The Rights of Nature, Earth Jurisprudence & Indigenous Peoples: A Human Rights based Approach

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Abstract

Although there are some potential connections between the movements to support the Rights of Nature (RoN), Earth jurisprudence and indigenous peoples, there are also some potential pitfalls and challenges in linking these movements. In exploring some of these challenges, this article explores how a human rights-based approach might help to alleviate some of these potential drawbacks by ensuring that indigenous peoples' cultural, social and spiritual rights are integrated in these legal developments. The article explores how human rights law could serve as a benchmark to guide the development of the RoN to ensure the integration, respect and promotion of indigenous peoples' rights, whilst supporting future development of the emerging Earth jurisprudence. It argues that the integration and respect of indigenous peoples' human rights could offer a solid platform to push and support the development of the RoN in a much more respectful and participatory manner, and potentially generate a solid platform to enhance new institutional arrangement to represents and speak on behalf of Nature.

Introduction

The movement to support the rights of Nature (RoN) and recognise the fundamental rights of natural entities is gaining momentum.[1] The main idea is that Nature and/or specific natural entities possess inherent rights.[2] This is grounded in Earth Jurisprudence, a legal philosophy highlighting that humans are only one part of a wider community of beings and that the welfare of each member of that community is dependent on the welfare of the Earth as a whole.[3] This represents a significant paradigm shift from Nature seen as an object of protection for the goods of humankind, to a subject of rights on its own, supporting a new non-anthropocentric relationship with Nature.[4] Although for many years the idea of granting rights to Nature has been rhetorical, the recent recognition of legal rights to Nature in several countries has moved the debate into a very tangible practical reality, leading to a potential "legal revolution".[5] Since Ecuador included Rights of Nature provisions in its Constitution in 2008, new legislation and court cases recognising specific rights and legal personality to natural entities have emerged in Bolivia, New Zealand, India, Colombia, Australia, Bangladesh, Uganda, Mexico and at the local level in the USA.[6]

The idea of recognising Nature as a person resonates with many indigenous peoples' cultures which are based on interconnectedness of all forms of life under which humans and nature are seen as part of a same system.[7] It also resonates strongly with many indigenous communities who are acting as custodians and stewards of Nature. From this perspective,

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[1] For analysis, see United Nations General Assembly, Report on Harmony with Nature, UN Doc, A/75/266 (2020) and for updates United Nations Harmony with Nature Programme: http://www.harmonywithnatureun.org (last visited April 6, 2021)

[2] C. Stone, *Should Trees Have Standing?: Law, Morality, and the Environment* (Third Edition. Oxford University Press, 2010); C. Cullinan, *Wild Law: A Manifesto for Earth Justice* (Chelsea Green Publishing, 2011)

[3] M. Maloney and P. Burdon, (eds.) *Wild Law – In Practice* (Routledge, 2014); N. Rogers and M. Maloney, *Law as if the Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017)

[4] See M. Serres, *The Natural Contract* (University of Michigan Press, 2011); R. F. Nash, *The Rights of Nature: A History of Environmental Ethics* (Madison, WI: University of Wisconsin Press; Cullinan, 1984)

[5] David Boyd, *The Rights of Nature, A Legal Revolution That Could Save the World* (Toronto, Canada: ECW Press, 2017).

[6] Constitution of the Republic of Ecuador, 2008, Section 71; Bolivia - Law No. 071 on the Rights of Mother Earth; Te Urewera Act (New Zealand, 2014); Te Awa Tupua (New Zealand, 2017). For an overview of all these developments, see UN Report on Harmony with Nature, UN Doc. A/75/266, Supp (2020)

[7] See C. Espinosa, "Interpretive Affinities: the constitutionalization of rights of nature, *pacha mama*, in Ecuador", J. Environ. Pol. Plann., 21 (5) (2019), pp. 608-622; and Elizabeth Macpherson, *Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience* (Cambridge University Press, 2019);

there is a strong connection between the idea of recognising the personality of Nature and indigenous peoples' stewardship and custodians' approaches to Nature. [8] Hence in theory, the 'legal revolution' emerging under the banner of the RoN could also become a significant avenue to promote and respect indigenous worldviews. However, despite these synergies there are also some potential discordances between the two movements. These include the potential danger of dominance of western legal concepts, the lack of integration and respect of the leadership of indigenous peoples, and the ultimate danger that recognising rights to Nature could undermine indigenous peoples' fundamental rights, notably their rights to self-determination, land and territories. One of the potential issues relates to the lack of voices from indigenous peoples themselves in the emerging field of the RoN, and notably within the development of Earth jurisprudence. Although indigenous voices and worldviews are central to putting nature rights forward, as analysed by O'Donnel, Poelina, Pelizzon and Clark the movement to support the RoN has a tendency to "bury" the leadership and influence of indigenous peoples' transformative approach to Nature.[9] A second issue relates to the medium itself: in the push to support the RoN there is an inherent danger of using law and legal institutions which are inherently dominated by Western legal and philosophical concepts with little regards to indigenous peoples' socio-cultural worldviews.

To address some of these concerns, this article explores how a human rights-based approach could offer a supportive legal framework to ensure the respect indigenous peoples' socio-cultural rights within the development of the RoN.[10] A human-rights based approach to the RoN could offer a relevant normative framework to ensure that indigenous peoples' rights are respected and protected whilst supporting the emergence of stronger Earth jurisprudence. To support this argument, the article analysis how the RoN and the rights of indigenous peoples could be self-supportive and complementary by focusing on four key legal issues, namely (1) indigenous peoples' rights to self-determination (2) cultural and spiritual

[8] See M. Graham, M. Maloney, "Caring for country and rights of nature in Australia: a conversation between earth jurisprudence and Aboriginal law and ethics", in C. La Follete, C. Maser (Eds.), *Sustainability and the rights of nature in practice* (CRC Press, Boca Raton, 2019): 385-400.

[9] Erin O'Donnell, Anne Poelina, Alessandro Pelizzon and Cristy Clark, "Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature", Transnational Environmental Law, 2020

[10] A human rights-based approach is "a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights." UNDP 'Integrating Human Rights with Sustainable Development', UNDP Policy Document 2 (New York, NY: UNDP, 1998), see also: The United Nations Office of the High Commissioner for Human Rights, Human Rights in Development, Geneva, 2003.

rights; (3) rights to lands and natural resources; and (4) rights to participation, consultation and consent. Based on these four key legal human rights principles, this article argues that the integration and respect of indigenous peoples' human rights could offer a solid platform to push and support the development of the RoN in a much more respectful and participatory manner, and potentially generate a solid platform to enhance new institutional arrangement to represents and speak on behalf of Nature.

1. Decolonising Law: Indigenous Worldviews, Earth Jurisprudence & Self-Determination

Although indigenous peoples' worldviews encompass extremely diverse cultural contexts, commonly many indigenous cultures share a common affirmation that land and nature are sacred and must be looked after.[11] This is often reflected in beliefs, practices, and transmitted through myriad of cultural practices, usually evidence through oral histories, rituals, including song, dance, paintings, rituals and other forms of cultural expressions.[12] For example, the Māori use the term '*kaitiaki*' (or *kaitiakitanga*) to describe their intergenerational guardianship responsibilities towards their ancestral territories.[13] In North America, the Lakota and Dakota nations use the terminology: *Mitakuye Owasin*, "All My Relations", when referring to their harmonious relationship with nature. Across Australia, many Aboriginal communities' cultural protocols indicate that nature must be protected for current and future generations, often referred to as "caring for country". Several indigenous communities in Western Australia have highlighted that they have a religious, legal, social and economic responsibility to 'look after' the lands and waters, by a combination of ritual performance, 'talking to country', conservation practices and daily social action.[14] These are only illustrations as many indigenous cultures are based on similar approaches to Nature. Despite the immense diversity of indigenous cultures, one of the commonalities is often the vision that Humans are part of their wider environment and that Nature itself is to be

[11] See J. Studley, *Indigenous Sacred Natural Sites and Spiritual Governance: The Legal Case for Juristic Personhood* (Routledge, 2018); and John A Grim (ed.) *Indigenous Traditions and Ecology: The Interbeing of Cosmology and Community* (Harvard Center for the Study of World Religions, 2001),

[12] See F. Berkes, *Sacred Ecology: Traditional Ecological Knowledge and Resource Management* (2nd ed. Routledge 2008)

[13] See Linda Te Aho, "Te Mana o te Wai: An indigenous perspective on rivers and river management", 35 river research and applications 1615–1621 (2019).

[14] See Sandy Toussaint, Patrick Sullivan, Sarah Yu, Mervyn Mularty Jnr., *Fitzroy Valley Indigenous Cultural Values Study* (Centre for Anthropological Research, The University of Western Australia, 2001)

regarded as an entity; an approach which differs from the dominant western anthropocentric approach to the world. From this perspective, the philosophical and legal theories of 'Earth jurisprudence', resonates strongly with some of the indigenous worldviews. By adopting a less anthropocentric relationship with Nature, Earth jurisprudence reflects and integrates many of the indigenous worldviews on the relationship with Nature.[15] However, a review of the literature on Earth jurisprudence indicates a heavily ascendency of Western theological and philosophical writing. As noted by Ngaire Naffine the push for the recognition of an Earth centred jurisprudence has been dominated by two "influential families of thinkers: secular rationalists and conservative Christians."[16] There is certainly an important acknowledgment of indigenous worldviews within Earth Jurisprudence, but as analysed by O'Donnell, Poelina, Pelizzon and Clark there is a danger of 'obscuring' the leadership role of indigenous peoples within the movement. One of the dangers of this lack of acknowledgment of the leadership of indigenous worldviews is that it might lead to some "weak legal pluralism" trying to copy indigenous relations with Nature without "testing the validity of the framework itself within the laws of the relevant Indigenous people."[17] As a way forward they suggest the importance of recognising the right to self-determination of indigenous peoples. Indeed, the recognition and integration of the right to self-determination could provide an important supportive legal framework by ensuring that indigenous peoples' leadership, rights and worldviews are fully respected.

Countless legal battles, political debates and diplomatic controversies have taken place on the right to self-determination and its legal meaning. It is beyond the scope of this article to re-examine these rich and intensive debates,[18] but suffice to say that with the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 and subsequent legal developments, there is an agreement that indigenous peoples have managed to bring a new transformative approach to the meaning of self-determination under

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[15] See P. Burdon, (ed.) *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011); Michelle Maloney & Patricia Siemen, "Responding to the Great Work: The Role of Earth Jurisprudence and Wild Law in the 21st Century", 5 Earth Jurisprudence & Envtl. Just. J. 6 (2015).

[16] Naffine, Ngaire. "Legal personality and the natural world: on the persistence of the human measure of value." Journal of Human Rights and the Environment 3 (2012): 68-83.

[17] Erin O'Donnel et al, *supra note* 9, at pp. 24-25

[18] For analysis, see: James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004); Knop, Karen. *Diversity and self-determination in international law*. Vol. 20. Cambridge University Press, 2002; Maivân Lâm, *At the Edge of the State: Indigenous Peoples and Self Determination* (Brill Nijhoff, 2000); Harald Gaski, *Indigenous peoples: self-determination, knowledge, indigeneity* (Eburon Uitgeverij BV, 2008);

international law.[19] An important element of this transformative approach is about the fundamental connections between the right to self-determination and natural resources. As captured by Ted Moses, the former Grand Chief of the Grand Council of the Crees: "Self-determination may make some people think of the right to vote, or the right to belong to political parties or the right to self-government. (…) But when I think of self-determination I think also of hunting, fishing, and trapping. I think of the land, of the water, the trees, and the animals."[20] This connection between the right to self-determination and Nature is reflected in the jurisprudence of international human rights bodies. As the UN Human Rights Committee (HRC) has observed, the right of peoples to self-determination and to dispose of their natural resources is "an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights".[21] Likewise, the UN Committee on Economic, Social and Cultural Rights (CESCR) has adopted a similar approach, refereeing to indigenous peoples' right to self-determination over natural in several of it concluding observations.[22] The UN Committee on the Elimination of Racial Discrimination (CERD) has also supported such connection between self-determination and natural resources. In its General Recommendation on the right to self-determination, CERD pointed out that the right to self-determination implies an obligation for States to act in order to preserve the culture of ethnic groups within their territory. The Committee found that such an obligation arises as a consequence of the right of self-determination and stated that such a right gives persons belonging to ethnic groups "the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups."[23] Based on such wording, self-determination would include a right for indigenous peoples to ensure

[19] For analysis, see Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (OUP, 2016); Rauna Kuokkanen, *Restructuring Relations: Indigenous Self-Determination, Governance and Gender* (Oxford University Press, 2019)

[20] Ted Moses, "Self-Determination and the Survival of Indigenous Peoples", in Pekka Aikio & Martin Scheinin (eds.) *Operationalizing the right of indigenous peoples to self-determination* (2001), 162.

[21] HRC 1990, para 13.3

[22] See: Argentina, UN Doc. E/C.12/ARG/CO/3 (2011); Finland: UN Doc. E/C.12/FIN/CO/6 (2014); Guatemala, UN. Doc. E/C.12/GTM/CO/3 (2014); Cambodia, UN. Doc. E/C.12/KHM/CO/1 (2009)

[23] CERD, General Recommendation XXI(48) on Self-Determination, U.N. Doc. CERD/48/Misc. 7/Rev. 3, para. 5 (1996).

that their specific worldviews and different approach to nature are integrated and respected.[24]

Despite the significant legal connection between the right to self-determination, natural resources and indigenous worldviews, little references to the right to self-determination have been integrated in the development of the RoN. The integration of the indigenous peoples' rights to self-determination could support and ensure that indigenous leadership is integrated and respected. The integration of the right to self-determination within Earth jurisprudence could also be relevant to address the over idealistic approach to indigenous environmental stewardship which sometimes marks the movement to support the RoN. There is a potentially dangerous over idealistic approach to indigenous stewardship of Nature, with indigenous peoples been described as having more virtuous, peaceful, and 'simplistic' ecological relationship with Nature. This idealistic ecological approach is a reminiscent of the 'noble savages' vision, which has had some very damaging long lasting impact on indigenous communities.[25] As noted by Rowland "[W]hen indigenous peoples are stereotyped as 'noble savages' they are once again frozen in the past and therefore can have little to contribute to human history."[26] The perpetuation of essentialist images of indigenous peoples whose cultural traditions and spiritual values predispose to live in harmony with Nature could lead to a tragic revival of the colonial 'noble savages' theories of the past. The 'ecologically noble savage' approach relies on socially constructed imaginaries which have also led to "repressive authenticity."[27] The danger of this socially constructed approach to nature rights, is that it assumes that indigenous peoples ought to preserve the planet. As noted by Bell: "on what basis do we assume that indigenous peoples hold some mystical secret waiting to be plumbed, that they exist to save Western society and the planet with their knowledge?"[28] The danger is also to reinforce a dichotomised approach between, on

[24] General Recommendation XXIII(51) on Indigenous Peoples calls upon states parties to ensure indigenous peoples effective participation but makes no mention of self-determination per se, U.N. Doc. CERD/C/365, in A/52/18, Annex V (1997).

[25] See T. Ellingson, *The Myth of the Noble Savage* (Berkeley: Univ. Calif. Press, 2001);

[26] Mike J. Rowland, "Return of the 'noble savage'': misrepresenting the past, present and future", Australian Aboriginal Studies 2 (2004): 2.

[27] See Raymond Hames, "The ecologically noble savage debate", Annu. Rev. Anthropol. 36 (2007): 177-190.; and P. Nadasdy, "Transcending the debate over the ecologically noble Indian: indigenous peoples and environmentalism" (2005) Ethnohistory 52:291–331

[28] Diane Bell, "Respecting the land: religion, reconciliation and romance-an Australian story", in John A Grim (ed.) *Indigenous Traditions and Ecology: The Interbeing of Cosmology and Community* (Harvard Center for the Study of World Religions, 2001), p. 482

the one hand 'noble' ecological indigenous peoples, and on the other hand greedy and destructive mainstream western societies. As captured by Fennell: "These ideas have been more recently supported through the efforts of indigenous rights activities and academics, mainly anthropologists, who have dichotomised both groups as being of two completely different ethical mind-sets: Western humanity as greedy and destructive, and their counterpart as communal, wise and responsible."[29] Graham and Maloney have engaged in an extremely relevant dialogue on this issue noting that "(…) Earth jurisprudence resonate very powerfully with people from the Western cultural tradition, as it helps people from this culture reveal and 'unpack' the deeply flawed basis of Western industrial society's approach to commodifying and using up the living world. What is important for the future of Earth jurisprudence in Australia is whether the theory and practice is of any use or relevance to First Nations Peoples."[30] In such context, the integration of the right to self-determination as a key element to support the development of the rights of Nature could help alleviate such dangerous paths by ensuring that indigenous peoples themselves are leading these debates.

Bringing to the fore the right to self-determination could also support the decolonisation of the dominant legal systems which are based on western approaches to nature. Despite decades of decolonisation, law and legal institutions are still dominated by western materialistic constructs under which nature is mainly been treated as something to be own and exploited by Humans. Most legal frameworks are human-centric - even environmental law is usually based on interest of the Humans with Nature being protected as a 'resource'.[31] As noted by Rawson and Mansfield : "(…) by treating rights for nature as a natural truth, RoN [rights of nature] is not only contradictory but naturalizes the colonial history of legal personhood."[32] As they argue, the rights of Nature "enacts a contradictory logic, where in the name of overcoming western human–nature dualism, and its concomitant anthropocentrism, it turns to western notions of rights, personhood, and holism as the solution. In so doing, nature becomes something identifiably 'natural' by becoming more like

[29] David A. Fennell, "Ecotourism and the Myth of Indigenous Stewardship", 16-2 Journal of Sustainable Tourism, (2008)

[30] Mary Graham and Michelle Maloney, "Caring for Country and Rights of Nature in Australia: A Conversation between Earth Jurisprudence and Aboriginal Law and Ethics" in Cameron La Follette, Chris Maser (eds.) *Sustainability and the Rights of Nature in Practice* (2019), at 385.

[31] On the Anthropocentric dominance of environmental law, see Vito de Lucia, *The 'Ecosystem Approach' in International Environmental Law: Genealogy and Biopolitics* (Routledge, 2019)

[32] Ariel Rawson and Becky Mansfield , 'Producing juridical knowledge: "Rights of Nature" or the naturalization of rights?', Environment and Planning E: Nature and Space 2018, Vol. 1(1–2) 99–119

colonial conceptions of the human, whose existence can only be legitimized by legal personhood."[33] One issue with the approach to the rights of nature is that it might just be a replication the already dominant western and largely individualistic, materialistic approach to law: Nature becomes a legal human entity controlled and managed by human institutions. It could contribute further to the Anthropocene by reinforcing the human led impact on nature.[34] In such context the rights to self-determination could offer a solid platform to support the decolonisation of the dominant western legalistic approach to nature, by becoming an anchor to support the introduction and respect of indigenous non-western approaches to nature.

Indigenous worldviews and relationship with Nature have started to be recognised in international human rights law. For example, the Inter-American Court of Human Rights (IACtHR) in a case concerning communities in Ecuador recognised that "[a]ccording to the worldview of the Sarayaku People, their land is associated with a set of meanings: the jungle is alive and nature's elements have spirits (*Supay*), which are interconnected and whose presence makes places sacred."[35] The right to self-determination has been at the heart of the 22 years long battle to get the UN Declaration of the rights of indigenous peoples (UNDRIP) adopted, this has led to a transformative understanding on the meaning of self-determination, such knowledge on the fundamental importance of self-determination ought to be at the heart of the development of the RoN. This article is not arguing for any predetermined meaning as to what the right to self-determination might mean in this context, but rather that self-determination ought to be a central principle to support future development on the RoN. One important element that was learnt over the long debates on the meaning of the right to self-determination is that its outcomes and application are not to be predetermined by external actors, but rather that it has a transformative potential to support the fundamental principle that it is for the concerned indigenous peoples to define what it ought to mean. Hence including self-determination within the frame of the RoN would serve as a strong platform for indigenous voices to be integrated and respected.

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[33] Ibid

[34] See Kotzé, Louis J. "Human rights and the environment in the Anthropocene." *The Anthropocene Review* 1.3 (2014): 252-275; and Avelar, I. (2013). Amerindian perspectivism and non-human rights. *Alter/nativas*, *1*, 1-21.

[35] *Kichwa Indigenous People of Sarayaku v Ecuador,* Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, para.57 (June 27, 2012). para 57

2. Recognising Cultural Integrity: Cultural Rights, Spirituality & Nature

Another significant potential legal connection between the rights of indigenous peoples and the RoN comes under the banner of cultural rights. International human rights law has developed a comprehensive jurisprudence recognising that indigenous peoples' cultural rights includes a strong connection to land and natural resources.[36] This has been affirmed under several international treaties, such as the International Covenant on Civil and Political Rights (ICCPR) which affirms in its article 27 the rights of minorities to practice their own culture. In its General Comment concerning the interpretation of this article, the Human Rights Committee (HRC), the UN body in charge of the monitoring of the treaty, has highlighted that for indigenous peoples cultural rights "may consist in a way of life which is closely associated with territory and use of its resources."[37] This approach recognising the connection between cultural rights, territories and natural resources has been at the heart of many general recommendations and individual decisions of the Committee leading to the establishment of a very developed jurisprudence linking indigenous peoples' cultural rights and the natural resources located in their territories.[38] While this approach does not include the recognition of the rights of Nature *per se*, it does support the rights of indigenous peoples to enjoy and maintain cultural practices connected to the use of natural resources. The Committee on Economic and Social Rights (CESCR) has also adopted a similar approach under the protection of the right to "take part in cultural life" highlighting the importance of protecting indigenous peoples' cultural values "associated with their ancestral lands" to "prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity".[39] Under this approach the rights of indigenous peoples to practice their cultural traditions is closely connected to their use and access to nature. Although it is not a direct recognition of the right of nature, this approach recognises that cultural traditions connected to the use of natural resources constitute an essential element of indigenous peoples' cultural rights, opening the

[36] See J. Gilbert, *Indigenous Peoples' Land Rights under International law* 2nd Ed. (Brill, 2016)
[37] Human Rights Committee (1994), General Comment No. 23: The Rights of Minorities (Art. 27), UN Doc. CCPR/C/21/Rev.1/Add.5, see para. 3.2 and 7
[38] For analysis see Martin Scheinin, "The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land", in *The Jurisprudence of Human Rights: A Comparative Interpretive Approach* (Theodore S. Orlin & Martin Scheinin eds., 2000).
[39] CESCR 2009, para 36

door for the recognition of indigenous worldviews and cultural approaches to Nature. There is also very strong jurisprudence emerging from the Inter-American system of human rights connecting indigenous peoples' cultural rights and natural resources. On many occasions, the Inter-American Court of Human Rights (IACtHR) has highlighted that the close relationship of indigenous peoples with their lands and territories "must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations."[40] As noted by the court:

> "The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity."[41]

Based on such a holistic approach, the Court has made references to the need to protect the cultural integrity of indigenous peoples, recognising the inextricability cultural rights and nature.[42] For example, in the case concerning the Moiwana community in Suriname, the Court highlighted that "in order for the culture to preserve its very identity and integrity, [indigenous peoples] … must maintain a fluid and multidimensional relationship with their ancestral lands."[43] The Court highlighted that the close relationship between indigenous peoples and their lands and territories must be recognized and understood as the fundamental base of their culture, spiritual life, integrity, economic survival and cultural preservation.[44] In the 2015 *Kaliña and Lokono* case, the court specifically acknowledged indigenous peoples' special physical and spiritual relationship with their natural environment highlighting the communities' interconnection with the animals, plants, fish, stones, streams

[40] I/A Court H.R, Yakye Axa Indigenous Community v. Paraguay, judgement of 17 June 2005 (Series C, No. 125) para. 131; see also: Case of the Mayagna (Sumo) Awas Tingni Community, para. 149.
[41] I/A Court H.R, Yakye Axa Indigenous Community v. Paraguay, judgement of 17 June 2005 (Series C, No. 125) para. 135
[42] See: I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs) Judgment of June 17, 2005. Series C No. 125, paras. 147 and 203; Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano v. Panama, Ser. C No. 284, para. 143.
[43] I/A Court H.R, Moiwana Village Case, at paras. 101, 102-03.
[44] I/A Court H.R, Yakye Axa Indigenous Community v. Paraguay, judgement of 17 June 2005 (Series C, No. 125) para. 51.

and rivers.[45] The court recognised that this relationship is based "on a profound respect for the environment, which includes both living beings and inanimate objects."[46] The court recognition of the communities worldviews and relationship with their natural environment was an important element of the positive ruling to recognise the communities' fundamental rights to their ancestral land and territories. Then, in the 2020 case concerning the *Indigenous Communities Members of the Lhaka Honhat Association v. Argentina,* the Court engaged more specifically with the rights of Nature highlighting that the right to a healthy environment protects components of the environment, such as forests, seas, rivers, and other natural features.[47] Relying on its previous advisory opinion on the relationship between human rights and the environment, the Court acknowledged the importance of the protection of nature in itself rather than for its "usefulness" to or "effects" on human beings.[48] Overall there is very rich and developed jurisprudence emerging from the Inter-American system of human rights connecting indigenous peoples' cultural rights and natural resources highlighting the importance of protecting indigenous peoples' cultural integrity by integrating and respecting their holistic and non-western relationship with nature.

Another significant approach linking indigenous peoples' cultural rights and the rights of Nature has emerged within the African system of human rights highlighting the intimate connection between religious and spiritual rights and natural resources. Although historically under human rights law, freedom of religion has been understood quite narrowly as protecting 'traditional' religions,[49] recent cases have highlighted that indigenous peoples' spiritual connections to their lands and territories should be protected under the right to freedom of religion. In its 2010 decision concerning the Endorois community in Kenya, the African Commission on Human and Peoples' Rights (ACHPR) highlighted that the community's ancestral territory should be regarded as a very significant spiritual place for the community.[50]

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[45] IACtHR *Kaliña and Lokono Peoples v Suriname,* Judgment (Merits, Reparations and Costs) 25 November 2015, paras. 33 and 35.

[46] Ibid, para. 36

[47] IACtHR: *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina*, Inter-Am. Ct. H.R. (Feb 6, 2020)

[48] Ibid, para. 203

[49] For analysis, see: Paul M. Taylor, *Freedom of religion: UN and European human rights law and practice* (Cambridge University Press, 2005); Jim Murdoch, *Protecting the right to freedom of thought, conscience and religion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2012)

[50] African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Keny*a, Communication 276/2003 (2010).

In recognising the spiritual value of the land for the community, the Commission underlined that "religion is often linked to land, cultural beliefs and practices, and that freedom to worship and engage in such ceremonial acts is at the centre of the freedom of religion."[51] Taking into consideration the Human Rights Committee's General Comments on religion,[52] as well as its own jurisprudence,[53] the Commission recognised that the Endorois' spiritual beliefs and ceremonial practices connected to their ancestral territory should be regarded as constituting a religion as defined and protected under the African Charter. The ACHPR found that the loss of access to their land and natural resources represented a significant restriction to the freedom of religion of the concerned community. The Commission concluded that the government had "interfered with the Endorois' right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the Community to maintain religious practices central to their culture and religion."[54] The recognition that spiritual practices connected to a certain land and natural resources should be regarded and protected as religious practices is an important statement not only within he African system but also in terms of international human rights law since little jurisprudence exists on such a correlation.[55] This was later reaffirmed and reinforced in the 2017 ruling of the African Court on Human and Peoples' RIghts in the case concerning the Ogiek community with the court highlighting that "[i]n indigenous societies in particular, the freedom to worship and to engage in religious ceremonies depends on access to land and the natural environment."[56] In terms of Earth jurisprudence, this is a significant development as it highlights potential connections between freedom of religion and indigenous spiritual connections, adding another dimension to be integrated in the decolonisation of western ideas and principles concerning the relationship between cultural practices and nature.

[51] Ibid., para. 166.

[52] Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\ GEN\1\ Rev.1 (1994).

[53] See *Free Legal Assistance Group v. Zaire, African Commission on Human and Peoples Rights*, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995).

[54] Ibid., para. 173.

[55] For references, see: J Briones, 'We Want to Believe Too: The IRFA and Indigenous Peoples' Right to Freedom of Religion'; 8 U. C. Davis J. Int'l L. & Pol'y 0 (2002); N I Goduka and J E Kunnie (eds.), *Indigenous Peoples' Wisdom and Power: Affirming Our Knowledge Through Narratives* (Ashgate, 2006); J L Cox, *From Primitive to Indigenous: The Academic Study of Indigenous Religions* (Ashgate, 2007); P P Arnold and A Grodzins Gold (eds.), *Sacred Landscapes and Cultural Politics: Planting a Tree* (Ashgate, 2001).

[56] ACtHPR *African Commission on Human and Peoples' Rights v Republic of Kenya* (26 May 2017), para. 165

Overall, the human rights approach to cultural rights and freedom of religion offer a strong anchor to support the integration and respect of indigenous peoples' worldviews and relationship with Nature, offering solid platform to support future development in Earth jurisprudence.

3. Collective Custodianship: Land Rights, Property Rights & Nature

Another relevant human rights approach to ensure the respect of indigenous peoples' rights in connection to the RoN comes under the norms and jurisprudence concerning land rights. Over the last decades, indigenous peoples have challenged the traditionally western individualistic approach to the right to property by pushing legal institutions to recognise the non-market and collective value of land rights.[57] By claiming their fundamental rights to property to land using human rights law indigenous peoples have pushed for new interpretation on the meaning of property rights to embrace collective and non-proprietarian approach to land rights.[58] In that context property rights are not seen as individualistic and based on market value, instead as stated by the Inter-American Court of Human Rights in its seminal ruling on the issue:

> "Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. (…) For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."[59]

Even though this judgment is not about Earth Law, the ruling highlights the intrinsic connection between land, natural resources and indigenous people' right to property by challenging the more traditional approaches to the meaning of the rights to property. Since

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[57] See J. Gilbert, *Indigenous Peoples Land Rights under International Law* (Brill, 2016); Rebecca Tsosie, Land, Culture, and Community: Reflections on Native Sovereignty and Property in America, 34 IND. L. REV. 1291 (2001).
[58] See Andro Linklater, *Owning The Earth: The Transforming History of Land Ownership* (2013).
[59] Awas Tigni case, para. 149

then the court has adopted several rulings underlining the collective and non-exclusive nature of indigenous rights to property over land and natural resources.[60] The court has highlighted that indigenous rights to property include "the communal form of indigenous land tenure as well as the distinctive relationship that indigenous people maintain with their land."[61] Hence this right to property also includes the 'specific relationship' with the concerned lands and territories. Importantly, land rights are not limited to the land itself but include natural resources. As noted in the case of *Kichwa Indigenous People of Sarayaku v Ecuador*:

> " (…) the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected to the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their lifestyle."[62]

This approach is not limited to the Inter-American system of human rights, and is also integrated within the African human rights system. In its 2017 judgment concerning the Ogiek community in Kenya, the African Court ruled that the right to property, found in Article 14 of the African Charter, can be a collective right for indigenous peoples supporting their fundamental right to occupy, use, and enjoy their ancestral lands.[63] The Court highlighted that indigenous property rights "do not necessarily entail the right of ownership in its classical meaning, including the right to dispose thereof", but rather emphasise the rights of possession, occupation, and use.[64] The Court added that these rights to use and enjoy the produce of the land, "presuppose[s] the right of access to and occupation of the land", and that violations of such rights also imply violations of the right to "enjoy and freely dispose of the resources produced by those ancestral lands."[65]

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[60] See illustrations: E.g. Mayagna (Sumo) Awas Tingni Community v. Nicaragua,; Yakye Axa Indigenous Community v. Paraguay, Sawhoyamaxa Indigenous Community v. Paraguay; Saramaka People v. Suriname,; Kichwa Indigenous People of Sarayaku v. Ecuador.

[61] See *Maya Indigenous Community of the Toledo District v Belize*, para 115-116

[62] Kichwa Indigenous People of Sarayaku v Ecuador (Merits and Reparations) (Inter-American Court of Human Rights, Series C No 245, 27 June 2012) [146].

[63] ACtHPR 2017, para 123 and 128.

[64] Ibid para. 127

[65] Ibid paras 200-201

The connection between the right to property and the fundamental collective right to possession of land and natural resources for indigenous peoples is also deeply anchored in the international jurisprudence of the UN human rights monitoring bodies, including the Human Rights Committee, the Committee on Economic, social and Cultural Rights and the Committee on the Elimination of Racial Discrimination. There are very strong recommendations, decisions, and comments emerging from the UN human rights treaty bodies highlighting that for indigenous peoples the right to property over land and natural resources is a fundamental human rights which includes a non-western approach to the meaning of the right to property over natural resources. Under this approach it is recognised that property rights are intimately connected to collective custodianship and guardianship of land and natural resources. Importantly, the approach of the human rights monitoring bodies has been to invite governments to recognise in their legal systems that indigenous peoples' land rights derive from their own customary laws and forms of land tenure, and that as such they exist as valid and enforceable rights absent formal recognition by the government.[66] This opens the door for the recognition of indigenous peoples own customary land and natural resources management systems, and potentially the recognition of indigenous worldviews and approaches to property over land an natural resources which are often much closer to the ideas of custodianship and guardianship that are central to Earth jurisprudence. An important element of this human rights-based approach to property is connected with non-discrimination. The principle being that as a matter of human rights, governments need to recognise indigenous peoples own system of customary land rights. As noted by Ahren: "The right to non-discrimination no longer allows the majority society to determine that its values and land uses constitute the norm and are consequently property rights generating, while (from the majority culture's perspective) different kinds of land uses common to an indigenous people have not resulted in and are not protected by rights. Rather, today the right to non-discrimination requires domestic property rights frameworks to have as a point of departure that other societies' values as they relate to nature and their uses of nature are equally relevant —and rights generating."[67]

[66] See for example CERD, Concluding observations: Canada, UN Doc, A/57/18 (2002), at para. 330.
[67] SOWIP report, p. 13

Overall there is a convincing human rights-based approach linking indigenous peoples' right to property and their right to custodianship and guardianship over the natural resources located on their ancestral territories.[68] This human rights-based approach to property rights to land and natural resources is based on the fundamental recognition of indigenous peoples' collective custodianship and guardianship rights over natural resources, recognising that indigenous peoples approach to nature not as something to be owned but as an entity to be approached as custodians. What is very significant in this approach is the fundamental change to the historical understanding of the right to property, instead of land and natural resources been seen as something that can valued under market terms, exchanges and sold, it is viewed and approached as a collective that need to pass on from generations to generations. Clearly not something that was envisaged in the dominantly western and individualistic approach to the meaning of the right to property, but which has been developed and nurtured by indigenous peoples' claims to land rights as being a fundamental human rights. This represents a significant paradigm shift in the approach to the meaning of property rights to land and natural resources, allowing the idea of custodianship and guardianship to emerge under international law. As aptly described by Cotula, in using the right to property indigenous peoples have "reframed into property terms indigenous conceptions that often contrast sharply with the basic premises of property—such as the separation between the 'owner' and the 'owned', and the configuration of the environment as 'things' that can form the object of property rights."[69] This fundamental shift in the way rights to property is connected to custodianship could offer a very solid basis to support future developments of the RoN, whilst acknowledging and integrating indigenous worldviews on the relationship with nature. This collective custodianship approach to property rights could provide a strong platform to support the recognition of the RoN since an important element of the push of the movement supporting Earth jurisprudence is about challenging the traditional individualistic notions of property rights over nature.

4. Environmental Governance: Participatory Rights, Consent & Earth Jurisprudence

[68] For further analysis, see J. Gilbert, *Natural Resources and Human Rights: An Appraisal* (OUP, 2018)
[69] Lorenzo Cotula,"(Dis)integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties", 23 Journal of International Economic Law (2020), p. 445

The fourth category of human rights that are relevant to include in the development of the RoN concerns the wider category of participatory rights. Participatory rights include the rights to effective participation, meaningful consultation, and free, prior, and informed consent (FPIC). These rights are expressed in several articles of the UNDRIP (Arts 10, 11, 15, 17, 19, 28-30, 32, 36 and 38) which strongly support the fundamental right of indigenous peoples to participation in any decisions affecting their lands and territories, including the natural resources located within their ancestral territories. The Declaration insists on the duty of governments to consult indigenous peoples in any decisions that may affect them, and on the duty to ensure indigenous peoples' participation in decision-making.[70] The duty to consult indigenous peoples is reflected in several provisions of the Declaration.[71] More specifically articles 19 and 32 require States to consult indigenous peoples in good faith, through appropriate procedures, with the objective of obtaining their agreement or consent when measures that may affect indigenous peoples are considered. Regarding the content of consultation, article 32 affirms:

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources."

Although not about the RoN, the recognition that indigenous peoples should be consulted in any decisions affecting the development of the minerals, water and other resources located within their territories opens the door to include indigenous worldviews and relationship with nature in the decision making process.

The rights to participation in decision making process concerning natural resources constitute a significant element of the more general human rights jurisprudence. The HRC Committee has recommended that states ensure "the effective participation of members of

[70] See Mauro Barelli, "Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead", The International Journal of Human Rights 16.1 (2012): 1-24.
[71] Articles 10, 11, 15, 17, 19, 28, 29, 30, 32, 36, 37 and 38.

minority communities in decisions which affect them."[72] The CESCR has recommended that states take "necessary legislative and administrative measures to ensure that the free and informed prior consent of indigenous peoples is obtained with regard to decisions that may directly affect the exercise of their economic, social and cultural rights."[73] The CERD committee has called upon states to ensure that indigenous peoples "have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."[74] The requirement to obtain FPIC necessitates consultation with indigenous peoples through their representative institutions before concessions are even granted, and the consultation process should proceed in accordance with protocols agreed with the indigenous community.[75] This approach is also strongly embedded within the jurisprudence of the regional human rights systems. For example, the IACHR has highlighted on many occasions that when it comes to use of land where indigenous peoples live, states must guarantee that 'indigenous peoples be consulted on any matters that might affect them" taking into account that "the purpose of such consultations should be to obtain their free and informed consent'.[76] The Inter-American Court of Human Rights in the case concerning the Kaliña and Lokono communities of Surinam ruled that the absence of explicit mechanisms that guarantee the effective participation of the concerned communities in decisions affecting the use of natural resources within their ancestral territories constituted a violation of their rights to property, cultural identity, and to participation in public matters. This is not an isolated decision as overall there is strong support for the rights to participation in decisions making process involving natural resources located within indigenous territories in many decisions and rulings of the regional human rights bodies.[77]

Despite these clear legal standards emerging under international human rights law, most indigenous peoples are usually excluded, marginalised and victims of the dominant processes governing the management of natural resources. Most laws and polices concerning

[72] HRC 1994a, para 7
[73] Ibid; see also CESCR 2019, para 13.
[74] CERD 1997, para 4
[75] See CESCR 2017, para 17; CESCR 2018, para 21
[76] Inter-American Commission on Human Rights 2009, "Indigenous and Tribal Peoples' rights over their ancestral lands and natural resources", OEA/Ser.L/V/II. Doc. 56/09: Norms and Jurisprudence of the Inter-American Human Rights System, (IACHR [2009] para. 157)
[77] For analyse and review see J. Gilbert, Natural Resources and Human Rights, chapter 4.

the management of natural resources prevent indigenous peoples from fully participating in, and benefiting from, decisions about natural resources. This also includes progressive places such as Colombia where the RoN and indigenous rights have been at the forefront of several significant legal decisions in the last few years.[78] Despite such progressive legal pronouncements recognising rights to nature, the rights of indigenous peoples to participation and decision making are not always integrated and respected in these decisions. As analysed by Macpherson, Torres and Clavijo Ospina: "For example, the Colombian Supreme Court's decision to recognize the Colombian Amazon as a legal subject, although theoretically ground-breaking in its recognition of the rights of future generations, apparently ignores the rights of indigenous peoples to their traditional territories and their key role in the management and protection of river ecosystems."[79] In such overall dominant process of natural resources which exclude indigenous peoples, the RoN with its focus on the recognition of indigenous peoples' custodianship rights could offer a solid platform to support the realisation of indigenous peoples' participatory rights. The right to participation to decisions concerning natural resources has some strong resonance with the notion of guardianship that is at the heart of the recognition of the movement to support Earth jurisprudence. Significantly, since Nature cannot act on its own in legal proceedings, the recognition of rights to Nature usually relies on the nomination of custodians, guardians, or trustees who can act on behalf of nature. For example, in 2017 the Whanganui River in New Zealand and the Atrato River in Colombia were granted legal personality via the recognition of the guardianship role of local indigenous communities. This recognition of a legal guardianship role for indigenous communities supports a more direct participatory role recognising their cultural stewardship connection with Nature as well as their fundamental human rights to effective participation. By recognising the value nature as a living being, and by integrating their cultural and ecological knowledge within the nominated custodians' authorities, the recognition of legal rights to Nature could offer a fine balance between the interest of Nature and the respect of indigenous peoples' rights. The legal recognition of the custodianship rights represents a

[78] See P.A. Acosta Alvarado & D. Rivas-Ramírez, 'A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court' (2018) 30(3) Journal of Environmental Law, pp. 519–26; L. Pecharroman, 'Rights of Nature: Rivers that Can Stand in Court' (2018) 7(13) Resources MDPI, pp. 8–9.

[79] E. Macpherson, J. Torres and F. Clavijo Ospina, "Constitutional Law, Ecosystems and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects", Transnational Environmental Law : 1-20 (2020), at 5

significant paradigm shift as it opens a more direct and potentially empowering participatory role for local indigenous communities through the establishment of guardian institutions integrating their cultural ecological knowledge and practices. For many indigenous communities the recognition of the RoN could represent a platform for the expression and recognition of their cultural stewardship connection with nature, but also their fundamental human rights to participation, consultation and consent over decisions affecting the resources located within their ancestral territories. .

Conclusion

In a general context where indigenous peoples' worldviews, interests, perspectives, and ecological knowledge have largely been undermined, repressed and colonised, the recognition of rights to Nature could offer a solid platform to recognise indigenous rights and worldviews. But as explored in the first part of this article there are also some potential pitfalls and misalignments between the two movements. On the one hand there is a danger of "burying" the leadership of indigenous peoples, whilst on the other hand there is also a danger of over-romanticising indigenous 'noble savages' eco-warriors' visions. In such context it seems that a clearer and more specific integration of the fundamental rights of indigenous peoples and notably their rights to self-determination could support a more respectful and integrative platform to address such potential pitfalls and contradictions. One of the argument being that self-determination should be the anchor and key framework to support the engagement of indigenous peoples within the movement supporting the rights of Nature. More broadly, the integration and respect of indigenous peoples' human rights could offer a solid platform to push and support the development of the RoN in a much more respectful and participatory manner, and potentially generate a solid platform to enhance new institutional arrangement to represents and speak on behalf of Nature. The recognition of the fundamental rights of indigenous peoples to land, natural resources and participation are the result of long decades of slow, painful advocacy and lobbying at the international level by many indigenous advocates, these standards represent a unique opportunity to ensure that the emerging movement supporting the rights of nature supports and integrates these rights as minimum standards, or as benchmark to support any development in this field.

On the flip side, the integration of human rights principles within the RoN framework represents a unique opportunity to support the implementation of indigenous peoples' human rights. With international human rights legal principles usually suffering from a serious implementation gap, it is worth exploring how the recent developments to support the RoN could enhance the implementation of indigenous rights. A strong articulation between the RoN and the concept of stewardship of nature could contribute to the implementation on some of the key fundamental rights proclaimed in international human rights law. Although most of the world's biodiversity is located on indigenous territories, indigenous peoples suffer from lack of recognition of their fundamental rights to their land and territories.[80] The intergovernmental global assessment provides clear evidence that lands managed by indigenous peoples and local communities are performing better in terms of biodiversity.[81] In such overall context, joining human rights law and the RoN to support the respect of indigenous peoples' rights over their land and natural resources could offer a solid platform to support the recognition of indigenous peoples' rights, whilst supporting the global effort to protect biodiversity. The application of a human rights-based approach respecting indigenous peoples' rights should be used as a benchmark to support a much more participatory and respectful platform for the development of the RoN, as well as providing a powerful support for less Anthropocene approach to the management of natural resources.

[80] It is estimated that nearly a quarter of the Earth's surface is managed by indigenous peoples, see C. Sobrevila, The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners (World Bank, 2008)

[81] Intergovernmental Science-Policy Platform for Biodiversity and Ecosystem Services, Global Assessment Report on Biodiversity and Ecosystem Services 2019 - https://ipbes.net/global-assessment