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Rights of Nature and Indigenous Cosmovision: A Fundamental Inquiry

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1. Introduction

'Should trees have standing?', the question famously asked by Christopher Stone (1972, 2010), has opened a decades-long discussion among scholars on giving rights to nature. In 2008, Ecuador became the first country in the world to bestow nature rights in its Constitution. With the urgency of climate change and many other disastrous consequences of the so-called Anthropocene, many countries followed by passing regional or national legislation giving rights to nature.[2] This type of legislation has been considered as an important step to transit from the current anthropocentric legal order(s) to an eco-centric one. An anthropocentric legal order, as the name indicates, puts human being in the centre of the discussion and considers nature merely as objects. For instance, under this approach, protecting nature could be based on human-centred reasons such as human's right to health, or even right to property. An ecocentric legal order, contrarily, claims that nature should have rights on its own for its own sake, taking nature as a proactive subject in our society and legal order.

Such transition is warmly welcomed by scholars. Anna Grear criticised the 'oppressive hierarchical structure' of the anthropos and its corollary 'corporate juridical subject that dominates the entire globalised order of the Anthropocene age' (Grear 2015). Kotzé and Calzalilla made a strong case against anthropocentric human rights approach in regards to environmental rights and appraised the eco-centric approach found in the Ecuador Constitution 2008 (Kotzé and Calzalilla 2017), which bestows nature enforceable legal rights. Borràs lauded the transition from 'an anthropocentric approach, denoted by the "right to the environment", to a biocentric approach constructed around "rights of nature".' (Borràs 2016) It may therefore seem that we can pat ourselves on the back for the long journey we have come from the dark side of the anthropocentric world.

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[2] By the time of writing, for the national level legislation on rights of nature, there are: Constitution of the Republic of Ecuador 2008, Bolivia Law of the Rights of Mother Earth 2010, and the Framework Law of Mother Earth and Integral Development for Living Well 2012, New Zealand Te Urewera Act 2014 and Te Awa Tupua Act 2017. As for the legislation concerning rights of nature that is at a sub-national level, there are, for instance, 2006 Tamaqua Borough in Pennsylvania, which is the first in the world to legitimise rights of nature. For court rulings, in 2016, Colombia's Constitutional Court ruled that the Rio Atrato possesses rights to "protection, conservation, maintenance, and restoration," and established joint guardianship for the river shared by indigenous people and the national government. In 2017, Indian Uttarakhand's high court issued an order giving rivers Ganga and Yamuna fundamental rights and legal personality, which, however, was currently suspended by the Indian Supreme Court.

However, such acclaimed transition is far from smooth. Many scholars have raised doubts about the implementation of rights of nature legislation (see, e.g. Kauffman & Martin 2016, Pietari 2016, O'Donnell & Talbot-Jones 2018). The fact that rights of nature legislation, in general, has limited practical impact is relatively well studied. A less attended yet perhaps more important and more fundamental question is whether rights of nature—as a newly established legal concept—can sustain the legal enterprise it has promised, i.e. the transition from an anthropocentric legal order to an eco-centric one. More precisely, the question remains of how such concept could function while embedded in an anthropocentric legal system. Without a solid legal theoretical foundation, rights of nature risk becoming a 'lofty rhetoric' (Boyd 2018) at the mercy of the social, political, and cultural powers.

One aspect of such foundation is legal reasoning, for that it embodies the core of a legal system *qua* rule of law. Therefore, in this paper, I ask whether we can weigh and balance indigenous cosmovision—the reasoning used as the main source of legitimacy in some rights of nature legislation—within a secular legal system. To put it differently, I investigate how to accommodate two sets of worldviews (spiritual and secular) in one legal system thta is based on one of them (secular). Particularly, how do spiritual arguments that support rights of nature weigh against rival secular arguments if the legal system is secular?

To answer these questions, I first investigate rights of nature legislation and court decisions in Ecuador (2008), Bolivia (2010, 2012), and New Zealand (2014, 2017) (Part 2). The reason to choose these three countries is not only that they have passed rights of nature into legislation, but that this legislation spans the Constitution to parliament law and act, providing a broad scope of rights of nature legislation. I further examine three barriers that rights of nature and their corollary spiritual reasoning are likely to encounter if they are invoked in secular courts: (a) spiritual reasoning is non-defeasible (Part 3) and (b) irrational (Part 4), and (3) the current concept of human rights as a universal legal norm is based on a circular logic (Part 5). All of these reasons, to varied extent, prevent rights of nature and their spiritual connotation being justified in a secular court. Therefore, at the end of the paper, in order to overcome these barriers and make rights of nature a truly operational concept, I draw inspiration from Dworkin's 'rights as trumps' thesis and the proportionality principle (5.2). I propose that in order for rights of nature and their spiritual connotations to have a functional place in a secular court, we need to create an exception—a meta rule for these legal concepts—and subject them to the proportionality principle.

2. Rights of nature legislation in Ecuador, Bolivia, and New Zealand

In this part, I first introduce the rights of nature legislation in Ecuador, Bolivia, and New Zealand. I then look into the spiritual reasoning used to support such rights and its overall role in the legislation.

2.1 The legislation in Ecuador, Bolivia, and New Zealand: a brief introduction

- 2008 Ecuador Constitution

In 2008, Ecuador reformed its Constitution, introducing the codification of rights of nature. This makes it the first country in the world to constitutionally recognise rights of nature. Specifically, Article 10 of the Constitution states that '[n]ature shall be the subject of those rights that the Constitution recognizes for it.' The specific rights that nature is the subject of are listed in Chapter Seven from Article 71 to 74. Generally, nature 'has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes', as well as 'the right to be restored'. Since nature cannot speak for itself, '[a]ll persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.' Apart from nature itself, persons, communities, peoples, and nations also 'have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living.'

- Bolivia Law of the Rights of Mother Earth (2010) and the Framework Law of Mother Earth and Integral Development for Living Well (2012)

Right after Ecuador amended its Constitution, in 2010, Bolivia passed the 'Law of the Rights of Mother Earth' (hereinafter referred to as Law 071). The single objective of Law 071 is 'to recognize Mother Earth as a political subject enshrined with … rights.' In 2012, Bolivia passed 'the Framework Law of Mother Earth and Integral Development for Living Well' (hereinafter referred to as Law 300), a successor to and expanded version of Law 071.

Law 071 declares that Mother Earth takes on the character of collective public interests and entitles it to the rights to life, to bio-diversity, to water, to clean air, to equilibrium, to restoration, and to free from pollution (Article 7). To this end, the Plurinational State of Bolivia has a corresponding obligation (Article 8), whereas natural persons and public or private legal entities have corresponding duties (Article 9). It also stipulates that all Bolivians exercise the rights under the Law. The logic behind this is that '[t]he exercise of individual rights is limited by the exercise of collective rights in the living systems of Mother Earth. Any conflict of rights

must be resolved in ways that do not irreversibly affect the functionality of living systems' (Article 6).

However, the progressive position of Law 071 that nature has a 'trump' legal status over individual rights is toned down in Law 300. Although Law 300 confirms the positive rights given to nature as established in Law 071, it also emphases the rights of the indigenous originary farmer nations and people and of the intercultural and Afro-Bolivian communities (Art. 9 (2)), 'the civil, political, social, economic and cultural rights of the Bolivian people for Living Well through integral development' (Art. 9(3)), as well as '[t]he rights of the rural and urban population to live in a fair, equitable and solidary society.' (Art. 9 (4)) Therefore, Law 300 clearly creates the possibility of rights of nature being superseded by human-centred goals such as integral development. The arguments to support rights of nature, in this context, will inevitably be weighed against rival secular arguments.

- 2014 New Zealand Te Urewera Act and 2017 Te Awa Tupua Bill

In 2014, the Tūhoe people and the New Zealand government agreed upon Te Urewera Act (the Act). In it, Te Urewera, a national park located in the North Island, is declared a legal entity which 'has all the rights, powers, duties, and liabilities of a legal person (Article 11 (1)).' The Te Urewera Board is established to exercise and perform the rights, powers, and duties of Te Urewera, and is responsible for its liabilities. The stated purpose of the Act was to 'establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance' (Article 4).

On March 14, 2017, the New Zealand Parliament voted to pass the Te Awa Tupua (Whanganui River) Claims Settlement Bill (the Bill), which declares the Whanganui River as Te Awa Tupua, a legal person with rights, powers, duties, and liabilities (Clause 14 (1)). It is further claimed that Te Awa Tupua is 'an indivisible and living whole" and "a spiritual and physical entity (Clause 13).' Te Pou Tupua, as 'the human face of Te Awa Tupua', will exercise and perform its rights, powers, duties, as well as being responsible for the liabilities on behalf of Te Awa Tupua (Clauses 14 (2), 18(2)). Te Pou Tupua comprises two people, one nominated by the Iwi and one nominated by a government minister (Clause 20).

2.2 Spiritual reasoning in the rights of nature legislation

2.2.1. Ecuador and Bolivia

There are obvious common principles in Bolivia and Ecuador rights of nature legislation due to their close cultural and legal traditions, as well as similar societal makeup. These principles are based on indigenous cosmovision in both countries. The most salient include: a) Pachamama (Mother Earth), b) Sumak Kawsay (Living in harmony with nature), and c) Vivir Bien (Living Well).

Specifically, although Pachamama literally translates as Mother Earth, both countries' legislation speaks of Pachamama as synonymous of nature (Sólon, 2018, p. 121). Pachamama having rights is equal to nature having rights. This understanding of Mother Earth may be derived from the indigenous spiritual understanding that nature (Earth) has a higher spirit in which human as part of it resides.

Sumak kawsay and vivir bien are two phrases that closely linked with each other. Sumak kawsay is an ancient Quechua word, which means to live in harmony with communities, ourselves, and most importantly, nature. The sumak kawsay way of living has permeated local indigenous cultures for thousands of years, and embedded in their ethical values (https://www.pachamama.org/sumak-kawsay). 'Vivir Bien'— translated as good living or living in harmony with Nature—is also an idea that is deeply rooted in their indigenous traditions, which affirms the need to live in harmony with Mother Earth and in equilibrium with all forms of life (Calzadilla & Kotzé, 2018, p. 403). Hence, both concepts are based on indigenous culture and have a spiritual connotation.

These three phrases form the main reasoning supporting rights of nature in the said legislation, which is evident by their position in the legal texts. First of all, in both countries' legislation, Pachamama, being used interchangeably with 'nature', is the subject of rights. In the Preamble of the Ecuador Constitution 2008, it is said that: '[c]elebrating nature, the Pacha Mama, of which we are a part and which is vital to our existence…' In Chapter Seven, where rights of nature are codified, it starts with the expression '[n]ature, or Pacha Mama, where life is reproduced and occurs, has the right… (Art. 71).' For Bolivia, 'mother earth' is in the title of both legislation: (i) Law 071 of the Rights of Mother Earth of 2010 (Ley 071 de Derechos de la Madre Tierra) and Framework Law 300 of Mother Earth and Integral Development for Living Well of 2012 (Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien). Similar to the legislation in Ecuador, 'mother earth' is also the subject of the rights codified in Law 071 and Law 300.

Regarding sumak kawsay and vivir bien, in the Preamble of the Ecuador Constitution, it states '[h]ereby decide to build: A new form of public coexistence in diversity and in harmony with nature, to achieve the good way of living, the sumak kawsay.' This is further confirmed in Section Two (Healthy Environment), where the rights of the population to have the 'good way of living (sumak kawsay)'(Art. 14), is recognised. In the rest of the Constitution, sumak kawsay is also said to be guaranteed for the Amazon territory (Art. 250) and the underpinning of the overall development structure of the country (Art. 275). For Bolivia, before the two legislation, the 2009 Bolivia Constitution had already put to recognise ancestral principles, 'especially those that underpin the Aymara culture, such as Vivir Bien or Suma Qamaña (living well)', as 'one of the ethical and structural principles of the state. (Calzadilla & Kotzé, 2018, p. 403)' These two phrases were invoked in Law 071 and Law 300 in the first Article of both legislation.

In sum, these three concepts and their corollary spiritual content are all 'based on the indigenous cosmovision' that 'signifies living in complementarity, harmony and balance with Mother Earth and societies, in equality and solidarity and eliminating inequalities and forms of domination.' (https://theredddesk.org/countries/laws/law-300-framework-law-mother-earth-and-holistic-development-living-well). These concepts are permeated in both countries' rights of nature legislation and function as the main supporting arguments for granting nature fundamental rights. Moreover, these indigenous concepts are also seen as the alternative to the Western capitalism and neo-liberal way of development, which are mostly represented as the exploitative economy (Gudynas 2013, Borros, 2017, Calzadilla & Kotzé, 2018). In this sense, these indigenous spiritual concepts are put forward as a resistance to the anthropocentric explorative economy and developmental model by grounding nature as a subject in law against human aggression.

2.2.2. New Zealand

Although the indigenous cultures in New Zealand are largely different from those in South America, the spiritual connection with mother nature is a common entry found in its 2014 Act and 2017 Bill.

In its 2014 Act, it explained Te Urewera as 'an ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty'. It is 'a place of spiritual value, with its own mana and mauri' and 'an identity in and of itself, inspiring people to commit to its care' (subpart 1, 3). To explain the relationship between Te Urewera and Tūhoe, it states as follows:

(4) For Tūhoe, Te Urewera is Te Manawa o te Ika a Māui; it is the heart of the great fish of Maui, its name being derived from Murakareke, the son of the ancestor Tūhoe.
(5) For Tūhoe, Te Urewera is their ewe whenua, their place of origin and return, their homeland.
(6) Te Urewera expresses and gives meaning to Tūhoe culture, language, customs, and identity. There Tūhoe hold mana by ahikāroa; they are tangata whenua and kaitiaki of Te Urewera.

To explain Tūhoe, it further states (Article 18): 'mana me mauri conveys a sense of the sensitive perception of a living and spiritual force in a place.' Similarly, in the 2017 Bill, it is said that:

the River is the source of spiritual and physical sustenance:
...Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River.
...Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.
... I am the River and the River is me... (Article 13).

Therefore, although the substance of the cultures and traditions differ, it is evident that the indigenous spirituality and its cosmovision are also the foundation of New Zealand 2014 Act and 2017 Bill. The indigenous worldview that nature is deemed as a superior spiritual being is the basis for recognising rights of nature in the above legal systems.

In sum, all three countries' legislation regarding rights of nature is largely supported by indigenous cosmovision. Those rights are given because nature as a whole or certain natural subjects are deemed as a spiritual being in the indigenous cultures and traditions. Hence, it is fair to conclude that above rights of nature legislation supports such rights with spiritual reasoning.

It is perhaps not a coincidence that all three pioneering rights of nature legislation is using indigenous cosmovision as their main source of legitimacy and supporting arguments. After all, as I have argued elsewhere, spiritual reasoning might be the only type of reasoning that has the ontological property to support fundamental rights (Wu, 2020). However, what is unclear is how can we assess spiritual reasoning in a secular legal system. In the rest of the paper, I will indicate three barriers that spiritual reasoning may encounter when put forward in

a secular legal system, which shall prepare us to accept that in order to make rights of nature and their spiritual connotation operative in a secular court, 'something's gotta give'.

3. The first barrier: Spiritual reasoning is non-defeasible—Compare spiritual reasoning with legal reasoning

3.1. A few working definitions

Without getting into the rich discussion of the following concepts, as any attempt to do so would appear far out of the scope of this paper, I will, in this section, clear some working definitions for these concepts, namely spirituality, legal reasoning, and spiritual reasoning. These working definitions are based on the theoretical discussions about these concepts, and chosen because of their (relative) majority acceptance and suitability for this discussion.

- Spirituality

To answer what is spiritual reasoning, we have to first to define what is spirituality. In a common denominator fashion of definition, '[s]pirituality is what gives meaning to everything else in one's life (Holzer 2014, 51).' That is '[i]t focuses on a belief in, or a relationship with, a higher power; it is the aspect of life that gives purpose, meaning, and direction...Everything is tied together by spirituality; it is the force that gives meaning to everything, and that which makes sense out of things' (Holzer 2014, 52). In other words, spirituality is one type of worldviews, the one that believes in a higher power. It provides the lens we use to perceive ourselves, the world, the higher power, and the relationship among them.

- Reasoning

According to Douglas Walton (1990), reasoning 'is the making or granting of assumptions called premises (starting points) and the process of moving toward conclusions (end points) from these assumptions by means of warrants. (403)' A warrant 'is a rule or frame that allows the move from one point to the next point in the sequence of reasoning. (403)' Reasoning is usually understood by its relationship with other closely linked yet distinctive terms, notably 'argument'[3] and 'argumentation'[4]. The connection among these concepts could be summarised

[3] According to Walton (1990, 411), an argument is 'a social and verbal means of trying to resolve, or at least to contend with, a conflict or difference that has arisen or exists between two (or more) parties.' It 'necessarily involves a claim that is advanced by at least one of the parties.'

[4] Walton (2006, 1): 'In the dialogues, there are many specific arguments, and they are connected together with other arguments...The word "argumentation" denotes this dynamic process of connecting arguments together for some purpose in a dialogue.'

as: a chain of argument constitutes argumentation, which usually is composed of reasoning. In this paper, these terms will be used according to the above definitions, but their differences will not be emphasised unless necessary.

- Legal reasoning

Legal reasoning is a distinctive field of reasoning that is different from logic, scientific, or ordinary reasoning and decision making (Ellsworth 2005, 687). It is first and foremost about law. More precisely, it is the logic tool legal professionals use to reach a verdict. According to Ellsworth, legal reasoning has two main types: deduction and analogy.[5] He also pointed out the differences between legal reasoning and scientific reasoning, which are that legal reasoning is put forward in an adversarial manner and is institutional (Ellsworth 2005, 696. For the institutional character of legal reasoning, see, e.g. MacCormick & Weinberger 1986).

- Spiritual reasoning

Based on the above definitions, I herein define spiritual reasoning in a legal context as a logic process that starts from a certain spiritual worldview and ends at a legal conclusion in the sense that it either supports one side's plea in court (in court cases) or supports a statement that has legal effects (in legislation). The logic process is also called a legal justification.

3.2 What makes a legal reasoning?

In order to understand what makes spiritual reasoning special in a secular legal system, we need to know a bit more about legal reasoning.

There are three main characteristics of legal reasoning that differentiate it from other types of practical reasoning, namely: 1) basing on the valid law; 2) defeasible; and 3) constrained by a binding judgement. First, the connection between legal argumentation and valid law, along with its institutionalisation, is self-evident; legal reasoning is meant to be derived from norms found in valid law and conducted in line with procedural rules. Second, the defeasibility of legal arguments entails that the goal of legal argumentation is to attack and defeat the rival argument. A defeasible argument is one 'in which the conclusion can be accepted tentatively in relation to the evidence known so far in a case, but may need to be retracted as new evidence comes in' (Walton, Reed, & Macagno 2008, 2). In a courtroom

[5] In addition to deduction and analogy, Scott Brewer (2013) states that there are also induction, abduction, and empirical or practical reasoning.

debate, the defeasibility of legal argumentation is overcome by the third feature of legal reasoning, that it is constrained by a binding judgement supported by authority. This postulate requires that the law to be positive (Radbruch 1950, 108).[6] It means in a courtroom debate, not only the adjudicator is the (only) authority to decide whether the opponent has indeed defeated the proponent's argument, but what the adjudicator decides is to be carried out.[7] By virtue of legal certainty, authority therefore constrains the infinite loop of the arguments exchanging between rival parties that stems from the defeasibility of legal reasoning.

3.3. Spiritual reasoning and the lack of defeasibility

Now that we established three main characteristics of a legal reasoning, a comparison between spiritual reasoning and legal reasoning is feasible. As far as rights of nature legislation is at concern, spiritual reasoning on rights of nature is based on a valid law. As long as the law is positive, what the judges decide will be carried out. Therefore, it is also constrained by the judgement. It is, however, the defeasibility feature that cannot be found in spiritual reasoning, which makes spiritual reasoning significantly different from other types of legal reasoning.

In its broad sense, defeasibility can be defined as follows:

> It is the process 'that responds to its normal inputs with certain outcomes (the default results), but which delivers different outcomes when such inputs are augmented with further, exceptional or abnormal elements (Sartor 2018, 315).

Following this definition, a defeasible reasoning is the type of reasoning that 'if the premises hold, the conclusion also holds tentatively, in the absence of information to the contrary (Walton 2008, 161).'

Furthermore, a distinction between monotonic and non-monotonic reasoning is also useful for this discussion. A monotonic reasoning means 'any conclusion that can be obtained from an initial set of premises can still be obtained whenever the original set is expanded with additional premises' (Sartor 2018, 317). In contrast, non-monotonic reasoning means that 'a

[6] Emil Lask et al., *The legal philosophies of Lask, Radbruch, and Dabin* (Harvard University Press 2013), 108.
[7] Of course, in the court debate, there is also the appeal procedure. At the end of the chain, however, there is always a judicial body that functions as the final check (such as a supreme court), and what that body decides is therefore final and certain. The same logic applies to the judicial dialogue and legal scholars' views on law. At the first glance, it seems the 'binding' characteristic does not apply to them. However, all of those arguments happened in a judicial dialogue or a legal article are put forward for the purposes of influencing the 'final decisions' which have legal certainty and are supported by authority. In this sense, reaching legal certainty supported by authority is indeed a necessary condition of legal reasoning.

conclusion that can be obtained from an initial set of premises may no longer be obtainable when the original set is expanded with additional premises.' (Sartor 2018, 317) A good example of monotonic reasoning, as Sartor pointed out, is deduction, because as long as we accept all premises of a deductive inference, by definition, we must continue to accept its conclusion (Sartor 2018, 317). In this sense, a deductive inference is also conclusive, because as long as we keep accepting the premises, any additional information will not affect our acceptance of the conclusion (Sartor 2018, 317). Hence, we can also distinguish deductively valid argument from defeasibly valid argument. For a deductively valid argument, 'the premises provide conclusive support for the conclusion: if we accept the premises we must necessarily accept the conclusion' (Sartor 2018, 318). In a defeasibly valid argument, however, since 'the premises only provide presumptive support for the conclusion', if we accept the premises we should also accept the conclusion, 'but only so long as we do not have prevailing arguments to the contrary' (Sartor 2018, 318).

Followingly, an argument can be attacked in three ways: by attacking its premises, by attacking its conclusions, or by attacking the support relation between premises and conclusions (Sartor 2018, 323). By definition, a conclusive argument can only be attacked by challenging their premises, because as long as we accept the premises, we also accept the conclusions, whereas a defeasible argument can 'also be attacked by denying its conclusion, even if its premises are not questioned' (Sartor 2018, 323).

Spiritual reasoning, in this sense, is a conclusive monotonic reasoning and can only be attacked by its premises. As the definition of spirituality is to accept a special set of worldviews, no added information would change the believers' acceptance of them. Once we accept its premises, it becomes a deductively valid argument. Therefore, a believer of certain spirituality would accept all the statements of this belief system, regardless of any new information. If the arrival of new information changes the believer's acceptance of the worldview, the believer will by definition fall out of the category as the subject to the spirituality.

A legal reasoning, however, is by definition a non-monotonic and thus defeasible reasoning. It is defeasible insofar as it involves more than deductive reasoning on the basis of valid law. As long as external justification (over and above a syllogism) is required, it is always possible to attack and defeat a legal reasoning by providing new information *qua* argument. The process of legal reasoning can be seen as a series of defeating rival arguments, which could be put as follows:

> defeasible reasoning activates a structured process of inquiry in which we draw prima facie conclusions, look for their defeaters, look for defeaters of defeaters, and so on, until stable results can be obtained. A process like this one reflects the natural way in which legal reasoning proceeds. This is especially the case in the law's application to particular situations, when we have to consider the different, and possibly conflicting, legal rules that apply to such situations and must work out conflicts between these rules. (Sartor 2018, 346)

Since spiritual reasoning is monotonic and conclusive, not defeasible, it cannot be weighed and balanced in court insofar as we accept its premises in the legislation, as are the cases in Ecuador, Bolivia, and New Zealand. This is because we can either agree or disagree with it by either accepting or dismissing it in the legal system. We cannot, however, take spiritual reasoning as one type of legal reasoning and weigh it against other types of legal reasoning (e.g. the argument that there is a valid contract between the local government and a mining company to conduct a mining business). Hence, by putting spiritual reasoning into legislation, we are supposed to agree that the legal system accepts such worldview as the vantage point to perceive ourselves, the world, our beliefs, and relationships in-between. Moreover, we accept both its premises and its conclusions. Hence, other competing reasoning cannot be held. This is, in a way, Dworkin's idea of 'rights as tramp' (I will further elaborate on this point in Part 5). In other words, as long as we build rights of nature upon indigenous cosmovision, such worldview has to trump other legal reasoning as far as rights of nature legislation is concerned.

Now, we have established that spiritual reasoning is not the ordinary type of legal reasoning because it lacks a key ingredient—defeasibility. This is, as I call, the first barrier when invoking rights of nature and their spiritual reasoning in court. Nonetheless, this doesn't mean that it is a new type of legal reasoning that we have not encountered before. In fact, similar reasoning (i.e. non-defeasible) can be found in the current legal systems. In the following parts, I will compare spiritual reasoning to two such types: namely religious reasoning and human rights reasoning, which shall reveal the other two barriers and hopefully, also shed light on how to assess rights of nature and their spiritual reasoning in court.

4. The second barrier: Spiritual reasoning is irrational—Compare spiritual reasoning with religious reasoning

Religious belief, in its general sense, is a special type of spirituality. Like spirituality, it also deals with meaning, purpose, and direction of life in general, *qua* a worldview that involves (a) higher power. Unlike spirituality, religion is an institution, which makes it a normative and more often than not, hierarchical system. There are two ways a current legal system incorporates religious reasoning. One is to base the legal system (wholly or partially) on the said religion, such as the Islamic legal system. The other is to include religion and its reasoning as a counterpart of other types of reasoning in a secular court. Herein, I only deal with the latter situation when religious reasoning is invoked in a secular legal system (I choose United States as an example), as the legal systems that have incorporated rights of nature and their spiritual connotation, thus far, are all secular.

4.1. The United States jurists' general attitude towards religious reasoning

For the general attitude regarding religious reasoning that has been established in the United States case law, it could be summarised as: un-justifiable on its own merit, because it is generally deemed as irrational and cannot be judged based on rationality. For example, in *Wolman v. Walter*, a case concerning the use of state provided textbooks for religious schools, Justice Stevens writes, '[t]he realm of religion . . . is where knowledge leaves off, and where faith begins' (Hitchcock 2004, vol. 2: 65). In the landmark case *United States v. Seeger*, in which Seeger refused induction into the draft on the basis of conscientious objection, which was further grounded on §6(j) of the Universal Military Training and Service Act, that provided an exemption from military duty because of one's religious training and belief. In its decision, the Supreme Court expanded §6(j) and states:

> . . . the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption [United States v. Seeger, 380 U.S. 163 (1965)].

Nevertheless, the Court ruled out political, sociological, philosophical views, or a merely personal code from the test (380 U. S. 173). Such distinction between religious belief and the rest types of personal views confirms that the Supreme Court considers religious belief cannot be compared to the political, sociological, or philosophical views. And the differences between

these two groups could be put as: the former is irrational, while the latter can be subject to rational debate.

In fact, although the Supreme Court has adjudicated many religion related cases, little did it judge religious reasoning based on its own merits. Rather, the religious reasoning is almost always tested against the First Amendment, particularly the Establishment Clause[8] or the Free Exercise Clause[9]. Both tests have nothing to do with the religious content but with its impacts on the society (Establishment Clause) or citizen's rights to freedom of religion (Free Exercise Clause). What the two Clauses don't say is how to rationally weigh and balance religious reasoning in court against secular reasoning.

This has been well represented in a more recent Supreme Court decision *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, which concerns whether the Colorado baker can legally refuse to make a wedding cake for a gay couple for religious reasons. In the decision, Justice Kennedy framed the problem as follows:

> The court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws,...
>
> Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the state itself would not be a factor in the balance the state sought to reach...[584 U. S. 2-3 (2018)]

Hence, the decision essentially deals with the balance between the First Amendment Rights and non-discrimination principle, while barely touches the topic of religious reasoning.

[8] Amendment's Establishment Clause prohibits the government from making any law 'respecting an establishment of religion.' This clause not only forbids the government from establishing an official religion, but also prohibits government actions that unduly favour one religion over another. It also prohibits the government from unduly preferring religion over non-religion, or non-religion over religion. See, e.g., Epperson v. Arkansas, 393 U. S. 97, 104 (1968) ('[Government] may not . . . aid, foster, or promote one religion or religious theory against another'); Zorach v. Clauson, 343 U. S. 306, 314 (1952) ('The government must be neutral when it comes to competition between sects').

[9] The Free Exercise Clause reserves the right of American citizens to accept any religious belief and engage in religious rituals. Free-exercise clauses of state constitutions which protected religious '[o]pinion, expression of opinion, and practice were all expressly protected'. The Clause protects not just religious beliefs but actions made on behalf of those beliefs. More importantly, the wording of state constitutions suggest that 'free exercise envisions religiously compelled exemptions from at least some generally applicable laws.' See Michael McConnell, Religion and the Constitution (2002), pg. 105 & 107. Also see: https://www.law.cornell.edu/wex/free_exercise_clause

It is sufficed to say that, in the US legal system, religion related cases are mostly debated and decided over the Establishment Clause, Free Exercise Clause, or other secular legal principles (such as procedural rules), rather than their religious merits. In fact, as pointed out in the beginning of this section, religion is generally considered irrational and unjustifiable among the jurists, which is not treated as in the same category with political, sociological, and philosophical arguments.

The way religious reasoning is dealt in the US legal system is a good example of what we can expect how spiritual reasoning will be treated in a secular court thus far. That is, the court will decide the case on the basis of secular reasoning, while render the spiritual connotation irrelevant. Just as religious reasoning, spiritual reasoning would also be deemed as irrational and therefore excluded from being judged on its own merits. The secular court's inability to assess non secular reasoning on its own merits put the second barrier when invoking rights of nature in court. In fact, without an according development of the legal theory, rights of nature and their spiritual connotation may just become another footnote of the environmental protection case, in which the indigenous cosmovision has no substantive weight in the decision.

5. The third barrier: Human rights is a closed logical circle—Compare spiritual reasoning with human rights reasoning

So far, I have pointed out the different features between spiritual reasoning and legal reasoning, i.e. spiritual reasoning is non-defeasible; and the similar characteristic shared by spiritual reasoning and religious reasoning, i.e. being deemed as irrational and therefore unjustifiable on its own merits in a secular court. Bearing both barriers, for spiritual reasoning to be adjudicable in a secular legal system, I turn to the notion of human rights, for that it too, is non-defeasible, irrational, and started with spiritual connotations. Thus, if human rights can function in a secular legal system, so could rights of nature and their spiritual connotation. In the next section, I explain why this, unfortunately, is not the case.

5.1 Three human rights declarations[10]

We can, of course, trace back to the time immemorial and find the evidence such as the concepts of property rights and citizens of a polis, to get the inspiration for fundamental rights. However, those concepts are, at best, the sources for today's thinking on human rights, whereas

[10]I use the term 'declaration' with its speech act connotation. See Searle (2010).

the concept of human rights has largely evolved and departed from the Ancient and Middle Age times. Thus in order to keep the discussion concise and relevant to our current legal context, I put the pinpoint at the Enlightenment era, which, by no coincidence, also marks the starting of the Anthropocene. Three iconic documents may be enough for now to illustrate the reasoning behind this prevailing ideology[11] of rights as we know it today: i.e. American Declaration of Independence (1776), French Declaration of the Rights of the Man and of the Citizen (1779), and later on, Universal Declaration of Human Rights (UDHR, 1948).

In the beginning of the American Declaration of Independence, it invokes 'Laws of Nature' and 'Nature' God' as the source to entitle the American people to separate from the British Empire. Then it follows its most famous paragraph:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

Similarly, this spiritual sentiment can also be found, albeit less saliently, in the French Declaration of the Rights of the Man and of the Citizen:

> The representatives of the French people, …have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man, in order that this declaration, being constantly before all the members of the Social body, shall remind them continually of their rights and duties…

Hence, the ontological sources for establishing human rights as a universal norm and a legal concept in the first place seem to have the following reasoning in common: human beings have rights that are bestowed by natural law (or God). Therefore, these rights are inalienable, natural, and sacred to human.

In a more contemporary and equally (if not more) important declaration that entails universal human rights, UDHR states that:

[11] I use 'ideology' in a value-neutral way.

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, …
>
> Article 1 All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Herein, human being human replaces the spiritual reasoning of natural law (God/sacredness) becomes the ground for granting human rights. The spiritual connotation from the Enlightenment texts is taken away and replaced with 'humanity', which serves both as the start and the end of the logic circle—hence, a tautology. From then on, 'being human' is kept as the one and only ground for bestowing human fundamental rights. Nevertheless, why being human can serve as the ground for bestowing fundamental rights to human? It didn't say. More importantly, how to define 'human' and who to define it? We wouldn't know. Without any rational deliberation, 'being human' becomes the foundation for human rights, which makes human rights a closed concept in the current legal systems. The consequences are: first, there is no conceptual room to expand fundamental human rights to non-human beings. Second, there is no logical room to process spiritual reasoning that supports rights of nature, not only because it is non-defeasible and deemed irrational—both can be said about human rights, but because the logic circle to bestow fundamental rights, as a tautology, is closed. One simply cannot join a closed club. This puts the third barrier to invoking rights of nature and their spiritual connotation in court.

Nevertheless, a club is only closed if 'we'—the owners, or the members, or the majority votes—say so. This is the message I got from Dworkin's famous 'rights as trumps' thesis. In the last section, I draw inspiration from the rights as trumps thesis and argue that the same logic should apply to rights of nature and their spiritual reasoning if we want them to be operative in a secular legal system.

5.2 Rights of nature as trumps and spiritual reasoning as an exception

Dworkin's famous thesis—rights as trumps is relevant to the current discussion in two aspects: First, it indicates that human rights reasoning as a category is non-defeasible, therefore it is comparable to the spiritual reasoning in the context of rights of nature. In the rights as trumps thesis, Dworkin discussed a utilitarian society under the egalitarian principle, which resembles

most of the critical features of a democratic society today. He argued that because there was a possibility to exclude the subgroup 'whose preference is discounted simply for being unpopular in the society' in this type of society (Dworkin 1984), we need to set restraints. In Dworkin's theory, such set of restraints is rights, i.e. rights should function as trumps over the egalitarian principle. This is also to prevent the self-conflicting results when un-egalitarian consequences are passed by egalitarian rules. Therefore, when rights function as trumps, they supersede the egalitarian principles and exclude the possibility of self-conflicting. In this sense, rights are non-defeasible; they are, in fact, the meta-rules.

Second, inspired by the rights as trumps thesis, a functional way to include rights of nature together with their spiritual connotation in a secular legal system, I propose, is to create an exception, a meta-rule. Without a meta-rule overriding the principles of a secular legal system, rights of nature and their spiritual reasoning would be obstructed by their non-defeasibility, irrationality, and the closed logic of human rights, which will immediately render these concepts useless in legal practice. Moreover, whenever rights of nature and their spiritual connotation are invoked in court, without creating an exception, we risk facing a fundamental self-contradiction of the secular legal system, the same way an egalitarian society would face when the majority vote for passing a non-egalitarian result.

Finally, the last piece of the puzzle is, how can we create such an exception? Simply declaring rights of nature and their spiritual reasoning as trumps would not work, because for now, most legal systems have already subscribed to a secular worldview and (human) rights as trumps principles—especially the legal systems that have legislated rights of nature. Assuming that we can (and should) declare rights of nature are as important as fundamental human rights; spiritual reasoning trumps other secular reasoning. We cannot, however, further state that rights of nature are more important than human rights; spiritual reasoning on rights of nature trumps human rights reasoning.

As a thought-experiment, I propose to solve this problem by using the proportionality principle the way it is used to solve the clash of fundamental rights. The principle of proportionality is understood here as the legal principle that allows for or requires the balancing of competing values. This enables adjudicators to decide whether a measure has gone beyond what is required to attain a legitimate goal and whether its claimed benefits exceed the costs. (https://europeanlawblog.eu/tag/principle-of-proportionality/). The European Court of Human Rights (ECtHR) defines this principle as follows:

> inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (*Soering v United Kingdom*. para. 89).

Followingly, I propose this principle could also apply to the conflicts between spiritual reasoning on rights of nature and fundamental human rights. Assuming a case occurred in an economically challenged society that desperately needs development in order to achieve fundamental human rights such as right to life, right to health, and right to shelter (which is actually not that far from the real scenario in the South American countries that have passed rights of nature legislation). A spring water company has made a contract with the local government to develop its business by marketing the bottled spring water from a local river. In return, it will financially support the local communities. One local indigenous community files a lawsuit to the court for an injunction on the basis of rights of nature law. It claims that the development of such business will harm the purity of the river and violate the sacredness of nature. How can the court balance rights of nature and the spiritual reasoning against not only right to development, but also right to life, health, and shelter that can be provided by the economic development? Under the principle of proportionality, one possible solution is for the court to conduct some extremely delicate and controlled balance with the help from the experts (spiritual leaders, economists, ecologists, etc.) to make the least possible damage to nature and in exchange of a level of development that people in the region can have the minimum standard of living that is essential to fundamental human rights. However, any more development that may derogate nature should be prohibited. Alternatively, there are also other options such as finding other places to host such business without disturbing the environment in where the community resides, and still use the profits to subsidise the local communities. The court, however, cannot simply refute the request for invoking rights of nature by stating the fact that there is a valid contract between the company and the local government. As long as rights of nature and their spiritual connotation are deemed as an exception and treated as important as fundamental rights, any reasoning less important cannot be used to justify the violation of the rights of nature. Furthermore, neither can the court state that rights to life, health, and development trump the sacredness of nature. As long as they are established to be equally fundamental, a delicate balance has to be conducted to deliver the least damage to all the fundamental principles involved. This is, as I propose, a feasible way to balance rights of nature and spiritual reasoning in a secular court. The same way we balance different fundamental rights.

This approach hurdles the first and second barriers (i.e. non-defeasibility and irrationality) by creating an exception for rights of nature and giving indigenous cosmovision the same weight as fundamental human rights reasoning. However, it does not solve the third barrier that human rights are a closed logic circle. The very fact that we are creating fundamental rights to nature is by definition in contradictory with the human rights logic. As I see no reason to keep a closed club that only reinforces the anthropocentric bias, I suggest it is about time to debunk the myth of human rights for its own good—to make it not only a universal and normative, but also a positive, defeasible, yet fundamental legal concept. This point, however, should be left for another occasion.

6. Conclusion

To bestow nature rights and base them on indigenous cosmovision is, after all, a welcomed development of the current legal system. It means human society has finally realised its ignorance towards other beings and started to put 'them' on the same footing as 'us'. Nevertheless, this process has to be done diligently, as any significant change of the current anthropocentric secular legal order requires a solid theoretical ground. Otherwise, both rights of nature and indigenous cosmovision risk of being lofty rhetoric that is at mercy of the political, economic, and social powers. In order for rights of nature and their indigenous roots to have a solid legal ground, it is not enough to only put them in the legislation and submit them to the court, for that there are three barriers preventing us to logically do so. Therefore, it requires, just as human rights, to create a meta-rule for rights of nature and their spiritual connotation, giving them an equal standing as other fundamental rights, so that they can be weighed and balanced in court under the principle of proportionality. This is certainly not the only way to move the motion forward, but a start for a further judicial discussion.

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