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Should Nature Have Rights? Orthodoxy and Innovation

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MIHNEA TĂNĂSESCU. *Understanding the Rights of Nature: A Critical Introduction*. Bielefeld: transcript Verlag, 2022.

Confronted by a stream of dire reports of present and pending ecological destruction, it is no wonder that many of us seek out developments that have the potential to lead us down a different path. One such development is the growing number of constitutions, laws, and judicial decisions that have recognized that natural entities—rivers, glaciers, mountains (or Nature as a whole)—have rights or legal personality. These developments include constitutional recognition of Nature in Ecuador and Bolivia, river personhood judgments in Colombia, India, and Bangladesh, and treaty-based legislative recognition of a range of natural entities, including rivers, mountains, and a former national park, in Aotearoa New Zealand, to name a few of the most prominent. While sometimes described as a trend, or even a "rights of nature movement," the details of these developments, remarkable for their diversity and place-based specificity, often get lost in the narrative created by both "rights of nature" proponents and simplistic critics.

Mihnea Tănăsescu explores the diverse histories, meanings, and examples of rights of nature ("RoN") developments and adopts a critical and reflective approach that foregrounds politics, arguing that "the question of who has the power to represent a nature with rights is central to understanding their potential." Nonetheless, law "matters a lot!" (Tănăsescu 2022, 17).

QUESTIONING THE RIGHTS OF NATURE ORTHODOXY

Tănăsescu takes particular aim at what he calls the "rights of nature orthodoxy," a narrative that sees their development as "inherently positive constructions (or, at worst, benign) that are going to save 'the environment' from rapacious 'humans'" (Tănăsescu 2022, 15). This "view of the rights of nature has [been] ... built through the advocacy of a transnational policy network, drawing on an ecotheological tradition steeped in liberal rights advocacy." Not only does this orthodox view ignore the diversity and

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place-based specificity of existing RoN developments, it is also grounded in a particularly Western ontological approach to the concept of "Nature" and a depoliticized interpretation of the foundational causes of the current ecological crisis. While capitalism's focus on limitless economic growth is often critiqued in RoN literature, it is "anthropocentrism" and the ownership or exploitation of nature by "humans" (as an apparently homogenous group) that receives the most attention. The solution, therefore, becomes both moral and conceptual—a reframing of nature and of humanity's place within it. Lost here, he maintains, is a critical analysis of who is driving, and benefiting from, the current system of expansionist, racialized, political capitalism, and of the institutional mechanisms they rely on to keep it in place (Tzouvala 2020; Natarajan and Dehm 2022, 23). For Tănăsescu (2022, 105), a "correct diagnosis of the ill" is necessary to enable innovative (and appropriate) cures.

The book's critique rests on the key concepts of nature/Nature, rights, legal personality, and the problematic binary between anthropocentric/eco-centric thinking.

nature/Nature

Tănăsescu (2022, 32) considers the "two very different ideas of nature at play within the rights of nature." Within what he describes as the "ecotheological tradition" (stemming particularly from the work of Thomas Berry [1999]), Nature is given a capital N and is conceived as a "totality"—essentially including everything there is, both physical and metaphysical, including products of human labor. This version of Nature also tends to be used as "a proxy for the good" (Tănăsescu 2022, 33). Moreover, there is an "inherent contradiction" in having the word nature mean both "that which is so [ontology] and that which should be so [morals]." However, the biggest problem with Nature as a Totality is the way it interferes with a relational understanding of the world through being defined at such a level of abstraction and due to its attachment to the quality of equilibrium or "harmony," leading to a focus on "restoration" (Tănăsescu 2022, 34). This nebulous outcome (of restoration) is often pursued by seeking to protect Nature from humans through forced separation—a practice that has been critiqued as "environmental colonialism" (O'Donnell et al. 2020). A relational understanding of nature—one that is particularly associated with many Indigenous peoples and that involves "situated relationships with natural beings that are always in flux"—is incompatible with both this level of abstraction and focus on equilibrium (Tănăsescu 2022, 57).

It is also this ecotheological understanding of Nature as a Totality that has led to the transformation of the Andean concept of Pachamama into Gaia or "Mother Earth," a gendering of nature that is problematic because it "goes seamlessly with the neoliberal idea that nature is first and foremost a producer, just like the stereotypical image of motherhood as fertility would suggest" (Tănăsescu 2022, 116, citing Tola 2018). In Bolivia, for example, the gendering of nature has been used to justify an escalation of resource extraction, such as mining, under the premise of accepting Mother Earth's "generous gifts" (Tănăsescu 2022, 127). Despite claims to the contrary, this singular feminine entity—often promoted by transnational environmental NGOs—also sits at

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odds with "indigenous conceptions, which are much more multidimensional and variegated" (Tănăsescu 2022, 116).

Rights and Legal Personhood

The concepts of rights and legal personhood are also subject to careful scrutiny throughout this book. While there are a variety of reasons why legal personality and legal rights may go hand in hand, the particular focus on legal personality within RoN discourse has partly been a response to a seminal argument made by Christopher Stone in his 1972 article "Should Trees Have Standing?" (Stone 1972). Stone's argument was a specific response to the fact that the Sierra Club could not bring a legal action to protect Mineral King Valley from being developed into a ski resort without the pretense of seeking to protect their own aesthetic interest in the place. Granting legal personhood to trees was a mechanism that Stone designed to provide broader standing for people to bring an action on behalf of the environment itself. Two issues are often ignored in discussions around the adoption of such mechanisms elsewhere. First, the doctrine of standing is far more open in many jurisdictions outside the United States, meaning that legal personhood is often not necessary to enable public interest environmental actions of this nature. Second, Stone's model of legal personhood was predicated on "a system in which, when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship" (Stone 1972, 464). The question of who ought to be granted this guardianship role, and whether it is the most appropriate method of providing legal recognition, is often sidestepped. It is also worth observing that Stone's argument was highly pragmatic. He observed a problem in US law and proposed a fairly conservative, technical solution with a vaguely "radical" conceptual underpinning.

Stone frames the recognition of legal rights and personality for nature as part of a moral evolution that reflects an "expanding circle of moral concern"—one that apparently began with caring only about one's immediate family (Stone 1972, 450–57). Tănăsescu (2022, 40) is highly critical of this idea, arguing that it "has no basis in empirical study" and reflects a uniquely Western liberal understanding of both law and morality. Beyond this, there is also the problem that the institutional recognition of rights has a history both of deradicalizing social movements (Clark 2017) and of enabling "a shifting pattern of exploitation" as these emancipatory claims are incorporated into the liberal, capitalist status quo (Tănăsescu 2022, 41). Competing rights claims "remain at the mercy of the state for resolution and effective application," with the result that RoN become yet another "tool for the state to satisfy certain environmental interests while advancing its largely extractivist agenda" (Tănăsescu 2022, 119).

Such critiques of rights are not new, and Tănăsescu is far from alone in his critique of these risks within RoN discourse. Where this book excels is in its commitment to nuance and to attention to detail. Tănăsescu is careful to acknowledge that there is nothing inherent within the RoN that leads to participating in this extractivist agenda. Instead, he argues "that a certain kind of rights, enamored with totality and completely uncritical of its own intellectual inheritance, can – perhaps despite themselves – do

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this" (Tănăsescu 2022, 119). He also notes these rights "harbor other possibilities as well, and the New Zealand cases are instructive here" (Tănăsescu 2022, 119).

RADICAL POTENTIAL AND INDIGENOUS AUTHORITY

Tănăsescu highlights the risk of "the settling of orthodoxy . . . uprooting the initial radical potential of the new idea" and, by doing so, seeks to, "keep the innovative impetus alive" (Tănăsescu 2022, 120). What are some of these innovative possibilities?

Given the critiques of RoN orthodoxy, particularly its alignment with colonialism and "ontological universalism" (Tănăsescu 2022, 67), why have any Indigenous peoples chosen to support (and even lead) the legal recognition of right for nature? Tănăsescu (2022, 68) argues that these have been strategic choices made within constrained conditions: "the rights of nature are one of the latest expansions of state power into indigenous worlds, one that is much better in many ways than other alternatives, but one that does nothing to fundamentally challenge the power of the state." He then turns to "cases that have started to show radically new possibilities, not least because they are anchored in specific places as opposed to relying on the concept of Nature" (Tănăsescu 2022, 69).

Two notable instances can be seen in Aotearoa New Zealand. Political negotiations, starting in 2005 and 2011 respectively, between the Crown (NZ government) and Iwi (nations/tribes) for settlement of historical claims under the historic 1840 Treaty of Waitangi led to legislation in 2014 and 2017 that transfigured a national park and a river into legal entities—meaning that they now have the right to legal standing. In both cases, it is not the conferral of legal personality that has been the most significant, but rather the central role of the Tūhoe and the Whanganui iwi (the local Māori tribes) in the creation of the legislation and governance arrangements, the space created for ontological and legal pluralism, and the way that power has shifted under these new approaches.

Despite these potentially radical elements, it is important not to romanticize the history of either of these cases. The granting of legal personality to these natural entities was not the benevolent gift of an innovative colonial state, but the result of compromises, reached after long-standing militarized resistance to colonial occupation and control, that continued into the early twentieth century, and a period of drawn-out litigation and negotiation. It was the Tūhoe and Whanganui iwi (tribes) who compromised here by working with a Western legal construction to find a workable way forward in the face of a state that was unwilling to recognize their rightful sovereignty over territory. Nonetheless, within this compromise, Tănăsescu argues that both groups have created radical possibilities through the resulting governance arrangements, the intrinsic values that have been embedded within them (in Te Kawa o Te Urewera and Te Pā Auroa nā Te Awa Tupua), and the choice of representatives (see also Cribb, Mika, and Leberman 2022).

In relation to the former national park, Te Urewera, Tănăsescu (2022, 82) argues that "it focuses on the governance arrangement that realigns power relations away from Crown dominance and towards an as yet unknown future." This leads to the argument, also made by others such as Macpherson (2022), that Te Urewera is more about indigenous rights than rights of nature—highlighting one aspect of why the

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anthropocentric/eco-centric dichotomy is so problematic. This is further emphasized by the fact that the Te Urewera management plan was drafted to focus on "the management of people for the benefit of the land," not the other way around (Tănăsescu 2022, 82). Focusing on people is not inherently antienvironmental, particularly not when grounded in a reciprocal relationship to place.

Here it is relevant to revisit the question of representation. Recall that Stone suggested that essentially anyone ought to be empowered to approach the court and ask to be made the guardian of an "endangered natural entity." He argued that qualifications for such a role would be straightforward, such as with environmental NGOs. Such an open approach to standing is essentially what was adopted in Ecuador under its "rights of Nature" constitutional provisions, and, predictably, the result has been a high number of cases where already powerful groups have made use of RoN to increase their power through the courts. In one example, "the Ecuadorian state used nature's rights to evict small-scale artisanal miners in a remote region of the country" only to subsequently expand corporate mining (Tănăsescu 2022, 119, 124). In contrast, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ) "designates one representative for Te Awa [the river], namely Te Pou Tupua, the equivalent of Te Urewera's Board, here described as the 'human face' of the river" (Tănăsescu 2022, 88). Neither Te Urewera's Board nor the Te Pou Tupua are "guardians," nor is this representative authority randomly assigned. It is here, in the minutia of these institutional details, that possibilities for innovation and the shifting of power have been created.

This strategic creativity has not, however, been confined to Aotearoa New Zealand. Even within seemingly orthodox outcomes, communities have created the space for the development of new, potentially radical, outcomes. When the Colombian Constitutional Court recognized Atrato river as having biocultural rights in 2016, in response to a legal action brought by an NGO "on behalf of residents suffering the harm of illegal mining activities on the river" (Tănăsescu 2022, 98), the judgment reflected many of the RoN orthodoxies that Tănăsescu critiques. The judge also created a guardianship model of one representative from the local community and one from the national government (the same government that had already failed to regulate the illegal mining). Nonetheless, "local communities seized on the opportunity created by the ruling to develop the model further, for and by themselves" and created "a multiple local guardian made up of 14 different people" (Tănăsescu 2022, 104). The new dialogue that has emerged from this process has also enabled the local community to slow down the rushed timeline imposed by the judgment, which provided just "four months for the creation of a medium and long-term plan for the river; five months for an intergenerational agreement" (Tănăsescu 2022, 105). Of course, the risk remains that the court order might act "as a straitjacket for . . . innovation" and that these rights for the Atrato "may prove to be another tool that it can use to exclude locals," but the community have also demonstrated that they are capable of making strategic use of this judgment, and their resulting "experiment in river representation" may still create new possibilities for radical innovation (Tănăsescu 2022, 106).

The book concludes by focusing on the kinds of representative arrangements and jurisprudence that open up spaces of innovation, enable legal and ontological pluralism, and create sufficient room for Indigenous peoples to exercise power and authority.

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Crucial here is the creation of governance arrangements that reflect reciprocity and relationality tied to place and the significance of both to representation. A range of new possibilities are canvased here, including the proposal for the Martuwarra (Fitzroy River) in Australia to be recognized as an "ancestral being" (Martuwarra RiverOfLife et al. 2020), and the potential synergies that may be found with the diverse commoning practices that exist across the globe. Tănăsescu also raises the question of whether the practice and theory of commoning could also be a promising basis from which to open up these spaces of innovation and place-based relationality (Tănăsescu 2022, 151). This is an intriguing question that merits further exploration—particularly because it has the potential to draw productively on two bodies of critical scholarship (RoN and commoning).

Judged against its own goals, this book is a success. It brings a sharp political economy analysis to an issue that has been dominated by legal scholars and philosophers. Interestingly, the physical geography of the places considered in the book seem to disappear into the background of this often highly theoretical analysis—leaving open room for further work that foregrounds the *places* of these place-based legal developments. Despite this, this book makes a valuable and timely contribution to the rapidly expanding body of critical "rights of nature" literature, and one that also provides an excellent primer on the development and history of the subject—making it suitable for those seeking an introduction and those already highly familiar.

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