

Chapter 2

Legal Protection of Sacred Natural Sites Within Human Rights Jurisprudence: Sápmi and Beyond

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2.1 Introduction

The Arctic is home to dozens of indigenous peoples. (Heinämäki 2010: 64) Many indigenous peoples of the circumpolar North share similar experiences of colonialization and oppression. For many generations, indigenous peoples have suffered violations of fundamental rights, including freedom of religion. Eradication of indigenous religions has been a tool used by the state in attempts to create ethnically, culturally and religiously homogenous states. While this can include the destruction or theft of indigenous religious artifacts, an issue which can be addressed by law, a particular aspect of indigenous religiosity still appears to be less easily covered by existing legal norms: in many indigenous religions, sacred natural sites play an important, and often crucial, role.

As they might not be easily identifiable as sacred sites by non-indigenous outsiders, indigenous claims to protection of sacred natural sites can be more difficult than claims for protection for non-natural religious sites, such as buildings.

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In addition, the loss of land title in colonial legal systems has added a layer of complication to the protection of indigenous sacred natural sites which provides a significant challenge when it comes to their protection: loss of land ownership means that many sacred natural sites are no longer the legally recognized property of indigenous peoples.

Against this backdrop, we investigate the possibilities, which exist under different regional human rights regimes to protect indigenous peoples' interests in sacred natural sites. As international law regarding the protection of indigenous rights has greatly benefitted from cross-pollination in the sense that regional decisions have gained prominence also beyond the geographical area of the deciding bodies, the norms investigated were global in nature. In order to get a full picture of the rights of indigenous peoples in the Arctic, it is necessary to look beyond the norms applicable specifically in the Arctic region.

The rights of Indigenous peoples are protected by a number of international legal instruments including the International Labor Organization's Convention No. 169, the UN Declaration on the Rights of Indigenous Peoples and the International Covenant on Civil and Political Rights. Indigenous rights are at risk of being overlooked when sacred sites are subject to the decisions of public authorities. Respect for Indigenous rights requires State authorities to take into account all applicable legal rules, including obligations which do not expressly refer to Indigenous peoples. These include regional human rights instruments. In this chapter, we will look at the ways in which regional human rights instruments in Europe and the Americas might be used to protect the sacred sites of Indigenous peoples.

2.2 Regional Human Rights Documents

2.2.1 The Inter-American Human Rights System

Although the American Convention on Human Rights does not explicitly mention sacred natural sites, they play a remarkable role in the Inter-American Court of Human Rights' (IACtHR) Indigenous land rights jurisprudence. The IACtHR has long been a trailblazer in the recognition of indigenous rights at the regional level, and its case law has provided substantial contributions to the development of indigenous rights in general.

The existence of sacred sites and their importance for a given community are relevant to the definition of Indigenous or tribal rights as formulated by the IACtHR. The Court's jurisprudence makes clear that groups need not be indigenous to the territory they currently inhabit in order to exercise the rights guaranteed by the Convention; it is the case, for example, of descendants of Africans originally brought over in the Americas during colonial times. Indigenous rights in this sense apply to tribal and indigenous peoples. In addition to its history and long ties to the land, it is a group's special way of living, along with its unique economic and social organization, including its special relationship with the land, which makes

it socially, economically and culturally distinct. (Saramaka: para. 86) This distinct status forms the basis of the State's duty to afford special protection to a given group. (ibid.) Indigenous peoples maintain "cultural, intangible and spiritual ties" (Sarayaku: para. 149) with the ancestral territories they have traditionally used and occupied. Their land and its associated natural resources are a part of their social, ancestral and spiritual essence, not only due to the presence of sacred sites but also by reason of the intrinsic sacred value of the territory itself. (Saramaka: para. 82) The existence of, and access to, sacred sites is therefore relevant to the extent that it forms a part of an Indigenous people's relationship with the land. In this aspect, the situation of the indigenous peoples of the Americas is not substantially different from the situation of the Sámi or of other Arctic indigenous communities.

This idea of a close connection between the people and the land is confirmed by the case concerning the Moiwana community in Surinam. Although the Moiwana are not indigenous to the land they inhabit, the Court emphasized the fact that community members live "in strict adherence to N'djuka custom" which involves a close connection to their ancestral lands and to the sacred sites found there. (Moiwana: para. 132) One expert witness explained during the proceedings: "N'djuka, like other indigenous and tribal peoples, have a profound and all-encompassing relationship to their ancestral lands. They are inextricably tied to these lands and the sacred sites that are found there and their forced displacement has severed these fundamental ties." (ibid.)

In the *Awás Tigni* case in Nicaragua, an anthropologist testifying underlined that the sacred places relevant to the community consisted of both the cemeteries which members visit when they go hunting, as well as sacred hills (Awás Tigni:23). According to this expert, hunting "is, to a certain point, a spiritual act." (ibid.)

The presence of sacred sites not only is used by the Court in order to identify the community concerned - and, in particular, as a founding element of its relationship with the land - but also constitutes a relevant element of the right to property Indigenous peoples claim in relation to the same land.

Firstly, the sacred value of places is inextricably linked to the collective understanding of the concepts of property and possession. (On the notion of property as contained in the American Convention on Human Rights see Pasqualucci 2006: 296) Land possession and use are not centered on the individual but on the group (Saramaka: para. 89) and spiritual beliefs linked to land and sites are an essential part of the group's identity. As stated by the Court, "[i]gnoring the specific forms of the right to the use and enjoyment of property based on the *culture, practices, customs and beliefs*¹ of each people, would [...] render protection under Article 21 of the Convention illusory for millions of people". (Sawhoyamaya: para. 120).

Secondly, the presence of sacred sites is considered evidence of the link that exists between an Indigenous people and the land they are claiming by the Court. According to the Court's jurisprudence, the enjoyment of the right to ancestral land has, as its prerequisite, the demonstration of the link existing between the land and

¹Emphasis added.

the community. Such a connection is based not only on the sacred value of land itself, but also on the presence of sacred sites (Saramaka: para. 82) and on the practice of cultural and traditional activities. (Sawhoyamaya: para. 131).

This is the reason why the existence of sacred sites plays a particularly prominent role in the framework of establishing a violation of Article 21 of the American Convention, *i.e.* the right to property. According to the Court's jurisprudence, the right of Indigenous peoples to their ancestral lands needs to be recognized as full title; consequently, land claimed must be titled, delimited and demarcated in consultation with the populations concerned. (Saramaka:para. 115) The right to use and exploit natural resources which lie on and within the land is closely related to the right to land itself even though, in this respect, the precise scope of the community's rights is less clear. As explicitly admitted by the Court in *Saramaka*, notwithstanding the fact that natural resources fall under the protection offered by Article 21, the scope of this right "needs further elaboration." (ibid.:para. 120; Errico 2011: 335).

Damage to sacred sites was one of the grounds upon which the Saramaka people based its claim of violation of its property right, emphasizing that while the entire territory is scared, injury had been caused to specific sites of great cultural and spiritual relevance. (ibid.:127) In determining the damage suffered by the community due to the exploration undertaken by the CGC company, the representatives of the community alleged that at least "one site of special significance" for the Sarayaku peoples had been damaged. This place consists of a sacred forest and its trees, one of which was destroyed, leaving the shaman without the power to obtain a medicine to cure his children and relatives. (Sarayaku: para. 104) Moreover, landings by helicopters had destroyed part of a site of great significance to the community and ancestral cultural rites and ceremonies had been suspended due to the activities of the oil company; finally, the seismic line laid down by the company passed near sacred sites used for ceremonies initiating young people into adulthood. (ibid.: para. 105)

In addition, the representatives argued that Article 26 of the Convention, which protects economic, social and cultural rights, had been violated. In particular, they stated that the suspension of traditional practices and rites caused by exploration and exploitation activities has had a profound impact on the transmission of spiritual knowledge and the teaching of cultural traditions and rituals. (ibid.:para. 137) It is precisely this kind of impact that was recognized by the Court when it affirmed that the Sarayaku community was entitled to consultation. (ibid.:para. 174)

All these elements were brought together by the Court when it jointly analysed the violation of the rights to consultation and communal property with regard to the right to cultural identity:

Given the importance that sites of symbolic value have for the cultural identity of the Sarayaku People and their worldview, as a collective entity, several of the statements and expert opinions provided during the proceedings indicate the strong bond that exists between the elements of nature and culture, on the one hand, and each member of the People's sense of being, on the other. This also highlights the profound impact on the social and spiritual relationships that members of the community may have with the different elements of the natural world that surrounds them, when these are destroyed or harmed. (ibid.:para. 219)

On the basis of these elements, the Court found that there had been a violation of the duty to consult Indigenous peoples as a result of “the intervention in and destruction of their cultural heritage”, including the failure to preserve sacred sites. (ibid.:para. 220).

The *Saramaka* judgment contains some interesting insights about the procedural requirements applicable to sacred sites, in particular the obligation to carry out environmental and social impact assessments. The Court, while reaffirming the obligation to conform to international standards and best practices in carrying out ESIA's, made explicit reference to the *Akwé:Kon Guidelines* which relate to the impact of activities on sacred sites and traditionally occupied lands. (Saramaka:para. 41) According to the *Guidelines*, the possible impacts on sacred sites and associated ritual or ceremonial activities must be taken into account in assessing the scope of potential cultural impact. (Akwé:Kon Guidelines 2004: 27).

The disruption of the spiritual life of Indigenous groups is even more evident in cases where the community is displaced, and thus totally unable to access its sacred sites. As illustrated by the expert testimony in the *Xákmok Kásek* case, displacement also prevents Indigenous peoples from burying their relatives at chosen sites in addition to preventing them from returning to these places. Consequently, these burial sites become “in some way [...] less sacred”, which in turn implies that an affective, symbolic or spiritual relationship cannot be developed. (Xákmok: para. 177 et seq.)

The violation of the “right to burial” was given particular emphasis by Judge Cançado Trindade in his separate opinion in the *Moiwana* case. Since their displacement, the community has been unable to bury the remains of its members killed in the 1986 massacre carried out by the Suriname army. (Moiwana:para. 3) According to the opinion, the possibility of performing the funerary ceremonies and of giving a “proper burial” to their deceased was an integral part of the obligation, for the survivors, to seek justice for their dead, who understood it as a “cultural responsibility.” (Xákmok: para. 57) As underlined by the Judge, the “right to burial” is a part not only of the voluntary law of nations, (ibid.:para. 60) but also of international humanitarian law, (ibid.:para. 68) and depriving a community of the possibility of maintaining their connection to the dead is a violation of the “right to the project of after-life.” (ibid.:para. 68) Judge Trindade enumerates a category of “spiritual damage”: an aggravated form of moral damage which cannot be quantified or give rise to pecuniary reparations. (ibid.:para. 71) This opinion places remarkable stress on the importance of access to sacred sites as an indispensable condition necessary for the maintenance of the community's inter-generational spiritual life and, in the specific case, to allow the survivors to discharge their responsibility towards the dead.

Finally, sacred sites have been taken into consideration by the Court in the context of the rights to life, personal integrity and personal liberty. In the *Sarayaku* case, these provisions of the American Convention were invoked by the representatives of the community in relation to the deposit and use of pentolite explosives by the CGC company. (Sarayaku:para. 101) The Court had previously made an order instructing the State to remove pentolite; (Sarayaku MP:31) however this order

had only partially been complied with when the Court rendered its decision on the merits. (Sarayaku:para. 246) In the judgment, the Court emphasized that the presence of pentolite had led to the community assembly's decision to restrict access to the affected area, despite the land's sacred character and importance as a hunting ground. (ibid.) The inability to access sacred places therefore acts as a factor which contributes to violations of the rights to life, personal integrity and personal liberty.

Notwithstanding the relevance attributed to sacred sites by the Court in the judgments analysed thus far, the same emphasis is not present in the context of provisions relating to reparations. It is the case, for example, of the *Sarayaku* judgment, where representatives requested, as a measure of restitution, to declare their entire territory as "Sacred Heritage Territory of Biodiversity and of the Ancestral Culture of the Kichwa Nationality", without the Court acceding to their request.

Sacred sites are equally considered in the context of reparation for non-pecuniary damage as was the case of the threat to the survival and cultural identity of the Sarayaku community. (ibid.:para. 230) In this context, the representatives cited the abandonment of their ancestral lands by sacred spirits, the damage caused to their worldview by the destruction of sacred places and trees of significant value to traditional medicine, and their inability to celebrate traditional festivals for a significant period of time. (ibid.:there fn. 367) If, on one side, the "the destruction of part of the forest and certain places of great symbolic value" is mentioned by the Court in the paragraphs relating to reparation, (ibid.:para. 322) the same is not true as regards the measures prescribed in the operative paragraphs, which include land restitution and consultation, without specifically addressing the access to sacred sites.

2.2.2 *The European Convention on Human Rights*

The European Convention on Human Rights (ECHR) was drafted without Indigenous peoples in mind but has nonetheless been applied to situations involving Indigenous peoples on a number of occasions. (Koivurova 2011: 1) In addition to the Sámi people of Northern Europe and the approximately thirty indigenous peoples of Russia, (Poelzer and Fondahl 1997) the European Convention on Human Rights also applies in French Guayana, which is an integral part of the French Republic, (Uimonen 2014: 150) and accordingly to the six Indigenous peoples there,² (Jiménez 2010) as well as to Greenland.

In particular the Sámi people face a major but often overlooked challenge when it comes to accessing their sacred sites. This section will address the issue of access to sacred sites as a human right with a focus on the Sámi people.

²These are the Kali'na, Lokowo, Pajikweneh, Teko, Wayana and Wayapi.

Sámi sacred sites or *sieidi* range from sites used by, and only known to, an individual to major sites which have been used by the inhabitants of one or more villages (Pulkkinen 2005a: 390). Historically, the criminalization of the *sieidi* cult led to the official disuse of major sacred sites but it is thought that their use continues (Pulkkinen 2005a: 390).

The at times highly personal and hence secret nature of a *sieidi* can lead to situations where a person who wants to access his or her *sieidi* is unable to do so if, as is often the case in Sápmi,³ the land is owned by others. For example in Norway's Finnmark province and in Finland's Lapland administrative area, large sections of the land are not privately owned but are owned or administered by either the State or public entities. While Indigenous peoples have land use rights, and are involved in decisions, which affect them through national Sámi parliaments in Norway, Sweden and Finland, they do not have a real veto power which could overrule the interests of the State.⁴ Therefore access to a specific location is by no means legally guaranteed. In Finland, however, the everyman's right grants far-reaching rights of access to land to everybody, not just the indigenous population, including the right to make use of some natural resources. It includes the right to pick berries or camp, so long as they occur a certain distance from settlements. It might also allow an individual or a small group of people to access a specific location, but it would likely exclude larger groups or access to land near houses. As Sámi sacred sites are not necessarily identifiable as such to outsiders, this right might not allow an Indigenous person to access a *sieidi* if such access would not be covered by the everyman's right, for example if the *sieidi* is now located on privately owned property near a home, but it could on the other hand mean that outsiders have a right of access to land which Indigenous families consider sacred. The question is then if the European Convention on Human Rights, in particular the freedom of religion protected by Article 9 provides for a right to access such sites and a right to exclude others from such locations. The question then becomes whether the European Convention on Human Rights, particularly the Article 9 protection of the freedom of religion, can ground a right to access such sites and a right to exclude others from these locations.

Article 9 of the ECHR protects the *forum internum* – the internal aspect of one's religiosity – but not necessarily the entirety of the *forum externum* – the visible expressions of such faith. (C. v. UK:147) The question posed here is whether access to a location owned by somebody else for religious purposes amounts to a practice which is protected under Article 9 of the ECHR. This question, e.g. whether a practice is religiously required, cannot be determined by public authorities, either at the national or subnational level, or the European Court of Human Rights. Activities, which are merely idealistic, *i.e.* activities which are inspired by but not necessarily

³Sápmi is the area currently recognized by states as the traditional home territory of the Sámi people, although present-day Sápmi is considerably smaller than the original Sámi homeland.

⁴Furthermore, despite the existence of some organisational structures, in Russia the Sámi people do not have a representative body, which could be compared in function and legitimacy to the national Sámi parliaments in Norway, Sweden and Finland.

required by the religion, are not covered by Article 9. With respect to land use, Article 9 does not even include the right “to have one’s ashes scattered on one’s own land.” (Reid:515) As a rule of thumb, worship (ibid.:516) “in a generally accepted form” (ibid.) will fall within the scope of Article 9. However, “in a generally accepted form” is a disclaimer that highlights the struggle those minority religions may face in attempting to find recognition by European human rights law. It is important to note that historically Indigenous forms of worship were not only not accepted but also persecuted and criminalized. A reconciliation of these competing rights and interests therefore becomes necessary.

Section 2 of Article 9 clarifies that the “[f]reedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”, including the right to peaceful enjoyment of one’s possessions. While the State cannot make human rights claims, the ownership of traditional Indigenous lands has often been transferred to corporations which could claim some human rights, particularly procedural rights and rights under Article 1 of Protocol 1 to the ECHR (ECHR-P1). Article 1 of Protocol 1 safeguards the peaceful enjoyment of one’s possessions. It does not guarantee unlimited usage rights. “Where ownership remains and some ability to exploit the property, a finding of *de facto* expropriation in the sense of deprivation is unlikely” (Reid 2007: 501), however in such cases there might still be a violation of the right to peaceful enjoyment of one’s possessions.

Even if an Indigenous person held title to the land at private law, the State could interfere and grant access rights to it. Sápmi is an important region to the extractive industry. Article 1 of Protocol 1 includes rules concerning expropriation but not regarding limitations for peaceful enjoyment. Furthermore, it might be possible for the State to control the use of property in the public interest, which might – or might not – include permitting others to worship. This type of decision, however, would have to be made on a case-by-case basis. It appears that limiting the right to peaceful enjoyment of one’s possessions is more difficult under the European Convention than limiting the right to express one’s religion because the former requires a public interest element while invoking the rights of others can be sufficient to limit public displays of faith.

It has become clear that the European Convention on Human Rights was not created with Indigenous peoples, and their special relationship to the natural environment, in mind. The Convention conceives freedom of religion as a human right. Its exercise involves something, which is done actively - believing, praying, acting in certain ways or refusing to act in others.

The ECHR fails to provide protection for the sacred,⁵ (Pulkkinen 2005b: 32) or the sacredness of locations, if their sacredness is not evident. Praying in a specific

⁵The Sámi languages use the words *áiligas* and *bassi* to refer to the sacred. The latter meaning “refer[s] to a more intimate, clan- or family-based kind of worship”, in particular in the context of a *sieidi*.

location might be protected but the location as such might not enjoy protection if it is not clear that it is a place of worship. This limits the possibility for Sámi families to restrict outside access to their sacred sites. For example under the aforementioned everyman's right, anyone could access a Sámi sacred site – potentially without any awareness of its importance to the local people. There are precedents for religious usage rights for state-owned areas elsewhere in Europe. After the invasion of Germany by the Napoleonic forces in the early nineteenth century, large parts of property owned by the Church were taken over by the authorities. To this day, there are still a number of church buildings in Germany, which as a result of this history are owned by the state and not by the religious community which uses the building (DBK 2003: 3) In these cases, the religious community in question has a usage right for religious purposes. (ibid.) Although the location of many Sámi sacred sites is publicly known, this model is not easily transferable to the Sámi sacred sites. The very personal, intimate relationship between the individual worshipper and the site, leads to an interest in preserving the secrecy of the location of such sacred sites in many instances. While a church building and the plot of land on which it is located are usually clearly defined in terms of their geographic location and space, it is fundamental to the essence of the Sámi sacred site that its location not be known to outsiders. Therefore, not having ownership of the land within the meaning of Article 1 of Protocol 1 to the ECHR is a greater disadvantage for Sámi families than it would be for other religious communities which could at least negotiate for usage rights with the State, when the State owned the property where a religious site was located. Essentially, in such cases both parties could simply use existing private law instruments to regulate the use consensually. This option is not available to the Sámi without revealing the locations of their sacred sites.

At the end of the day, in this case human rights law is not as sharp a sword as one might have hoped it to be from the perspective of indigenous groups. From the perspective of indigenous peoples such as the Sámi, the ECHR does not provide adequate protection for sacred sites. In this case it is the rights of others, which are a potential obstacle to the full realization of Indigenous rights, highlighting the need for further work in order to reconcile Indigenous interests with the rights of others.

2.2.3 Shortcomings of Existing Approaches to Freedom of Religion

The way in which the Sámi and other indigenous peoples relate to sacred natural sites is fundamentally different from the mainstream approach in international law, which is based on a localized understanding of religious practices which relates to man-made constructions, in particular buildings, such churches, synagogues, mosques, temples etc. But this is only part of the problem. From a legal perspective, the entire approach of modern human rights law can make for an uneasy fit when it comes to indigenous peoples:

Some of the difficulties in finding protections for Indigenous sacred sites stem from the larger framework of freedom of religion analysis within the Western legal tradition and the international human rights regime affected by it. The legal guarantee of freedom of religion developed out of a particular period in European history: the Peace of Westphalia and western European attempts to mitigate conflict between warring religious groups following the 100 Years' War. Freedom of religion has since become an essential human right protected in international instruments and national constitutions. (e.g., Fox 2008, analyzing the official treatment of religion in 175 states and noting only a small number not offering constitutional protection to religion.) Current human rights analysis, however, has largely interpreted freedom of religion as an individual right that protects personally-held beliefs recognized as religious beliefs and, to some degree, an individual's right to manifest those beliefs. This conception does not easily protect collective forms of spirituality or forms of spirituality differing from organized religions.

Benjamin Berger has argued that the Western human rights approach to freedom of religion has largely been based on liberal individualism, which raises problems even for dealing with religions that are inextricably intertwined with culture, including Judaism (Berger 2007: 310 et seq.).⁶ The judicial struggle over analyzing harms against Judaism in relation to racial/ethnic discrimination or under freedom of religion analysis illustrates this point, as do questions that have gone before courts on Jewish membership rules (Swartz 2010: 229).

Scholars like Kuppe (2009: 61), Beaman (2002: 144), and van Niekerk (2007: 36 et seq., 40 et seq.) have rightly argued that the individualistic manner of framing religious freedoms combined with cultural biases in favour of dominant, traditional religions have led to judicial interpretations of freedom of religion that have been less helpful for non-majoritarian religions generally. The United States Supreme Court's well-known decision in *Lyng v. Northwest Indian Cemetery Protective Association* (Lyng) illustrates the point. The claimants attempted to use the Free Exercise clause to prevent forestry and road construction from being permitted through a traditional religious site within a forest. (ibid.:442 et seq.) The Court noted the "grave" (ibid.:451) impact on Indigenous religious practices, but it held that "whatever rights the Indians may have to the use of the area, [...] those rights do not divest the Government of its right to use what is, after all, its land", (ibid.:453) dismissing the Free Exercise claim.⁷ (see ibid.:449) In a dissenting opinion, Brennan J. argued that Indigenous spirituality was conceptually different and that "the area of worship cannot be delineated from social, political, cultural, and other areas of Indian lifestyle." (ibid.:459 et seq.) He rejected the majority's holding that "government action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion." (ibid.:472) Kuppe analyzes the case as demonstrating that in the eyes of a Western court, a religion itself is not threatened if the existence of a sacred place is threatened. (Kuppe 2009: 62) While the overall existence of a

⁶ Although Berger is writing in a Canadian context, his claim is not necessarily restricted to Canada.

⁷ This was based partly on a distinction between direct coercion and indirect interference.

religion which uses thousands of man-made (and hence reproducible) sites might not depend on the existence of a single site, the situation is different when it comes to indigenous sacred natural sites. A Sámi sacred natural site cannot be made. This is an issue which affects many indigenous peoples: the relationship, spiritual or otherwise, is between the people and the individual members of the people and specific locations. Sacred land cannot be exchanged for other land once it is lost. The sacrality of something which can be owned is an issue which is not easily grasped by the law.

In addition, the community-component of indigenous religiosity is not necessarily comparable to the Western approach to freedom of religion. While also used collectively, in most Western jurisdictions, religious freedom has typically taken the form of a freedom enjoyed by an individual believer. Canada, as just one example, has taken this tendency particularly far in recent years. In the *Amselem* case in 2004, (*Amselem*) the Supreme Court of Canada enunciated an approach to freedom of religion cases based solely on non-trivial interference with an individual's sincere belief that showed a nexus with religion, specifically avoiding any enquiry into the belief's actual connection with a religious group so as both to protect the individual who might differ from a group and also so as to minimize the courts' enquiries into private matters. This is not to say that there can never be protection of a religious group. However, often, the group's claim relies either upon assertion of the claims by individuals or assertion of a property-type interest. The latter possibility arose, for example, in the context of the claim of a Congregation of Jehovah's Witnesses against the city of Lafontaine, which also went before the Supreme Court of Canada in 2004. (*Congrégation*:48) The Court referred to the claim as an "individual" claim in relation to procedural fairness in zoning issues, even though it was clearly a claim by a religious community, and only property-type interests then protected the religious community.

The widespread adoption of proportionality analysis in various constitutional systems means that the assertion of an individual right is up against any justification that can be offered on the basis of more widespread societal considerations. The Supreme Court of Canada's more recent decision in *Hutterian Brethren* (Alberta) serves as an example of the point. In the case, certain groups of Hutterites with a particularly stringent interpretation of a prohibition on graven images held a sincere belief against having their photographs on their driving licences but the majority of the Supreme Court of Canada effectively put each individual believer's claim up against the security interest asserted by the State in having a uniform system of identification. The majority ignored the community-undermining effects of its decision not to require the accommodation. An individual asserting rights in relation to a sacred space will be in no better position against any broader societal use of the space. Furthermore, property rights that might protect the constructed sacred spaces of Western religious communities will often provide no protection in the context of sacred natural spaces, which are not supported by Lockean concepts of property.

The individualized focus present in freedom of religion analyses is evident in Article 18 of the International Covenant on Civil and Political Rights, which focuses very much on the dangers of coercion of the individual, albeit with a limited

reference to freedom to manifest religion “either individually or in community with others” (ICCPR). However, in the Indigenous context, the Declaration on the Rights of Indigenous Peoples has now seen the adoption of text that reacts to this tradition (UNDRIP).

In particular, it is worth comparing the text of Article 12 of the Declaration to traditional protections of religious freedom. The first component of Article 12, “the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies”, (ibid.) corresponds roughly to the traditional human rights conception codified by Article 18(1) of the International Covenant on Civil and Political Rights, whose central guarantee is “the right to freedom of thought, conscience and religion” and resulting “freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”. (ICCPR) Article 12 of the UNDRIP differs even in the parallel portion of the text, which does not put the traditional emphasis on individual choice concerning religion and incorporates different idea of “spiritual and religious traditions, customs and ceremonies” in lieu of “conscience and religion”. (UNDRIP).

However, Article 12 of the UNDRIP goes farther than these smaller differences and actually goes on to add other key rights, including “the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains”, (ibid.) thus placing a specific emphasis on sacred sites and on burial sites in a manner that implicates specific territorial sites. This makes protection for Indigenous religion and spirituality intertwined with land and resource issues in a manner not typical of other religious freedom claims. The Declaration on the Rights of Indigenous peoples calls human rights jurisprudence to a new approach.

In noting this, we do not claim that all Indigenous spiritual traditions are inherently collectivistic. Indeed, as noted earlier, the use of some sacred natural sites is quite individualized. Our claim, rather, is that the UNDRIP recognizes religious and spiritual rights with a text differering from many historical human rights approaches both in having some more room for collective aspects and also in having greater room for inherent connections of religion and spirituality with land.

2.3 Emerging Models

Within Western legal traditions, there is an emergent possibility of constructing a different narrative of freedom of religion. Some of these possibilities make room for claims by religious communities themselves, and there are already traces of this possibility in some jurisprudence. In the context of the ECHR, the European Court of Human Rights’ decision in the 2002 case of the *Metropolitan Church of Bessarabia v Moldova* provides an example of the Court considering the religious claims of a community. The Court noted that: “the autonomous existence of

religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords". (Metropolitan:para. 118) Citing this case in an early 2015 labour rights decision, the Supreme Court of Canada has also now signaled its potential support for the collective rights of religious communities. (Ontario:para. 64) That recognition is not necessarily of organized religions but of communities of individuals engaged in religious or spiritual practices.

In New Zealand, as discussed by scholars like Adhar (2003: 632–33) there are court decisions showing a sincere attempt to respect traditional Maori relationships with the land, and one may note in particular the decision of the Environment Court in the *Beadle* or Northlands Prison case, (*Beadle*) in which the Court recognized a Maori "cultural and traditional relationship" with certain sites, such as two geothermal ponds, (ibid.:para. 462) and called on the government to show respect for that relationship in its approach to development in the region. Here, there is respect for a religious or spiritual connection with land.

Adopting a more collective approach and then looking to the kind of group interest at stake in different scenarios permits a more genuine engagement with the different sorts of conflicts that can arise in relation to sacred natural sites (e.g., Newman 2011). For example, scholarly writing on collective rights has suggested that it then becomes possible to consider the nature of the group interests at stake and identify a Native American spiritual interest as taking priority over the recreational interests of rock climbers in the same site. (ibid.) Matters are more complicated, though, where there are sincere spiritual interests on both sides, as would be the case if the rock climbers were replaced by sincere New Age spiritualists. Or, one confronts challenging scenarios, such as where Hopi artefacts are located in unexcavated sites on Navajo lands, with the Navajo arguing against excavation based on the sacredness of the lands but the Hopi seeking excavation to access their artefacts. (ibid.)

On these sorts of challenges, an approach with room for collective rights allows us to identify some challenging conflicts where they arise, leaving us to grapple it as best we can. This is not simple but it may well be preferable to trying to force some religious claim into an individualistic framework, such that they then lose almost automatically to the societal justifications thrown up against them. Writing on collective rights shows that recognizing collective rights need not interfere with individual rights, so long as the collective rights at issue meet requisite tests of serving the members of their communities and of showing mutual respect with other groups' equally mutually respectful rights claims. (cf. ibid.⁸).

The challenge of seeking protection for sacred natural sites becomes a sort of test question for analyses of religious freedom, one that traditional Western individualistic accounts struggle to deal with. The consequence has long been the

⁸The Supreme Court of Canada has recently stated that "[r]ecognizing group or collective rights complements rather than undercuts individual rights" (Ontario:para. 65), although without offering a full theoretical explanation.

worse for sacred natural sites. Today, even in a secular age, there is an increasing recognition of what is being lost. Perhaps we can predict in the near future that this awareness will make things not so much the worse for sacred natural sites as so much the worse for incomplete Western accounts of freedom of religion. Accounts of freedom of religion falter if they do not make room for the sacred. Developing strands within freedom of religion analyses, combined with the real potential in the new text of the Declaration on the Rights of Indigenous Peoples, open new hope and possibilities for approaches to freedom of religion better suited to protection of sacred sites than in the past.

2.4 Conclusions

Regional human rights conventions have the benefit of usually being more accessible to local legal counsel than global instruments. However, when it comes to Indigenous sacred sites, regional human rights documents generally suffer from two major shortcomings: (i) they tend to overlook Indigenous peoples in part because they were drafted at a time when States sought to assimilate and integrate Indigenous peoples into dominant society; and (ii) the approach to freedom of religion and its relation to other rights is skewed towards forms of worship which are associated with settled rather than nomadic communities.

In this chapter, we have shown how Indigenous rights in relation to sacred sites have often sat uneasily in regional human rights instruments, notably the IACHR and the ECHR. The challenges stem from a broader Western approach to freedom of religion that made its way into the ICCPR as well, with freedom of religion being framed in quite individualistic ways. Developments in recent years, however, offer hope that law can begin to recognize the sacred and can protect sacred spaces more effectively than human rights law has in the past. It is the case, for example, of the IACHR jurisprudence, where protection of sacred sites made its way through the protection of the right to property of Indigenous communities. Through its jurisprudence, the Inter-American Court gave emphasis to the role sacred sites can have in shaping the relationship between the Indigenous peoples and their ancestral land, making it a relevant element for the assessment of the violation of the right to property but also for the protection Indigenous peoples' cultural identity.

In this context, the UNDRIP's reinterpretation of freedom of religion stands as an important moment, along with other moves toward more collective interpretations of freedom of religion.

The UNDRIP's article on religion and spirituality embraces a broader conception than Western-derived human rights approaches to religious freedom traditionally have. Implementation of the UNDRIP is one obvious recommendation, albeit one framed too generally to be meaningful. To be more specific, in this particular context, the UNDRIP's interpretation on freedom of religion must be infused into domestic and regional interpretations of freedom of religion in the context of claims concerning Indigenous sacred sites. If the UNDRIP does not directly

apply, and existing instruments have older descriptions of freedom of religion, their interpretation can nonetheless be updated. Between UNDRIP and gradually developing conceptions within domestic legal systems more generally, there is real hope for the law to develop so as to offer stronger protections to Indigenous sacred natural sites.

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