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The Right to a Healthy Environment as a Basic Human Right – Possible Approaches Based on the Practice of the Human Rights Mechanisms, with Special Regard to the Issues of Indigenous Peoples

Abstract

The aim of the author is to examine the nexus between the development of the indigenous peoples' rights – which came like a blast – and the prevalence of the right to a healthy environment. As another goal, the author aims to reveal how the protection of indigenous peoples' rights can facilitate the realisation of environmental protection and sustainable development goals. In order to achieve his goals, the author – after clarifying the definitions in the first chapter – introduces the indigenous peoples and healthy environment related practice of the three regional human rights protection mechanisms – namely the European, the Inter-American and the African – in the second chapter. In the third chapter, the author briefly introduces those rights of the indigenous peoples, which could serve the protection of indigenous peoples' rights and the positive and negative examples. The author draws his conclusions in the last chapter.

Keywords: healthy environment, basic human right, human rights mechanisms, indigenous peoples

1. Grounding

The eve of the international environmental law dates back to the 1972 Stockholm Declaration, which was the first to stipulate that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being […]"[1] At the same time, the declaration stipulated the duty of man to protect and improve the environment for future generations. The above quote verifies the statement that the right to healthy environment stems from the connection of human rights and the environment protection.[2] This nexus was emphasized by judge Christopher G. Weeramantry in his

György Marinkás: The Right to a Healthy Environment as a Basic Human Right – Possible Approaches Based on the Practice of the Human Rights Mechanisms, with Special Regard to the Issues of Indigenous Peoples – Az egészséges környezethez való jog, mint alapvető emberi jog - Lehetséges megközelítések az egyes emberi jogvédelmi mechanizmusok gyakorlata alapján, különös tekintettel az őslakos népeket érintő kérdésekre. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2020 Vol. XV No. 29 pp. 133-170, https://doi.org/10.21029/JAEL.2020.29.133

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[1] Stockholm Declaration (16 June 1972), Principle 1.

[2] Hermann 2016a, 39.

https://doi.org/10.21029/JAEL.2020.29.133

dissenting opinion[3] annexed the judgement[4] brought by the International Court of Justice (hereafter: ICJ) in the Gabčíkovo-Nagymaros Project.[5] He argued that: "The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself." Weeramantry's other conclusion that is worth highlighting is that the traditional legal system consisted the concept of sustainable development, without stipulating it expressis verbis.[6] – This conclusion is verified by the practice of the Strasbourg, the Inter-American and the African Court.

When discussing the topic, the basic theoretical question is, whether the preceding anthropocentric or the recent ecocentric approach is more expedient.[7] Answering this question is not easy at all, since the human rights mechanisms[8] feature significant differences in their respective practices.

The anthropocentric approach can be regarded as the classic appreciation of the right to a healthy environment, which does not classify the right to a healthy environment as an individual human right. Instead, it protects the environment by 'greening' the already existing civil and political rights, and by utilising these rights and the institutions created in order to protect them. Since this approach does not recognise the right to healthy environment as a sui generis human right, it cannot exist as a subjective right and its existence as a collective right is also excluded. Whereas, the ecocentric approach treats the right to healthy environment as a solidarity right, the subject of which is the collective and not the individual. The point of origin of this perception is that the environment is the precondition of life on the Earth, thus a value, which worth protection per se. Moreover, it perceives the protection of the environment as a precondition of protecting human rights. As a consequence environment protection goals may prevail over human rights.[9] – As it is to be introduced in the next part, several human rights mechanism realised the above mentioned interrelatedness of human rights and environment protection.

The task to be solved is harmonizing the two approaches in a way that enables to facilitate the adventages of both. That is to say, the anthropocentric approach – due to its minimalistic attitude – does not allow to make the best of this right. The ecocentric approach – although its goals are desirable – does not fit in the classic system of human rights. As Veronika Hermann argues the desirable goal is to find a system, which considers the environment as a value worth the protection, but by the end of the day

[3] The dissenting opinion of judge Christopher G. Weeramantry in the Gabčíkovo-Nagymaros case, 91–92.
[4] ICJ, Gabčíkovo-Nagymaros case, judgement, 15 September 1997.
[5] For a detailed analysis of the case see: Raisz & Szilágyi, 2017.
[6] Bándi 2013, 69.
[7] Hermann 2016b, 26.
[8] Although the recent research does not cover the environmental law of the EU, it is worth mentioning that the EU's approach is anthropocentric, that is to say it regards the protection of human life and health as the ultimate goal. In spite of all, the environment protection law of the EU is one of the most developed and most innovative. Still, the question, whether the EU can roll over the anthropocentric approach remains unanswered. See: Alblas 2017; see furthermore: Pikramenou, Nikoletta, Rights of Nature: Time to Shift the Paradigm in the EU?
[9] Hermann 2016b, 5.

lets the human interest prevail. Herman resolves this conflict by approaching human rights from the aspect of human needs. As she argues, every human right can be equated with one or two human needs, just like every human need can be expressed with one or two human rights. The special subjects of human rights can be rendered as needs. Is the right to a healthy environment can be considered as a human right based on the above logic? – Asks Hermann. – The right to a healthy environment expresses a need for an environment, which provides food, [10] water, air and space of living that is not detrimental to health. It is evident that if the individual lives in an environment, where he/she is not capable to acquire healthy water and/or food or the air is polluted to such a degree that it jeopardises his/her health that cannot be reconciled with human dignity. That is to say, the general objective of the right to a healthy environment is to protect human dignity, while its special objective is to protect the environment.[11] As Hermann concludes her flow of thoughts.

The intergenerational equity has to be mentioned among the fundamental conceptions. Intergenerational equity demands every generation to pass the environment in a condition as that given generation received it. As judge Pinto de Albuquerque argued in one of his dissenting opinions from 2012 the prevalence of intergenerational equity is a precondition of realising sustainable development.[12] On the other hand, there is a precondition of the intergenerational equity as well: its prevalence postulates the prevalence of intragenerational equity. As Veronika Greksza argues, the fulfilment of the preceding one cannot be expected from a generation that cannot satisfy the needs of its own members.[13]

2. A Summary of the Practices of the Regional Human Rights Mechanisms

2.1. The Practice of the European Human Rights Mechanism

The keystone of human rights protection in Europe, the European Convention on Human Rights[14] (hereafter: ECHR) neither refers expressis verbis to the right to a healthy environment nor to the protection of human environment. Although the solid idea of adopting a protocol emerged in 1999, actual steps were not taken.[15] That is to say, the European Mechanism contributes to the protection of the right to a healthy environment indirectly, through the case-law of the European Court of Human Rights (hereafter: ECtHR).[16] The Court – which stands on the ground of evolutive interpretation[17] – has already deducted certain elements of the right to healthy environment form the ECHR in some of its cases, typically from the right to life[18] (Article 2 of the ECtHR) and the right to respect for private and family life (Article 8 of

[10] On the respective provisions of the Hungarian Basic law, see: Hojnyák 2019.
[11] Hermann 2016b, 6.
[12] See: ECtHR, Hermann v. Germany.
[13] Greksza 2015, 16–19.
[14] European Convention on Human Rights (Rome, 4 November 1950).
[15] Greksza 2015, 22.
[16] Hermann 2016b, 3.
[17] For a detailed analysis of the evolutive interpretation please see: Szemesi 2008.
[18] ECtHR, Öneryildiz v. Turkey.

ECtHR).[19] The scope of rights may be invoked is rather wide, however.[20] In Hermann's interpretation, this solution means the recognition of the environmental dimension of the already existing rights rather than the amplification of the established system with environmental rights. She concludes that as a result the level of the existing protection is lower than it could be.[21] Greksza, who examined the case-law of the ECtHR from the aspect of its compliance with the principle of intergenerational equity, articulated two further critiques. Firstly, the principle of intergenerational equity has not received the necessary emphasis so far in the case-law of the ECtHR. Secondly, that the requirement of the significant disadvantage alongside with the direct and personal concern hinders the development of a preventive approach.[22] As to date[23] the principle of intergenerational equity was mentioned only in the Hermann v. Germany case.[24] – In his dissenting opinion, Judge Pinto de Albuquerque, made his statement on the precondition of sustainable development, namely that is prerequisites the prevalence of intergenerational equity. The latter ones are held disquieting by Greksza, because they render any actio popularis like intervention in favour of nature impossible. [25]

Hermann and Greksza made similar de lege ferenda proposals. Hermann argues that the ECtHR – utilizing the living instrument character of the ECHR – could increase the level of the states positive protection obligation based on the right to life (Article 2 of the ECtHR) and the right to respect for private and family life (Article 8 of ECtHR). This obligation should include the protection of the elements of the environment and the rationalised utilization of natural resources. The legitimacy for this is provided by the common constitutional traditions.[26] Greksza also considers the evolutive interpretation as a possible solution. In her view, the ECtHR could derive the collective aspects of the right to healthy environment from the letters of the ECHR.[27] What is more, the Court could increase the level of protection provided for the procedural rights, if it would presume the personal concern – thus the indirect victim status – of the civil organisations aimed at environmental protection.[28]

[19] ECtHR, Lopez Ostra v. Spain.

[20] For a list of the aforementioned rights and related rights please open Greksza's article at pages 22-23.

[21] Hermann 2016a, 6.

[22] The theoretical grounds of the tools aimed at facilitating the shaping of preventive approach please see: Nagy 2013.

[23] Based on the research carried out by the writer of the current article on the 5th June 2020, the statement made by Greksza in 2015 stands fast.

[24] ECtHR, Hermann v. Germany.

[25]As mentioned above, the environment protection law of the European Union fells outside the scope of the current study. On the other hand, the author considers it worth mentioning that the restricted locus standi of private persons before the European Court of Justice has been a subject to heavy criticism ever since the court existed. Recently debates arise regarding the need for a broader locus standi in environmental matters. Szegedi 2014a; Szegedi 2014b.

[26] Thirty member states – out of the 47 – incorporated provisions on the value of environment or obligations to protect environment. Furthermore, 2/3 of the population of the CoE member states are live in a country, which constitution either protects or takes into consideration the environment protection, the right to a healthy environment or the intergenerational equity.

[27] Greksza 2015, 25.

[28] Hermann 2016a, 205–210.

The fact that 41 member states of the Council of Europe (hereafter: CoE) – out of the 47 – have ratified the Aarhus Convention,[29] and that 2/3 of the member states have a constitution[30] that contains environmental protection.[31] The tool of dynamic interpretation is limited, however: the ECtHR can only diverge from its earlier case-law if certain criteria are met.[32] The adaption of a protocol on the protection of the environment would mean more clearer legal solution. That's what Greksza argues for. The necessary political back-up is non-existent, however:[33] the Committee of Ministers of the CoE has dismissed any proposals so far arguing that most of the member states grant the right to healthy environment in its constitution. Furthermore – as a novel counter-argument – the committee highlights that the Charter of Fundamental Rights of the European Union[34] guarantees the right to a healthy environment in its Article 37. This argument is rather weak, however: the above mentioned article does not stipulate any basic rights. Instead it's a political agenda.[35]

Regarding the rights of indigenous peoples, it can be stated that in this regard, the European Mechanism has always represented a rather restraint attitude compared to the Inter-American or the African one.[36] If it ever heard cases related to indigenous peoples, those cannot be regarded as relevant from the point of the right to a healthy environment.

2.2. The Practice of the Inter-American Human Rights Mechanism

Similarly to the ECHR neither the American Convention on Human Rights[37] (hereafter: ACHR) nor the American Declaration on the Rights and Duties of Man[38] contain expressis verbis provisions on the right to a healthy environment. Contrary to European Mechanism however, the member states of the Organisation of the American States[39] (hereafter: OAS) succeeded in granting this right: Article 11 of the San Salvador protocol[40] of the ACHR grants the right to a healthy environment and the duties of the states to grant it.

The Inter-American Court of Human Rights (hereafter: IACtHR) had to face the issue of preserving the environment in its indigenous peoples related case-law.[41]

[29] Aarhus Convention.
[30] Recently the constitutional status of the principle of precaution was examined by the constitutional court.
See: Szilágyi 2019; A magyar Alaptörvény rendelkezéseinek részletes elemzését lásd: Téglásiné Kovács & Téglási 2019.
[31] Hermann 2016a, 205–210.
[32] Greksza 2015, 25.
[33] Hermann 2016a, 205–210.
[34] Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, pp. 391–407).
[35] Greksza 2015, 26.
[36] See: Marinkás 2018, 186–190.
[37] American Convention on Human Rights (San José, 23 May 1969).
[38] American Declaration on the Rights and Duties of Man (Bogotá, 1948).
[39] See: OAS 2020.
[40] San Salvador protocol (San Salvador, 17 November 1988).
[41] Raisz 2008.

However, the emphasis was put on other rights in these cases,[42] a part of those rights, e.g. the free, prior and informed consent (hereafter: FPIC) may be utilized for environmental protection purposes.[43]

Having regarded the IACtHR's sensitivity for environmental protection issues, it was expected that the court – as soon as it gets the opportunity – will elaborate the connection between the right to a healthy environment and other rights. It is no exaggeration to say that the student made rings round his master.[44] In its advisory opinion of 15 November 2017,[45] the IACtHR – interpreting Article 4 (1) on the right to life and Article 5 (1) on the right to human dignity – made important statements.

Firstly, the Court stated that the right to a healthy environment may be derived from the right to life and the right to human dignity.[46] Feria-Tinta and Milnes argues that the judgement feautures more merits than this: this was the first time, when an international tribunal interpreted the environmental law as a uniform system, and held that the right to a healthy environment is a basic right, equal to other such rights.[47] Despite the fact that the advisory opinion was initiated regarding a particular project, the judgment may be abstracted well on every possible bi- or multilateral environmental dispute. The chance for the prevalence of the judgement's provisions[48] are enhanced by the fact that the written opinions of the OAS member states regarding the right to a healthy environment were all in favour Colombia's petition and the interpretation enshrined in it.[49]

Secondly, the IACtHR by delivering this judgment opened the gate for the diagonal human rights claims. – As Feria-Tinta and Milnes call it. – This means that citizens of a third state – other than the polluter state – may lodge a petition against the state, which is responsible for the pollution.[50] By doing so the Court enables the effective protection of the victims of cross-border pollutions, particularly because the Court stated that the locus standi exist in case of pollutions caused by private parties if the state can be held responsible because it failed to perform its supervisional taks.

[42] For a detailed analysis of the indigenous related cases of the IACtHR see: Marinkás 2013a, Marinkás 2013b, Marinkás 2012.
[43] See: Marinkás 2018, 111–135.
[44] The case-law of the ECtHR serves as model and as a reference for the IACtHR even from the beginning, since the ECtHR already elaborated a full-fledged case-law by the time the IACtHR started to function. Later, however the IACtHR affected the case-law of the ECtHR. See: Raisz 2010, Raisz 2009, Raisz 2007.
[45] EJAB, OC-23/17.
[46] The IACtHR based its reasoning on the followings: firstly it stated that there is an inevitable connection between nature protection and the prevalence of human rights, secondly it held that certain human rights are extremely vulnerable in this regard. That is to say the degradation of nature directly effects their prevalence. Furthermore, the IACtHR defined those rights, which prevalence is of paramount importance to increase the effectiveness of environment protection, including the right to free speech and the right to participate in decision making. See: EJAB, OC-23/17, paras. 47, 55, 65.
[47] Feria-Tinta & Milnes 2019.
[48] Banda 2018.
[49] Feria-Tinta & Milnes 2019, 50–51.
[50] IACtHR, OC-23/17, paras. 81–82, 93–94, 104.

This shall be regarded as a significant turning point, since the standpoint of the Inter-American system was rather moderate in this issue.[51]

Thirdly, the IACtHR defined the material and procedural obligations of the states in this field,[52] which may be derived from the prevalence of the right to life and human dignity. These obligations are particularly:[53] (a) to prevent significant environment degradation, (b) to establish regulation and supervision, (c) to obey the principle of precaution and the (d) to cooperate in good faith. – The latter one includes (e) the obligation to inform the potentially affected state. – Last, but not least the state is obliged to (f) inform the citizens and to (g) provide them with possibility to take part in the decision making and protect their (h) right to judicial protection.

Fourthly, it shall be highlighted that IACtHR in its advisory opinion paid special attention[54] for the constitutional rules of the OAS member states. The Court emphasized in this regard that legal systems of Colombia and Ecuador treat nature as a quasi legal entity, which holds rights. Their rights are protected by the supreme courts of the beforementioned countries.[55] However the advisory opinion does not mention the Colombian Atrato river case, it is worth mentioning, because the Supreme Court of Colombia held that the river was a legal entity, entitled for certain rights and the right to judicial protection of these rights.[56] Furthermore, the same court in its 2018 judgement,[57] stated that the Amazonas rain forest was a legal entity. The court's intention was to protect the rain forest from the ever increasing deforestation.[58]

2.3. The Practice of the African Human Rights Mechanism

Contrary to the above introduced human rights documents, the African Charter on Human and Peoples' Rights[59] (hereafter: Banjul Charter) contains a provision on the right to a healthy environment, however it does not mention it expressis verbis. Article 24 of the Banjul Charter states that 'All peoples shall have the right to a general satisfactory environment favourable to their development.' The definition was criticized by many for its rather vague nature. The task of providing an exact explanation of 'general satisfactory environment' and 'favourable to […] development' was left to the African Commission on Human and Peoples' Rights (hereafter: ACHPR) – 'watchdog' of the Banjul Charter – and partly to the national supreme and constitutional courts. The former one got the chance to make a clarification in the SERAC and others v. Nigeria case[60]– a.k.a. Ogoni-case[61] – for the first time. – It is worth mentioning that the

[51] Feria-Tinta & Milnes 2019, 54–55.
[52] Feria-Tinta & Milnes 2019, 55–56.
[53] IACtHR, OC-23/17, paras. 95–103, 242.
[54] IACtHR, OC-23/17, para. 62.
[55] The Supreme Court of Colombia, judgement, T-622-16, 10 November 2016; The Supreme Court of Ecuador, judgement, 218-15EP-CC, 9 July 2015.
[56] See: The Constitutional Court of Colombia, judgement, T-622/16.
[57] The Supreme Court of Colombia, judgement, STC 4360-2018.
[58] The event preceding the case was a 44% increase in deforestation from 2015 to 2016.
[59] African Charter on Human and Peoples' Rights (Banjul, 27 July 1981).
[60] ACHPR, SERAC and others v. Nigeria case (155/96).
[61] For a detailed analysis see: Marinkás 2014.

Ogoni-case is relevant for the protection of indigenous rights. – The ACHPR held that Article 24 of the Banjul Charter together with Article 16 – which grants the right 'to enjoy the best attainable state of physical and mental health' – creates an unambiguous obligation for the state. As the Commission held: it is 'clear that there is no right in the African Charter that cannot be made effective.'[62] This approach is rather familiar with the African Human Rights Mechanism: the Banjul Charter does not contain any reference for the so called progressive realization in case of the third generation rights. – The sole exemption is Article 16, however the original intention of the drafting parties was overwritten by the case-law of the court. Furthermore it has to be emphasized that the ACHPR applied the so called 'obligations approach' during the consideration on the merits of the case, which was elaborated by Henry Shue,[63] and further developed by Asbjørn Eide.[64] This approach dispenses with the traditional generation-based classification of human rights, thus enables the evaluation of these rights with equal weight.[65] This approach is based on the following premise: the state has 3+1 obligations regarding human rights: it has to respect, protect, fulfil and facilitate them.[66] The first obligation – unlike the other three – is a negative obligation, which obliges the state to abstain from the infringement of human rights. The protection of human rights is a positive obligation, which requires active involvement from the state: it has to protect citizens from the possible infringement of third parties. – Either natural or legal entities. – The fulfilment of rights obliges the state to bring any action that enables the citizens to enjoy their rights. Last, but not least by facilitating the rights, the state tries to obtain the support of the society for these rights.[67]

On the other hand, the ACHPR – besides promoting the rights of indigenous peoples and environmental protection goals – paid attention to a vital interest of the states, namely the right to access natural resources to be found on their territory. The Commission made the following statements: "It requires the state to take reasonable […] measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."[68] First of all it has to be highlighted that the Commission acknowledged the right of the states to access natural resources to be found on their territories, secondly by doing so the states have to fulfil several procedural guarantees – e.g. the right to be informed and to be involved into the decision making – in order to facilitate the prevalence of the right to a healthy environment. Last, but not least the right to judicial protection has to be provided for every citizen. As Emeka P. Amechi points out, however the ACHPR was occupied by the procedural side of Article 24 rather than its material side. Thus – unlike in the previous cases – material side was not elaborated.[69]

[62] Ogoni-case, paras. 52–53, 68.
[63] Shue, 1980.
[64] See: Asbjørn Eide 2020.
[65] Please visit the website of the Icelandic Human Rights Centre 2020.
[66] ACHPR, Ogoni-case, paras. 43–48.
[67] Marinkás 2018, 141–142.
[68] ACHPR, Ogoni-case, para. 52.
[69] Amechi 2009, 63.

The majority of the supreme and constitutional courts of the African states exhibited a similar attitude: they tried to strike a balance between the environment protection goals and the interest of the state to utilize their natural resources for their development. In this regard the case-law of the ACHPR tally in with the national courts' practice, that is to say they both concluded that certain amount of environmental pollution and a certain degree of environmental degradation is conform with the Banjul Charter. What is more the citizens shall endure it.[70]

The right to a healthy environment was mentioned in the Endorois-case,[71] however only in an indirect way: the ACHPR considered it through the prevalence of FPIC.[72] – It is worth mentioning that ACHPR alongside with the other organs of the African Union do not originate the FPIC only from the right to self-determination. They usually invoke other rights as well.[73]

The African Court on Human and Peoples' Rights (ACtHPR) delivered only one indigenous peoples related case so far, namely the Ogiek-case,[74] in which the Court did not examine the Article 24 of the Banjul Charter.[75] The case is worth mentioning for other aspects, however.[76]

3. The protection of indigenous peoples' rights and the environment through the right to land

3.1. The development of the right to land

The international law did not pay attention to the rights of the indigenous peoples until the last quarter of the indigenous peoples' rights, including their right to own and possess the lands they have been occupying from time immemorial. A change has started only in the last decades,[77] which was induced by scholars. This was followed by the practice of human rights mechanisms with a certain delay and uncertainty. States still do not exhibit a uniform practice. What is more some of the states still strongly oppose the recognition of indigenous land rights, since they regard it as a threat to their right to access natural resources within their territory.

[70] Ibid., 67, 69.
[71] ACHPR, Endorois-case.
[72] See: Marinkás 2014b.
[73] Roesch 2017.
[74] ACHPR, Ogiek-case.
[75] For the details of the case see: Marinkás 2018, 161–168.
[76] It has to emphasize that the ACtHPR – departing from the practice of the ACHPR – used the definition of Erica-Irene Daes, the former president of the UN Working Group on Indigenous Populations instead of the definition elaborated by the ACHPR. For the detailed analysis of defining the indigenous peoples with special regard to the African ones, please see: Marinkás 2018, 18–22, 138–140.
[77] Marinkás 2015a.

Several indigenous-specific document pay attention to the indigenous peoples' right to own and possess land. ILO Convention 169[78] provides a stronger guarantee for indigenous' peoples land rights than any other human rights documents. The aforementioned document deals with land rights in seven articles. The first one is Article 13, which emphasizes the close connection between indigenous peoples and their lands. Article 14 demands 'The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.' The use of 'possess' induced debates in the literature, which had to be settled by the ILO. The ILO in its guideline took the view the wording of the Convention does not prerequisite the current possession of the land, some kind of nexus between the indigenous peoples and land has to exist, however.[79] It can be concluded from the guideline and practice of the ILO organs[80] ILO Convention 169 does not allow demands that seek to remedy historical injustices. As a result several indigenous peoples are excluded from the circle of potential petitioners.

As another important question it had to be decided whether the indigenous peoples are entitled to own or possess their lands. The drafters of ILO Convention 107[81] – the predecessor of No. 169 – intentionally omitted the right to possess and opted for solely mentioning the right to own. They argued that if the right to possess was included into the Convention, governments would recognise only the right of possession, weakening the legal position of indigenous peoples. Contrary to this, Convention 169 – as a step back in this context – recognises both the right to own and possess. The obvious reason was that some states wanted to make their indigenous population believe that they do not have the right to own their traditionally occupied lands, they can only pass it from generation to generation. Alexandra Xanthaki argues that this interpretation can be deemed as grounded in the light of political realities.[82] Nevertheless, ILO Convention 169 grants an effective protection: Article 17 requires states to protect the lands of the indigenous peoples. In this regard states have to recognise traditional land transfer methods. In the meantime states are obliged to prevent the land acquisition of non-indigenous person acting with malicious intentions e.g. making use of their traditions or the fact that most indigenous peoples are unaccustomed to law.

The indigenous peoples' rights are protected by the UN Declaration on the Rights of Indigenous Peoples[83] (hereafter: UNDRIP) as well. Article 10 of the Declaration states that: 'Indigenous peoples shall not be forcibly removed from their lands or territories.'

[78] C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169).
[79] Indigenous and Tribal Peoples Rights in Practice. A Guide to ILO Convention No. 169.
[80] In 2000 the Governing Body of the ILO brought its decision in the case of the Danish Uummannaq community, which initiated the return of their ancient lands. The Body declined the request and held that the return of the Uummannaq community would require the displacement of other indigenous peoples, who occupied the land in the meanwhile. This – as the Governing Body argued – would result in a trauma, similar to that occurred some 50 years ago. – Document No. (ILO): 162000DNK169, para. 36; See furthermore: Marinkás 2015b
[81] C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107).
[82] Xanthaki 2007, 83.
[83] A/RES/61/295.

The UNDRIP approaches the land rights from the direction of cultural rights, which is in conformity with the practice of UN bodies,[84] the recent point of view of the scholars[85] and – last but not least – with the own interpretation of indigenous peoples. As the representative of an Australian indigenous group stated: "land is basis of creation stories, faith, spirituality and culture. Furthermore, it means a connection between the recent and the past generations. The loss or degradation of land causes serious hardship for indigenous peoples."[86] The representative of the International Indian Treaty Council – a person with an indigenous origin – held that: "land is the sacred mother of indigenous peoples, their life-giver and their source of survival, therefore [their right to land] constitutes the heart and spirit of the draft."[87] – Namely the draft of the UNDRIP.

Summarizing the above it can be concluded that the culture-based approach can be regarded as the main-stream theory, despite its drawbacks.[88] The latter one refers to the fact that the decision makers – who are likely to come from the majority of the society – tend to picture the culture of indigenous peoples in a false way either completely or partly.[89]

Olivier De Schutter – the former UN Special Rapporteur on the right to food – elaborated a completely different approach in his reports analysing the right to land. He argues that the right to land is two-headed: firstly, it can be regarded as a sui generis right, which can be derived from the right to property and from the recognition of the close connection between indigenous peoples and their lands. Secondly it can be regarded as an instrumental right of the right to food,[90] since land is the basic tool of producing food, thus needs special protection.[91] However this approach is logical in itself, having regarded the close spiritual connection between indigenous peoples and their lands, it cannot be regarded as relevant from the viewpoint of indigenous rights.

3.2. Negative examples and good practices

The author of the current article, after studying the relevant cases and the literature came to the conclusion both in his 2016 PhD thesis and in his 2018 monography that there is a clear and verifiable nexus between the recognition of indigenous peoples rights and the realization of environment protection goals. Based

[84] Marinkás 2018, 231–233.
[85] Julian Burger argues that 'in case indigenous peoples do not receive the control over their own future, their development and over their own lands, their situation will not improve at all.' – Burger 1994, 195.
[86] ATSIC, Native Title Amendment Bill 1997, Issues for Indigenous Peoples. ATSIC, Canberra, 1997, 5.
[87] UN Doc, E/CN.4/1997/102), para. 248.
[88] Dulitzky, 2010.
[89] In order to avoid the above dilemma Marcos Orellana argues that the protection of indigenous peoples' lands shall be grounded on the right to life, instead on the right to property, since the right to life – unlike the right to property – is almost exempt from restrictions. However, Orellana himself acknowledges that this would create tension between the tribes and the states. See: Orellana & Marcos 2008, 846–847.
[90] The right to food in the Hungarian law-system is analysed by: Téglásiné Kovács 2017.
[91] De Schutter 2010, 306.

on the events occurred ever since and literature analysing them, his conclusion still stand on their ground.

Among others Allen Blackman and his fellow co-authors – after studying the results of the two years of research – came to the conclusion[92] that the thorough protection of indigenous rights have a positive effect on deforestation. – Some scholars argue however, that one must be cautious regarding the general applicability of these results.[93]

The aforementioned deforestations are caused by the overexploitation of land, which is mainly attributable to the wide-spread single-crop systems, which induces erosion and soil depletion. As a result more land is needed to be involved into agricultural use year by year. – This procedure is named as land grabbing by De Schutter.[94] – It is worth mentioning as an important interconnectedness that the firm protection of indigenous peoples' rights makes the execution of land grabbing less easy. Ironically, however some activities aimed at environment protection may speed up land grabbing. As an ample example, the ever increasing demand for biofuels on the one hand cause deforestation to meet the demand for the basic commodities and on the other hand jeopardise food security of the affected states. As the special rapporteur pointed out, the shift to produce the basic commodities of the biofuel may result in a shortage of food and in the increase of food prices. The latter one can mean starvation for the people of the developing countries, who usually have to spend a vast majority of their income on food.[95]

As an interconnected problem the number of internally displaced persons (hereafter: IDP) grows year by year. Having a glance at the last decade, the fact that the actual number of IDP exceeded the estimations published before 2010 can be considered as a telling data. While even the estimations predicted several tens of millions persons, [96] in their 2020 article Renée V. Hagen és Tessa Minter claimed that the number was twenty million. Annually.[97]

The UN Reducing Emissions from Deforestation and Forest Degradation (hereafter: UN REDD) was launched in 2008 to help the developing countries in reducing excessive deforestation. Tropical forest are disappearing in a frightening extent: between 1990 and 2005 13 million hectares of rain forests were cut or burned down annually as an average. This means 200 square kilometres per day, which exceeds the ability of the rain forests to renew or the capacity of the forestation programs. Deforestation and logging attributes to 17 % of the emission of green-house gases, since in the developing countries it's a wide-spread practice to burn down the forests in order to gain arable lands.[98]

[92] Blackman & Allen. et al., 2017.
[93] Robinson & Brian 2017.
[94] De Schutter, 2011.
[95] De Schutter 2010, 306–309.
[96] See: Internal Displacement Monitoring Centre 2009.
[97] See: Hagen & Minter 2020.
[98] See the website of the UN REDD: FAO, UNDP, UNEP Framework Document 2008.

Earlier, the UN REDD was criticised, because even traditional users of land, namely the indigenous peoples, were excluded from their lands, who only exploited its natural resources in an extent, which is necessary for their survival.[99] Those, who tried to return to their land were confronted[100] with the authorities, which seek to prevent their return even by imposing criminal sanctions.[101] This is the so called Yellowstone-model from the 19th century. In this approach the best way to protect nature in its original shape is excluding every human activity, except for tourism. Excluding human activity means the prohibition of the traditional ways of agriculture pursued by the indigenous peoples.[102] This outdated model – which proved to be harmful in several developing country[103]– was replaced by another model in several national parks of several countries.[104] One of the recent best practices is the inclusion of indigenous peoples into the UN REDD programme in the Darién region of Panama with a positive result based on the research of Javier Matero-Vega and his fellow researchers.[105]

4. Conclusions

The author – after studying the case-law of the regional human rights mechanisms and the relevant literature – argues that there is a clear interconnectedness between the thorough protection of indigenous peoples' rights and the achievement of environment protection goals, including the prevalence of the right to healthy environment. The more sensitivity the given human rights mechanism displays towards human rights, the more it is inclined to take nature protection into consideration. This is clear based on the comparative analysis of the case-law of the European and the Inter-American mechanisms: while the former one seems to display limited willingness to protect indigenous peoples' rights and reluctant in utilizing its full capacity to facilitate the prevalence of the right to a healthy environment, the latter one 'leads the field.' The African Mechanism – which pays special attention to the protection of indigenous rights just like the Inter-American Mechanism – puts emphasis on environment protection goals as well. It has to be noted however that the Banjul Charter contains several third generation rights expressis verbis, which is a great advantage.

The above mentioned conclusions are reinforced by the positive effects of the programmes carried out with the involvement of indigenous peoples: the traditional way of life of indigenous peoples is an ample example of using natural resources only to an extent what is necessary. However the author is realistic in this field and argues that while this knowledge cannot be imported into the modern societies as a whole, utilizing this knowledge at least in parts can be deemed as necessary.

[99] De Schutter 2010, 308–309.
[100] See: Endorois-case.
[101] Hershey 2019.
[102] See: Poirier & Ostergren, 2002.
[103] Hershey 2019, 68.
[104] See: Marinkás 2018, 262–264.
[105] Mateo-Vega 2017.

The other conclusion of the author is that sensitivity of a given regional human rights mechanism towards indigenous peoples' rights affects the constitutional law and to the law system of the member states. South-American states serve as an ample example in this regard, which gradually recognised more and more rights of the indigenous peoples and in the recent time rights related to environment protection as well. This is attributable to the case-law of the Inter-American system. It has to be mentioned however, that in case of the European Mechanism the situation is quite the opposite: while most member states of the CoE sport a constitution that guarantees the right to a healthy environment, the ECHR still does not contain any such provisions. This omission had to be remedied by the ECtHR with a mixed result.

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