An uneasy alliance: Critiquing Rights of Nature from the perspective of an Indigenous relationist ethos

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William Robinson, detail from *Purling Brook escarpment* 2005

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Introduction

Here I use the perspective of an Indigenous relationist ethos (IRE) to critique the Rights of Nature (RoN) legal framework, understanding that both IRE and RoN are elements of Earth Jurisprudence (AELA Education, 2022a). Many of the same values and concerns unite IRE thinkers and RoN proponents, yet certain irreconcilable differences exist, and these are the subject of my critique. I begin with a brief exposition of IRE and RoN, for context.

Indigenous Relationist Ethos

The diverse Aboriginal 'Dreamings' or genesis stories share a common implication that the Earth created and raised humans, that the Earth provides us with material sustenance and life-meaning, and that we are therefore eternally bound to care for it and its resources according to a law of obligation. This duty of care, or 'Indigenous custodial ethic', emerges from the recognition that a reciprocal relationship exists between the Earth system and its human inhabitants — a relationship that must be maintained in stable balance as a precondition for long-term ontological security and socio-political order (Brigg & Graham, 2020b). Indigenous people's relationship to the Earth broadly, or more specifically to their ancestral land, forms the blueprint for relations among members of their human communities who understand themselves to be interconnected, interdependent and mutually obligated to a network of kin, ancestors and totems (Brigg & Graham, 2020b). A reverence for 'Country', or local bioregional place, acknowledges that "sacred places [are] living libraries of natural biodiversity and ecosystems, and a living link with the long chain of evolution" (Mason, 2011, p. 44). The quality of sacredness inheres, says Mary Graham (2008, p. 186), in the relationship between the human spirit and the natural life force.

Rights of Nature

RoN proponents recognise that under Western colonial law, "land ownership entails the legal right to destroy that piece of land" (Linzey, in AELA Education, n.d.). They further recognise that a pattern of systematic exploitation of nature in the Anthropocene has led to the current climate and ecological crises wherein most of the Earth System's planetary boundaries have been transgressed, rapidly destroying the planet's life support system (Greenprints, 2022). Moreover, decades of anthropocentric environmental law, even when enforced, have amounted to little more than "a system of *organised non-liability…* that suppresses the environmental protections it was supposed to provide" (Dibley, 2019, p. 28, citing Ulrich Beck). The RoN framework seeks to 'dismantle the source code' of Western laws which are based on hierarchical governance structures and on ideologies of extractivism and expansionism (Linzey, in AELA Education, n.d.). In line with other justice movements which have succeeded in converting non-rights-bearers into rights-bearers, RoN proposes to transform the legal status of the natural world "from being property … to itself being recognised as a legal entity with certain legal rights that need to be protected" (Margil, in AELA Education, n.d.).

Commonalities

Before critiquing RoN from the perspective of IRE it is worth highlighting what they have in common. Both envisage a radical cultural transformation from anthropocentrism, which "explicitly privileg[es] human welfare over that of all other living beings" (Washington, 2019, p. 20), to ecocentrism, which regards nature as worthy of moral consideration and finds inherent value in all natural entities, processes and systems. Both RoN and IRE are championed by people who see through the "illusion that we can have environmental protection while leaving [Western colonial law] intact" (Linzey, in AELA Education, n.d.) Both strive to overcome the tyranny of human exploitation of nature, wherein nature is conceived as a resource for human consumption. And both are holistic in vision and restorative in approach, attempting to restore both ecological integrity and community cohesion by enabling "wrongdoer[s] to make appropriate amends… [and by facilitating] mediation… healing … and restitution" (Mason, 2011, p. 43).

A critique of RoN from an IRE perspective

The notion that "where life exists, rights exist" (Maloney, 2019) is axiomatic among RoN proponents, yet from an IRE perspective it is hard to see what evidence could be marshalled for or against this belief. Notwithstanding the assertion by Thomas Berry, a progenitor of Earth Jurisprudence, that rights "originate where existence originates" (Cullinan, 2011, p. 103), the public recognition of rights emerges from negotiated decisions among stakeholders authorised to speak for given communities. It is not surprising, then, that rights have historically been claimed by and for those with a voice to claim them. This has led to rights discourse being thoroughly human-centric. Pablo Solón puts the problem starkly:

> Why, if the rights of Mother Earth and nature were born criticizing anthropocentrism, have [RoN proponents] used the concept of 'rights' that is very anthropocentric?… Thomas Berry was never entirely happy with the language of 'rights', but 'it was the best we had to be going on with'. (Solón, 2018, p. 127, citing Jules Cashford)

Even Michelle Maloney, who describes RoN as "a spearhead concept to push human beings in Western industrialised systems to think differently about nature", sees RoN as a provisional phenomenon and wonders what will follow it (AELA Education, n.d.). She muses, 'Wouldn't it be great if we didn't talk about rights and we just talked [solely] about obligations to look after the place?', and wonders, in the spirit of IRE, "what a law would look like that was crafted as a law of obligations [instead]" (AELA Education, 2022c).

Maloney's (2019) observation that Earth jurisprudence (including RoN) requires us to regard the non-human world as "sacred, non-negotiable and irreplaceable" echoes Graham's summation of IRE as "a sacralised, ecological collaborative stewardship system" (AELA Education, 2022b). However, other researchers doubt whether RoN is capable of achieving such a radical transformation. Miranda Forsyth et al. (2021), for instance, consider it a live question "whether taking a rights-based approach favours legalism instead of exploring the ongoing relationships between people and place and Indigenous approaches to recognising nature's voice" (p. 34). They further note that powerful perpetrators in our society tend to enjoy impunity for crimes against nature, with

corporations "account[ing] for regulatory sanctions/fines as a cost of doing business, encouraging recidivism" (Forsyth et al., 2021, p. 27).

Erin O'Donnell (in ALEA Education, 2022c) clearly articulates the tension between ecocentrism and anthropocentrism within RoN:

> On the one hand, we're trying to radically transform legal systems to say 'nature is no longer just an object. It is a participant. It is an equal with humans'. But the way we're doing that is to bring nature in to an anthropocentric legal system and to basically make it into a corporation… Those ideas sit very uncomfortably with each other. How can you radically transform the system, whilst … collapsing nature … into nothing more than the legal fiction of a legal person, and then insert it into a human environment and expect it to participate as a human would in that environment?"

Another reason to doubt whether RoN can achieve a shift to Earth-centeredness (as embraced by IRE) is that the very concept of rights is rooted in the individualistic and hierarchical orientation of mainstream Western political thought, a worldview that classically undervalues interconnectedness, interdependence and holism. Just as Western legal systems have long "fragment[ed] nature into '*things*' that in reality are never dissociated: the forest from the soil, the underground water from biodiversity, the land from the minerals" (Solón, 2018), so too RoN (when applied to entities like rivers, glaciers or mountains) ineluctably fragments nature. And although RoN avoids treating nature as human property and indeed strives to protect nature from exploitation, it nonetheless risks reducing the Earth System to "a collection of [subjects] … [rather than a] comprehensive whole" (Burdon, 2012, p. 29). Further, IRE acknowledges natural entities are not discrete but intertwined in complex networks, so any attempt to delineate their boundaries (as RoN often demands) is a fool's errand. Even in a RoN case such as the Birrarung river and its lands, which jointly acquired legal personhood as "one living and integrated natural entity" (ALEA Education, 2022c), any attempt to delimit the river and its lands biogeophysically would meet the Sorites paradox (Bennett, 2010, pp. 8–9).

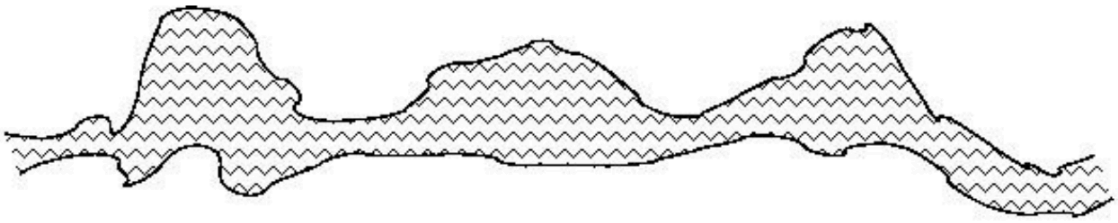

Fig. 1 Is this just an irregular river, or is it three lakes joined by a river?

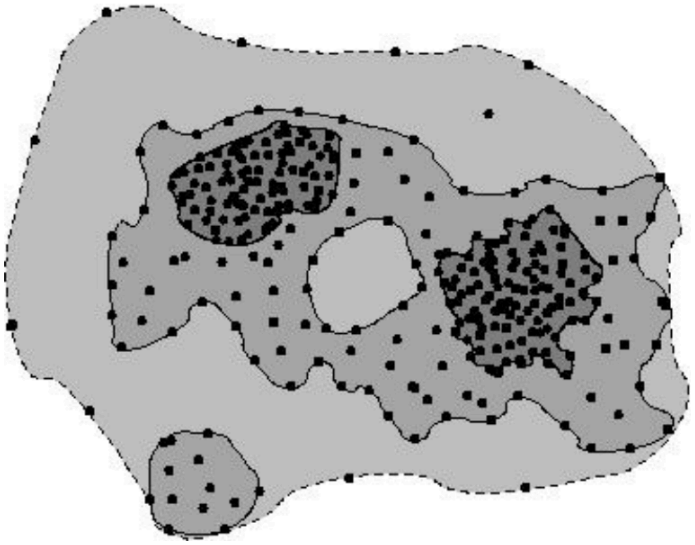

Fig. 2 Possible forest demarcations for a given tree distribution. Inner contours are based on a high threshold on the tree density. Outer contours are based on lower thresholds.

Note: Figures 1 & 2 reprinted from Bennett (2010), pp. 8 – 9.

Further, all rights (including RoN) are hierarchical, in the sense that legal systems need to determine which rights take priority in an adversarial conflict.[1] By contrast, IRE does not fragment, delineate or hierarchically organise the Earth; such hubris would be anathema.

From an IRE perspective it would seem bizarre that in RoN legal personhood cases, natural entities such as rivers are cast as perpetual legal minors, while their human guardians, standing *in loco parentis*, are liable for the actions of their 'wards'. This legal construction engenders a deeply unbalanced relationship between humans and others in the Earth community, a relationship that is strikingly at odds with the mutuality inherent in IRE.

[1] These criticisms of RoN are weaker in relation to places where RoN are mandated at a national level, such as in Ecuador, where the 2008 constitution evokes 'Pachamama', the Indigenous concept of 'Mother Earth' (Sundström, 2021).

A further critique is that RoN — like the human rights framework from which it sprang — originated in a Hobbesian political philosophy and consequently relies on sovereign powers and 'command-obedience power relations' to uphold, protect, and enforce whatever rights have been institutionally recognised (Brigg & Graham, 2020a, 2020b). From the perspective of IRE, this may be regarded as an excessive imposition on members of a community who could instead be encouraged to take responsibility "for regulating their own behaviour — for being their own law-bearer as they enact their autonomy in relation with Country and others" (Brigg & Graham, 2020b).

RoN experts ask: "Who can speak on behalf of … the more-than-human?" (Forsyth et al., 2021, pp. 19–20), but from an IRE perspective, nature doesn't need a voice audible in the Courts in order to be worthy of care. To quote O'Donnell: "if you speak to Indigenous peoples about their relationship to a river, they will talk about it as being one of reciprocity, mutual obligation. They have co-created each other… So legal duties aren't really a good way of understanding that relationship" (ALEA Education, 2022c).

While it is frequently said that RoN has Indigenous roots (e.g. Mason, 2001, p. 43; Sundström, 2021; Wijdekop, 2018), Indigenous participants do not necessarily recognise a continuity between IRE and RoN. As Thomas Linzey says of his conversations with Maori activists in an Indigenous co-management program: "When I raised the phrase 'Rights of Nature', [they] didn't even recognise the phrase… They said 'Well, that wasn't rights of nature work that I did'" (AELA Education, n.d.). In a similar spirit, Maloney remarks that "an Indigenous person might say: 'Why do you need rights of nature when Mother Nature exists?'" (ALEA Education, 2022c). Two specific cases will illustrate this point. Following the granting of legal personhood to the Whanganui river in 2017, the lead negotiator for the Whanganui tribe said his people had "fought to find *an approximation in law* … [of the Indigenous] perspective [of] the river as a living entity… an indivisible whole" (Ainge Roy, 2017, citing Gerrard Albert, italics added), revealing that even RoN victories are seen as a compromise from the perspective of IRE. Similarly, the Te Urewera rainforest in New Zealand — widely regarded as a RoN success story, with the rainforest being recognised in 2014 as a legal entity and the Tūhoe people as its guardians — was "still a compromise on what the Tūhoe actually want: simply the return of their land. The

idea that the government had to grant these … rights [of nature] is almost offensive to those who live there" (Draxler, 2022, citing Amy Westervelt). O'Donnell makes a similar point:

> Traditional Owners… consider the river already to be a living entity and should not have to depend on settler law to bestow this status upon it… [T]he recognition of nature as legal subjects is often the result of Western legal frameworks adopting and translating concepts from the laws of Indigenous peoples. Without deep, respectful engagement, such translations can involve a reinterpretation (or appropriation) of these laws that may actually undermine the rights of Indigenous peoples or require them to adopt legal positions that are at odds with their worldviews. (O'Donnell, 2021)

From the perspective of IRE, which centres an ethic of care, rights frameworks (including RoN) represent an unduly clinical, bureaucratic approach to ethics. Concepts key to rights discourse such as respect, dignity, individuality, entitlement, empowerment and validity are deeply incommensurate with concepts in care discourse such as compassion, sympathy, empathy, kindness, concern and solidarity. I contend that the focus within RoN on regulations, enforcement, and sanctions is fundamentally at odds with feelings of love and warmth implicit in the caring, custodial relationships that define IRE. As Westervelt (2021) observes: "It is hard to just mash these two very different justice systems together" (35:53).

To the extent that RoN proponents make progressive efforts to transplant IRE values into a Western legal framework, we see an ambivalent rapprochement, but IRE and RoN remain strange bedfellows. To complicate matters, the two systems are frequently muddled, as in Senator Mehreen Faruqi's first speech to Parliament: "Nature has intrinsic value… Let's enshrine the rights of nature in law to protect Australia's natural wonders, like the Great Barrier Reef, the Great Artesian Basin and the Murray-Darling system, from greedy exploitation… [to achieve] a more caring, kind and compassionate world" (Commonwealth of Australia, 2018, p. 5405).

For brevity, I have restricted my above discussion to theoretical issues, but I acknowledge there are also practical concerns about the impacts of RoN on the living world. Firstly, in most regulatory contexts, affected communities tend not to be genuinely empowered by RoN due to inadequate accountability measures, with proxies for rights-bearing natural

entities lacking anything approaching a veto power (Forsyth et al., 2021, p. 35). Secondly, RoN risks fracturing the relationship between humans and the natural world, and may even reinforce human dominance over nature as people either become complacent about their responsibilities towards the rights-bearing natural entity, or feel threatened, regarding the natural entity "as an adversary or rival for resources… [leading to] a transactional or competitive relationship" (O'Donnell, 2021).

Conclusion

I consider IRE and RoN to be philosophically incompatible systems of thought, elements of which may be synchronously applied but not properly fused. As Wood (2016) observes, common law and Indigenous customary law inhere in different normative systems. As long as RoN remains dominated by individualistic and hierarchical thinking, I am doubtful that it can attain its ecocentric ideals. Yet to abandon RoN altogether would be risky for a world already in crisis. While nations like Australia remain colonial powers and are subject to state capture by extractive industries, we dare not overlook the potential contribution of any system that strives for more ecocentric outcomes.

Fortunately, some RoN scholars recognise that a change in legal structures is not sufficient for developing an Earth-centred world (Solón, 2018, p. 127) and that a narrow focus on legal rights can actually be counterproductive (O'Donnell, 2021). Recent research into environmental management practices suggests that a combination of restorative justice (akin to Indigenous justice) and court orders may be more effective than either pursued on its own (Forsyth et al., 2021, p. 26). This kind of legal pluralism — in which Indigenous laws, values and interests are respected, and Indigenous people are included in community ecological governance structures — is more likely than legalistic RoN alone to succeed in both protecting ecological systems and achieving a more reciprocal relationship between people and place (O'Donnell, 2021). Some researchers argue for a restorative approach to be "integrate[d]… more holistically into daily regulatory environmental practice, such that it permeates the entire regulatory spectrum" (Forsyth et al., 2021, p. 19). I maintain that true integration between such heterogenous systems is troublesome, but elements of IRE can be dovetailed with RoN with the goal of dismantling the structural and systemic drivers of planetary degradation.

Proponents of RoN who share this radical, transformative vision have begun pushing for a widespread paradigm shift in which nature is not only legally recognised as a rights-bearer, but deeply and universally felt to be a living being. The ambition here is, as O'Donnell (2021) says, "far-reaching and profound: to reset and reframe the human relationship with nature… [enabling] meaningful change". Mari Margil (in AELA Education, n.d.) agrees:

> So much of this work is about how to get that cultural shift, that societal shift, that people begin to reorient how they think about nature and their role within nature as part of nature, and connecting to an ecosystem such as a river that people can really hold in their hearts.

To this end, those of us interested in Earth Jurisprudence must "speak from the heart" (Maloney, 2015, p. 49); we "must 'bring our whole selves to the party', going beyond our rational legal skills to also embrace and channel our compassion, spirit and love for the Earth" (Maloney, 2019, citing Cormac Cullinan).

Ultimately, however, this may not be enough. Even a visionary and sensitive RoN movement may be unable to reform a hegemonic legal system that is shot through with anthropocentrism. For this reason, we might better view RoN, as Westervelt (2021) does, as "a step on the pathway to [Indigenous] sovereignty and [land restitution]" (35:13, citing Annette Te Imaima Sykes). Westervelt's next question is one we should each ask ourselves, our governments and civil society: "[D]o we really need to force the Indigenous system into the coloniser Court system, or can we just give [Indigenous peoples] real sovereignty?" The latter would require further legal reform in jurisdictions where courts continue to declare Aboriginal sovereignty non-justiciable.

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