NOTE

The River Divides, the River Unites: A Critique of the Relationship Between Human Rights and the Rights of Nature

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ABSTRACT

The Rights of Nature movement has been steadily growing in recent years. Multiple countries have now granted nature legal rights. As it has grown, it has invited comparison with another aspirational legal system: Human Rights. Some proponents of Rights of Nature have argued for linkage between the two systems, while others seem to suggest that they are at odds with each other. This Note undertakes a critical analysis of the relationship between Rights of Nature and Human Rights. It uses the analyses of Finnish legal scholar Martti Koskenniemi, who has advanced one of the most cogent critiques of rights. This Note first considers court cases from Colombia, India, and the United States where Human Rights and Rights of Nature have gone up against each other, demonstrating the conflict that can arise between competing rights in a system. The philosophies that underlie both systems are then compared. The two systems rely on greatly different philosophical underpinnings, and necessarily reflect different value judgments. This Note suggests that there are still ways forward for Rights of Nature to succeed. The idea of "biocultural rights," where nature's rights and the rights of human populations are linked together, serves to make people friends with nature instead of foes. Mainstream Human Rights has suffered criticism that it is too internationalist and takes the individual out of their context. Biocultural rights could be a step forward.

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INTRODUCTION

> It is very hard to see how the received legal toolbox could possibly deal with exorbitant global inequality, climate crisis, depletion of natural resources, and violence in its myriad forms. The tools we have are the ones that every day continue articulating that world into existence: the public diplomacy of states and the global enforcement of property claims. Surely something cleverer is needed to think about the persistence of the human world.[1]

The development of rights of nature ("RoN") as law is accelerating. As of the time of this writing, Ireland and Aruba were both considering constitutional amendments to recognize RoN.[2] A 2023 report by the U.N. Environment Programme found that at least thirty countries had already given some recognition to RoN at the national or sub-national level.[3] At the same time, two million species worldwide are at risk of extinction, and the world has never met a U.N. target for halting the destruction of ecosystems.[4] RoN purports to be a solution to this problem and to environmental problems more broadly.

The idea of rights of nature, broadly speaking, is about recognizing nature as having rights in itself, at least for purposes of the legal system. One of the most important of these rights is standing, which was featured in the title of the first article about legal RoN, "Should Trees Have Standing?" by Christopher Stone.[5]

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1. DAVID KENNEDY & MARTTI KOSKENNIEMI, OF LAW AND THE WORLD: CRITICAL CONVERSATIONS ON POWER, HISTORY, AND POLITICAL ECONOMY 292 (2023) (Koskenniemi speaking).

2. Louise Cullen, *Ireland Could Give Nature Constitutional Rights*, BBC (Dec. 16, 2023), https://perma.cc/XHU2-JQ7G; Katie Surma, *Aruba Embraces the Rights of Nature and a Human Right to a Clean Environment*, INSIDE CLIMATE NEWS (Mar. 25, 2024), https://perma.cc/JH2G-5UDJ.

3. U.N. Env't Programme, Environmental Rule of Law: Tracking Progress and Charting Future Directions, 95 (Nov. 2023), https://perma.cc/F88S-YBH7.

4. Patrick Greenfield, *Beyond Montreal: A Year on has the World Lived Up to the Promises Made at Nature Summit?*, THE GUARDIAN (Dec. 18, 2023, 3:00 PM), https://perma.cc/PE9B-VRJF.

5. CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT 1–32 (Oxford Univ. Press 3d ed. 2010) (1974).

The movement has broadened since Stone's article. Existing RoN laws contain a variety of different rights for nature and specific parts of nature. Some laws, such as Ecuador's constitution, allow for anyone to sue on behalf of nature, while in Australia and New Zealand, particular groups or entities have been appointed to exercise and protect RoN.[6]

By its very name, RoN invites comparison with another set of rights: Human Rights.[7] RoN proponents have claimed that RoN and Human Rights are basically compatible.[8] For example, the nonprofit Earth Law Center put out two reports in 2015 and 2016 where they analyzed "co-violations," which are "situations in which governments, industry, or both violate human and nature's rights with the same activity."[9] They listed one hundred violations in the first edition and followed it up with one hundred more in the second.[10] The report claimed that "[n]ature's rights and human rights are intertwined and co-dependent," and that the combination of the two systems of rights, including the use of the Universal Declaration of Human Rights, could help resist the current economic system, which "assumes that nature and humans are 'resources,' to strengthen the economy for itself."[11] For their part, some in the Human Rights community have also welcomed RoN, saying that it could potentially strengthen Human Rights.[12] The recent development of the human right to nature has also bolstered recognition of nature's intrinsic value.[13]

On the other hand, Corrigan and Oksanen argue that there will be inevitable tensions between RoN and Human Rights.[14] As RoN continues to grow, these tensions deserve to be addressed head-on. How true are the arguments that RoN and Human Rights proponents make for linkage? How deep are the tensions that Corrigan and Oksanen have hinted at? Are the differences between the two forms of rights irreconcilable?

To answer these questions, this Note will analyze the conflicts between Human Rights and the rights of nature through the lens of Finnish critical legal scholar Martti Koskenniemi. Koskenniemi has focused on the problem of rights throughout his career. This Note will first analyze the problem through Koskenniemi's internal critique, which analyzes the basic functioning of rights within a legal system and argues that rights tend towards incoherency and conflict. Court cases about RoN from Colombia, India, and the United States will then be used to explore

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6. Daniel P. Corrigan & Markku Oksanen, *Rights of Nature: Exploring the Territory*, *in* RIGHTS OF NATURE: A RE-EXAMINATION 1, 6 (Daniel P. Corrigan & Markku Oksanen eds., 2021).

7. I capitalize "Human Rights" to denote the modern, dominant Human Rights system and related philosophies, as opposed to rights for humans more broadly. I do not change other authors' use of lowercase for human rights where it occurs.

8. *See* Corrigan & Oksanen, *supra* note 6, at 101; PETER D. BURDON, EARTH JURISPRUDENCE: PRIVATE PROPERTY AND THE ENVIRONMENT 92 (2015).

9. GRANT WILSON, MICHELLE BENDER & LINDA SHEEHAN, 2016 UPDATE: FIGHTING FOR OUR SHARED FUTURE: PROTECTING BOTH HUMAN RIGHTS AND NATURE'S RIGHTS 4 (2016).

10. *Id.*

11. *Id.* at 5.

12. U.N. Env't Programme, *supra* note 3, at 118.

13. *Id.* at 104, 109.

14. Corrigan & Oksanen, *supra* note 6, at 9.

the conflict of rights in practice. This Note will then turn to Koskenniemi's historical/political critique, which analyzes the historical and political contexts that imbue the language of rights with meaning that they lack on their own. This section will explore the philosophies espoused by backers of Human Rights and RoN, and how compatible these rights movements are with each other.

Through this critique, this Note will show that Human Rights and Rights of Nature, on the whole, are not particularly compatible with each other. Although proponents of RoN may view this as damaging to their case for public support, this Note will suggest that there are still paths forward to win support for the rights of nature. In particular, RoN should embrace the idea of situating humans themselves within nature's rights, promoting an ecological community approach. Human Rights as a formal system may be opposed to RoN, but the actual rights of humans need not be.

I. INTERNAL CRITIQUE: RIGHTS IN DIRECT CONFLICT

Koskenniemi's internal critique focuses on what Ronald Dworkin calls "rights as trumps."[15] This critique analyzes how rights function. According to Dworkin's view, rights function as an apolitical constraint on what otherwise would be "administrative discretion by resort to realist 'policies.'"[16] Under this view, rights are supposed to be self-interpreting and self-evident principles that actively constrain judges and guide them to a decision.

Koskenniemi contends that even though rights have real distributive consequences,[17] rights on their own do not determine outcomes, which instead depend upon the choices of decision makers. He identifies four main problems with the Dworkian rights-as-trumps view. The first problem is what he calls "field constitution," or what the appropriate framing of a conflict should be.[18] The way that a conflict is framed changes which rights are considered, with real distributive consequences. In an environmental context, this is the difference between nature and natural resources. The second problem is that "[i]n every important social conflict, it is possible to describe the claims of both sides as claims for (the honouring of) rights."[19] Koskenniemi provides an environmental example:

> The rights of the upstream industrial user of a common watercourse may conflict with the right of the downstream user to clean water. Neither right enjoys an absolute preference. Any balancing will have to invoke the values of either economic prosperity or a clean environment without any expectation that the

15. Martti Koskenniemi, *The Effect of Rights on Political Culture*, *in* THE EU AND HUMAN RIGHTS 99, 101 (Philip Alston ed., 1999).

16. *Id.*

17. Martti Koskenniemi, *Rights, History, Critique*, *in* HUMAN RIGHTS: MORAL OR POLITICAL? 41 (Adam Etinson ed., 2018).

18. Koskenniemi, *The Effect of Rights*, *supra* note 15, at 106.

19. *Id.* at 107.

> attained outcome would manifest some sort of an inherent or non-political equilibrium between them.[20]

To resolve conflicts between rights, they must always be compared to some reference point beyond them—namely, a conception of proper, orderly society—which resolves the balancing issue.[21] However, the language of rights obscures the political aspect of this outside reference.[22]

Koskenniemi's third critique is that rights always come with exceptions, which are always inherently political decisions, because there are no strict rules on when such exceptions are made.[23] His fourth critique explains the source of all of these problems: rights are formulated in indeterminate language.[24] Even the basic right to life needs explanation, such as whether and to what extent it includes unborn fetuses. Therefore, rights can only be given full meaning if policies are developed for them (perhaps by caselaw).[25]

Koskenniemi's critiques are compounded by the proliferation of new rights.[26] The more rights a society has, the more potential conflict between rights exists and the more a judge or arbiter will, by necessity, be forced to select which rights to enforce over others. The addition of new rights exacerbates the internal incoherency of rights.

Koskenniemi's position is opposed to the official stance of the United Nations, which holds that all Human Rights are interconnected and interdependent.[27] Theo R.G. Van Banning proposes an alternative to rights conflict based upon the idea of interconnectedness that he calls "interaction."[28] He defines this approach as "a continuous process whereby the human right(s) of one person is actively strengthened or limited by the other human right(s) of the same person or of another person."[29] The extent of rights is therefore marked by how they interact with other rights: if a right loses out in an interaction, then that right simply did not extend as far as it initially seemed. The United Nations and Van Banning, as proponents of mainstream Human Rights, thus both deny that rights conflict truly exists beyond misapplication by flawed humans. Van Banning's approach is similar to that of the proponents for a linkage between Human Rights and RoN. Proponents see the two sets of rights as mutually reinforcing and working in harmony to guide proper outcomes and demonstrate shortcomings.[30]

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20. *Id.* at 109
21. *Id.* at 109–10.
22. *Id.* at 110.
23. *Id.* at 110–11.
24. *Id.* at 111.
25. *Id.* at 111–12.
26. Koskenniemi, *Rights, History, Critique*, *supra* note 17, at 55.
27. *See* World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (June 25, 1993).
28. *See* THEO R.G. VAN BANNING, THE HUMAN RIGHT TO PROPERTY 22 (2002).
29. *Id.*
30. WILSON ET AL., *supra* note 9, at 7.

Still, several scholars have pointed out the potential for conflict between RoN and other rights. Andreas Guttman considered an Ecuadorian case where an infrastructure project was halted because it conflicted with the rights of a river.[31] Francine Rochford hypothesized that granting rights to rivers in Australia's Murray-Darling Basin would imperil the human right to water, because these rivers do not flow naturally throughout the year and need to be "watered" by the government, which she thinks would not be allowed if the rivers had nature rights.[32] Even Stone acknowledged this conflict, writing, "But the time is already upon us when we may have to consider subordinating some human claims to those of the environment per se."[33] And Cullinan addressed the criticisms of Guttman and Rochford, arguing that humans should move instead of canalizing a river, if that is the only way to stop it from flooding its banks and washing away housing.[34]

As courts have started to contend with RoN, we can directly observe how Human Rights have already begun to interact with various rights of nature in law. This Part will look at how courts in Colombia, India, and the United States have handled RoN in practice, with an eye to how Koskenniemi's internal critiques do or do not apply. This Part will specifically analyze RoN's impact on the human rights outlined in the Universal Declaration of Human Rights (UDHR)[35] and the International Covenant on Economic, Social and Cultural Rights.[36]

A. THE ATRATO RIVER: SEEMING RIGHTS-HARMONY

In 2016, the Constitutional Court of Colombia in *Center for Social Justice Studies v. Presidency of the Republic* declared that the Atrato River holds certain legal rights.[37] In this case, Afro-Colombian and Indigenous inhabitants of the Atrato River Basin sued the government for not doing enough to restrain illegal mining, and thus violating their fundamental rights of "life, health, water, food security, a healthy environment, the culture and the territory of the active ethnic communities."[38] The court found that these rights had been breached.[39] To resolve the harm, the government was ordered to protect the rights of the Atrato River in collaboration with local ethnic communities.[40]

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31. Andreas Guttman, *Pachamama as a Legal Person? Rights of Nature and Indigenous Thought in Ecuador*, *in* RIGHTS OF NATURE: A RE-EXAMINATION, *supra* note 6, at 36, 44.

32. Francine Rochford, *"Rights of Nature" in a Water Market*, *in* RIGHTS OF NATURE: A RE-EXAMINATION, *supra* note 6, at 51, 62.

33. STONE, *supra* note 5, at 23.

34. CORMAC CULLINAN, WILD LAW: A MANIFESTO FOR EARTH JUSTICE 107 (Chelsea Green Publ'g 2011) (2003).

35. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

36. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

37. Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 2016, Sentencia T-622/16 (Colom.), *translated in Judgment T-622/16, Constitutional Court of Columbia (Nov. 10, 2016), The Atrato River Case* 100, 110 (2019) [hereinafter Atrato River Case], https://perma.cc/XG7P-MZPF.

38. *Id.* at 7–10.

39. *Id.* at 102, 104.

40. *Id.* at 100, 110.

The case does not seem to involve rights conflict at first glance. The various government agencies that were sued defended themselves on grounds that they were not responsible for the actions or that the plaintiffs filed an improper type of suit.[41] 99.2% of the mining activity conducted in the district was done without a permit, so there was no real property right for the court to weigh.[42] Indeed, the illegal industrial mining disrupted the inhabitants' traditional "artisanal" mining, and the wealth from the illegal mining was not trickling down, with 78.5% of the district living in poverty, and 48.7% in extreme poverty, although the court did note that some communities depended upon the mining.[43]

Instead, the court made arguments about the links between the rights of nature and humans. Granting the Atrato River rights and tasking the government to protect those rights was supposed to protect the rights of the inhabitants that had been violated. The court grounded its granting of rights with the concept of "biocultural rights," which links rights to natural resources and rights to culture in situations where cultures are characterized by a deep interdependent relationship with their environment.[44] Biocultural rights give people the right to manage their environment in a way that is compatible with their culture while at the same time recognizing the intrinsic value of nature.[45]

Giulia Sajeva has pointed out that biocultural rights could create rights conflicts of their own if not properly applied.[46] Specifically, they create the potential that Indigenous people could lose them if they cease to maintain their traditional, nature-protective lifestyle.[47] This might privilege nature's right to benefit from Indigenous protection over any Indigenous rights to decide their own path. Indeed, the court said, "[T]hese rights imply that communities must maintain their distinctive cultural heritage, which is essential for the maintenance of the planet's biological diversity and cultural diversity."[48] Sajeva argues that biocultural rights must be part of a package with more traditional Indigenous rights and RoN to avoid these potential conflicts and ensure full protection for both Indigenous people and nature.[49]

Also signaling potential rights conflict is the court's admission that mining activity

> legal and illegal - raises important questions not only at the national level but also at the international level due to the deep constitutional tension that it poses

41. *Id.* at 11–12.
42. *Id.* at 61.
43. *Id.* at 7, 61, 68.
44. *Id.* at 35–38, 100.
45. *Id.* at 35–38.
46. Giulia Sajeva, *Environmentally Conditioned Human Rights: A Good Idea?*, *in* RIGHTS OF NATURE: A RE-EXAMINATION, *supra* note 6, at 85.
47. *Id.* at 93.
48. Atrato River Case, *supra* note 37, at 36.
49. Sajeva, *supra* note 46, at 94.

> in general terms between the right to development of States and respect for the fundamental rights of communities where such projects are developed.[50]

Although this conflict did not come up directly in the case, because the vast majority of the mining concerned was illegal, it does point to a potential area of conflict in the future. Part of the International Covenant on Economic, Social and Cultural Rights' protection of peoples' right to self-determination includes the right to "freely pursue their economic, social and cultural development."[51] If RoN is more broadly adopted, it could run up against the right to economic development.

B. MOTHER EARTH OVER HUMANS: RIGHTS OF NATURE IN INDIAN COURTS

India first recognized RoN in two 2017 decisions from the Uttarakhand High Court. The first, *Mohd Salim v. State of Uttarakhand*, gave legal personhood to the Ganga and Yamuna Rivers.[52] Ten days later, the court also gave the wetlands, glaciers, and lakes of the Ganga and Yamuna river basins legal personhood in *Lalit Miglani v. State of Uttarakhand*.[53] In *Miglani*, the court described what rights nature has:

> Rivers and Lakes have intrinsic right[s] not to be polluted. Polluting and damaging the rivers, forests, lakes, water bodies, air and glaciers will be legally equivalent to harming, hurting and causing injury to [people]. Rivers, Forests, Lakes, Water Bodies, Air, Glaciers and Springs have a right to exist, persist, maintain, sustain and regenerate their own vital ecology system[s] . . . . The integrity of the rivers is required to be maintained from Glaciers to Ocean[s].[54]

Because the decision forbade the discharge of sewage into the river, [55] this case could be read as conflicting with the right to property (UDHR Art. 17),[56] but that ban is unremarkable in the broad scope of environmental law. Later in 2017, the Indian Supreme Court reversed the two decisions, citing thorny questions of interstate boundaries and questions of who would pay for damages caused by the river, because the court's grant of legal personhood could be read to make the river liable for harm it caused to humans.[57]

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50. Atrato River Case, *supra* note 37, at 58.
51. International Covenant on Economic, Social and Cultural Rights, *supra* note 36, at 5.
52. Kelly D. Alley, *River Goddesses, Personhood and Rights of Nature: Implications for Spiritual Ecology*, 10 RELIGIONS 502, 1 (2019).
53. *Id.* at 8.
54. Lalit Miglani v. State of Uttarakhand, 61 (Uttarakhand High Court, 2017), https://perma.cc/RW3Q-ANCK.
55. *Id.* at 65.
56. Universal Declaration of Human Rights, *supra* note 35, art. 17.
57. Katie Surma, *Indian Court Rules That Nature Has Legal Status on Par With Humans—and That Humans Are Required to Protect It*, INSIDE CLIMATE NEWS (May 4, 2022), https://perma.cc/37RF-A83Z.

Indian courts have continued to apply RoN even after the Supreme Court's ruling. *Periyakaruppan v. The Secretary to Government, Revenue Department, Secretariat, Chennai*, from the Madras High Court, demonstrates a remarkable conflict with Human Rights.[58] There, a former government employee alleged that the government had improperly punished him by denying him his full pension for selling off protected forest land on his supervisor's order.[59] He invoked an Indian Supreme Court ruling that said there should be equality in punishment between those who were involved in the same crime.[60] Others who had helped Periyakaruppan commit the crime had had their cases dismissed.[61] The Madras Court agreed with him that this principle should apply, but they still upheld the punishment. Drawing from *Miglani*, the court recognized "Mother Nature" as a legal entity and held that all necessary steps should be taken to protect her, including punishing anyone who infringed on her rights.[62] The government was ordered to reduce the petitioner's punishment (as some of the sales were stopped before they went through), but the court made it clear that "[t]his punishment is imposed for the act done against mother nature."[63]

The *Periyakaruppan* decision strikes directly at the Human Right to equal protection under the law (UDHR Art. 7).[64] The Indian Supreme Court had created a principle that punishments should be equally applied to perpetrators, a principle that the Madras High Court recognized as just. But because Periyakaruppan's crime was against Mother Nature, this principle of equal protection was abridged, and he was punished more than his counterparts who committed the same crime. Arguably, RoN also won out over the right against retroactively higher criminal penalties (UDHR Art. 11.2).[65] While his action was illegal at the time he committed it, his co-violators had not faced the charge of committing a crime against Mother Nature, and there is no reason that Periyakaruppan should have expected such a charge. It is difficult to see how van Banning's view of interaction could apply here, as RoN appears to have ridden roughshod over the interests of equality and avoidance of retroactive punishment.

The greatest example of potential conflict between RoN and Human Rights in India occurred in 2020 when the High Court of Punjab and Haryana declared the Sukhna Lake in Chandigarh to be a legal entity.[66] Remarkably, the Sukhna Lake

58. Periyakaruppan v. The Principal Sec'y to Gov't, Revenue Dep't, Secretariat, Chennai (Madras High Court, 2022), https://perma.cc/PB36-FXF2.

59. *Id.* at 3–5.

60. *Id.* at 14–16.

61. *Id.* at 17.

62. *Id.* at 19, 21.

63. *Id.* at 22.

64. Universal Declaration of Human Rights, *supra* note 35, art. 7.

65. *Id.* art. 11.2.

66. Court on Its Own Motion vs. Chandigarh Admin. (Sukhna Lake Case), 3, 137 (Punjab and Haryana High Court, 2020), https://perma.cc/7GPA-BGVD.

is not naturally occurring but was built in 1958 by damming a stream.[67] Despite the fact that the Sukhna Dam was a human creation, it was not held to be property of the government (UDHR Art. 17)[68] or a legitimate exercise of the freedom to control their natural resources (International Covenant on Economic, Social and Cultural Rights Part I. Art. 1.2).[69]

However, in the court's order, the rights of the Sukhna Lake ran more directly against another Human Right: the right against arbitrary interference with one's home (UDHR Art. 12).[70] The court ordered that all construction within the lake's catchment area should be demolished, including any homes constructed there.[71] The court had previously declared such construction illegal in 2011, but that order had not been followed.[72] The government was ordered to provide nearby alternative housing and compensate anyone displaced, yet they all still had to leave. The *Hindustan Times* reported that the court order could affect 1,700 homes and 30,000 people.[73] One could argue that this was not arbitrary, as it was the result of a court order, and the homes may have been built illegally in the first place. But statements like these would be cold comfort for anyone who was forced to relocate as a result of a case to which they were not a party. Indeed, a protest was held soon after the order by those who would be displaced.[74]

These cases perfectly illustrate Koskenniemi's critiques of rights. In the Sukhna Lake case, the court made no mention of the rights of those affected by their order, instead choosing to focus on the ecological impact of construction on the lake. The court knew to do this by drawing on external sources, including a passage of Justice Douglas's dissent in *Sierra Club v. Morton* that quoted Stone.[75] In *Periyakaruppan*, the court did acknowledge the petitioner's right to equal punishment, but decided that the rights of Mother Earth outweighed that right, and thus created an exception to the general rule of equality. Again, the court had to reach beyond the rights themselves, and looked instead to the general

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67. *Id.* at 6; *see also* Prabhat Semwal et al., *Modelling of Recent Erosion Rates in a Lake Catchment in the North-Western Siwalik Himalayas*, 4 ENV'T PROCESS, 355, 357 (2017).

68. Universal Declaration of Human Rights, *supra* note 35, art. 17.

69. International Covenant on Economic, Social and Cultural Rights, *supra* note 36, at 5.

70. Universal Declaration of Human Rights, *supra* note 35, art. 12. UDHR also recognizes a right to adequate housing in Article 25, but technically this is not directly affected by the court order, as it orders the government to provide alternative housing. *See id.* art. 25.

71. *Sukhna Lake Case*, at 143–44.

72. Seema Sharma, *Demolition of Illegal Construction in Sukhna Lake Area Put on Hold till the Pandemic is Under Control*, MONGABAY (Apr. 16, 2020), https://perma.cc/K4CQ-XJHY.

73. Hillary Victor, *Sukhna Catchment: HC Order Likely to Affect 1,700 Houses, 30,000 People Living in Kansal* HINDUSTAN TIMES (Mar. 16, 2020, 12:59 AM IST), https://perma.cc/3G37-Q9U4.

74. Sharma, *supra* note 72. Later in 2020, the demolition order was reversed on appeal. Rajinder Nagakorti, *High Court Stays Its Sukhna Catchment Demolition Order*, TIMES OF INDIA (Dec. 19, 2020, 4:07 IST), https://perma.cc/5NCG-62P6.

75. *Sukhna Lake Case*, at 128–130 (citing Sierra Club v. Morton, 405 U.S. 727 (1972) (no page range given)).

destruction of nature to decide that "[a]ny such act [causing destruction to nature] ought to be checked at all levels."[76]

C. THE LAKE ERIE BILL OF RIGHTS AND VAGUENESS

The only United States decision directly on the merits of a RoN provision echoed Koskenniemi's fourth critique: rights language is vague. In 2019, the city of Toledo, Ohio passed a city charter amendment called "The Lake Erie Bill of Rights" ("LEBOR"), with the backing of local activists and the non-profit Community Environmental Legal Defense Fund (CELDF).[77] This law came after years of pollution in Lake Erie and the issuance of a 2014 warning by the city not to drink water from the lake.[78] LEBOR stated that Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally evolve."[79]

A local farm corporation and the State of Ohio sued the City of Toledo in the Northern District of Ohio for enacting the ordinance. Ohio focused on state supremacy ideas, while the farm corporation focused on the potential threat of enforcement they would face.[80] The court held that the rights for Lake Erie were overly vague in violation of the Due Process Clause of the U.S. Constitution's Fourteenth Amendment.[81] In doing so, the court decided that the due process rights of the farm corporation to know what conduct would infringe the ordinance (similar to the UDHR's right against arbitrary arrest [Art. 9][82]) outweighed any potential rights that Lake Erie had.

Ironically, the court did not recognize how "due process" is itself a vague term. In order to hold that laws are void for vagueness under the Due Process Clause, they had to cite to U.S. Supreme Court precedent.[83] While this move reflects formal standards around precedent and constitutional supremacy, it still resorts to an idea outside the basic words of the right itself. On its face, it is difficult to see how the right "to exist, flourish, and naturally evolve" is any vaguer than a right to "due process." Certainly an average, non-legally educated person would better understand what "existing" and "flourishing" mean.

II. VISIONS OF RIGHTS

Koskenniemi's external critiques of rights follow from his internal critique. In the internal critique, he discussed the problem of framing and the need for an

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76. Periyakaruppan v. The Principal Sec'y to Gov't, Revenue Dep't, Secretariat, Chennai, 18–19 (Madras High Court, 2022), https://perma.cc/PB36-FXF2.

77. Timothy Williams, *Legal Rights for Lake Erie? Voters in Ohio City Will Decide*, N.Y. TIMES (Feb. 17, 2019), https://perma.cc/C9X4-MRGL.

78. *Id.*

79. Drewes Farms P'ships v. City of Toledo, 441 F. Supp. 3d 551, 554 (N.D. Ohio 2020) (citing TOLEDO, OHIO, MUN. CODE ch. XVII, § 254(a) (2019)).

80. *Id.* at 555.

81. *Id.* at 556.

82. Universal Declaration of Human Rights, *supra* note 35, art. 9.

83. *Drewes Farms*, 441 F. Supp. 3d at 555–56 (first citing Roberts v. U.S. Jaycees, 468 U.S. 609, 629 (1984); and then citing Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)).

external, political referent to resolve rights. Where do these frames and referents come from?

To answer this, Koskenniemi turns to critical history. History shows that rights are not timeless, and do not follow a straight teleological path. Instead, they appear "in the contexts of contestation where they have been used to defend or attack distributive schemes and claims of jurisdiction."[84] Rights language can be used for different tasks.[85] Koskenniemi illustrated the contextual usage of rights with examples from Early Modern European history. Hugo Grotius defended the Dutch government and the Dutch East Indies Company with a notion of universal human rights based upon a system of contracts. Once liberty and property were contracted to establish the state, they were firmly joined to the state, and could not form a basis for a claim against the state.[86] John Locke viewed property as *the* fundamental right, and unlike Grotius, held that it *was* enforceable against the government, helping to justify his stance against absolutism and for the Glorious Revolution.[87] Koskenniemi has cautioned that even if the same words are used, their meaning changes throughout history, as the examples of Grotius and Locke with property show.[88]

Koskenniemi understands the history of law as that of sensibilities, which include ideas, practices, constraints, an image of self and society, and political faith.[89] The formal structure of laws and rights may not constrain lawyers and judges, but the structural biases of law from customs, beliefs, and practices do.[90]

Still, the actual language of rights does matter:

> Rights language has distributive consequences. In an otherwise utilitarian policy-environment, rights indicate preferences that we believe should not be overridden by whatever net benefits a policy might offer. This is why everyone has a great interest in translating their preferences into rights.[91]

That rights have distributive consequences is doubtless true for RoN. The granting of legal personhood to a river means that there is a particular set of perspectives that must be considered when making any decisions about that river.

The present moment of ecological crisis certainly provides a "context of contestation."[92] Tensions around protection of the environment and development of natural resources are perhaps higher than at any prior point in history. As seen in the previous Part, courts have to resolve conflicts between Human Rights and

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84. Koskenniemi, *Rights, History, Critique*, *supra* note 17, at 43.
85. *Id.*
86. *Id.* at 46–48.
87. *Id.* at 50.
88. *See* KENNEDY & KOSKENNIEMI, *supra* note 1, at 60.
89. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, 2 (2001).
90. KENNEDY & KOSKENNIEMI, *supra* note 1, at 83, 110.
91. Koskenniemi, *Rights, History, Critique*, *supra* note 17, at 41.
92. *Id.* at 43.

RoN, and one side may lose out in the resolution. This Part therefore considers the politics and philosophy of Human Rights and RoN. Are they compatible views? What are their points of conflict?

A. HUMAN RIGHTS: THE UNIVERSAL HUMAN INDIVIDUAL

There is uncertainty about when exactly the concept of Human Rights originated.[93] It is clear that the idea of Human Rights originated in Europe, although Ignatieff argues that they gained global reach primarily through their adoption by decolonizing nations after 1945.[94] Samuel Moyn, however, argues that Human Rights did not gain their prominence in international law until the 1970s, when western lawyers could reclaim the language from the "dangers" of the anti-colonialist approach.[95]

Although there are many different interpretations as to the nature of Human Rights, there are a few widely accepted principles. Human Rights are universal: they apply to humans everywhere.[96] As such, they hold that everyone has some measure of equality.[97] Human Rights have a strong international aspect,[98] although they also have local expressions.[99] They have a strong individualistic orientation,[100] and usually focus on the right of the individual against the state.[101] (Although there is a move towards group Human Rights, many western proponents of Human Rights view it with skepticism or hostility.[102])

The divide amongst Human Rights theorists is usually expressed as one between the orthodox view and the political view.[103] According to the orthodox view, Human Rights are based upon something innate; they are derived from the basic virtue of being human. This is often founded upon the idea of inherent human dignity, with Human Rights acting as a tool to protect that dignity.[104] The orthodox view is thus similar to natural law ideas. The political/pragmatic view holds instead

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93. John Tasioulas, *Human Rights*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 348 (Andrei Marmor ed., 2012).

94. MICHAEL IGNATIEFF, THE ORDINARY VIRTUES: MORAL ORDER IN A DIVIDED WORLD 17 (2017).

95. SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 179 (2010).

96. Universal Declaration of Human Rights, *supra* note 35; VAN BANNING, *supra* note 28, at 37; Corrigan & Oksanen, *supra* note 6, at 7.

97. International Covenant on Economic, Social and Cultural Rights, *supra* note 36; IGNATIEFF, *supra* note 94, at 27.

98. Universal Declaration of Human Rights, *supra* note 35, art. 28; Corrigan & Oksanen, *supra* note 6, at 8.

99. IGNATIEFF, *supra* note 94, at 18.

100. *Id.* at 207; *see* Adam Etinson, *Introduction* to HUMAN RIGHTS: MORAL OR POLITICAL?, *supra* note 17, at 1, 29.

101. VAN BANNING, *supra* note 28, at 28, 168. Of course, there are situations where states can wield Human Rights for their own ends.

102. Etinson, *supra* note 100, at 30–31; Otto Spijkers, *"New" Human Rights and Human Dignity*, CAMBRIDGE CORE BLOG (Oct. 12, 2022, 19:14), https://perma.cc/UBV2-AQN2.

103. Etinson, *supra* note 100, at 1; Tasioulas, *supra* note 93, at 348–49.

104. VAN BANNING, *supra* note 28, at 167; Spijkers, *supra* note 102.

that Human Rights arise from a particular political context and have a specific function to play within modern society. Koskenniemi's view on rights falls within this basic category, but proponents of Human Rights also share this view. Proponents recognize that Human Rights are a creation of modernity, but still hold that they serve a useful function, such as "setting standards of political legitimacy, serving as norms of international concern, and/or imposing limits on the exercise of national sovereignty."[105]

While the political view has gained a great deal of traction in scholarship, the orthodox view comes closer to the view of official human rights bodies, and likely to the popular view as well. The first article of the Universal Declaration of Human Rights proclaims: "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." The "official" view, more closely aligned with the orthodox view, also encompasses the idea that all rights are interdependent, and that no hierarchy of rights should be created.[106]

Human Rights have been described as assuming a fundamental liberalism, at least as practiced by their main advocates.[107] This liberalism sets up the universal human individual as the primary focus of law. It essentializes the individual and removes them from the context of their society and its politics. Koskenniemi writes:

> And the doubt must remain that the abstract subject celebrated as the carrier of universal human rights is but a fabrication of the disciplinary techniques of Western "governmentality" whose only reality lies in the imposition on social relations of a particular structure of domination. Universality still seems an essential part of progressive thought – but it also implies an imperial logic of identity: I will accept you, but only on the condition that I may think of you as I think of myself.[108]

Human Rights are thus often seen as an imposition on the non-Western world, although this is disputed.[109]

B. CHRISTOPHER STONE AND THE ORIGINS OF THE RIGHTS OF NATURE

Although some point to antecedents in Indigenous thought and the writings of Aldo Leopold,[110] the modern idea of RoN, certainly in a legal sense, traces directly to the 1972 article, "Should Trees Have Standing?," by American law professor

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105. Etinson, *supra* note 100, at 1.

106. World Conference on Human Rights, *supra* note 27, ¶ 5; VAN BANNING, *supra* note 28, at 199.

107. Ben Golder, *Theorizing Human Rights*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 684, 689 (Anne Orford & Florian Hoffmann eds., 2016); Slavoj Žižek, *Against Human Rights*, 34 NEW LEFT REV., July–Aug. 2005, at 115–16.

108. KOSKENNIEMI, GENTLE CIVILIZER OF NATIONS, *supra* note 89, at 514–15.

109. César Rodríguez-Garavito, *Human Rights at 75: The End of Endism*, OPEN GLOBAL RIGHTS (Dec. 1, 2023), https://perma.cc/63M8-MGGM.

110. ANTHONY R. ZELLE ET AL., EARTH LAW: EMERGING ECOCENTRIC LAW–A GUIDE FOR PRACTITIONERS 233 (Anthony R. Zelle et al. eds., 2021); Corrigan & Oksanen, *supra* note 6, at 2 (noting that Stone did not base his idea of RoN on Leopold).

Christopher Stone. By his telling, Stone was teaching an introductory property class when he began musing on how property rights had been constructed differently throughout history and started speculating on the idea of assigning rights directly to natural objects.[111] His class laughed, and he decided to write an article to save his reputation.[112]

Stone adopted a historical posture. He followed a somewhat liberal, teleological arc of rights-expansion to more and more groups, focusing in particular on the recent civil rights movement in the United States.[113] He argued that this expansion of rights also expanded the law's moral sensibility.[114] Thus, rights could be expanded to natural objects as they had been expanded to other groups. Doing so would not overly upset the legal system but instead could follow models of corporate personhood and guardianship for mentally incompetent people.[115]

Stone did not see rights as necessarily inherent to their bearers. As he made clearer in a later article, legal rights do not depend upon moral rights: nature could be given rights just because it was the most convenient way of promoting its interests.[116] Stone did not view rights as absolutes or as necessarily interrelated, but instead as subject to fights and due process.[117] It is worth noting, of course, that Stone was discussing rights primarily in the U.S. legal system, not "capital-H" Human Rights.

"Should Trees Have Standing?" wavered between revolutionary promise and expansion of status quo. On the one hand, Stone's model for rights drew firmly on established legal thinking. He made use of economic arguments[118] and acknowledged that nature would not always take priority over human interests.[119] As the title of his article suggests, the rights he was advocating for were mainly procedural.[120] He suggested that, rather than have all of nature be protected, we might draw up a list of "most jealously-to-be-protected objects" that should in particular be granted rights.[121]

On the other hand, Stone spoke derisively of Hegel's view of property as necessary for self-actualization.[122] Stone speculated on how granting rights to nature would lead to a society that would want to preserve the environment more.[123] The final pages of his article discuss the need to move beyond the religious view that

111. STONE, *supra* note 5, at xi.
112. *Id.* at xii.
113. *Id.* at 1, 31.
114. *Id.* at 22, 31.
115. *Id.* at 1, 8.
116. *Id.* at 69.
117. STONE, *supra* note 5, at 4, 18, 53.
118. *Id.* at 13–14, 25.
119. *Id.* at 16.
120. *Id.* at 18, 20–21.
121. *Id.* at 21.
122. *Id.* at 27.
123. STONE, *supra* note 5, at 22–23.

nature is the dominion of humans and the need to give up our sense of specialness and separateness in the universe in order to deepen our ability to love.[124] Humanity needed a new myth about its relationship with nature:

> What is needed is a myth that can fit our growing body of knowledge of geophysics, biology, and the cosmos. In this vein, I do not think it too remote that we may come to regard the earth, as some have suggested, as one organism, of which mankind is a functional part–the mind, perhaps: different from the rest of nature, but different as a man's brain is from his lungs.[125]

Oksanen and Kumpula have identified that Stone wrote at a moment when the United States was at the center of environmental protection, and innovation was encouraged.[126] Stone wrote his opinion in a rush so that Justice William Douglas could read it before the U.S. Supreme Court decided *Sierra Club v. Morton*,[127] and succeeded, as Douglas cited Stone in his dissent and echoed the idea of standing for natural objects.[128]

Stone was cited directly in a case by the Supreme Court of Pakistan to support the idea of RoN,[129] and Douglas's dissent, including his citation of Stone, was cited in two cases by the High Court of Punjab and Haryana, including in the Sukhna Lake case.[130] These cites partly reveal where the courts received their external political referents: from Stone.

C. EARTH JURISPRUDENCE AND OTHER TOTALIZING APPROACHES TO RIGHTS OF NATURE

There are several writers and organizations that see RoN as part of a larger project to overhaul the law. The most important of these projects is Earth Jurisprudence. Earth Jurisprudence seeks a whole-scale reformulation of the law away from anthropocentric principles towards ecocentrism. Most Earth Jurisprudence authors specifically point towards the works of Thomas Berry, a Catholic priest and "geologian," as the main inspiration for their work, although they also acknowledge their debt to Stone.[131]

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124. *Id.* at 26, 28.

125. *Id.* at 29.

126. Markku Oksanen & Anne Kumpula, *Close Reading Stone: Investigating the Seminal Article*, *in* RIGHTS OF NATURE: A RE-EXAMINATION, *supra* note 6, at 176, 179.

127. STONE, *supra* note 5, at xiv.

128. *See* Sierra Club v. Morton, 405 U.S. 727, 741-42 (1972) (Douglas, J., dissenting) (citing Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972)).

129. D.G. Khan Cement Co. v. Government of Punjab, C.P.1290-L/2019, 13 (Supreme Court of Pakistan 2019) (citing Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 481, 501 (1972)).

130. Karnail Singh et al. v. Haryana, CRR-533-2013, 45-47 (Punjab and Haryana High Court, 2019), https://perma.cc/GCR6-GNPK (citing Sierra Club v. Morton, 405 U.S. 727 (1972)); *Sukhna Lake Case*, 128–130 (Punjab and Haryana High Court, 2020), https://perma.cc/7GPA-BGVD (citing Sierra Club vs. Morton, 405 U.S. 727 (1972) (no page range given)).

131. CULLINAN, *supra* note 34, at 28, 95–96; BURDON, *supra* note 8, at 1.

Earth Jurisprudence authors have tended to accept the critical idea that laws are shaped by the dominant society and come about from particular historical circumstances. They see the current legal system as grounded in the idea of human domination over nature, particularly in the realm of property, and as directly instrumental in causing environmental harms.[132] Burdon even echoes Koskenniemi's internal critique of rights, writing:

> In the final analysis, laws and legal rights are empty signifiers, in the sense that their meaning is open to disputation and rival claims. Of particular importance in giving rights meaning is the question of how rights come into existence - a factor related to the issue of which communities or institutions influence the ways in which rights are filled with meaning . . . . Accordingly, the definition and interpretation of the law or right is itself an object of continuing struggle . . . .[133]

At the same time, Earth Jurisprudence proponents have also tended to argue that their ideas are based upon a sort of natural law (although Cullinan explicitly notes how natural law has been predominantly anthropocentric).[134] At the top there is the "great law," the functioning of the universe, from which every thing on Earth derives its rights.[135] Thomas Berry wrote:

> The natural world on the planet Earth gets its rights from the same source that humans get their rights, from the universe that brought them into being . . . . All rights are species-specific and limited. Rivers have river rights. Birds have bird rights. Insects have insect rights. Humans have human rights. Difference in rights is qualitative not quantitative. The rights of an insect would be of no value to a tree or a fish.[136]

Proponents assert that Earth Jurisprudence's problem is figuring out how to structure and develop human laws so as to follow the "great law."[137] Cullinan asserts that because everything is dependent on the survival of the overall Earth ecosystem, "the first principle of Earth jurisprudence must be to give precedence to the survival, health and prospering of the whole Community over the interests of any individual or human society."[138] Doing so will have a positive effect on humans because a functioning ecosystem is necessary for human survival.[139]

Earth Jurisprudence is not nearly as connected to liberalism as are Human Rights. Burdon is openly opposed to liberalism, and bases some of his analysis on

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132. BURDON, *supra* note 8, at 4, 11; CULLINAN, *supra* note 34, at 63–68; ZELLE ET AL., *supra* note 110, at 12–14.
133. BURDON, *supra* note 8, at 76.
134. CULLINAN, *supra* note 34, at 71.
135. BURDON, *supra* note 8, at 79, 81–82; CULLINAN, *supra* note 34, at 78.
136. CULLINAN, *supra* note 34, at 103 (quoting THOMAS BERRY, THE AWAKENING EARTH (1984)).
137. BURDON, *supra* note 8, at 92.
138. CULLINAN, *supra* note 34, at 100.
139. *Id.*

Marxism.[140] Cullinan does not directly mention liberalism, but he has expressed an aversion to Enlightenment thinking and the pursuit of maximum economic growth.[141] Earth Jurisprudence appeals to a universal notion of rights but also grounds this notion in particularity: humans have a particular variation of those rights as driven by their species needs. The individual is thus made more aware of both their connection to and difference from other parts of the world, but without an assumption that humans are in a privileged position above all else.

The Community Environmental Legal Defense Fund takes a slightly different approach to RoN from Earth Jurisprudence. The CELDF does not incorporate Berry's idea of quasi-natural law, but instead diagnoses the fundamental problem in society as the privileging of corporate and state power over the rights of communities and ecosystems.[142] Their approach to RoN tends to focus more directly on its anti-corporate and local democratic role. Earth Jurisprudence proponents tend to share CELDF's anti-corporate and pro-local democratic views, but, as Cullinan has acknowledged, come to those views from different places.[143]

Fukurai and Krooth invoke both Earth Jurisprudence and the CELDF as supporting their idea of Original Nation Approaches to International Law (ONAIL).[144] They take an Indigenous-rooted, decolonial approach. For Fukurai and Krooth, RoN is useful at the present moment to harness the power of the state to protect ecosystems, but eventually they want to abolish the state, which would also get rid of the legal form of rights.[145] ONAIL thus represents a far-left political version of RoN directly opposed to the traditional liberalism that undergirds mainstream Human Rights.

D. RIGHTS OF NATURE AS POLITICAL COMPROMISE

Tănăsescu cautions that RoN, as they have been applied in practice, do not always come from a place of ecological concern as their primary theorists advocate.[146] For example, in New Zealand, they arose as the result of a battle for land.[147] New Zealand took an area of land called Te Urewera from the Tūhoe people in the nineteenth century, and the Tūhoe fought to reclaim it. The Tūhoe did

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140. BURDON, *supra* note 8, at 11–12.

141. Cormac Cullinan, *Wild Law and the Challenge of Climate Change*, SOUNDINGS, Winter 2007, at 116, 121–22.

142. Marsha Jones Moutrie, *The Rights of Nature Movement in the United States: Community Organizing, Local Legislation, Court Challenges, Possible Lessons and Pathways*, 10 ENV'T & EARTH L.J. 5, 9 n.22 (2020).

143. CULLINAN, *supra* note 34, at 184.

144. HIROSHI FUKURAI & RICHARD KROOTH, ORIGINAL NATION APPROACHES TO INTER-NATIONAL LAW: THE QUEST FOR THE RIGHTS OF INDIGENOUS PEOPLES AND NATURE IN THE AGE OF ANTHROPOCENE 217–18, 227, 230 (2001).

145. *Id.* at 215.

146. Mihnea Tănăsescu, *The Rights of Nature as Politics*, *in* RIGHTS OF NATURE: A RE-EXAMINATION, *supra* note 6, at 69.

147. *Id.* at 73.

not have a concept of ownership in their culture, but they did have a notion of special relationality with the land and wanted to reclaim their traditional authority, so they sought ownership as a way to better allow for their relationality.[148]

The New Zealand government could not take "the politically impossible step of granting ownership of the land to the Tūhoe,"[149] so, in 2014, it passed the Te Urewara Act, granting the land legal personhood.[150] Te Urewara became governed by a representative board according to Tūhoe principles, an arrangement that is fairly similar to the functioning of a corporation.[151] Legal personhood is not a concept with Tūhoe traditions, but instead a "next best thing" in the western legal system.[152] The creation of rights for Te Urewara was therefore a political compromise between the Tūhoe and the New Zealand government not driven by any sort of ecological consciousness.[153] However, the Tūhoe do "recognize humans' relational place within an ecosystem," and so the Te Urewara Act may still promote ecological values.[154] As RoN continues to grow, it is likely that there will be more stories of RoN being adopted for reasons other than those offered by RoN's original proponents.

E. RIGHTS OF NATURE AND HUMAN RIGHTS

The orthodox conception of Human Rights and RoN as espoused by Earth Jurisprudence directly conflict with each other. Both concepts are based on what is essentially a natural law claim. The orthodox view of human rights is based upon human dignity and equality, while Earth Jurisprudence is based upon ecosystem functioning and interrelationship with nature. Human Rights are certainly anthropocentric in their orientation and justification.[155] The idea of the inherent dignity of human beings does to an extent suppose their specialness. Thomas Paine is an early exemplifier of this separateness:

> Generally speaking, we know of no other creatures that inhabit the earth than man and beast; and in all cases, where only two things offer themselves, and one must be admitted, a negation proved on anyone, amounts to an affirmative on the other; and therefore, Mr Burke, by proving against the Rights of *Man*, proves in behalf of the *beast*.[156]

148. *Id.* at 74–75.
149. *Id.* at 79.
150. Te Urewara Act 2014 (N.Z.).
151. Tănăsescu, *supra* note 146, at 75–76.
152. *Id.* at 77.
153. *Id.* at 77.
154. Seth Epstein, *Rights of Nature, Human Species Identity, and Political Thought in the Anthropocene*, 10 ANTHROPOCENE REV. 415, 428 (2022).
155. Sajeva, *supra* note 46, at 85.
156. THOMAS PAINE, THE RIGHTS OF MAN 195 (Penguin Classics 1985) (1791).

Human Rights theorists tend to find it a problem when justifications for Human Rights could embrace animal rights, while Earth Jurisprudence theorists embrace animal rights as part of their project.[157]

Yet there is some overlap between the two positions. Earth Jurisprudence advocates tend to like the idea of fundamental rights. Humans, of course, have fundamental rights within the Earth Jurisprudence framework. Earth Jurisprudence theorists can thus meaningfully talk of "lower-case h" human rights. However, they understand these human rights in terms of interrelationality and fundamental equality with the rest of nature, which is a far cry from having inherent human dignity as the basis for rights.

Stone's approach to RoN is not as opposed to Human Rights per se, although his historicist and conflict-oriented view of rights certainly challenges the orthodox view that Human Rights basically derive from innate human dignity. His view is potentially compatible with that of the pragmatists: both understand rights as fulfilling particular needs within their given time or political structure.

RoN challenges the idea of the interdependence of Human Rights. Property is listed as a right under UDHR Article 17,[158] although many proponents of Human Rights are uncomfortable with its inclusion.[159] Proponents of RoN, whether of Stone's view, Earth Jurisprudence, or the CELDF, are all opposed to property, certainly as it is expressed in our current legal systems.

Unlike Human Rights, RoN do not claim to operate primarily as a claim against the state. Proponents, especially the CELDF and ONAIL, claim that it can have this effect, and that it can challenge other engines of dominance, such as corporations. But it can also easily be used by the state, or in cooperation with the state, as seen in the Atrato River and *Periyakaruppan* cases.

RoN theorists argue for more relationality than Human Rights proponents tend to. Humans have duties to the rest of nature. Although the rights form in practice can divide humans from nature,[160] all of the decisions surveyed in this Note have discussed human duties to nature. RoN proponents almost never see the particular legal rights as ends in themselves. Even Earth Jurisprudence, with its invocation of natural rights, talks about how those pre-existing natural rights must be translated into a legal form for humans that is not the same as the inherent right itself.[161] Humans are not understood as abstract individuals, but as related to a whole universe of other beings. RoN defends the rights of ecosystems, which are made up of a great many individual components.

157. Etinson, *supra* note 100, at 16; Annabel Brett, *Doing Without an Original: A Commentary on Martti Koskenniemi*, *in* HUMAN RIGHTS: MORAL OR POLITICAL?, *supra* note 17, at 61, 64; ZELLE ET AL., *supra* note 110, at 293–294, 332 (chapter on "Nonhuman Rights," a.k.a. animal rights).

158. Universal Declaration of Human Rights, *supra* note 35, art. 17.

159. VAN BANNING, *supra* note 28, at 2–3; KENNEDY & KOSKENNIEMI, *supra* note 1, at 65–66 (Koskenniemi speaking).

160. Guttman, *supra* note 31, at 43–44.

161. *See* BURDON, *supra* note 8, at 94–95.

The main philosophies associated with RoN create a direct conflict with the orthodox view of Human Rights. An accommodation is possible between the pragmatists and Stone's view, but even that would require significant changes by either group. Their views on property rights would have to dramatically shift one way or the other. RoN proponents often justify their approach by a need to work within the legal system as it presently exists, but their overall philosophical aims mean that the idea of Human Rights becomes unstable, and they have shown willingness to consider alternatives to rights if they were to be made available.[162]

CONCLUSION: THE PROMISE OF RIGHTS

Despite his many criticisms, Koskenniemi has occasionally praised rights. He has noted that rights, by their universality, have the potential to give voice to those who would otherwise be excluded from society.[163] Rights are

> valuable precisely because of the way they combine the particular with an attempt at the universal and thus provide resources for challenging existing hierarchies and exclusions . . . [for] to claim a right is . . . to claim in the name of universality: this belongs not only to me but to everyone in my position.[164]

This is almost the exact claim that Stone made with "Should Trees Have Standing?" Stone believed that the extension of rights to nature would draw in a more varied set of interests that the law did not otherwise consider. Our moral universe would expand.

Yet Koskenniemi has also stated that rights may have more power when they are not actually enacted into law. "Human rights arose from revolution, not from a call for mainstreaming. One cannot be a revolutionary and participate in the regular management of things without some cost to both of those projects."[165] By remaining on the periphery, rights may be better placed to exert a normative pull over politics.[166]

Stone wrote in 2010 that "Should Trees Have Standing?" had an impact on ethics and legal thought far out of proportion to its actual impact on the courts.[167] While that may still be true to an extent in the United States, the cat is out of the bag elsewhere. RoN have been implemented in legal systems around the world, and they have had real consequences.[168]

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162. ZELLE ET AL., *supra* note 110, at 233; FUKURAI & KROOTH, *supra* note 144, at 215.
163. KOSKENNIEMI, GENTLE CIVILIZER OF NATIONS, *supra* note 89, at 516–17.
164. Golder, *supra* note 107, at 691 (quoting Martti Koskenniemi, *Human Rights, Politics, and Love*, 13 FINNISH Y.B. INT'L L. 79, 93 (2002)).
165. *Id.* at 692 (quoting Martti Koskenniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 HUMAN. 47, 55 (2010)).
166. *Id.*
167. STONE, *supra* note 5, at xi.
168. *See supra* Part I.

As RoN becomes a legal reality, its proponents must make sure that it does not deepen the divide between humans and the rest of nature. A desire to overcome this divide could explain why several proponents of RoN have claimed that RoN and Human Rights work hand in hand. Yet this Note has shown that their claim must at least be heavily qualified.

Donoso correctly stated that it is both morally and politically necessary for defenders of RoN to uphold individual rights, even if it may not be analytically necessary for the project.[169] He proposed basing rights for ecosystems off of the individual rights of non-human animals.[170] But we can go a step further and include *humans* within the rights of ecosystems.

This approach is closer to that taken in the Atrato River case than to how India has handled RoN. RoN in India has been used to divide humans from nature and to punish them for injuring it. A case like Sukhna Lake does nothing to endear RoN to people. In Colombia, RoN was used to directly protect both humans and nature. The form of RoN that the court created involved humans *with* nature, recognizing that they are intimately connected.

Koskenniemi highlights the ways in which the language we use around rights has effects, and the RoN movement must be aware of this: RoN proponents must always insist that their proposals will benefit humans as well as the rest of nature, *and then show how this is true*. Otherwise, they will risk creating results where courts rule wholly against humans or nature and deepen the divide. The way forward is perhaps more bottom-up efforts like LEBOR in Toledo. RoN can adapt to local circumstances in a way that mainstream Human Rights have often failed to do.

RoN can make itself an ally to those hoping to transcend the liberal subjectivity of Human Rights. It can help offer an alternative of place-bound connection. Perhaps the rights-form is not ideal. But if rights of nature are advanced as part of a vision of something greater, then they might have a chance to fulfill their promise.

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169. Alfonso Donoso, *Toward a New Framework for Rights of the Biotic Community*, *in* RIGHTS OF NATURE: A RE-EXAMINATION, *supra* note 6, at 140, 147.

170. *Id.* at 150–51.