

# INSIDE-OUT INTERNAL AND EXTERNAL LIMITS TO RIGHTS: DOES IT MATTER?

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## ABSTRACT

Literature is rich on whether and how rights are limited by *external* considerations, such as other rights or particularly important general interests. This article concentrates on what *could* be a different type of limit of rights: *internal* limits stemming from the very foundations of a right. Its aim is to understand whether these hypothetically different internal limits actually collapse on the idea of internal limits of coherence theories; or whether they are equivalent, in terms of effects, to external limits to rights. In order to show the origin of the troubling with internal limits, the article begins with a brief introduction of biocultural rights of indigenous peoples and local communities and of the challenges they encountered, allegedly, because of the internal limits that rose from their foundations. It then concentrates on coherence theories and the internal limits they envisage, and continues with the analysis of two examples – freedom of expression and parental rights – in order to understand whether turning external limits into internal ones causes any change in the arising normative positions. Building on this thought experiment, it tries to explain which of the *sui generis* features of biocultural rights are, actually, due to their double foundation and which, instead, are generated by other, concealed operations. Finally, after recognizing the complexities of the idea of care and stewardship between two subjects/interests, it points out the more subtle implications of internal limits of rights, opening the way to considerations concerning the way legal concepts are used and interpreted.

## KEYWORDS

Diritti, conflitti, limiti, fondamenti, teorie coerentiste, diritti bioculturali.

Rights, conflicts, limits, foundations, coherence theories, biocultural rights.

# Inside-out.

## Internal and External Limits to Rights: does it matter?

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### 1. *Introduction*

Literature is rich on the limits of rights<sup>1</sup>, may they be limits arising from conflicts with other rights or from conflicts with particularly important and pressing interests of the collectivity (such as public safety or democracy<sup>2</sup>). This debate is most often concentrated on positions that deny and positions that accept the existence of such conflicts (coherence theories vs pluralist theories<sup>3</sup>), or on asserting which of these limits are justified, and which are threats to and violations of rights<sup>4</sup>.

This article concentrates, instead, on what *could* be a different type of limit, an *internal* one stemming from the conflicts that may arise between the very foundations of a right<sup>5</sup>.

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<sup>1</sup> The analysis of the limits of rights is very much dependent on the definition chosen to describe them (on the incompatibility or lack thereof among fundamental rights, see COMANDUCCI 2004, 317 ff.). For example, as WALDRON noted (1993, 205), the very thin and negative construction of rights as *side-constraints* proposed by NOZICK (1974) saves rights from the possibility of finding limits in each other, as each individual shall simply be concerned with her/his omissions and no actions is entailed. In this paper, I adopt an interest theory of rights, which appears to me as the most suitable to handle the current understanding of rights (CELANO 2001). I will consider X to have a right when «other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty» (RAZ 1988, 166). And I will consider that «a right of one person [...] is the ground of a duty, ground which, if not counteracted by conflicting considerations, justifies holding that other person to have the duty» (RAZ 1988, 171). I will also adopt a dynamic vision of rights according to which each right grounds different duties, which are not all predefined and static as they may change depending on the circumstances (RAZ 1988, 171).

<sup>2</sup> In the words of Wenar: «Each right trumps competing considerations in most circumstances, but there are certain circumstances in which another right with higher priority – or a pressing non-right consideration – determines what may or should be done» (WENAR 2011, 26).

<sup>3</sup> CELANO 2013, 138 ff. For a reconstruction of the debate on conflictivism and non-conflictivism in human rights, see MALDONADO MUÑOZ 2016.

<sup>4</sup> See for example Thomson's distinction between violation and infringement of rights (THOMSON 1977); and GEWIRTH's (1981, 92) distinction between the violation of a right – unjustified infringement – and the override of a right – a justified infringement. See also CELANO 2013, 140, on the (mere) rhetoric value of this distinction.

<sup>5</sup> With *foundation* of a right it is meant the very reasons/interests/needs a right grounds upon/was recognized for (whether from a moral, legal, or political point of view). FERRAJOLI (2001, 298 ff.) distinguishes four meanings of

This enquiry emerged *vis à vis* the unexpected limits emerging out of a construct, biocultural rights of indigenous peoples and local communities<sup>6</sup>, which, while promising harmony and achievements, encountered some cumbersome limits. Their allegedly *internal* limits nurtured pressing political and rhetorical implications to the point of fuelling the attacks of a very politicized debate (as the one on indigenous peoples rights is).

The nature of these unexpected *internal* limits remains quite opaque and in need for clarifications<sup>7</sup>. Are these internal limits something *sui generis*, which has its specific consequences and rules? Or are they nothing more than irrelevant and fungible architecture of rights? Are their consequences equivalent to those of classic external limits? Or to those of the internal limits coherence theories describe?

In order to show the origin of the troubling with internal limits, the article begins with a brief introduction of biocultural rights and of the challenges they encountered, allegedly, because of the internal limits that rose from their foundations. It then concentrates on coherence theories and the internal limits they envisage, and continues with the analysis of two examples – freedom of expression and parental rights – in order to understand whether turning external limits into internal ones causes any change in the normative positions that arise. Building on this thought experiment, it tries to explain which of the *sui generis* features of biocultural rights are, actually, due to their double foundation and which, instead, are generated by other, concealed operations. Finally, the article points out the more subtle implications of internal limits, opening the way to considerations concerning the way legal concepts are used and interpreted.

## 2. *The strange case of biocultural rights*

Biocultural rights are an idea developed in 2010 predominantly by Sanjay Kabir Bavikatte<sup>8</sup>, an Indian scholar and activist highly engaged in issues concerning the rights of indigenous peoples and local communities and their virtuous relationship with the environment. The protection of the environment is widely debated because of its importance for the future of the world and humanity – as well described by the idea of Anthropocene<sup>9</sup> – but also, increasingly, for the danger it posed and still poses on indigenous peoples and local communities living in biodiversity-rich areas. In fact, the interests of indigenous peoples and local communities to live and dwell on their traditional lands have often been jeopardized by old style *fences-and-fines* conservation approaches<sup>10</sup> built on the assumption that humans are bound to hurt the environment and their presence must be avoided if protection is to be assured. Bavikatte's work

the term *foundation*: the reason, or theoretical foundation; the source, or legal foundation; the justification, or assiological foundation; the origin, or historical-social foundation. In this paper, we will refer to the third meaning, i.e. the normative answer to the question: *which rights should be given recognition?*

<sup>6</sup> BAVIKATTE 2014; SAJEVA 2018.

<sup>7</sup> During my writing of my book on biocultural rights, I realized how important these unexpected internal limits were and I stumbled with their pressing political and rhetorical implications. However, to tell the truth, at the beginning this distinction appeared to me quite clear and not deserving particular attention. I was wrong. While I expected complicated critiques concerning anthropocentric and non anthropocentric views, perplexity against the importance I gave to environmental considerations, and complete denials of the alleged existence of this strange thing called biocultural rights, I most often encountered critiques and requests for clarifications concerning the distinction, or lack thereof, between what I called internal limits of biocultural rights, and more classical external and internal limits.

<sup>8</sup> BAVIKATTE, ROBINSON 2011; BAVIKATTE 2014. For a critical analysis of biocultural rights, underlining their specific characteristics, as well as their positive and negative sides, see SAJEVA 2018.

<sup>9</sup> CRUTZEN, STOERMER 2000; ZALASIEWICZ et al. 2017.

<sup>10</sup> MACKENZIE 1988; UN GENERAL ASSEMBLY 2016; MBARIA, OGADA 2017.

on biocultural rights, gaining strength from a wide and growing literature, challenged these assumptions which so often lead to the eviction of indigenous peoples and local communities for the creation of protected areas. He retold how it is widely demonstrated that some indigenous peoples and local communities have preserved traditional ways of life that are actually supportive of the environment.

Biocultural rights are defined as those rights that indigenous peoples and local communities need in order to maintain their role as *stewards of the environment* of their lands and waters. Biocultural rights build on the understanding that those communities and peoples, whose ways of life are erected on the idea of *care* for the environment, need to be recognized a cluster of rights in order to maintain those practices and ways of life that make them environmental stewards<sup>11</sup>. More precisely, a basket of rights which includes: right to self-government, right to cultural diversity, right to lands and resources, and the complementary procedural rights. Building on these assumptions and looking at the developments of international environmental law and policy and at court cases<sup>12</sup>, Bavikatte came to the conclusion that biocultural rights are currently emerging as a new human right<sup>13</sup>, and at the same time expressed an *opinio de iure condendo* in favour of their recognition for moral and political reasons<sup>14</sup>.

At a first glance, biocultural rights appear as grounded on the *single* interest of indigenous peoples and local communities to act as environmental stewards. A closer look, however, shows how this foundation is actually the product of the combination of two different interests, belonging to the two different subjects that biocultural rights aim at protecting. A first foundation being the interest of indigenous peoples and local communities to live according to their self-determined practices and worldviews in their traditional lands. A second foundation being a more complex and *sui generis* one, the conservation of the environment, which may be declined as an interest of nature itself<sup>15</sup> (where nature is recognised as one of the right-

<sup>11</sup> Among the others, see: PRETTY et al. 2009; MEINE 2010; AGRAWAL, GIBSON 1999; GAVIN et al. 2015; REED 2008; OUDENHOVEN et al. 2010; SCHMIDT, PETERSON 2009; MAFFI, WOODLEY 2010; POSEY 1999.

<sup>12</sup> International environmental law has shown the ability and willingness to increasingly acknowledge the need to recognize and promote the rights of indigenous peoples and local communities in conjunction with environmental protection. See: the 1992 UN Convention on Biological Diversity, the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, the 2006 International Tropical Timber Agreement, the 2001 Food and Agriculture Organization International Treaty on Plant Genetic Resources for Food and Agriculture, the 1995 Agreement for the Implementation of the UN Convention on the Law of the Sea, the 1994 Convention to Combat Desertification, the 1971 Ramsar Convention on Wetlands. See also: 2009 Endorois Welfare Council v. Kenya case of the African Commission on Human and People's Rights; 2001 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter American Court of Human Rights, No.79, Ser. C; 2013 Orissa Mining Corporation Ltd. Versus Ministry of Environment & Forests & Others.

<sup>13</sup> I here use the term human rights as tools to further particularly important interests of individuals and groups, where at least one of such interests is considered as having an ultimate value, and as being so important (from a moral, legal or political point on view) to «set the limits to the sovereignty of States» (RAZ 2010, 328; BEITZ 2003). Today, human rights are most often described as rights «that we have simply in virtue of being human» (GRIFFIN 2008, 2), and not because of race, citizenship, gender, class, and so on. However, as the idea of human rights and their international and national recognition have evolved (BOBBIO 1990), human rights have come to include the rights of groups, such indigenous peoples, which are considered holders of value as groups, *per se*, and which are in need of special protection.

<sup>14</sup> There currently exists no explicit legal recognition of biocultural rights, but only a number of texts that have been interpreted as recognizing them. Biocultural rights may or may not move to the next stage of a fully recognized *human right* in international law, however, they deserve attention to understand their potential implications for indigenous peoples and local communities.

<sup>15</sup> In fact, if the protection of the environment was not treated as such, biocultural rights would appear as a cluster of indigenous peoples rights concerning access and use of lands and natural resources. They would be *indigenous rights*, solely grounded on the ultimate interests and value of indigenous peoples.

holders)<sup>16</sup>. Reading carefully Bavikatte's words<sup>17</sup> and the texts he cites<sup>18</sup>, biocultural rights stem from environmentally relevant documents whose ultimate goal is the protection of biodiversity because it has an intrinsic value<sup>19</sup>, and indigenous peoples figure as subjects whose rights are to be protected because they have preserved ways of life relevant for biodiversity<sup>20</sup>, not simply because they are holders of intrinsic value *as indigenous*.

The double foundation<sup>21</sup> of biocultural rights, which protects the interests of two distinct subjects, leads to some troubling implications, which differentiate them from indigenous peoples rights<sup>22</sup>. Unless we fall for the idea of the noble savage myth – according to which indigenous peoples and local communities are always and will always remain *pacific friends of the Earth*<sup>23</sup> – we face potential conflicts that may arise between the two very foundations of biocultural rights, i.e. between the two subjects whose interests should be protected by biocultural rights. The right to self-government, as well as cultural and land rights, exercised by indigenous peoples and local communities as holders of biocultural rights might, in fact, at times, clash with the preservation a certain ecosystem, species or non-living natural entities. There is no necessary, perpetual, coincidence between the interests of the so-called *stewards of the environment* and the environment. They might be in the position to/want to act as stewards at times, but not at other times. Changes occurring outside a community<sup>24</sup>, or changes occurring within a community<sup>25</sup>, may lead to consequences which run counter the interest for the conservation of the environment.

Given that both foundations and interests-holders (indigenous peoples and nature) have equal standing within biocultural rights, both are equally sought to be protected and achieved through the instrument of biocultural rights. But when they cannot walk hand in hand, they act as limits one to the other. Such limits, however, appear as *stronger* than classic external limits:

<sup>16</sup> Whether it is appropriate to treat nature as a holder of rights is a complex issue which is not relevant for the purpose of this paper. For a treatment of its main contours see STONE 1972; SURRELLÉS 2017; STUDLEY, BLEISCH 2018; KAUFFMAN, MARTIN 2017. For a collection of court cases recognizing nature (or parts thereof) as rightholders, see: [www.naturerightswatch.com](http://www.naturerightswatch.com).

<sup>17</sup> «The demand for biocultural rights» he underlines, «does not take as its point of departure the inherent right of a group or community to flourish, but rather [...] the ethic of stewardship: it is the ethic of stewardship and not the group per se that justifies the right» (BAVIKATTE 2014, 142 f.).

<sup>18</sup> See above, note 12.

<sup>19</sup> Preamble of the Convention on Biological Diversity: «Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components. [...] Affirming that the conservation of biological diversity is a common concern of humankind».

<sup>20</sup> Quite explicatory is article 8j of the Convention on Biological Diversity, considered to be one of the central tools of the debate on indigenous peoples and the environment: «Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity».

<sup>21</sup> Throughout the whole article I will refer to double-foundation rights. However, there is no reason to exclude the fact that foundations may also be more than two.

<sup>22</sup> To be noted that biocultural rights are also different from indigenous peoples rights because they are pictured as held, equally, by local communities, i.e. those communities that do not fit with indigenous peoples definitions and henceforth do not have the same rights. I have dwelt extensively on this difference in SAJEVA 2018 (chap. 5), while in this paper I will focus solely on indigenous peoples because their reference as holders of biocultural rights is precisely what sparked the fierce critics mentioned above.

<sup>23</sup> See the movie *Avatar* (2010) for very simple and Hollywoodian representation of the noble savage myth. For a more scholarly and deep reconstruction see ELLINGSON 2001.

<sup>24</sup> Such as for example, the abundance of a certain hunted species decreases; or access to a once well conserved area becomes a threat for the area itself.

<sup>25</sup> Such as for example, the decision to aim for unsustainable, though legal, projects, such as the concession of an area for timber production; or changes in religious practices that lead to the increase of the population.

they seem to concretise in the form of duties towards the environment: indigenous peoples and local communities whose biocultural rights are recognized are called not only not to harm the environment, they are called to *promote* the conservation of the environment<sup>26</sup>. A duty which stems from the fact that, within the biocultural rights construct, indigenous peoples and local communities are not the only holders of protected interests; also the environment is. Such duty arises with the acceptance of biocultural rights: i.e. once a community claims for the recognition and protection of its biocultural rights, it implicitly (consciously or not) accepts to the duties they come along with<sup>27</sup>.

The double foundation of biocultural rights led them to enter a very political debate. A debate in which their double foundation structure was very relevant for NGOs, activists, policy makers, indigenous representatives, and scientists. Biocultural rights were not only accused to be inconvenient for indigenous peoples (dismissing the fact that in certain situations they might be useful), but actually detrimental. From a political point of view, to claim that biocultural rights are limited by environmental considerations *because* they are part of their foundations, was received as being very much different from claiming that indigenous peoples rights are limited *because* there are particularly important and pressing interests of the collectivity (i.e. external limits) that need to be taken in consideration – even though such external interests may include *particularly pressing* environment concerns.

Biocultural rights were perceived as different from many points of view<sup>28</sup>, which may be summarized as follows:

- 1) The basket of rights to self-government and to land and to cultural diversity granted through biocultural rights appear as not only limited by other rights or very important considerations concerning the general interest. They appear to be limited, also, by the interest for the protection of the environment, whether it is particularly important or not (whether, for example, it concerns radioactive waste disposal or not)<sup>29</sup>.
- 2) Indigenous peoples and local communities who claim biocultural rights are called to be and remain sustainable and are called to a *duty* of sustainability. Biocultural rights involve an active duty of care towards the environment on the part of their holders. Indigenous peoples rights, instead, do not require the exercise of the right to self-determination in ways that *promote* the conservation of the environment. It is sufficient for them not to harm the environment beyond certain limits (as those that apply to private property owners on radioactive waste disposal).

<sup>26</sup> On the difference between rights and so-called duty-rights, see MANIACI 2018.

<sup>27</sup> The community remains free to renounce to the duties biocultural rights come along with, but at the cost of renouncing, also, to the rights their basket contains. They are a *take all or nothing* deal, but not a compulsory one.

<sup>28</sup> For these reasons, it is true that biocultural rights are a second-best option to be, always, treated with care and attention. However, they might be a powerful tool in the hands of indigenous peoples whose indigenous status (and hence rights) is denied by the State they reside in, or whose rights are limited by environmental interests of the State (because they, for example, live in a protected area the State is not willing to degazette).

Moreover, biocultural rights are particularly important because they propose the recognition of a set of human rights to local communities – which currently lack a full recognition as subjects of international law, and are only timidly seeing group human rights recognized to them (SAJEVA 2018).

<sup>29</sup> And, vice versa, the protection of the environment pursued through the instrument of biocultural rights finds a limit in the respect of the importance of the preservation of the cultural diversity of indigenous peoples and local communities and in the protection of their self-government. Hence, if for example the protection of a certain area may well be achieved through the construction of an old style people-out protected area, the recognition of biocultural rights to the inhabitants of that area requires to find a balance with their interests in pursuing their community life in that area, even if it may guarantee slower or lower (though still effective) conservation outcomes. For a deeper analysis of these points, see SAJEVA 2018.

- 3) Only indigenous peoples who live sustainably may be recognized as holders of biocultural rights, while to be holder of indigenous peoples rights it is sufficient to be *indigenous*.

These characteristics appeared *sui generis* as compared to the classic understanding of rights and the expectations of the first biocultural rights' interpreters. They were the unanticipated product of the double foundation, and consequent internal limits, of biocultural rights. In response to them, biocultural rights were accused of compromising the fight for indigenous peoples rights, providing States a more convenient alternative, less costly and with environmental outcomes. An alternative that could shift the burden of environmental protection, once again, on indigenous peoples, denying them single-foundation *un(internally)limited* indigenous peoples rights. Or, worst, that the rhetoric of environmental stewardship on behalf of indigenous peoples could endanger indigenous rights leading judges, politicians and the like, to consider sustainability a requirement to hold indigenous peoples rights as well. The violence of these critiques – partly justified, partly not – shaded the positive sides of the potential introduction of biocultural rights in international law.

On the ground of these considerations, it may be said that the internal limits deriving from the two foundations of biocultural rights appear quite full of political implications. For this reason, this article uses biocultural rights to better understand the distinction, of lack thereof, between internal and external limits to rights. To begin our enquire, it will try to understand whether internal limits are, actually, nothing more than the limits that coherence theories try to cast away.

### 3. *Catch me if you can, coherence*

It is beautiful and fascinating to think that any ruler really wishing to protect rights will be able to do so, always and fully, without limitations. Unfortunately, it is necessary to accept that rights may conflict with and limit one another<sup>30</sup>. It is not surprising given that rights are instruments to protect certain interests, and interests may of course conflict with each other, because resources are overall limited, because their realization may entail incompatible behaviours on the same people, because someone's interest may require the behaviour of someone else which is protected by a right (immunity, freedom, lack of claim), and so on<sup>31</sup>. Moreover, rights may also be limited by interests and values that are not protected by other rights, but which are considered as particularly important for the general interest<sup>32</sup>.

Conflicts between rights, or between rights and general interests or values, and the consequent arising limits, are not a nice thing. They are not what a defender of rights, and human rights in particular, wishes to face; there is always the fear they might endanger the power of rights, entering a dangerous slippery slope leading to a flat landscape where rights have no higher position than other interests, values and principles. Many are in fact the theories – mostly grouped under the name *coherence theories* and opposed to those called *pluralist theories* – which prefer to take a different route, one leading to a land of harmony

<sup>30</sup> According to Waldron, «when we say *rights in conflict* what we really mean is that the duties they imply are not compossible» (WALDRON 1993, 206). The duty holder may find herself in a condition of impossibility to fulfil two or more rights of two or more right-holders, or two or more rights of the same right-holder.

<sup>31</sup> COMANDUCCI (2004, 322) identifies two conditions for the rise of conflicts (abstract incompatibility) between two norms recognizing (fundamental) rights: both have the same (or partially the same) scope; the first ascribes to certain subjects a favourable normative position (among those elected by Hohfeld, such as a claim), and the second ascribes to other subjects the opposite of the correlative of that first position (a privilege rather than a duty).

<sup>32</sup> Among the many examples, article 29 of the Universal Declaration on Human Rights conditions, in *exceptional circumstances*, rights and freedoms to limitations necessary to secure the requirements of morality, public order and general welfare in a democratic society. Some of these interests and values might be, ultimately, traceable back to other rights (as necessary conditions to guarantee their fulfilment), but that's not how they are presented nor treated.



where *real* rights or their *real* content do not conflict with each other, nor with the *really important* external interests and values<sup>33</sup>.

Coherence theories cannot erase the scarcity of resources, nor impel actual conflicts between single interests, values and needs. What they, instead, appear to be doing is shifting external limits arising from external considerations to internal ones, in a domain intrinsic to the right and fit to dismiss the emergence of conflicts as real ones. Are these *internal* limits equivalent to the *internal* limits stemming from the double foundations of rights? A brief look at coherence theories might help understand<sup>34</sup>.

According to the heterogeneous set of theories that may be labelled *illusory conflict declination*<sup>35</sup>, conflicts only appear *prima facie*<sup>36</sup>. More specifically, according to *monist theories* the rights system (either legal, moral, or political) can be read under one supreme end or principle that should guide the interpretation and application of each right, ensuring that no *real* conflicts may arise. In case of conflict, the common end or principle will guide us towards a harmonic interpretation of the rights in question, showing us that the conflict has, in fact, never been there. Each of the apparently conflicting rights had already inherent limits which we might have overlooked at first, but under the light of the common end or principle we will be shown the path along which no conflicts, and hence no fearful external limits, are encountered<sup>37</sup>.

Alternatively, it is claimed to be sufficient to reveal the *true hierarchy* existing between rights or between rights and other very important interests, values or principles<sup>38</sup>. It is so possible to understand where a right is to be placed and whether, henceforth, it should prevail or not – without being *externally* limited, but actually allowing its correct application within its internal limits. This argumentative strategy builds on the belief that values and rights belong to a coherent system (for example the Constitutional one) whose hierarchy, though maybe not immediately evident, is already set and certain. The interpreter facing an *illusory* conflict hence would have to look for such hierarchy and apply it to the concrete case<sup>39</sup>.

<sup>33</sup> As MALDONADO MUÑOZ (2016, 126) suggests, the debate on the existence, or lack thereof, of conflicts between fundamental rights is not characterized by a coherent, tidy, mono-dimensional set of theories. They are heterogeneous, at times overlapping or incoherent among them. What I present here is a brief and simple reconstruction which heavily builds on CELANO (2013) and PINO (2010).

<sup>34</sup> The most easily dismissed of these theories, or better say group of theories, *minimalist theories* (CELANO 2013, 131–133), resolves the issue calling for the “hard currency” (STEINER 1998, 233–239) of rights against their unjustified, dangerous and costly inflations. According these theories (referred to as *minimum core declination* theories in PINO 2010, 145), there is only a small core of rights, which is precise, determined, non-conflicting, hence there are no conflicts between *real* rights, though there might be apparent ones between *real* rights and *fake* ones. Following, for example, Nozick’s description of rights as moral side constraints, the pool of rights is so confined that conflicts and consequent violations are hard to picture (though not impossible as he himself admits: «The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid» (NOZICK 1974, 30 in note)). This declination is not particularly interesting because it cannot explain the current ever-growing and messy reality of human rights. It forces its supporters to reduce the number of *real* rights to a very limited core, usually excluding social rights, group rights, and new generation rights.

<sup>35</sup> CELANO 2013, 138 ff.

<sup>36</sup> CELANO 2013, 139.

<sup>37</sup> So, taking an example used by DWORKIN (2006), the apparent conflict between the right to free speech and the dignity of every person is resolved in the case of hate speech by showing that, in fact, the *real* right to free speech does not include the right to abuse minorities and call for their segregation: in the right to free speech there is an intrinsic (internal) limit to protect the dignity of minorities, which stems from the common end of the legal system of respecting and protecting human dignity and equality (the ultimate fundamental value of the system). The limit to the right to free speech, found in the dignity of minorities, is intrinsic to the right itself. It is, an internal limit.

<sup>38</sup> The *true hierarchy* may be obtained through the interpretation of the supreme goal or principle, or through the interpretation of the Constitution, which may contain a number of different principles and goals that should guide each interpreter towards the correct application of the law *as it should be*. For a position focused on the paramount role of the Constitution – within democratic Constitutional States – see FERROJOLI (2001; 2004).

<sup>39</sup> Things are not as easy as one may think after reading my brief reconstruction. The identification of the correct

Finally, according to other authors<sup>40</sup>, to solve *illusory* conflicts between rights it claimed to be sufficient to proceed with their *specification*: i.e. if all the *intrinsic* limits of a right are discovered conflicts may disappear<sup>41</sup>. These limits were already there, within the right<sup>42</sup>. They were part of its true meaning and scope and are not contingent on the situation of conflict that has emerged<sup>43</sup>.

The debate between coherence theories and pluralist ones is vast and it is not necessary to enter its awry roads. It is sufficient to say that according to pluralist theories, instead, conflicts between rights may occur, and it is not possible to identify a criterion able to guide the resolution of conflicts before they actually occur<sup>44</sup>. But a position is to be taken to understand whether or not what we have identified as the internal limits stemming from two foundations correspond to the internal limits of coherence theories.

Coherence theories build on the idea of a coherent normative web, where all interests, values, and principles of the system are predetermined – though maybe not self-evident, as yet. There is a predetermined hierarchy of rights, or a real content of each right that intrinsically takes in consideration all other rights, principles and values to draw the borders of rights themselves, or there is a common end to be reached through the application of rights. The framework in which rights, and human rights in particular, find themselves in (may it be the international human rights law one, or the regional human rights law one, or one of the many national ones) presupposes, instead, an atomistic vision of values, one in which each value (or set of values)

hierarchy is a very complex task, even according to those authors that think of it as a possible enterprise. For example, according to MORESO (2006 – see also 2002), it is not possible to coherently and comprehensively reconstruct all moral principles of a system in order to identify the correct hierarchy to apply to a concrete case.

<sup>40</sup> «When rights appear to conflict with other oral considerations, including other rights, we may resolve the tension by reducing either the scope of the right or its stringency» (SHAFER-LANDAU 1995, 225). See also OBERDIEK (2008), who distinguishes between general rights – which are «general in virtue of the fact that their content does not depend at all upon context» - and specified rights – which are «specified in virtue of the fact that their content nevertheless depends entirely on context» (128). See also STEINER 1977; 1994; THOMSON 1977, 49; MARMOR 1997; MORESO 2006 (for some of the critics raised against Moreso, see CELANO 2002 and COMANDUCCI 2004; for a reply see MORESO 2002a).

<sup>41</sup> The specification manoeuvre is not an easy task. Gewirth describes three criteria to correctly identify all the permissible specifications of a right so that it may be «entirely valid without any further exception», i.e. absolute (GEWIRTH 1981, 95 f.): specifications shall be recognizable in ordinary practical thinking, «justifiable through a valid moral principle», «able to avoid disastrous consequences of fulfilling the right».

<sup>42</sup> What may appear as external limitations – conflicts – stemming from the interaction with other rights, principles or values, are, in fact, limits that each right already entails, inherently. So the right that «your-box-not-be-broken-into-and-your-drug-not-taken-without-your-consent» was, actually, «your-box-not-be-broken-into-and-your-drug-not-taken-without-your-consent-when-there-is-no-child-who-needs-that-drug-for-life» (THOMSON 1977, 49).

<sup>43</sup> So for example, according to OBERDIEK (2008, 134 f.), in the famous cabin case pictured by FEINBERG (1978) – a hiker breaks into a cabin in the mountains to save himself from a storm – the property right of the cabin owner is not justifiably contravened: it simply does not entail the possibility of forbidding someone in special need to enter the cabin (and hence does not entitle the owner to a compensation for the break-in). On the point see also SHAFER-LANDAU (1995), who explains that according to pluralist theories the right that the hiker breaks is a general right, a *prima facie* right which does not include any specification. He claims, instead, that a much better reconstruction of rights accounts for a set of *full-fledged* rights, much more specific and hence, importantly, fully inviolable.

<sup>44</sup> Pluralist theories do not simply accept the existence of conflicts among rights and particular important interests: they also provide paths for solutions. GUASTINI (2006) describes the technique usually applied by Constitutional judges as one creating a mobile assiological hierarchy, i.e. a one-time-only hierarchy based on a value-judgment through which the judge establishes which principle is to prevail in the single concrete case. On the same lines, according to the principle of proportionality proposed by ALEXY (2002; 2005), conflicts among principles (unlike conflicts among rules which are to be solved through hierarchical, chronological, or speciality criteria) are to be balanced one with the other: one has to bend in favour of the other to the least possible extent, just as much as it is needed to realize the first. However, this process has a one-time-only value because each circumstance is different and requires its particular balancing. Hence, it is not possible to find fixed paths of solutions, such as for example stating that one principle is hierarchically superior to another and should always prevail, or stating that a certain principle already includes, intrinsically, certain limitations in favour of other principles.

acts on its own to survive and then, once it reaches the surface, starts fighting with all other values not to be drowned. In such a chaotic and unstable framework each right arises to protect a certain interest that is not already part of a coherent, pre-ordered system. The current (and potentially changing) structure is the product of the accumulation of fights to uphold individuals' and groups' interests. Fights scattered through time and space, each pursuing its own ends on the ground of argumentations concentrated on the specific interests, principles, values at stake. In such a framework, there is no guaranteed coherence among the heterogeneous values or goals that belong to it, nor among the means available to reach them. Coherence theories, hence, do not appear adequate to account for it.

If coherence theories and *their internal* limits are dismissed as inadequate to describe the *real* unstable, untidy, scattered framework where rights are placed, we have to admit that the internal limits stemming from the conflicts between two foundations, as those of biocultural rights, cannot be described as equivalent to the internal limits of coherent theories. The two "types" of limits cannot be turned one into another without losing part of the information they carry with themselves: without turning them into something different from what they were meant to be.

The question we are now left with is: are what we labelled as *internal* limits of double-foundation rights actually different from/not equivalent to classical *external* limits of rights? In other words, may the so-called internal limits of biocultural rights be turned into external limits, without losing relevant features or adding inappropriate ones?

#### 4. *External limits: that's all folks?*

In order to answer to this question, a look at two examples – the right to freedom of expression and parental rights – might be very helpful. In particular, we will engage in a thought experiment entailing the shifting of external limits to internal ones to try to understand whether the two can be considered to be equivalent.

##### 4.1. *The importance of being internal: right to freedom of expression*

Freedom of expression is commonly understood to be a human right. It safeguards the intrinsic value of every person by protecting her fundamental interest in expressing ideas and communicating with other people<sup>45</sup>. However, we are also used to see it limited<sup>46</sup>, and perceive it as correct (though maybe not at specific times).

Would its limits change (or their consequences would) if we moved a value which is benefitted by the right to freedom of expression inside its foundations<sup>47</sup>. We could concentrate on the fact that freedom of expression can *also* benefit the interest in the general growth of knowledge and culture. What happens, then, if we draw the right to freedom of expression as *also*, grounded on this interest? If, in other words, the growth of knowledge became an interest to be promoted through the realization of the freedom of expression?

<sup>45</sup> I will here regard the interest of every person to express her ideas and communicate with other people as the foundation of the right to freedom of expression. It is, of course, not the only way to picture the right, as other values and interests may be regarded as its foundation. However, I will not dwell on these different options because it seems to me to be irrelevant for the proposed thought experiment.

<sup>46</sup> The right to privacy of other people, the safeguard of public order and security, the dignity of other people and so on are typical examples of external limits to such important freedom. For an analysis of some justifications concerning restrictions to the right to freedom of expression see SCANLON (1972).

<sup>47</sup> Similarly, in the biocultural rights case the conservation of the environment is benefitted (most of the time) by the protection of the interests of indigenous interests.

First of all, it would feel hard to accept that only those people who are likely to exercise the right to freedom of expression in ways that contribute to the growth of knowledge are entitled to it. Similarly, we would feel uncomfortable if the recognition of this right was conditioned to the results of empirical tests controlling its ability to generate an increase in knowledge and culture. We would hardly welcome these practices as in line with the very grounding of freedom of expression – at least not with the way we are used to perceive it. We would rather consider them as serious violations.

If conditioning the freedom of expression in this way seems unacceptable, it is because we are used to regard the interest of every person to communicate as the *proper and only* foundation of this right, not, also, the interest in the growth of knowledge. The latter can easily be considered an interest to be protected, but as long as it acts as a limit from the *outside* of the structure of the right to freedom of expression. Limits justified by the defence of the growth of knowledge are usually perceived as having a very high (and often controversial) threshold – such as for example the denial of the holocaust, or politically-relevant fake news. In fact, we do not, usually, regard it as one of the *raison d'être* of such right: the latter may exist and be exercised even if it does not lead to the growth of knowledge.

Hence, it seems possible to say that if we shifted an external value often promoted by a right inside its structure, turning it into one of its foundations, we would expand its influence on the right: we would be giving, in this case to the growth of knowledge, a force it did not have before. A force resembling very much that of a duty, a duty imposed on the right-holder: *when you exercise the right to freedom of expression you should, also, promote the growth of knowledge/should not act in ways that are detrimental to the growth of knowledge*. The two structures, we may say, *are not equivalent*.

A different example, parental rights, might rise the suspicion that the issue is more complex than it seems at the moment.

#### 4.2. *The un-importance of being internal: parental rights*

Parental rights could be described as having two heterogeneous foundations/grounding interests. On one side we could picture the interest of the parent to exercise her role as *parent*, including living with her child, taking decisions concerning her present and future activities, etc. The parent's interest grounds a cluster of normative positions in her favour, which correspond to duties on, mostly, the State and the rest of the community. However, we may also say that parental rights are grounded on a second foundation: the interest of the child to be taken care of and given the means necessary for her full development as a human being. This interest, we could argue, grounds another cluster of favourable normative positions on behalf of the child and the corresponding cluster of unfavourable normative positions on the State, the community, and the parent. The interest of the child in having a good life and developing as a human being is precisely the limiting point as well as the ultimate goal of the favourable positions of the parent: not only the parent may exercise them only so far as they do not damage the child, but she should actually exercise them in ways that promote child's interests.

This set of limits to the favourable positions of the parent stems from the very foundations of parental rights, which, according to this description, include the interest of the child in being treated so to promote her wellbeing and development. So framed, hence, the limit seems to be an *internal* one stemming from one of the foundations of the right itself, and not from another right or particularly important general interest.

Now, focussing on our shifting exercise, we could also describe parental rights as having one foundation and having to be balanced with the (external) right of the child to her full development and wellbeing. We could say that parental rights are to be recognized to protect the fundamental interests of parents to act as parents, and that this interest grounds a set of favourable positions of the parents and the corresponding unfavourable positions on the State

and the community as a whole. This, simpler (single-foundation) right would then be balanced with other rights, including the child's right to her full development and wellbeing, which grounds another set of rights and corresponding duties – some of which on the parents themselves. These rights and duties are to be balanced with parental rights: they act as limits, *external* ones, to parental rights. Such a shift from a structure to the other (double foundation right, to externally limited single foundation right) can be undertaken without losing sight of any of the elements, i.e. interests, values, principles, that the rights aim at protecting, nor dismissing any of the normative positions that arise on the right and duty holders. The two structures, we could say, seem *equivalent*. Parental rights could ground solely on parents' interests and then find an external limit, including a set of duties, in the child's right.

How, then, can it be that when we looked for clues in the right to freedom of expression, we found that there was a difference in terms of the normative positions that arose in the single and double foundation declinations? How come we saw the emergence of limits which we did not have in our hands before when we shifted to a double foundation right to freedom of expression? A step backward is necessary to understand.

### 5. *He's just not that into you*

If we look attentively at the two thought experiments, we see that there is an important distinguishing point between what lied behind parental rights, and what lied behind the right to freedom of expression. And it seems to be the reason that led to such opposite results.

Let's walk back to the right to freedom of expression. In our thought experiment we saw how the growth of knowledge, once moved from interest benefitted by the freedom of expression to second foundation of the right, grew in power and prominence and led to the raise of different normative positions. Well, no surprise, we turned the turkey for the Christmas dinner into one of the farmer's sons<sup>48</sup>!

More specifically, by shifting the growth of knowledge from outside to inside the right we did not, simply, turn it into one of the right's foundations. We first needed to make it *able to become a foundation*. In other words, we did a triple (not single) operation:

- First, we boosted its rank to that of value strong enough to be able to commonly limit (be balanced with) the freedom of expression.
- Secondly, we bound the realization and protection of the freedom of expression to the realization and protection of the growth of knowledge. We made the *strength of the bond between the two interests* much higher than it was.
- Then, we shifted the growth of knowledge from the position of one of the values which is, *at times*, fostered by the realization of the right to freedom of expression, to one of the reasons/points of that right to exist (i.e. a foundation).

In other words, our thought experiment did not entail a simple *shifting* exercise, from outside to inside. It entailed three different steps. Had the first two steps not been necessary, then the

<sup>48</sup> MACCORMICK's (1976, 80) example with children and turkeys explains the difference existing between a value/interest grounding a right and a value/interest which is benefitted by the realization of a right. MacCormick claims that there is a duty on a farmer to feed both his sons and turkeys: turkeys are to be fed to get fat and be eaten for Christmas, while kids are to be fed because it is a very important interest they have. The feeding occurs for the turkeys because their wellbeing is a means to an end – the Christmas lunch – while it occurs for the children because their wellbeing is an end in itself which grounds a set of rights (unless maybe we are talking about Hansel and Gretel being fed by the witch).

experiment would have produced different results. If, for example,

- we already regarded the growth of knowledge as a value so important to be able to commonly limit the freedom of expression; and
- we already thought, along the lines of Mill<sup>49</sup>, that the freedom of expression's *raison d'être*, its *point*, the reason for which it should be entitled protection through the form of rights, is the fact that its realisation leads, also, to the growth of knowledge,

then our shifting exercise would have led to the raise of the same normative positions. On the contrary, *normally*, we perceive the growth of knowledge as important, but not enough to commonly limit the freedom of expression; and, *normally*, we perceive its bond with freely expressing ideas and communicating with other people as important, but not as paramount.

Hence, the reason why the two thought experiments suggested two opposite answers – internal or external limits are equivalent/are not equivalent in terms of arising normative positions – is due to the fact that the two experiments, actually, required different operations<sup>50</sup>.

In fact, if we look at the parental rights case, we see how:

- the wellbeing of the child is, *already, normally* considered as sufficiently important to ground rights and prevail, most of the times, on the interests of parents;
- it is, *already*, common to perceive the bond existing between the interest of a parent and the interest of a child as paramount.

Hence, structuring parental rights as having two distinct foundations, did not bring to changes in the arising normative positions (as compared with single-foundation parental rights balanced with the rights of the child) because parental rights were *already* bond to and limited by children's rights.

Similarly, in the case of biocultural rights, the link between indigenous peoples' interests and the conservation of the environment is not made up on the spot. It is the product of a long history of conservation practices and of political fights based, precisely, on the contribution indigenous peoples and local communities can bring to the environment. Hence, we could say, they could be equivalent to indigenous peoples rights limited by an internationally recognized (as it is not, yet) right of nature to exist and flourish.

In this case, as in the parental rights one, the idea of *care, stewardship, responsibilities* are central to the rhetorical and political discussion. They are the glue that binds together the two foundations and that can generate this strange thing internal limits seem to be<sup>51</sup>.

What we learnt from the two thought experiments is that: shifting an external value/interest (y) benefitted by a right (A') into one of its foundations – turning it into right (A) with a double foundation (x and y) – does not bring any change in the arising normative positions, if, and only if:

- the value/interest (y) is already perceived as so important as able to commonly limit (be balanced with) the single foundation right (A');
- the value/interest (y) is strongly bound to the other value/interest (x).

<sup>49</sup> MILL 1859, chapter II, in particular 95 ff. Mill would, however, unlikely agree on conditioning the freedom of expression to the growth of knowledge – as, according to him, the growth of knowledge may flourish only through the lack of limits to the freedom of expression.

<sup>50</sup> The whole shifting exercise presupposed a certain understanding of the values involved, a certain ideological mindset. The mindset that may be considered to be the most *common* one, i.e. children's interests considered so important to prevail over (most) parents' choices; the growth of knowledge considered to be, most of the time, less important than the preservation of the freedom of each person to express her/him self.

<sup>51</sup> It would, overall, appear quite inappropriate to structure a right as having two foundations which are perceived as having a weak or inexistent bond, or, even worst, which are more often in conflict with each other than not.

It is important to notice that even though we stressed the importance of the existence of a very strong bond and on the ideas of *care*, *stewardship*, *responsibilities*, we witnessed the rise of limits. The emergence of limits seems to derive from the fact that the two foundations might most often walk hand in hand, but, unless we fall for the *environmentally noble savage* or *noble parent* trap, they, *also*, might not. Parents' desires, interests, and even needs might fall under the realm of the idea of *care*, *responsibility*, *stewardship*, but they might as well not. Similarly, not all indigenous peoples are sustainable, nor will necessarily be so in the future. And here it is where conflicts, and consequent limits, emerge. If the two foundations were always harmoniously interlinked, we would not encounter internal limits but, rather, that land of harmony that biocultural rights promised at first<sup>52</sup>.

## 6. *Internal limits strike back*

### 6.1. *The interpreter*

According to our analysis, there seem to be no different normative positions that arise if a right is described as internally, rather than externally, limited (or vice versa). However, we have so far treated the world as if it was a normatively (morally, legally, politically) transparent one. A world where every interpreter of rights (it being a judge, a civil servant, a policy maker, a State representative, an activist, a lawyer, a representative of an indigenous people, a protected area administrator) understands them in the same way, according to a strict line of normative reasoning that leads, always, to the same *correct* results. A world where all interpreters have a sterilized understanding of the values they deal with, and of the normative positions they contain – as if the latter were predetermined and static.

However, the world of rights is as far as it may be from being normatively transparent. It is a world of passion, of interests, of politics, where the way a right, its constitutive elements and their respective weights, and the weight of the right as compared to the weight of other rights and interests, depend on the history of that right: by whom it was advocated for, under which pressures, to challenge which injustices, to protect the value of what, or which interest of whom, with which idea of justice in mind, with which rhetorical arguments. In the real world of politics, injustices, aspirations and hopes, the architecture of a right is important for the way in which their interpreters expect it to be applied, wish it to be developed, fear to see it implemented. It is a world where the difference between internal and external limits may still be, as we shall soon see, surprisingly, relevant.

A fresh new look at the strange features we pointed out for biocultural rights might help us analyse which of them were related (and how) to the double/single foundation framework and which were not.

#### 1) *More pervasive limits*

The favourable normative positions recognized to indigenous peoples through biocultural rights appear as not only limited by other rights or very important interests of the collectivity. They appear to be limited, also, by the interest for the protection of the environment, whether a particularly important matter arises or not.

<sup>52</sup> I am much indebted to Giorgio Maniaci for the development of this paragraph. Talking to him has enlighten some of the more complex aspects of the idea of *care* and of the complexities of distinguishing between the right to act as caregiver and the duty to act as such. For a reconstruction of the concept of liberal/egalitarian autonomy encompassing, both, the right to be taken care of and the right not to be taken care of (to be left alone), see MANIACI 2012, 89 ff.

If right A has a double foundation, entailing the protection of x and y, both interests shall *always* be *balanced* one with the other when the right is implemented. So, for example, the interest of the child in developing to her fullest is not something that limits the right of a parent (framed with a double foundation) only if the parent has an unconventional desire (such as prohibiting a blood transfer in case of need). The interest of the child limits (is to be balanced with) the interests of the parent even in normal circumstances, such as when choosing which school to attend.

If x and y both make up the foundations of right A they are always nearby: any interpreter sees them constantly together. Therefore, the interpreter is likely to require their balancing, not only in special circumstances – when she is required to stop and think – but also when she acts rapidly and spontaneously, because no extra effort is needed to make both salient: no need to look at other rights and particularly important interests and wonder whether they are relevant to the case and should be balanced with interest x.

If instead right A is founded only on the protection of interest x, and interest y is protected by other rights or very important interests of the collectivity (it acts as an *external limit*), y is likely to be perceived as something not always pertinent with the implementation of right A. Y does not, in *all* circumstances, act as a limit, it is contingent and conditional on something which needs to occur to light a bulb in the interpreter's mind. Y figures as something weaker than an interest positioned at the very root of right A, because it is less *salient*. Packs of associations with other cases, other subjects or other interests, as well as perceptions of bonds and priorities, or the emergence of histories and memories may arise in the interpreters' mind only if she sees the reference to y at the very foundation of right A.

### 2) Rise of unexpected duties

Biocultural rights were accompanied by the rise of unexpected duties towards the protection of the environment on indigenous peoples.

If right A has a double foundation, entailing the protection of x and y, both shall always be *promoted* through the implementation of right A. So, for example, the interests of the child shall always be promoted when double-foundation parental rights are exercised. They should be the guiding beacons of parents' choices, not simply their limiting point.

Following what understood above (§ 5), the rise of unexpected limits, entailing duties as well, was due to the fact that a value or interest was elevated to a rank it did not have before/was not fully visible or accepted before. The rise unexpected limits was not due to the double foundation *per se*, but to the fact that in the new discourse the weight of an interest/value was considered to be higher<sup>53</sup>.

### 3) Changes in requirements

In order to be holder of biocultural rights, it is not sufficient to qualify as indigenous people. It is necessary to be, also, sustainable and willing to act sustainably.

If right A has a double foundation, entailing the protection of x and y, in order to qualify as holder of right A, a subject needs to have certain characteristics related to both x and y. So, for example, to be recognised as holder of parental rights, one needs to be a parent (or to be entitled to act as such) and to be able/willing to care for her child. In fact, a parent that ceases to be able to/willing to properly care for her child, may lose her (double foundation) parental rights because the grounding interests she was recognized them for have halted to exist.

<sup>53</sup> As in the freedom of expression discourse, in indigenous peoples rights talks the protection of the environment, is not, usually, regarded as a value whose weight is strong enough to limit indigenous peoples rights (beyond very exceptional circumstances), nor to bring to life environmental duties on indigenous peoples. In the biocultural rights discourse, instead, the environment is treated as an interest strong enough to be balanced with other really important interests able to ground human rights.



- a. The double foundation, in this case, brings to life a significant change to a right. It changes the list of potential holders.
- b. It also has another more subtle, but important, consequence.

To be a right-holder means to be considered valuable. It contains an intrinsic positive qualification<sup>54</sup>. On the contrary, not qualifying for a right, getting close but not close enough, is likely to suggest a negative qualification. Hence, structuring a right as having two foundations means that qualifying as a right holder becomes harder. In fact, not only the subject needs to be in possession of certain characteristics related to the initial foundation (x), such as being – biologically or legally – a parent, or being indigenous. The subject also needs to be in possession of certain characteristics related to the second foundation (y), such as being able to take care of a child, or being sustainable. In this way interest/value y becomes more *influential*, as it becomes able to *tell* which subjects may be entitled to become rightholders<sup>55</sup>. This consideration would of course, be unfounded and inexplicable if rights, and the world of rights, were perceived as normatively transparent, tidy and characterized by clear and evident *correct* and *sterilized* interpretations. Qualifying or not as a right-holder would not carry with it positive/negative considerations: it would be a simple ticking box exercise (you have/you do not have quality 1/quality 2).

## 6.2. *Before final credits: few words on remedies*<sup>56</sup>

Before moving to the conclusions, a not-so-small further point needs to be discussed.

*Ubi jus ibi remedium*: if a right is violated, a remedy is to be provided. This statement is not one of those that can be done with a light heart. Beside the not so secondary difficulties concerning reaching a court, obtaining a favourable decision, and having it implemented<sup>57</sup>, there lays the whole controversy concerning whether rights which are *justifiably* infringed – hence *rightfully* limited because of other rights or very important general values – entitle, or not, for compensation<sup>58</sup>. This controversy leads us to a very complex realm of arguments<sup>59</sup>. However, for as complex as these arguments may get, what seems to matter the most is whether an action is perceived as (at least partially) normatively flawed or not<sup>60</sup>, and, hence whether there is some kind of normative residue that needs to be compensated for through a remedy.

For the purpose of our analysis we need to understand whether the presence of internal

<sup>54</sup> According to POGGE (2008, 61) one of the discontinuities between natural rights and human rights on one side and natural law on the other lays, precisely, on the moral value recognized to rightholders: they are sources of moral concern, hence, they may ground moral demands, also in the form of rights.

<sup>55</sup> For indigenous peoples, being dismissed as holders of certain rights on the ground of their lack of sustainability means saying: *indigeneity is not enough*, a sentence that was at the root of their land evictions and marginalization during (and after) colonization. Hence, the rhetoric of biocultural rights brings back old enemies, which might influence the interpretation of indigenous peoples rights, and drive it towards considering environmental stewardship a requirement to hold, also, indigenous peoples rights.

<sup>56</sup> I am indebted to Cristina Redondo for raising this controversial point during the XXIV *Congreso italo-francoluso-español de teoría del derecho*. I hope to remember correctly her critiques and to be giving them a sufficient reply.

<sup>57</sup> For a reconstruction of international human rights law on remedies, see SHELTON 1999.

<sup>58</sup> This controversy brings us back to that concerning coherence theories (specification theories in particular) and pluralist ones. On the controversy, see SHAFER-LANDAU 1995. On infringements that derive from wrongful acts see, among the others, ROSS 1930, 21 and QUINN 1985.

<sup>59</sup> For different arguments see, among the others, THOMSON 1977, 60; MONTAGUE 1984; MONTAGUE 1988; and FEINBERG 1978.

<sup>60</sup> See for example the critique that Montague raises against Thomson and Feinberg on whether the hiker's break into the cabin owner is morally flawed or not (MONTAGUE 1988).

rather than external limits makes any difference in terms of remedy. Is a judge likely to rule differently if she faces a claim against the allegedly wrongful implementation of an internally limited, double-foundation (x and y), right (A); or whether she faces a claim against the allegedly wrongful balancing of a single-foundation (x) right (A'), with interest (y)?

At a first glance, one may think that if x gets limited by y, while right A' may entitle to a remedy, right A does not because this is precisely what its double foundation requires<sup>61</sup>. However, after a closer look, the difference does not seem to be so stark.

First of all, in order to make a valuable assessment we shall compare a right A, with right A' understood in a normative system which recognizes the interest acting as second foundation (y) as grounding another right or as a very important general interest<sup>62</sup>.

Secondly, whether or not the judge will rule in favour of the recognition of remedies will depend on the details of the case. However, we can say that she will have to:

- *vis à vis* right A, verify that both interests x and y have been *rightfully* taken in consideration and weighted one with the other, so as to guarantee that neither interest was *excessively* disregarded/favoured;
- *vis à vis* right A', verify that it was *rightfully* balanced with all other rights and very important general interests of the relevant normative system, including the ones grounded on y.

In both cases, the judge will rule on whether all relevant interests were correctly protected or not and, if the latter, on whether there is any normative residue that entitles to a remedy. In both cases, the judge will deal with the same interests, values and correlative weights. Hence, there is no reason to believe that she will, *necessarily*, act differently. At most, she might be less *likely* to see, perceive, and recognize some sort of unjustified infringement being imposed on the double foundation right than in a single foundation one. In fact, she will face a right which already entails some intrinsic limitations, thus the threshold considered acceptable might be perceived as higher – even though there is no reference whatsoever within right A on where the correct threshold should lay – because the salience of each interest/value is likely to be higher – both x and y are always present, asking to be taken in consideration and protected<sup>63</sup>.

### 7. Final credits: return of internal limits

Throughout the article we have tried to answer to the question: are internal limits arising from conflicting interests acting as foundation of a right anything different from the internal limits described by coherence theories or from classic external limits to rights?

Firstly, coherence theories appeared as actually inadequate to describe the chaotic reality of rights, their historical character and their messy normative grounds. Hence, the internal limits

<sup>61</sup> Just like, one may think, it is the case when dealing with biocultural rights one side and indigenous peoples rights on the other: while the first should of course bend to environmental considerations, the second does not and, if forced to, entitles to a remedy.

<sup>62</sup> This comparison may appear rather counterintuitive, but if we compared, for example, biocultural rights with indigenous rights in the current international legal system, which does not recognize such a prominent weight to the conservation of the environment, we would be comparing two assets which are, clearly, very different: their weights and elements are different, hence the presence of internal or external limits is bound to lead to different results.

<sup>63</sup> For example, we could compare biocultural rights with indigenous peoples rights understood in a legal system which recognizes the rights of nature. A State decides to turn the ancestral land of an indigenous community into a National Park. The community can continue to live on most of its ancestral land, but its use of natural resources is limited. Even though in the international law system we are picturing indigenous peoples rights shall be balanced with the right of nature, the community may abide to a court to obtain a remedy, claiming that restrictions are disproportionate. Hence, the people might be entitled to a remedy. *Vis à vis* biocultural rights, the community may still abide to a court claiming that the limitations imposed are neither necessary nor adequate, and the people might be entitled to a remedy. However, it might be less likely to be granted because the judge may be more inclined to consider the limitations as proportionate.

that coherence theories use were dismissed as unable to account for the internal limits deriving from the double foundation of rights.

We then wondered whether internal limits and external limits actually produce equivalent results. In order to answer to this question, we looked at two examples. The right to freedom of expression suggested that turning external limits into internal ones brings changes in the normative positions that arise. On the contrary, parental rights showed how parental rights with a double foundation (and, hence, internally limited) produce equivalent results to a single-foundation parental right balanced with a single foundation child right.

The two examples led to opposite results. Here we noted how the freedom of expression was not truly appropriate to be compared with parental rights. It required us an extra operation to move the growth of knowledge from outside to inside the right: granting the growth of knowledge a weight it did not have before. A weight that made it able to commonly limit the freedom of expression. We added to the legal/ethical/political framework a new interest able to limit the freedom of expression<sup>64</sup>. On the contrary, in the parental rights example, the interests of the child did not need any boost in rank. They were already perceived as so important as to be able to limit parental rights. The latter example, hence, was the only really appropriate for our comparison between internal and external limits. And it seemed to suggest that the difference between them is pure architecture of rights, something that leads to the same results.

Before moving on, we underlined that not all interests can be clustered together as foundations of a right: they need to walk hand in hand most of the time, as in the case of parental rights and biocultural rights; they need to be bound by ideas of *care, responsibility, stewardship*. Binding together in the foundations of a right two mostly/always conflicting interests would result in an over-limited right whose realization would be quite unrealistic and counter-intuitive: both interests would appear to be continuously limiting one-an-other.

How come, we wondered, this close relationships led to conflicts and consequent limits? Here, we found an answer in the denial of the *noble savage* nor a *noble parent myth*: *care* is not pure correspondence of wills and interests of the carer and the cared-for. For this reason, double-foundation rights may incur in the internal limits we are exploring.

When all seemed to suggest the equivalence of internal and external limits, we stopped to look again at the three features of biocultural rights which were pointed out at the very beginning of the article. And we noted that:

- the (2) *raise of unexpected duties* was the consequence of a change in the recognition of the weight of a value/interest – a boost in rank which changed its ability to limit rights – hence it was not due the fact that an interest was shifted from external to internal;
- the (1) *increase in pervasiveness of limits* and the (3) *consequences of the creation of extra requirements to become rightholders*, could instead be ascribed to the fact that the architecture of a right entails a double foundation – because the world of rights is chaotic, and interpreters of rights do not have a sterilized understanding of them.

The difference between internal and external limits that we have thus encountered seems to lay somewhere deep inside the way rights are perceived, understood, felt, and it influences the way in which rights are used, or are expected (wished, feared) to be used. It seems to derive from the

<sup>64</sup> Apparently, the double foundation changed the results of the game between freedom of expression and growth of knowledge. But the truth is that the results of the game were changed by turning the growth of knowledge into an interest able to commonly limit the freedom of expression. In fact, such change in the results of the game would have been the same if the *boost in the rank* of the growth of knowledge was undertaken, while the creation of the double foundation right to freedom of expression was not. A single foundation right to freedom of expression would equally be limited by the *boosted* growth of knowledge.

fact that interpreters (whoever they may be) are people, not machines (yet!). They hold a body of knowledge, memories, values and feelings which may or may not be evoked by a right, depending on its architecture, depending on how the right is dressed up. If it contains already inside its structure two interests they are always, both, salient, and will most likely be taken in consideration. If, instead, it contains only one interest it will be balanced only with those other interests that openly enter in conflict with it – only with those that make themselves salient in other ways and for other, contingent, reasons. Similarly, qualifying or not as holder of a right (because of its single or double foundation) is accompanied by potentially substantial difference in the way a subject is perceived: *you are not good enough*, a double-foundation right may say. And even if there are other sets of rights protecting that same subject, the rejection is likely to have political repercussions in its perception of the self and in the way others perceive her/him/it. Likewise, having a single or double foundation does not entail stark and necessary differences in the recognition of remedies, but it may influence what an interpreter perceives to be dealing with. A right with a double foundation and hence *doomed* to accept limitations, or a single-foundation right whose weight and importance are jeopardized by other rights or general interests. Even though no different decision is due, the interpreter may be more inclined to rule for the recognition of remedies *vis à vis* the single-foundation right.

Finally, we can say that an interpreter is unlikely to be indifferent to the fact that a right builds on one foundation or on two concurring and mutually limiting ones. The cause of these different perceptions may lay in a layer which is not explicitly conscious to an interpreter. A layer which influences her explicit reasoning, but which does not, always nor necessarily, appear clearly in her mind nor bring to the same results. This consideration may appear rather discomfoting, as one could expect for rights to be always implemented in the most appropriate way – always balanced with all other relevant interests, not only those that (by chance) materialise to the interpreter's mind. However, rights are historical products, just like humans are. And no human performance can be fully unbiased by the concrete realities of our minds and their circuits.

Our enquire into the opaque aspects of the internal limits of biocultural rights led to many considerations concerning the *architecture* of rights, all somehow related to the way rights are *perceived* by their interpreters (whoever they may be). They led to considerations concerning what may or may not influence peoples' understanding of rights. We did not concentrate on whether these understandings were or were not *correct*, but we tried to take in consideration their causes and consequences (in terms of decisions and remedies, for example). As the article developed, we found ourselves in a realm more and more distant from the classical grounds of legal theory. We moved into the realm of questions concerning the way concepts are construed in our minds and we found ourselves opening the doors of new disciplines and methodologies. It is now probably time to acknowledge the need to more profoundly engage with them, especially if we are truly interested in understanding how rights (and legal concepts in general) work in the real world of peoples and their minds, rather than in the abstract world of concepts.

## References

- AGRAWAL A., GIBSON C. 1999. *Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation*, in «World Development», 27, 4, 1999, 629 ff.
- ALEXY R. 2002. *Diritti fondamentali, bilanciamento e razionalità*, in «Ars Interpretandi», 7, 2002, 131 ff.
- ALEXY R. 2005. *Balancing, Constitutional Review, and Representation*, in «International Journal of Constitutional Law», 3, 5, 2005, 572 ff.
- BAVIKATTE S.K., ROBINSON D. 2011. *Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing*, in «Law Environment and Development», 7, 1, 2011, 35 ff.
- BAVIKATTE S.K. 2014. *Stewarding the Earth. Rethinking Property and the Emergence of Biocultural Rights*, New Delhi, Oxford University Press.
- BEITZ C.R. 2003. *What Human Rights Mean*, in «Daedalus», 132, 1, 2003, 36 ff.
- BOBBIO N. 1990. *L'età dei diritti*, Torino, Einaudi.
- CELANO B. 2013. *I diritti nello stato costituzionale*, Bologna, Il Mulino.
- CELANO B. 2001. *I diritti nella giurisprudenza anglosassone contemporanea. Da Hart a Raz*, in «Analisi e Diritto 2001», 2001, 1 ff.
- CELANO B. 2002. «Defeasibility» e Bilanciamento. *Sulla possibilità di revisioni stabili*, in «Ragion Pratica», 18, 2002, 229 ff.
- COMANDUCCI P. 2004. *Problemi di compatibilità tra diritti fondamentali*, in «Analisi e Diritto 2002-2003», 2004, 317 ff.
- CRUTZEN P.J., STOERMER E.F. 2000. *The "Anthropocene"*, in «Global Change Newsletter», 41, 2000, 17 f.
- DWORKIN R. 2006. *Moral Pluralism*, in ID (ed.), *Justice in Robes*, Cambridge (Mass.), London, The Belknap Press of Harvard University Press, 105 ff.
- ELLINGSON T. 2001. *The Myth of the Noble Savage*, London, University of California Press.
- FEINBERG J. 1978. *Voluntary Euthanasia and the Inalienable Right to Life*, in «Philosophy & Public Affairs», 7, 1978, 93 ff.
- FERRAJOLI L. 2001. *I fondamenti dei diritti fondamentali*, in VITALE E. (ed.), *Diritti Fondamentali. Un dibattito teorico*, Roma-Bari, Laterza, 279 ff.
- FERRAJOLI L. 2004. *La pragmatica della teoria del diritto*, in «Analisi e Diritto 2002-2003», 2004, 351 ff.
- GAVIN M.C., MCCARTER J., MEAD A., BERKES F., STEPP J.R., PETERSON D., TANG R. 2015. *Defining Biocultural Approaches to Conservation*, in «Trends in Ecology and Evolution», 30, 3, 2015, 140 ff.
- GEWIRTH A. 1981. *Are There any Absolute Rights?*, in «Philosophical Quarterly», 31, 1981, 1 ff.
- GRIFFIN J. 2008. *On Human Rights*, Oxford, Oxford University Press.
- GUASTINI R. 2006. *Ponderazione. Un'analisi dei conflitti tra principi costituzionali*, in «Ragion Pratica», 26, 2006, 151 ff.
- KAUFFMAN C.M., MARTIN P.L. 2017. *Can Rights of Nature Make Development More Sustainable? Why some Ecuadorian lawsuits succeed, and others fail*, in «World Development», 92, 2017, 130 ff.
- MACCORMICK N. 1976. *Children's Rights: A Test-Case for Theories of Right*, in «Archiv Für Rechts- Und Sozialphilosophie», 52, 3, 1976, 305 ff.
- MACKENZIE J.M. 1988. *The Empire of Nature: Hunting, Conservation and British Imperialism*, Manchester - New York, Manchester University Press.

- MAFFI L., WOODLEY E. 2010. *Biocultural Diversity Conservation: A Global Sourcebook*, London, Washington, DC, Earthscan.
- MANIACI G. 2012. *Contro Il Paternalismo Giuridico*, Torino, Giappichelli.
- MANIACI G. 2018. *Non-disponibilita dei diritti fondamentali*, in «Notizie Di Politeia», XXXIV, 132, 2018, 144 ff.
- MALDONADO MUÑOZ M. 2016. *Conflictivismo y anti-conflictivismo en los derechos fundamentals*, in «Diritto e Questioni pubbliche», 16, 2, 2016, 106 ff.
- MARMOR A. 1997. *On the Limits of Rights*, in «Law and Philosophy», 16, 1997, 1 ff.
- MBARIA J., OGADA M. 2017. *The Big Conservation Lie*, Auburn WA, Lens&Pens Publishing LLC.
- MEINE C. 2010. *Conservation Biology: Past and Present*, in SODHI N.S., EHRLICH P.R. (eds.), *Conservation Biology for All*, Oxford, Oxford University Press, 7 ff.
- MILL J.S. 1959. *On Liberty*. London, John W. Parker and Son, West Strand.
- MONTAGUE P. 1984. *Rights and Duties of Compensation*, in «Philosophy & Public Affairs», 13, 1, 1984, 79 ff.
- MONTAGUE P. 1988. *When Rights Are Permissibly Infringed*, in «Philosophical Studies», 53, 1988, 347 ff.
- MORESO J.J. 2002. *Conflitti tra principi costituzionali*, in «Ragion Pratica», 18, 2002, 201 ff.
- MORESO J.J. 2002a. *A Proposito di revisioni stabili, casi paradigmatici e ideali regolativi: replica a Celano*, «Ragion Pratica», 18, 2002, 247 ff.
- MORESO J.J. 2006. *Dos concepciones de la aplicación de las normas de derechos fundamentales*, in «Revista Direito», 2, 2, 2006, 13 ff.
- NOZICK R. 1974. *Anarchy, State, and Utopia*, Oxford, Blackwell Publishing.
- OBERDIEK J. 2008. *Specifying Rights out of Necessity*, in «Oxford Journal of Legal Studies», 28, 1, 2008, 127 ff.
- OUDENHOVEN F., MIJATOVIC D., EYZAGUIRRE P. 2010. *Bridging Managed and Natural Landscapes. The Role of Traditional (Agri)Culture in Maintaining the Diversity and Resilience of Social-Ecological Systems*, in BÉLAIR C., ICHIKAWA K., WONG B.Y.L., MULONGOY K.J. (eds), *Sustainable Use of Biological Diversity in Socio-Ecological Landscapes. Background to the Sotoyama Initiative*, Montreal, Secretariat of the Convention on Biological Diversity, 8 ff.
- PINO G. 2010. *Diritti e interpretazione*, Bologna, Il Mulino.
- POGGE T. 2008. *How Should Human Rights Be Conceived?*, in ID. (ed.), *World Poverty and Human Rights*, Second Edition, Bodmin, Polity Press, 58 ff.
- POSEY D.A. 1999. *Introduction: Culture and Nature - The Inextricable Link*, in POSEY D.A. (ed.), *Cultural and Spiritual Values of Biodiversity. A Complementary Contribution to the Global Biodiversity Assessment*, Nairobi, Intermediate Technology Publication, 1 ff.
- PRETTY J., ADAMS B., BERKES F., FERREIRA DE ATHAYDE S., DUDLEY N., HUNN E., MAFFI E., et al. 2009. *The Intersections of Biological Diversity and Cultural Diversity: Towards Integration*, in «Conservation and Society», 7, 2, 2009, 100 ff.
- QUINN W. 1985. *The Right to Threaten and the Right to Punish*, in «Philosophy & Public Affairs», 14, 1985, 328 ff.
- RAZ J. 1988. *The Morality of Freedom*, Oxford, Clarendon Press.
- RAZ J. 2010. *Human Rights Without Foundations*, in BESSON S., TASIIOULAS J. (eds.), *The Philosophy of International Law*, Oxford, Oxford University Press, 321 ff.
- REED M.S. 2008. *Stakeholder Participation for Environmental Management: A Literature Review*, in

- «Biological Conservation», 141, 10, 2008, 2417 ff.
- ROSS D. 1930. *The Right and the Good*, in STRATTON-LAKE P. (ed.), Oxford, Oxford University Press.
- SAJEVA G. 2018. *When Rights Embrace Responsibilities. Biocultural Rights and the Conservation of Environment*, New Delhi, Oxford University Press.
- SCHMIDT P.M., PETERSON M.J. 2009. *Biodiversity Conservation and Indigenous Land Management in the Era of Self-Determination*, in «Conservation Biology», 23, 6, 2009, 1458 ff.
- SCANLON T. 1972. *A Theory of Freedom of Expression*, in «Philosophy & Public Affairs», 1, 2, 1972, 204 ff.
- SHAFER-LANDAU R. 1995. *Specifying Absolute Rights*, in «Arizona Law Review», 37, 1, 1995, 209 ff.
- SHELTON D. 1999. *Remedies in International Human Rights Law*, Oxford, Oxford University Press.
- STEINER H. 1977. *The Structure of a Set of Compossible Rights*, in «Journal of Philosophy», 74, 12, 1977, 767 ff.
- STEINER H. 1994. *An Essay on Rights*, Oxford, Blackwell Publishing.
- STEINER H. 1998. *Working Rights*, in KRAMER M., SIMMONDS N.E., STEINER H. (eds.), *A Debate over Rights. Philosophical Enquiries*, Oxford, Oxford University Press, 233 ff.
- STONE C. 1972. *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, in «South California Law Review», 45, 1972, 450 ff.
- STUDLEY J., BLEISCH W.V. 2018. *Juristic Personhood for Sacred Natural Sites: A Potential Means for Protecting Nature*, in «Parks Journal», 24, 2018, 81 ff.
- SURRALLÉS A. 2017. *Human Rights for Non-humans*, in «Hau: Journal of Ethnographic Theory», 7, 3, 2017, 211 ff.
- THOMSON J.J. 1977. *Some Ruminations on Rights*, in «Arizona Law Review», 19, 1977, 45 ff.
- UN GENERAL ASSEMBLY. 2016. *Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples*, Victoria Tauli-Corpuz, A/71/229.
- WALDRON J. 1993. *Rights in Conflict*, in ID. (ed.), *Liberal Rights. Collected Papers. 1981-1991*, Cambridge, Cambridge University Press, 203 ff.
- WENAR L. 2011. *Rights*, in ZALTA E.N. (ed.), *The Stanford Encyclopedia of Philosophy*. Available at <https://plato.stanford.edu/entries/rights/> (accessed on 15/12/2019).
- ZALASIEWICZ J., WATERS C., HEAD M.J. 2017. *Anthropocene: Its Stratigraphic Basis*, in «Nature», 541, 2017, 289 ff.