the individual social systems, providing therefore a relevant framework for the transformation of law. When incorporating the principle of sustainable development into legal order, the pervasiveness of anthropocentrism in all segments of the western cultures needs to be taken into account.<sup>45</sup> The ontological and ethical orientation of the said principles does not have its "roots" in the existing (legal) value system and/or established western legal and political philosophy.<sup>46</sup> The western legal philosophy has not included other natural entities in the quest for the "human formula."<sup>47</sup>

From the ecocentric ontology, i.e. co-dependent centrality of man in "ecological community"<sup>48</sup> issue the rules of behaviour, i.e. ethical norms, with the following essential commandments: show respect for other natural entities, treat them with respect and satisfy own personal (material) needs within the limits of the natural equilibrium. When other natural entities are being used (to meet own needs) the limit determined by the natural equilibrium must never be overstepped. The basic value of the nascent culture is the maintenance of the natural equilibrium; its implementation necessitates a limitation and/or adjustment of one of the key existing values – material progress and/or un-limitedness in satisfaction of material needs. The limitation is necessary because the un-limitedness of the material progress has brought about the destruction of Nature. Man must return within the boundaries set by the natural equilibrium.

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of the Nature Protection Act (Official Gazette of Republic of Slovenija *Zakon o varstvu okolja* No. 39/06, 49/06 – ZMetD, 66/06 – odl. US, 33/07 – ZPNačrt, 57/08 – ZFO-1A, 70/08, 108/09, 108/09 – ZPNačrt-A, 48/12, 57/12, 92/13, 56/15, 102/15, 30/16, 61/17 – GZ, 21/18 – ZNOrg, 84/18 – ZIURKOE and 158/20) as a state of mutually balanced relations and influences of living beings among themselves and their habitats. Under the law the natural equilibrium is upset if human activity destroys a biocenosis in terms of quantity or quality; if it encroaches on or destroys the habitats of plant or animal species or affects the proper functioning of ecosystems; if it interrupts the mutual connection between individual ecosystems or causes a significant isolation of certain populations.

<sup>44</sup> Cf. Richardson 1997, at 56.

<sup>45</sup> Klaus Eder ascertains that the pervasiveness of anthropocentrism in the western cultures practically "pushes" us into the exploitation of nature. See Eder 1996, at vii.

<sup>46</sup> One of the quintessential values of the western cultures is the material progress and/or the satisfaction of material needs. This value is directly connected with the exploitative and/or anthropocentric attitude of man towards other natural entities.

<sup>47</sup> Kaufmann 1994, at 134.

<sup>48</sup> Expression used by Roger S. Gottlieb. See *The Ecological Community* (Roger S. Gottlieb ed., 1997).



The oppositeness of the above mentioned values is manifest: on the one hand, there is unlimited exploitation of nature generated by the tendency towards an un-limited material progress and, on the other hand, the need for the adjustment of the use of Nature and/or the adjustment of satisfaction of material needs to the constraints of the planet and/or Nature, i.e. constraints defined by natural equilibrium. However, this is not the oppositeness between the value of the material progress itself and the value of the preservation of natural environment. The oppositeness relates to the un-limitedness of material progress, i.e. the un-limitedness and/or exploitativeness of human interaction with Nature.

It has to be established that despite the “breakthrough” of the issues of the relationship between man and other natural entities from the margins of philosophy (“counterculture”) in the last decade,<sup>49</sup> Nature continues to be ignored in the dominant contemporary legal philosophy and social theory (political philosophy) regardless of the ideological or philosophical origin.

Regardless of the possible reasons for such ignorance, this stance, today, when these issues have become global political issues<sup>50</sup> can not be explained otherwise than by entrapment within the context of anthropocentric orientation of the western culture.

Man’s “descent” into Nature implies, therefore, a value system which has “no roots”<sup>51</sup> in the western cultures. In other words, in the actual established legal and political philosophy as the “ideological superstructure» and the starting point of the positive law and the state, the central position is taken by man and just satisfaction of man’s material needs, whilst Nature (natural equilibrium) remains “outside the door.”

The successful transformation of law and/or its effectiveness (influencing the change in the treatment of other parts of nature in everyday life) is therefore directly related to the incorporation of values introduced by the new awareness in a (legal) value system of the western cultures. The first step of the transformation of law is therefore the ecologisation of legal philosophy.<sup>52</sup>

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<sup>49</sup> “Until recent decades, most western thinkers and traditions have been silent about the evolving rape of nature and its consequences for humanity. (...) An occasional Romantic poet, a tradition of conservatism very much outside of mainstream social and ethical theory, early (largely ignored) glimmerings in Heidegger and the Frankfurt School (...) – these exceptions prove a rule of profound intellectual blindness. Theorists for the most part took it for granted that how humanity treated the nonhuman world was not a serious problem.” *The Ecological Community*, *supra* note 48, at x.

<sup>50</sup> This is a global ecocentric political construction of nature, “materialised” in the Rio Declaration.

<sup>51</sup> “Environmental Law is entering a critical phase because environmentalism is at a turning point. The real debate about how environmental considerations should be integrated into the economic and social order is just beginning. The next debate will be centred around the forthcoming re-evaluation of the core legislation of the environmental decade.” Tarlock 1993.

<sup>52</sup> Only a few authors have dealt with some aspects of this topic so far. In recent years Vito De Lucia in his article outlines some starting points for an ecological philosophy of law. See Vito De Lucia, *Towards*



### 3. Discussion and Conclusion: The Foundations of Ecocentric Legal Philosophy

Teach your children what we have taught our children: that the earth is their mother. Whatever befalls the earth befalls the sons of earth. If men spit upon the ground, they spit upon themselves. The earth does not belong to man, man belongs to the earth. Man did not weave the web of life, he is merely a strand in it. Whatever he does to the web, he does to himself.

*Chief Seattle, The Squamish, 1854*<sup>53</sup>

No real progress can be made in environmental law unless some of the insights into the sacredness of land derived from traditional tribal (Indian) religions become basic attitudes of the larger society.

*Vine Deloria, Jr., Standing Rock Sioux, 1991*<sup>54</sup>

#### 3.1. Introduction

Nomos is understood as the normative social system of the western cultures, whereas the rules of behaviour are characterised by the attribute of lawhood. In the western cultures, nomos is thus the synonym for legal rules governing behaviour. The content of these rules depends on the context determined by the legal and political philosophy and/or the spiritual framework of a certain culture as the “ideological” superstructure of nomos.

The nomos of the western cultures has ever since the mentioned turning point of the “homo mensura,”<sup>55</sup> i.e. the separation between humanity and nature, lost touch with the “law of Nature” (nomos theios) and has become the “property” of man – “human law” (anthropeioi nomos).<sup>56</sup> In the history of the western civilisation, the idea of law<sup>57</sup> has been linked only to man.

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*an Ecological Philosophy of Law: A Comparative Discussion*, 4(2) J. Hum. Rts. Env't 167 (2013). Sara De Vido in her article proposes an eco-centric approach to International Law and outlines some of basic principles. See Sara De Vido, *A Quest for an Eco-centric Approach to International Law: The COVID-19 Pandemic as Game Changer*, 3(2) Jus Cogens 105 (2020).

In this article, this topic is addressed *comprehensively* – in it I propose *the foundations of an ecocentric legal philosophy*.

<sup>53</sup> The Squamish are North American Indians. Ponting 1993, at 150.

<sup>54</sup> The Sioux are North American Indians. Hill 1994, at 27.

<sup>55</sup> In the original: *metron anthropos*.

<sup>56</sup> Cf. Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* 31–33 (1990) and Surya Sinha, *Jurisprudence (Legal Philosophy) in a Nutshell* 18–22 (2006).

<sup>57</sup> The idea of law and/or the concept of law is connected with justice. In our examination of the issue of the rules of human behaviour in relation to other natural entities, we are interested in the substantial aspects of the legal philosophy, i.e. the substantive issues of the correct, just law.



In this regard, it should be noted that this essay does not deal with the issue of lawhood (statehood) as the key attribute of “anthropeioi nomos,”<sup>58</sup> but that we are interested in the centrality of man in Nature and/or the incorporation of the “natural law” in the “human formula.”<sup>59</sup> The idea of law (justice) overlaps at this point with the issue of legal ontology. In this sense, the human formula and/or its part which regulates human behaviour in relation to other natural entities (“nomos interspecies”)<sup>60</sup> is understood as the “correct path”<sup>61</sup> which ensures a harmonious centrality of human community in Nature.

The lawhood of the rules of behaviour is understood as a departure point<sup>62</sup> whereby the desired de-anthropocentrism of nomos needs to be redefined.

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<sup>58</sup> We are not dealing with the anarchist political philosophy. Concerning law and state in the anarchist political philosophy see the excellent study by authors Thom Holterman & Henc van Maarseveen, *Law and Anarchism* (1984).

<sup>59</sup> This is Dostoyevsky’s syntagm who once said: “The ant knows the formula of its abode, the bee knows the formula of its beehive – they know it not in a human way, but in their own way – but that is all they need. Only man does not know his formula” (according to Kaufmann 1994, at 134).

<sup>60</sup> For the purpose of transparency, for that part of the human formula which specifies the rules of behaviour with regard to other biotic communities, the term “*nomos interspecies*” or “law of Nature” will be used and for other parts of the human formula (the rules regulating man’s private interaction and the rules regulating man’s social interaction, i.e. man’s social and/or political thought, the term “internal law” will be used.

<sup>61</sup> For understanding law as the “correct path” see George P. Fletcher, *Basic Concepts of Legal Thought* 38–39 (1996). For general issues of legal ontology cf. Richard A. Posner, *The Problems of Jurisprudence* 161–247 (1990).

<sup>62</sup> Here we should call your attention to the fact that the established western legal and political (liberalist) philosophies emanate from Hobbes’ syntagm “*homo homini lupus*” and the ensuing “*bellum omnium contra omnes*” (hence from the assumption that man is an aggressive and selfish being) as a starting point and/or “natural state” into which subsequently enter the law and state, at the transition from a natural (pre-legal, pre-civilisation) state into a social state. This is a vulgarised interpretation of Darwin’s theory, so-called social Darwinism (socio-biology), which perceives the basic “law of nature” as the food chain in which “big fish eat small fish” and applies this to the understanding of relationships among people. According to this view, conflicts among individuals and groups are resolved by competition of the parties in conflict. Such method of resolving conflicts is natural (biological), whilst resolving conflicts (contentiousness and conflictness are, as has been said before, the basic property of human community in a “natural state”) through the interference of state and law is an artificial method of conflict resolution. Regardless of the already mentioned fallacy of Hobbes’ assumption of the “natural state” of man, i.e. regardless of the fact that in the past there existed cultures with a different value orientation (the Iroquois, the Huron, etc. – see also Jack Weatherford, *How the Indians of the Americas Transformed the World* (1988) and Margaret Mead, *Coming of Age in Samoa* (1928); cf. also Peter S. Wenz, *Environmentalism and Human Oppression in The Ecological Community*, *supra* note 48, at 3 and Zimmerman 1994, at 165–170), the fact that the contentiousness and conflictness seems to be, in accordance with the mentioned empirical findings in the recent decades, a prevailing characteristic of the western culture. It is contentious, however, whether it is possible to expand such a finding (eurocentric) to encompass man as a species. It is contentious, therefore, whether aggressivity in relations among people in the western cultures, evident practically at every step of the way (at the empirical level as well as the level of imagination – media), allows the conclusion of man’s “wolf-like” nature (biological-instinctive orientation).



It is not possible to discuss the lawhood of the “human formula” without the state. The state is understood as a result of social agreement reflecting man’s social aspect (Aristotle’s *zoon politikon*).<sup>63</sup>

From the point of view of redefinition of the relationship between human and other biotic communities, the incorporation of Nature in the basic social agreement or the *contrat social* (social agreement) is crucial and is understood as the “sample-genetic definition of civil life,” as an idea of the hypothetical original state, as the widest framework for human social aspect, i.e. a frame for human community, society, in short, the “generator of civil society,” whilst for the purposes of our essay, the focus lies on the entry of Nature in *nomos*, i.e. the (authoritative) normative system of human community.

In this sense, social agreement is understood as the contract of statehood providing the basis for the operation of the state, assigning the attribute of lawhood<sup>64</sup> to the “human formula.” The contract of statehood, therefore, is understood as the basic consensus regarding human social organisation which at the “material” level, the level of the positive law, is represented by the constitution, whereby we are interested in particular in that part of the contract of statehood (constitution), as a social pact, which refers to the substantive definitions, i.e. definitions of the fundamental common values and goals.

### **3.2. Shaping of Ecocentric Legal Philosophy**

#### **3.2.1. Premises of Natural Law**

The scientific realisation of man’s centrality in the network of co-dependent natural entities (“*prima ontologia*”) is certainly one of the realisations of the natural, cosmic law, the “divine *nomos*” (“*nomos theios*”), i.e. law which throughout the history of the western man has provided the criteria and norms for human behaviour.

The fundamental natural law (*Logos* – Heraklit, common to all natural entities, is the co-dependence and the inter-connectedness of all natural entities. The fundamental (cosmic) law is thus the same for all Nature, which means that all living beings must abide by it. It is the “cosmic formula” showing man his place in the *cosmos* (Nature); another issue altogether is the “human formula” and what it should be like.

In terms of rules of behaviour which man should respect in interacting with other natural entities, it is (thanks to *prima ontologia*) no longer possible to talk of

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<sup>63</sup> In this sense we issue from the liberalist (social/political and philosophical) context of contractuality simply because of its (liberalist) all-encompassing empiricism in the contemporary western cultures. According to de-Shalit (Avner de-Shalit, *Is Liberalism Environmental-Friendly?* in *The Ecological Community*, *supra* note 48, at 82, 83), when discussing the transformation of *nomos*, it is necessary to take into account (the philosophical orientation) of the actual prevailing political context, i.e. liberalism.

<sup>64</sup> Cf. David Gauthier, *The Social Contract as Ideology in Contemporary Political Philosophy: An Anthology* 27 (Robert E. Goodin ed., 1997) and Quentin Skinner, *The State* 3–26 (1989).



the “indisposition”<sup>65</sup> of nature, i.e. the problem which condemned the philosophy of natural law to failure in its search for the criteria and norms for human behaviour “which would turn out to be resistant to human arbitrariness.”<sup>66</sup>

“Prima ontologia” is thus cognisance obtained from Nature, allowing man to understand<sup>67</sup> the criteria and norms for his behaviour towards other natural entities.<sup>68</sup> Prima ontologia and the ensuing rules of behaviour represent the cognisance of the natural, cosmic law – order that must be taken into account in the formulation of the positive law. They are therefore the legitimisation of the correct or just law (at least in terms of the relationship with other natural entities).<sup>69</sup>

“Prima ontologia” shows man his initial centrality – centrality in Nature. Man, therefore, is not merely a social, political being (zoon politikon), but is (first and foremost) a natural being (zoon physicon). The basic law of nature, the cosmic order, and the inter-interconnectedness and co-dependence of all natural entities are for the western man, defined in culture as the antipode of wild nature,<sup>70</sup> a given, committing him to action in compliance with the cosmic order.

The image of Nature as a dynamic interaction of mutually intertwined and co-dependent natural entities, signifies the restoration of the organic image of Nature.<sup>71</sup>

The above mentioned philosophical premise of law is also the basic premise of pre-Socratic philosophy (Ionic nature scientists) which was relegated to the “dustbin of history” with the advent of “homo mensura” and the ensuing anthropomorphizing of the western philosophical thought. As shown above, the centrality of western

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<sup>65</sup> Kaufmann 1994, at 50.

<sup>66</sup> *Id.*

<sup>67</sup> This is a scientific, and thus intellectual (rational) cognisance of the “cosmic law.” Kant rejected the possibility of rational cognisance of the objective world, but not entirely. He attributes to reason the potential for a priori knowledge of the objective world (not through sensuousness) within the mathematically supported natural science. Kant therefore admits the possibility of a rational cognisance of just law, if such cognisance is achieved with the aid of science. Cf. Kaufmann 1994, at 83–86. Thus also Richard O. Brooks, *Coercion to Environmental Virtue: Can and Should Law Mandate Environmentally Sensitive Lifestyles?*, 31(1) *Am. J. Jurisprud.* 21, 36 (1986).

<sup>68</sup> Cf. Herbert L.A. Hart, *Koncept prava [The Concept of Law]* 178 (1994).

<sup>69</sup> Natural law has always been understood as the criterion of the positive law, as a criterion of its legitimacy. According to the classical approach, the natural law provides the basis for the positive law.

<sup>70</sup> Culture as the domain of order as an antipode to nature as the domain of disorder, chaos, stems from the already mentioned image of nature as a chaotic world which man must leave behind.

<sup>71</sup> In his discussion of the connection of natural law with the image of nature, Richard A. Posner establishes the fatal consequences of the changes of the image of nature. “It was one thing to speak of natural law when nature was conceived to be the expression of divine love or order, and quite another to find universal legal norms in Darwinian nature, red in tooth and claw. The natural law project has never recovered from what Nietzsche called the death of God (at the hands of Darwin).” Posner 1990, at 14.



civilisation in the ontological anthropocentrism stemming from the ontological duality, was not questioned, not even by Kant in his (famous) solution of the other (epistemological) duality of the West.<sup>72</sup>

The ecocentric ontology (prima ontologia) and the ensuing ecocentric ethics has long-term consequences for the shaping of human nomos. It demands that man create law and social order in compliance with the mentioned premise of the "natural law." This means a departure from the western man's centrality in ontological duality which places man apart from Nature (cosmos). In creating order, the rules of behaviour, and laws, man must take into account his position in Nature (he is part of Nature and not its master) and his vital connection with other biotic communities.

If we paraphrase Artur Kaufmann through the optic of ecocentrism, "law is a cluster of mutual relations of people and relations towards other natural entities."<sup>73</sup> The mentioned (scientific) cognisance of the basic law of nature translated into the "philosophical language" means the following: the ontology of relations (among people and between man and the other parts of Nature), i.e. "prima ontologia."<sup>74</sup>

If the western legal philosophy has dealt so far with the filling of the void which has occurred with the "banishment of Nature," Nature has re-surfaced as the force aided by science to guide human behaviour in relation to other natural entities.

The search for the natural law does not focus on a preordained collection of natural laws which would determine the rules of social (human) order, but merely the "cosmic order" which would show man his true place in creation, in Nature.

This is then the issue of relation between man and Nature and hence the issue of "cosmic formula." From here on it becomes the issue of the "human formula," i.e. human nomos.

The answer to the issue of what the "human formula" should be like depends on the cognisance of the "cosmic formula." The ideological and value orientation of the human law (and hence the rules regulating the relationships between people) depends on the previous ontological cognisance of the relationship of man with Nature, the remaining cosmos.<sup>75</sup>

<sup>72</sup> Although, according to Kaufmann, there was, in the field of philosophical epistemology, no way back after Kant's philosophy (epistemology), it should be emphasised that Kant was aware, even though his ontology/cosmology remains within the anthropocentric "mainstream" western philosophy (man is the master of nature), of the harmoniousness of the "starry sky above;" he saw it, however, (within the spiritual framework of his period - the liberation of man) merely as a universe of religious-artistic intuition and not as a guide for human action in relation to other natural entities. See also Robert C. Solomon & Kathleen M. Higgins, *A Short History of Philosophy* 213–214 (1996).

<sup>73</sup> Kaufmann 1994, at 32.

<sup>74</sup> "Instead of the ontology of substance, ontology of relations should be developed." *Id.* at 32.

<sup>75</sup> For more detail on the connection of human relations with Nature inside human community see Wenz 1997. On the basis of anthropological sources, Wenz demonstrates the direct link of the "conquest" of nature, i.e. the anthropocentric social construction of nature with the wish to control, dominate, or, in the words of Derrida "control-impulse." "Human oppression results largely from technologies and





Insofar as “prima ontologia” is based on the image of wild nature which man must cultivate to establish order, the ideological basis for human nomos also rests on the image of the man as a savage, living in a natural state “bellum omnis contra omnem.” Hence the human nomos is a means of creating social order from the natural state of chaos and dis-order.<sup>76</sup>

If, on the other hand, prima ontologia is based on man’s centrality in the dynamic harmonious relationship with nature, this underlying view has a corresponding value system in human nomos.<sup>77</sup> The anthropological and, therefore, empirical confirmation of the mentioned link can be found in most non-western (“primitive”) cultures.<sup>78</sup>

If the western philosophy of law has been predominantly characterised by an awareness of a lack of knowledge about human law (and what it should be), this, according to Kaufmann,<sup>79</sup> only reveals a deep insecurity as to what man really is. Or, in the words of Dostoyevsky:

The ant knows the formula of its abode, the bee knows the formula of its beehive – they know it not in a human way, but in their own way – but that is all they need. Only man does not know his formula.<sup>80</sup>

The search for man’s “formula” begins in “prima ontologia,” i.e. in the knowledge of the oneness of the reality whose part man is. The subjective-objective notion of reality in which man “observes” Nature “from above” and questions his own essence does not, of course, provide the framework for solving the riddle of man’s formula.

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institutions developed under the guidance of mainstream anthropocentric views. (...) Devaluation of nature is related not only to the development of more advanced agriculture, increasingly complex social divisions of labour and relations of exploitation, but also to the desire for control.” *Id.* at 4.

<sup>76</sup> Hobbes’s legal and political philosophy is one of the cornerstones of the western culture. For an analysis of the western cultures from the point of view of a “mechanical” model of social community see Merchant 1980, at 206–215.

<sup>77</sup> The connection of man with other parts of Nature and man’s relationship with fellow human beings was already the subject of study by Montaigne in the western philosophy. Montaigne posits that a brutal attitude towards animals leads to the brutal attitude to people. For more detail see Andrej Kirn, *Ekološka (okoljska) etika [Environmental Ethics]* 10–11 (1992).

<sup>78</sup> Within the framework of this essay it is not possible to give more attention to this issue. For more information on the direct relationship of individual cultures of the North American Indians with nature and human relationships (also between men and women) see Llewellyn, *The Cheyenne Way*; Weatherford 1988; Jack D. Forbes, *Columbus and Other Cannibals: The Wetiko Disease of Exploitation, Imperialism and Terrorism* (1992) and Wesel, *Matriarchy Myth*.

The underlying ecocentric value of human nomos is best illustrated by the wisdom of the chief of the Indian tribe Nez Perce: “Treat all men alike. Give them all the same law. Give them all an even chance to live and grow. All men were made by the same Great Spirit Chief. They are all brothers. The earth is the mother of all people, and all people shall have equal rights upon it.” Chief Joseph, Nez Perce, 1879, according to Chief Seattle, from *Words of Power: Voices from Indian America* 48 (Norbert S. Hill Jr. (Oneida) ed., 1994).

<sup>79</sup> Kaufmann 1994, at 134.

<sup>80</sup> *Id.* at 134.



The different ontological premise of man's position in the universe, i.e. "ontology of relationships," provides assistance in the search for the "correct and just" human nomos. Only cosmic nomos exists objectively (in nature), whilst man must find his own nomos, his own "formula."

The ecocentric value orientation of nomos will thus have to be gradually reflected within that part of "human formula" which regulates the mutual interaction of human community (i.e. in the "internal law" of human community). The inter-connectedness of all natural entities (human and other biotic communities), i.e. mutual ecocentric interaction, as the ontological characteristic of man's position in cosmos, is (also) the underlying value of the "internal human law."<sup>81</sup>

### 3.2.2. *Redefinition of the Western Legal Philosophy – Natural Equilibrium as the Underlying Universal Legal Value (Ecocentric Legal Philosophy)*

#### 3.2.2.1. Idea of Law

The scientific realisation of man's central position in the network of co-dependent natural entities ("prima ontologia") has re-introduced the issues of man's centrality in Nature on the stage of the western philosophy. Other natural entities "have returned" to the western philosophy of law, for centuries "burdened" merely with the issues of man.

The determination of the rules of conduct which man must respect in interaction with Nature also implies an expansion of the idea of law itself (justice and correctness). Justice also refers to the interaction between man and Nature and not only to the interaction within human community. Just law, therefore, (from the point of view of relationship between human and other biotic communities) is law which complies with the ecocentric ethics, law which directs man's conduct in order to preserve the natural equilibrium. Consequently, the economic interaction has to be maintained (kept) within the framework ensuring the vitality of other biotic communities.<sup>82</sup>

"Prima ontologia" as the scientific cognisance of the dynamic link and co-dependence of all biotic communities is the philosophical premise of nomos. The connectedness and co-dependence, i.e. the ecocentric ontology, implies the exercise of respect and care in human interactions with other natural entities, and hence implies

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<sup>81</sup> Interactiveness in the sense specified above as a characteristic of human "internal law" has been established by Roberto M. Unger with regard to ancient China. "All in all, the feudal world of ancient China provides us with wonderful example of society almost wholly dependent on interactional law and not yet acquainted with other sorts of law." Roberto M. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* 96 (1976).

<sup>82</sup> This approach has been criticised by certain ecocentric philosophers as "speciesism." For more detail see *Foundations of Environmental Law and Policy*, *supra* note 30, at 43. Such criticism is accepted at the philosophical level; however, in the process (collective action) of "resurrection of Nature" it should be emphasised that human community has only just entered the transition phase from anthropocentrism to ecocentrism. In view of that, the philosophical approach of "deep ecology" (the respect for life of individual natural entities) or the approach of prof. Stone (the respect for life and thus also of non-living nature) may represent a very remote goal indeed.



the ecocentric ecological ethics.<sup>83</sup> Its essence is to keep the economic interaction within the framework ensuring the vitality of other biotic communities.<sup>84</sup>

At this point we have to address the issue of whether the obligation to respect the natural equilibrium stems from the “rights” of other (living and non-living) natural entities. And whether the *prima ontologia* demands an expansion of the theory of rights to other natural entities. The concept of the expansion of legal rights was developed by Christopher D. Stone in his well-known article “Should Trees Have Standing? – Toward Legal Rights for Natural Objects.”<sup>85</sup> In a similar vein, Claude Lévi-Strauss argues for the proposed amendment of the Universal Declaration of Human Rights.<sup>86</sup>

Stone posits that the (scientific) cognisance of man’s co-dependent centrality in Nature dictates an expansion of rights to other (living and non-living) natural entities. In a persuasive argumentation, which he begins with a review of the historic expansion of rights (from slaves to legal persons), Stone argues for the expansion of rights. In this he follows the pragmatic orientation, i.e. the possibility to represent the interests of other biotic communities before the courts. The essence of Stone’s conception is the possibility of setting up guardians to represent the rights of other biotic communities before the courts.

Lévi-Strauss’s argumentation is somewhat narrower in that it proposes an expansion of rights to encompass the community of life. In recognising the rights, he aims higher, i.e. to the creation of the new Declaration of Rights.

May we then imagine such a basis for freedoms which would be self evident enough to be applicable to all without discrimination? Only one was noticed; however, it demands that man be no longer defined as a moral being, but as a living being, which is his most noticeable property. If, however, man’s rights are most of all the rights of a living being, it follows directly that the natural boundaries for these rights, recognised for humankind as a species,

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<sup>83</sup> The motive for ecocentric ecological ethics may be heteronomous when we show respect and care in our interaction with other natural entities because we are aware of the negative consequences caused by the aggressive exploitativeness of the human community (in the words of Chief Seattle: “Man did not weave the web of life, he is merely a strand in it. Whatever he does to the web, he does to himself”) or autonomous when we show respect and care because of the natural entities themselves.

<sup>84</sup> This approach has been criticised by certain ecocentric philosophers as “speciesism.” For more detail see *Foundations of Environmental Law and Policy*, *supra* note 30, at 43. Such criticism is accepted at the philosophical level; however, in the process (collective action) of “resurrection of Nature” it should be emphasised that human community has only just entered the transition stage from anthropocentrism to ecocentrism. In view of that, the philosophical approach of “deep ecology” (the respect for life of individual natural entities) or the approach of prof. Stone (the respect for life and thus also of non-living nature) may represent a very remote goal indeed.

<sup>85</sup> Christopher D. Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45(2) *South. Calif. L. Rev.* 450 (1972).

<sup>86</sup> Lévi-Strauss 1985, at 340–346.



are defined by the rights of other species. The rights of humankind terminate when their implementation endangers the existence of another species.<sup>87</sup>

The system of (human) rights is one of the central elements of the social organisation of western cultures. The right is actually a materialisation of justice (a just state respects the rights; human interaction is just if rights are respected). If in our search for the answer to the question, we depart from the actual philosophical context of rights, a single conclusion is possible. Justice in relationship to others (and hence also natural entities) is only possible if they have rights.

As shown above, humankind is in a period of transition from the “environmental protection” to the “maintenance of the natural equilibrium.” An essential difference between the two is that the latter demands that man respect other biotic communities. We believe that this basic position necessitates the recognition of the rights of other biotic communities.<sup>88</sup>

Although some may disagree, it should be noted that the value systems with regard to rights have shown to be transitory in history (slaves, women), so we can expect this to be the case with regard to the rights of natural entities.<sup>89</sup>

Despite the seemingly impossible establishment of the rights of other biotic communities *de iure*, some legal acts have managed to assign these rights *de facto*. Leonard Ortolano cites the example of the American Endangered Species Act (ESA) protecting the animal and plant species identified as endangered and demonstrates that the lawmaker *de facto* recognised the rights of individual animal species by granting them protection.<sup>90</sup>

We believe that the definition of natural equilibrium should be considered the criterion of human interaction with other biotic communities for *de facto* recognition of their rights, namely the right to existence. Respect for natural equilibrium also “covers” the rights of other biotic communities to existence. The threat to natural equilibrium should be understood as endangerment of the right of other biotic communities to existence. Respect for interaction with Nature issues from the rights of other

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<sup>87</sup> Lévi-Strauss 1985, at 342.

<sup>88</sup> Cf. Ortolano 1997, at 37–39.

<sup>89</sup> We should emphasise that to recognise rights to other biotic communities would certainly not mean that their rights would be equal to the rights of the people and it would also not mean that all biotic communities would have equal rights. The criterion for the scope and the type of rights is natural equilibrium. It is not possible to examine this issue in greater detail within the framework of this essay. See also Christopher D. Stone, *The Environment in Moral Thought*, 56(1) Tenn. L. Rev. 1 (1988); Stephen Toulmin, *The Case for Cosmic Prudence*, 56(1) Tenn. L. Rev. 29 (1988); Tarlock 1988.

<sup>90</sup> Ortolano 1997, at 38. We should emphasise that to recognise rights to other biotic communities would certainly not mean that their rights would be equal to the rights of the people and it would also not mean that all biotic communities would have equal rights. The criterion for the scope and the type of rights is natural equilibrium. It is not possible to examine this issue in greater detail within the framework of this essay. See also Stone 1988; Toulmin 1988; Tarlock 1988.



biotic communities to existence and implies the obligation to maintain the natural equilibrium.<sup>91</sup> This provides the basis for the maintenance of the natural equilibrium as a duty for man as an individual and as a duty for the state to ensure it.

A shift from the existing framework of “environmental protection” to the framework of “maintenance of the natural equilibrium” means therefore a shift from the anthropocentric approach of “environment purification” to the ecocentric approach of the maintenance of the state of equilibrium in relationships between human and other biotic communities, whereby the approach is dynamic and not static.

The concept implied is the concept of “dynamic equilibrium,” whereby human interaction with other parts of Nature is inherent to the “dynamics of nature.” The ethical imperative therefore is not the withdrawal of man from Nature but an attitude of respect in interaction.<sup>92</sup>

A. Dan Tarlock<sup>93</sup> draws attention to the importance of understanding the dynamism of natural equilibrium in the creation of the natural law. Unlike the current prevailing belief with regard to the static nature of the natural equilibrium, the transformation of the natural law must take into account the latest scientific findings with regard to the dynamic and chaotic nature of the constantly changing ecosystems. According to Tarlock, such a scientific premise dictates a turning point in the natural law. “Enhancing the capacity” of law for an ongoing monitoring of the “dynamism of nature” is essential.<sup>94</sup>

### 3.2.2.2. Legal Values

The incorporation of Nature in the very essence of law inevitably triggers a redefinition of legal values. The natural equilibrium, i.e. the equilibrium of life (including human life), as a central value of ecocentric ecological awareness is becoming a legal value. In this sense, we could speak of the expansion of the legal subject, i.e. the expansion of values which are the subject of legal protection.

The following is of crucial importance: natural equilibrium is becoming a basic and a common legal value.

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<sup>91</sup> This, of course, is not an absolute. The duty to preserve the natural equilibrium (respect for the right of other biotic communities to existence) is limited with so-called basic (vital) needs of man.

<sup>92</sup> Such ethical approach could be expressed also with the paraphrase of the well-known Leopold's maxim: “A thing is right when it tends to preserve the dynamic (added by P.S.) integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.” Aldo Leopold, *A Sand County Almanac*, according to *Foundations of Environmental Law and Policy*, *supra* note 30, at 41.

<sup>93</sup> A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial in Law and the Environment: A Multidisciplinary Reader*, *supra* note 27, at 25.

<sup>94</sup> “The major institutional change necessitated by the nonequilibrium paradigm is the need to apply adaptive management to biodiversity protection. (...) We favor management consistent with the core idea of the rule of law – consistent application of fixed rules to yield a single, final decision. Our environmental laws accept a scientific premise and then requires its continued application regardless of subsequent research findings and thinking. (...) Adaptive management, in contrast, is premised on the assumption that management strategies should change in response to new scientific information.” *Id.* at 31.



### 3.2.2.2.1. Natural Equilibrium as a Fundamental (Basic) Legal Value

The definition of natural equilibrium as a criterion (framework) of correct law places the maintenance of natural equilibrium as a legal value in initial position. It is obvious that the natural equilibrium is thus becoming a fundamental legal value, a fundamental criterion of the correctness (justice) of law.

The initial position of natural equilibrium means that the constraint of natural equilibrium defines in particular the human interaction which has the function of satisfaction of (material) needs, i.e. economic interaction. The initial position of the maintenance of natural equilibrium as a legal value implies the enframing of the other (legal) value, i.e. the satisfaction of material needs (economic interaction).

In his satisfaction of (material) needs, man is no longer un-limited,<sup>95</sup> but is constrained by the framework defined by the natural equilibrium.

A redefinition of legal philosophy directly limits the exploitativeness (un-limitedness) of the satisfaction of human material needs (but does not limit the satisfaction of material needs as such) and/or redefines the orientation of the western cultures towards an un-limited material progress,<sup>96</sup> which means that man has returned within the boundaries set by the natural equilibrium. The initial position of the maintenance of natural equilibrium thus does not mean the "sacrifice" of economic progress,<sup>97</sup> but implies its enframing within the boundaries of the natural equilibrium.

### 3.2.2.2.2. Natural Equilibrium as a Common Legal Value

The maintenance of the natural equilibrium is also a value in the common, public interest of human community.<sup>98</sup> This does not relate to what we want as individuals,

<sup>95</sup> The un-limitedness of the (economic) interaction with Nature is linked with the conviction of the western cultures that the (material) development also is un-limited. This conviction, however, rests (implicitly) on the belief in the progressiveness of human (planetary) history, i.e. constant progress – the transition from worse to better. Cf. also Carl Mitcham, *The Sustainability Question in The Ecological Community*, *supra* note 48, at 359, 362.

<sup>96</sup> Cf. Christopher D. Stone, *The Gnat Is Older Than Man: Global Environment and the Human Agenda in Law and the Environment: A Multidisciplinary Reader*, *supra* note 27, at 417, 420.

<sup>97</sup> To assume that the conflictness of the maintenance of natural equilibrium and material progress is insurmountable is a fallacy. In the conflict involving the maintenance of the natural equilibrium, the un-limitedness of the material progress exists insofar as it is linked with the un-limited burdening of Nature, and thus the exploitation of Nature. The principle of sustainable development rejects the concept of zero growth (Club of Rome) and/or "zero sum mentality." Without having to discuss man's inherent developmentality we can establish that it is not problematic *per se*, but that the un-limitedness of the (material) development is problematic. The basic premise should therefore be the orientation towards the material progress with its enframing as the key. The key issue is how to achieve the enframing. In our view, for the existing state (destruction of Nature) and for the "dynamism of nature," state interference in the private sphere (in particular the economy) is crucial. It is premised on the assumption of the impotence of the western economy (market), and thus its incapacity to itself provide the necessary enframing. The reason for this should be sought in its inherent orientation towards the maximisation of material progress.

<sup>98</sup> In his classical study, Sagoff sees the difference between the common, public interest (common value) and the private interests (values) of individuals with regard to relation to Nature as the difference



but to what we are as a human community.<sup>99</sup> The collectivity, commonality of natural equilibrium as a legal value is the foundation for the creation of the ecocentric social theory (political philosophy). The definition of natural equilibrium as a basic and common legal value implies that the maintenance of natural equilibrium is defined as the fundamental public interest.

The “initial position” and “commonality” of the natural equilibrium assign the state the role of the guardian of the interests of human community as well as the interests (rights) of other biotic communities. They thus represent the legitimisation of state activities affecting the environment in the private sphere<sup>100</sup> and thus provide the baseline for a redefinition of the political philosophy of the western cultures.

### 3.2.2.2.3. Maintenance of Natural Equilibrium as a Human Right

The investiture of the natural equilibrium in the system of legal values also gives rise to the necessity of the definition of the maintenance of the natural equilibrium as human right.<sup>101</sup> Considering the necessity of the establishment of the active role of the state in the maintenance of the natural equilibrium, the state should ensure also this right. In our opinion, the environmental right should also comprise the right to the maintenance of the natural equilibrium as a traditional human right, and the guardianship of other biotic communities, i.e. the possibility of “civic” interference also in the interest of other biotic communities.<sup>102</sup> Stone’s concept of legal guardianship of the interests of other biotic communities has led (first) in the American law (and later elsewhere), also on the basis of the well-known separate opinion by the Supreme Court Judge William O. Douglas in the case *Sierra Club v. Morton*,<sup>103</sup> first towards the liberalisation of the “standing doctrine”<sup>104</sup> and later towards the creation of the statutory instrument of “legal guardianship” by so-called class-action.<sup>105</sup>

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between the interests of man as a consumer and the interests of man as a citizen. Mark Sagoff, *The Economy of the Earth: Philosophy, Law, and the Environment in Foundations of Environmental Law and Policy*, *supra* note 30, at 18.

<sup>99</sup> *Id.* at 22.

<sup>100</sup> Cf. Lévi-Strauss 1985, at 391.

<sup>101</sup> Cf. Joseph L. Sax, *The Search for Environmental Rights*, 6(1) *J. Land Use & Env’t L.* 93 (1990).

<sup>102</sup> This is based on the “guardianship concept” developed by Christopher D. Stone in his article “Should Trees Have Standing? – Toward Legal Rights for Natural Objects.”

<sup>103</sup> The Supreme Court of the United States, 405 U.S. 727 (1972), according to Ronald H. Rosenberg & Thomas J. Schoenbaum, *Environmental Policy Law: Problems, Cases, and Readings* 23–25 (1991).

<sup>104</sup> The courts increasingly allowed the filing of complaints with regard to the protection of the interests of other biotic communities. See also Ortolano 1997, at 43–44.

<sup>105</sup> See also Schoenbaum & Rosenberg 1991, at 28–33; *Law and the Environment: A Multidisciplinary Reader*, *supra* note 27, at 285; Ortolano 1997, at 43–44 and Alexandre Kiss & Dinah Shelton, *Manual of European Environmental Law* 480 (1995). In the Slovene law, the provision with regard to such complaints is contained in Article 15 of the Environmental Protection Act.



#### 3.2.2.2.4. Relationship Between the New Legal Value and the Existing Legal Values

The initial position of the natural equilibrium<sup>106</sup> addresses the issue of relationship of the new legal value towards the existing fundamental legal values of the western cultures. At issue is in particular the question of conflict between the new legal value, i.e. the maintenance of natural equilibrium and other legal values firmly implanted in these cultures.

The conflicting character of the “emerging” value becomes obvious at the moment when its incorporation in the legal order demands an adjustment (limitation) of certain “deep-in-structure” values of the western cultures (nomos). At issue is in particular the un-limitedness of the economic<sup>107</sup> interaction of human and other biotic communities and the related material progress as one of the basic (legal) values of the western cultures.

The enforcement of the maintenance of natural equilibrium may also demand a limitation of another legally protected value, for example, the right to the freedom of movement or some other human right. Thus, for example, the administrative court of the state Baden Württemberg in its review of the regulation prohibiting night diving in the lake because of its negative impact on water organisms rejected the complaint by a plaintiff who claimed that this represented an inadmissible interference with the constitutional (human) right to personal development (para. 1 of Art. 2 of the German constitution). The administrative court estimated that the public interest (of the maintenance of “well being” of water organisms) justifies the said limitation.<sup>108</sup>

The following two values are at “conflict” here: natural equilibrium and material progress. The definition of the maintenance of the natural equilibrium as the fundamental, shared value legitimises an interference (limitation) with regard to other legal values, in particular the un-limitedness of the economic interaction. Such an intervention often represents the limitation of other legal values, also of private property.<sup>109</sup>

<sup>106</sup> The definition of natural equilibrium as a basic common legal value opens up the issue of the role of science as a source of the knowledge of the limits of the natural equilibrium. For more detail see Mark Sagoff, *Ethics, Ecology, and the Environment: Integrating Science and Law*, 56(1) Tenn. L. Rev. 1, 77 (1988). The issue of reliability of scientific knowledge and the possible “technocratic approach” of the western cultures is thereby raised. See Tarlock 1997, at 29–31.

<sup>107</sup> The “economic” interaction implies human activity in Nature for the purpose of production of material goods (for personal needs or for the purpose of marketing).

<sup>108</sup> VGH Mannheim, NVwZ 1988, 168.

<sup>109</sup> This concerns the restriction of the freedom of ownership (ecological function of property) and also direct divestment – expropriation of private property. The incorporation of the natural equilibrium as a basic common legal value in the legal value system (the Constitution), and therefore the definition of the maintenance of the natural equilibrium as the fundamental public interest, is, in our opinion, a circumstance which the citizens (owners) are expected to count on. This means that the weight of public interest is a priori very high, which has to be taken into consideration by the Constitutional Court when weighing both values, i.e. private property and natural equilibrium (principle of proportionality).





The initial position of natural equilibrium is not absolute; it is limited with the vital needs of human community.<sup>110</sup> Nevertheless, each time an activity affecting Nature takes place for the purpose of meeting man's vital needs, the limits of the natural equilibrium must be taken into account as much as possible.<sup>111</sup>

The new value, i.e. the maintenance of natural equilibrium, must be "materialised" in the "contracts of statehood" and/or constitutions of the western countries, which means that as a category it features next to "freedom" and "democracy."<sup>112</sup> The entry of Nature in the western (legal) value system, i.e. in the contract of statehood (constitutions) is, as we have shown, *conditio sine qua non* for an efficient change in the legal order and, in the final analysis, for a change in man's attitude towards Nature.<sup>113</sup>

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<sup>110</sup> See Richardson 1997, at 50–51; Taylor 1997, at 29–44 and Stone 1988, at 1–13.

<sup>111</sup> This is the so-called "principle of minimum wrong," Taylor 1997, at 36.

<sup>112</sup> Cf. *Environmental Planning and Sustainability* 4 f. (Susan Buckingham-Hatfield & Bob Evans eds., 1996).

<sup>113</sup> In my opinion, the already adopted international acts which provide the grounds for the principle of sustainable development (Rio Declaration and several conventions) necessitate the amendment and/or change of constitutional acts of individual countries. Of key importance is the incorporation of the ecocentric legal philosophy (and hence the incorporation of the natural equilibrium in a system of legal values as a priority) as well as the incorporation of the ecocentric political philosophy (and thus the definition of the state as a guardian of its natural equilibrium). Certainly the inclusion of the above-mentioned international legal acts in the legal order of the individual country, even without a corresponding amendment of the constitutional act itself, requires that the existing constitutional provisions be interpreted in accordance with the principle of sustainable development.



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