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Commentary: Wu's "Indigenous Cosmovision and Rights of Nature: A Legal Inquiry"

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In this paper, Jingjing Wu undertakes an ambitious task: the adjudication of rights between two conceptually distinct worldviews. In one hand are the rights of nature grounded by an Indigenous cosmovision and in the other are the secular rights of individuals, communities, and corporations. When these rights clash—as they are expected to do—the worry is that the rights of nature (as underwritten by spiritual reasoning) will fail to establish its merit (or make its case), especially when those rights are considered within a system that presupposes the secularity of reasoning. Wu points to the US legal system as providing the paradigm response to founding the rights of nature on an Indigenous cosmovision: the accompanying spiritual arguments would be deemed "irrational and unjustifiable" and not on par with other arguments, such as political, social, or philosophical arguments (Wu, p. 15). The question boils down to this- how are the rights of nature to be justified in way that is admissible in contemporary, secular institutions?

At the outset, I readily admit that it is not an easy task to be the one who must object to the project of grounding the rights of nature (I mean, who wishes to be the one that denies nature its protection from exploitation/degradation?). Admittedly, I am sympathetic to Wu's overall project and support the protection of nature. However, I present two general challenges to the way in which Wu defends the rights of nature. My paper is thus divided into two sections to deal with each challenge separately.

In the first challenge, I take issue with the initial description of an Indigenous cosmovision as the justification for the rights accorded to nature in Ecuador, Bolivia, and New Zealand. I propose that the rights of nature found in the three examples are not derived from an Indigenous cosmovision but are instead stipulative. An appeal to an Indigenous cosmovision is appropriate when first attempting to amend or rewrite the law (in the case of Ecuador, the constitution) to provide nature with rights. (e.g., Why should nature have rights, or why should we provide rights in our constitution?) However, once codified, the rights are stipulated and so it seems that an Indigenous cosmovision is superfluous when trying to adjudicate a conflict of rights. Instead, the arguments would appeal to those stated in the law and constitution (or interpreted from those) and not from spiritual reasoning.

Even if my critique stands regarding the three examples (Ecuador, Bolivia, and New Zealand), it does not remove the possibility of a conflict of interests in societies where the rights of nature have not been codified, such as the United States. It is very easy to imagine a situation where an Indigenous community is actively protesting the destruction of nature and providing justification for their actions in court. In the second section of this paper, I present the barriers to accepting spiritual reasoning as justification for the rights of nature and consider Wu's strategy for overcoming those barriers. As regards the strategy proposed by Wu, I worry that utilizing

Dworkin's rights as trumps thesis rests on a weak analogy between humans and nature. This analogy, although implicit, underwrites the initial step of Wu's strategy—the creation of a meta-rule to include rights for nature. I conclude that this analogy must be addressed to move forward on the justification for rights being extended to nature.

Before I begin with the first section of critique, I would like to make some general comments about the use of the terms, "Indigenous cosmovision" and "Indigenous reasoning". First, we must be very careful when making general statements about the reasoning of Indigenous people. The worry is that by ascribing certain features found in examples from **some** Indigenous communities, we feel safe to ascribe those features to the whole group. The worry here is often referred to as Pan-Indianism. (While it does have its uses, we must exercise caution when using the term Indigenous). Although I will be referring to an Indigenous cosmovision throughout this paper, I think we should keep in mind that some Indigenous nations/communities may have differing attitudes toward nature and religious entities.

Another issue is the suggestion that the recognition of rights comes from a religious groundwork. Terms, like sacred, do sometimes refer to religious practice, but it can also refer to the practices of being in the world—those that are connected with epistemology and knowledge praxis. For example, an American Indian community, like the Oceti Sakowin (Sioux Nation), may seek to protect a particular body of water from pollution, but the motivation for doing so is that the river is understood to be a relation, like a family member. For many Indigenous communities, relationships are part of their ontology. Thus, the obligation to be respectful may come from standing in a relationship with that particular entity and not something that is mandated by a higher power. It is spiritual, but not understood in the same way that a non-Indigenous person would think of as religious. Note too that the descriptions for the rights of nature in Ecuador as expressed in the constitution do not have religious underpinnings. I express these two worries—the worry about Pan-Indianism and the conflation of sacred/spiritual with religious merely to point out that what may hold for the Indigenous peoples of Ecuador and Bolivia (Qechua) and the Tūhoe of New Zealand may differ from other Indigenous people across the globe. That said, if a commonality could be located, for example something like relationships, then the problem of spiritual reasoning may be mitigated. If not, then it seems that the justification of the rights of nature may actually be piecemeal (pluralism?).

1. Stipulated Rights vs. Indigenous Cosmovision

The trouble with the cases provided by Ecuador, Bolivia, and New Zealand is that the rights granted to nature are stipulated in the constitution and legal code of those countries. As Wu describes, there are similarities between Ecuador and Bolivia—those being cultural, legal, and the composition of the societies (Wu, p. 5). These similarities are not surprising given that a large number of the population of each country are the descendants of the Incan Empire (the Qechuan people)—where most non-Indigenous people see national borders, the Indigenous communities had those borders imposed upon them post discovery/colonization. The Qechua lived along the Andes and today, their descendants are present across several countries in South America. Thus, it makes sense that the communities are very similar with respect to their traditions; they share a common culture. To use these two societies as support for a singular Indigenous cosmovision emphasizes the colonial borders and not the Indigenous ones. Colonialism causes us to see

difference where it may not exist. The introduction of the Tūhoe people of New Zealand helps, but we are relying solely on really two distinct Indigenous perspectives.

An additional worry that I have concerning an Indigenous cosmovision is the uncritical emphasis on what are deemed to be distinctly Indigenous principles/ideas. Pachamama or Vivir Bien in the legal codes of Ecuador and Bolivia may be based on similar principles, but culture is dynamic and so I doubt that these notions, as they appear in the law, are solely Indigenous or religious. The notion of Pachamama present day may differ from its use by the ancestors of the Qechua people. I am not suggesting radical differences (though there are practices that have since ceased—like human sacrifices), but what I do suggest is that the intimate ties with the religion of their colonizers (Christianity) has diluted or changed the original Indigenous cosmovision so that it is not considered alien by society. As part of colonization, religious observances and practices that were distinctly Incan now share Christian holy days and the belief in Pachamama has taken a different cast under the influence of colonization—so much so that hikers to Machu Pichu are asked if they would like to participate in offerings to Pachamama.[1] That these Indigenous notions have become socially acceptable is what enables them to be written into laws and constitutions. I suggest that Ecuador and Bolivia are more homogeneous than a multicultural country, like the United States, which is the example of a legal system Wu uses for demonstrating the barriers for rights based on an Indigenous cosmovision. Note that Wu was careful to state that religiously homogeneous countries, like an Islamic state, would not be considered in the paper because those countries lack difference between what is legal and what is religious. A settler state like, the United States, is not homogeneous and it would prove a challenge to have the rights of nature incorporated into law in a way similar to that in Ecuador and Bolivia.

Given that the term Indigenous cosmovision is only supported by essentially two examples and that those resulting examples are the results of colonization, I am not convinced that the Indigenous cosmovision is as religious or spiritual as Wu contends. It also leads me to question whether the focus should be on the arguments utilized within the context of the adjudication of conflict. Instead, it may be more appropriate to the arguments that motivate the codification of the rights of nature. As it stands, the rights given to nature in Ecuador, Bolivia, and New Zealand are stipulated in the law. For example, in the case of New Zealand, nature is considered a person and its attendant rights/obligations are conducted by proxy. Once one has rights, it seems that the law, whether in a constitution or given by proxy, is what justifies those rights when assessing the conflict of those rights. Thus, it seems that the real worry for Wu is not whether spiritual arguments are troublesome for deliberations of conflict. Rather, it is whether spiritual arguments can justify getting the rights of nature included/codified into law.

Although I have challenged the examples of rights underwritten by an Indigenous cosmovision, I do think that an interesting contribution might be in the case of Indigenous testimony; particularly in cases where Indigenous communities have mobilized to protect nature (a river, a lake, a mountain, etc.) against mining, fossil fuel transport, and the like; especially in a country where the rights of nature are not provided for in the law. In these cases, it seems that Barrier Two (the charge of irrationality) as presented by Wu would disadvantage Indigenous people using spiritual claims as part of their case in a secular legal system.

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[1] Hill, Michael (2008). "Inca of the Blood, Inca of the Soul". *Journal of the American Academy of Religion*. **76**(2): 251–279. doi:10.1093/jaarel/lfn007.

2. Barriers, strategy, and analogy

Let's suppose that I am in error about the first section and that there is need for a method that adjudicates between the arguments that support the rights of nature when in conflict with other human rights.

As Wu states, the task of having the rights of nature recognized by a legal system (while at the same time not overriding the rights of others) encounters three barriers: the first is that spiritual reasoning is non-defeasible, which means that if the rights of nature (as underwritten by an Indigenous cosmovision) are incorporated into secular law, then it must be accepted by all parties. The reason for this, according to Wu, is that the rights of nature are justified by monotonic, conclusive, and non-defeasible arguments (p. 12). By incorporating an Indigenous cosmovision into legislation, the legal system singularly adopts this particular worldview as the frame, making "other competing reasoning" a non-starter. This is great for nature; however, it is absurd given that most legal systems are predicated on the unique status of humans.

Wu identifies a second barrier—that spiritual reasoning is considered irrational—which prevents such arguments from being fully considered in a secular court. In this case, as Wu suggests, spiritual reasoning would be devoid of its justification (the Indigenous cosmovision). To an Indigenous philosopher, this barrier is not limited solely to the context of affording rights to nature. The discipline of philosophy has a robust history of marginalizing the thought and epistemology of Native American and First Nations communities, noting the people were too primitive, too passionate, or living in a state of nature to be rational. That the epistemology of Native Americans is not propositional and that their narratives lack the patterns and justifications required in Western epistemology—well, let's just say that this barrier has a somewhat familiar ring to it. To describe the reasoning as irrational is troubling: it not only seems hasty, but it also problematizes the people and not the institutions that fail to recognize inferences outside of a narrow few. For example, the emotions, long considered outside the realm of rationality are now gaining traction as a result of research done by feminist epistemologists. The narratives and oral traditions of Indigenous people—histories that only until recently were kept outside of the courtroom—are now being accepted as evidence. While I do not doubt that secular, colonial courts would deem the arguments underwritten by an Indigenous cosmovision as irrational, I question whether it is a problem with the arguments, or is it perhaps a problem with the institution? That said, it may be there are multiple ways of dealing with this barrier—Wu's creation of a meta-rule being only one.

The third barrier identified by Wu is that drawing an analogy between the rights of nature and human rights fails. As a possible solution to the impasse created by the first two barriers, Wu considers understanding the rights of nature in the same manner that we understand human rights (p. 15). There are several reasons for doing so: the arguments for human rights are "non-defeasible, irrational, and started with spiritual connotations" (p. 15). They are, in short, analogous to the rights for nature. Unfortunately, Wu claims that this fails because the spiritual basis for grounding human rights drops from the justification—granting rights to humans is grounded on "being human." The club, according to Wu, is closed and one cannot become a member of a closed club.

Wu notes that those in the club could open the membership to include other categories, and according to Wu, the talk of rights of nature gets on the table via Dworkin's thesis: rights as trumps. Dworkin's thesis is a way to prevent the overreach of the majority in a utilitarian society that functions under the egalitarian principle. The worry for Dworkin is that a society that forms policy via utilitarianism (and its accompanying egalitarianism) could marginalize minority/unpopular groups within the society. By giving groups rights, the government prevents the use of the egalitarian principle from riding roughshod over the interests of minority groups. As regards Wu's account, I am confused as to what is the minority or unpopular group—is the focus on protecting the beliefs of Indigenous people (which are potentially a minority view) or is Nature considered the group (after all, it is nature that is getting the rights and that is not popular either). Wu needs to make this point clear if they rely on Dworkin's thesis.

The second piece of Wu's strategy is to create a meta-rule that opens the door for legitimizing spiritual reasoning in the legal system; one that "overrides" the three barriers presented earlier. The meta-rule paves the way for spiritual reasoning to be presented in court as the justificatory reasoning for the rights of nature and more importantly, it allows for the introduction of a nonhuman member into the club. In fact, since Wu uses the United States as a paradigm, I suggest that Wu research the creation of corporate personhood to bolster the likelihood of a nonhuman entity being accepted into the club. It may be that in this way, nature could be afforded rights.

The third piece of Wu's strategy serves as the ground for how much weight can be afforded to the rights of nature when under deliberation. According to Wu, the principle of proportionality (the balance of competing views) would be brought to bear on deliberations when rights conflict. Recall, that the non-defeasibility of spiritual reasoning could override most other arguments concerning rights. Proportionality, for Wu, prevents the rights of nature from superseding all other rights.

Wu believes that this strategy: the rights as trumps, creation of a meta-rule, and the principle of proportionality would not only introduce the arguments supporting the rights of nature into a secular legal system, but would also function within the deliberations of conflict to ensure a fair treatment of all involved. While these strategies are complex and require unpacking, their treatment appears in the last two and a half pages of the paper. Thus, there are some holes, such as whether Indigenous communities or nature are the unpopular groups in a utilitarian society that possess rights that trump.

A more pressing issue, however, is the use of Dworkin's rights as trumps to support the creation of a meta-rule for including the spiritual reasoning that supports the rights of nature. My worry is that there is a weak (and possibly implicit) analogy between nature and humans in the use of Dworkin's thesis. First, Dworkin's account is intended to address the overreach of a "utilitarian society under the egalitarian principle" (p. 17). Foremost, the theory of utilitarianism presupposes a human focus. Accounts of utility, whether those accounts aim to maximize desire or preference satisfaction, presuppose agency (human agency).

Perhaps Wu intends to avoid this worry by appealing to the creation of a meta-rule—one that permits nature into the club. Yet this solution is problematic--if we allow for a nonhuman group into the club—the justifications for rights (that trump), at least as they are laid out by Dworkin, are anthropocentric. For example, Dworkin refers to liberty and equality as reasons for allowing the rights of some groups to trump the egalitarian principle. A society that is predominantly Christian may seek to establish a law against same sex marriage. The right to

equality, however, might be invoked by gay and lesbian couples to trump the utilitarian policy prohibiting their legal union. Another justification for the rights of a minority trumping utilitarian policy might be privacy, which is believed to be granted by the Constitution (via the historical interpretation by the US Supreme Court). Even in cases where we allow for interpretation of constitutional rights, there still needs to be a justification that is not anthropocentric when granting the ability to trump to nature. The justification for having rights as trumps are, at least as put forth by Dworkin, anthropocentric—liberty and equality. Given that nature and humans are not similar in the ways relevant for liberty and equality, I am not sure where the justification for nature having rights that trump would originate and so I believe the analogy fails. Wu will need to provide some kind of account to support that nature has rights that may trump utilitarian policy.

Perhaps the creation of the meta-rule is the part of the strategy that introduces the nature into the club? It seems that here too would require a justification for membership. Given that spiritual reasoning is seen as irrational, I do not see a way to convince the membership to include nature without a general (nonspiritual) argument. There must be a reason for the exception. As I have mentioned earlier, corporate personhood may provide some insight as to formulating reasons and arguments for granting nature member status in the human being club. Yet, the reasons for creating a meta-rule must be provided.

The creation of a meta-rule to allow for the inclusion of nature into the club reveals another worry: stipulating the rights of entities that have a link to spiritual or religious worldviews would open the door for other, similar entities to be granted status as well. One such entity, fetuses, has been a player in deliberations regarding personhood for years, and supporters for the view that fetuses have rights (that trump) would be keen on finding a strategy that would grant membership into the club. Before someone suggests that I am heading down the path to a slippery slope, I contend that fetuses could have more in common with being human than nature, and being human was the justification for human rights.

According to Wu, if we are able to "declare [that the] rights of nature are as important as fundamental human rights" then the spiritual reasoning would trump human rights (Barrier One), with the next step being to use the proportionality principle to solve the clash of rights. It is at this point that Wu is moves to the proportionality principle and the adjudication of conflict. But Wu has not provided a way to make the antecedent of the conditional true. If the United States did believe that the rights of nature were on par with human rights, then we should find recourse in the legal system. Yet, we do not. The US does recognize nonhuman entities with rights—corporations—but nature is still not in the club.

At the beginning of this paper, I noted that Wu takes on an ambitious project. When we see the many threats to nature on social media, it seems natural to move to a way to protect nature (in all its forms—lakes, rivers, plains, etc.) from degradation. As I sit at my desk in a world experiencing a pandemic, I am struck by the resilience of nature when humans are forced to quarantine. Nature does not need humans—we need nature. How very strange that it is us that must grant it rights to protect it. I thank the author for the opportunity to read this very interesting paper and I look forward to their response.