

# **Input on Indigenous Peoples and the right to freedom of religion or belief (FORB)**

Núria REGUART-SEGARRA\*

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1. Indigenous peoples' religious beliefs represent their quintessential defining element<sup>1</sup>. Such beliefs must be understood as those that emanate from their deep spiritual connection with their ancestral territories and that encourage them to venerate their natural habitat as inherently sacred. It is precisely the centrality the land holds in the indigenous forms of religiosity what has traditionally not allowed such beliefs to be understood as included in the concept of "religion" that prevails in western societies, on the basis of which the land constitutes a material means of production that lacks religious significance. Sacrality has often been attributed to the buildings owned by major religious denominations that they have designated as sacred spaces, which has led to the notion of "religion" being conceived in a rather restrictive way. This has caused, at the same time, the delegitimization of indigenous religious beliefs and value systems, which have been deemed inferior and unworthy of protection. This differential factor is the main source of incomprehension and rejection that surrounds the great problems these peoples face

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\* PhD in Law and Lecturer in Law and Religion at the Universitat Jaume I of Castellón (Spain).

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today, so much so that the discrimination these peoples are still subject to finds their most elementary origin in their religious convictions.

2. The study of indigenous peoples' FORB reveals that it is because of the axiological intensity of their religious beliefs that they are legitimately protected by such a radical human right and by all the instruments that enshrine it at the national and international level, as they represent, in community members' lives, their highest standards of behaviour. They have the same legitimacy and validity as those of any other human group and are thus worthy of the special legal protection granted by international law. Hence, all forms of religiosity that pursue the moral improvement of human beings must receive the recognition and effective protection they deserve.

3. The current major obstacle to the effective realization of the right to FORB of indigenous peoples is land-grabbing. These practices are often perpetrated by both State and non-State actors and, while also infringing numerous human rights, they completely preclude the ability of these peoples to fully enjoy their FORB, which comprises not only the sacred places their territories host, but also the territories themselves, as a consequence of the intrinsic sacredness attributed to them.

4. At the international level, there is a positive trend towards the explicit recognition of their spiritual values as key factors that define their worldviews and ways of life. In particular, the long-awaited United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), in clear harmony with Article 18 of the International Covenant on Civil and Political Rights, proclaims their right to FORB in Article 12, which bets on the express recognition of the collective facet of this human right. Following the path initiated by the UNDRIP, as well as by ILO Convention No. 169, the American Declaration on the Rights of Indigenous Peoples configures the free exercise of spirituality and indigenous beliefs as an autonomous right that must be guaranteed. Taken this together with the special consideration indigenous spiritual beliefs and values systems receive in the international sphere, it is evident that these peoples possess a current regulatory framework that fully protects all aspects of their existence, with singular attention paid to their spirituality, whose safeguard is deemed critical.

5. At the regional level, indigenous peoples have focused their efforts on claiming the existence of their collective rights to land property. These rights have been recognized both within the Inter-American System of Human Rights and the African System, with an obvious difference, since the African Charter expressly enshrines collective rights,

while the American Convention only provides for individual rights, so its main control bodies have had to draw on the general rules of interpretation to be able to inspire their decisions in external sources that, due to their notorious relevance, are fundamental in the resolution of cases submitted to their scrutiny.

6. The spiritual link indigenous peoples share with their traditional lands is decisive in recognizing the existence of their property rights over them<sup>2</sup>. This has been confirmed by both the Inter-American Commission and Court, as well as by the African Commission and Court, although in very technically different ways. While it is generally considered that the Inter-American System has protected indigenous peoples' rights with the greatest resoluteness and determination since, virtually, its very origin, and that the African is, of the three Systems, the one that has presented the greatest delay in its effective start-up, it is necessary to stand up for the latter in relation to the explicit recognition of the violation of these peoples' right to FORB in cases of this sort<sup>3</sup>. This is due to the fact that both the Commission and the African Court have analyzed this spiritual connection under the protection of their FORB, unlike the Inter-American Commission and Court, which understand this connection is comprised within the right to collective property. This has caused that the violation of the right to FORB of these peoples as a consequence of land and water grabbing practices has never been analyzed as such in the Inter-American System, which means it has overlooked the singularity of this human right.

7. The positioning of the European Court of Human Rights as regards indigenous rights contrasts negatively with that of its correlatives, since it has not treated these peoples in accordance with international standards on indigenous peoples' rights when they have triggered their control mechanism. Moreover, it also deviates from its own jurisprudence which, in general terms, is the one that has garnered the greatest international prestige due to its exquisite technical-legal level and its high degree of compliance. This statement cannot apply to land-grabbing cases under its jurisdiction, in which the Court has focused its analysis on the property right itself and has failed to assess the existence of a religious factor that could rightfully be protected under the freedom of thought, conscience and religion. This is despite its vast case law about this right, which

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<sup>2</sup> Professor Camarero-Suárez firmly states that it centralizes and strengthens their fight against the human rights abuses caused by land-grabbing (ibid, at 26).

<sup>3</sup> In particular, see the Endorois ([2010](#)) and Ogiek ([2017](#) and [2022](#)) decisions.

has shown to include, even without expressly mentioning them, the religious beliefs of the indigenous peoples of Europe. The European Court must take advantage of the legal opportunity provided by current international law in order also to become a world referent in the protection of the rights of these peoples.

8. At the national level, the exhaustive study of Canadian aboriginal law, following a three-month research stay at University of Ottawa's [Human Rights Research and Education Centre](#), has denoted an historical propensity of state authorities to try to dominate, silence and, on some occasions, eliminate one of the most vital aspects in these peoples' survival: their spirituality. This has been the purpose of numerous policies adopted by the Canadian Government throughout its rather recent history, which differs, abruptly, with its current practice, focused on the promotion of a series of actions whose aim is to reveal the whole truth and reconcile with their indigenous peoples. Therefore, the main threat that presently hangs over the cultural and religious integrity of these peoples is also represented by land-grabbing practices carried out by large companies with the state approval, which directly affects the sacred places to which their territories give shelter. This has resulted in abundant conflict situations within the national territory that have been brought before Canadian courts, with worrying results.

9. The case selection studied<sup>4</sup> has shown that regardless of whether these peoples choose to expressly defend the sacredness of their ancestral territories or not, there is no doubt that it is their close spiritual connection with them which gives them the strength they need to keep persevering in their struggle to preserve their integrity and control over them. However, when the indigenous people involved has expressly brought it up, the judicial bodies have not granted the religious factor a decisive role in extracting their final conclusion. In this vein, the Supreme Court wasted the ideal opportunity offered by the *Ktunaxa v. British Columbia* case, in which it could have established a jurisprudential precedent of the utmost relevance about the FORB of indigenous peoples. Its refusal to acknowledge this human right violation placed the religious beliefs of this people outside the legal limits established for it in the Canadian legal system, making it devoid of substance. The two judgments issued more recently on *Redmond v. British Columbia* seem to take a step forward in this regard. The final outcome of this case will need to be closely monitored.

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<sup>4</sup> See generally Reguart-Segarra, N., *Los pueblos indígenas de Canadá...*, note 1.

10. Along with land-grabbing, the other major threat that challenges the cultural survival of indigenous peoples with increasing intensity and imminence is climate change (CC), whose effects are already being felt around the world and, especially, in the areas these people typically inhabit<sup>5</sup>. Indigenous peoples are placed in a situation of particular vulnerability to its effects due to a series of circumstances that distinguish them from the rest of the population. Among them, its material and spiritual interdependence with the territories they inhabit since ancient times stands out.

11. Indigenous peoples are crucial agents of change in biodiversity conservation and the fight against CC, which is primarily due to the principles of sustainable development and green economy that rule their societies and to the traditional knowledge (TK) they hold<sup>6</sup>. This TK, which was transmitted by their ancestors from generation to generation until the present, is an intrinsic part of their system of spiritual beliefs, from which it emanates, and, therefore, is protected by the right to FORB. The empowerment of indigenous peoples as agents of change is essential so that they can share with humankind all the knowledge they willingly wish to express and they can work side by side with western scientists on equal terms and conditions.

12. The lack of recognition and effective enjoyment of these peoples' rights over their territories causes a worsening of their natural ecological conditions, as they are left at the discretion of the economic interests of public and private actors, who prioritize them over the compliance with environmental policies aimed at the preservation of biodiversity and the mitigation and adaptation to CC. Shielding these peoples' human rights is essential so that they can play the key role they deserve in this matter. Therefore, one of the most effective ways to fight for the welfare of the Earth is to fight for indigenous rights.

13. The protection that TK receives in international law is not uniform. Having examined the branches of international environmental law on biodiversity and CC, as well as international human rights law, it is noted that each of them is at a different stage of development. The regime established around the Convention on Biological Diversity provides for the most complete set of both binding and non-binding obligations, and gives a singular consideration to respect for indigenous peoples' sacred places and for the secret

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<sup>5</sup> The study on this subject was carried out at the [Strathclyde Centre for Environmental Law & Governance](#) (University of Strathclyde, Glasgow).

<sup>6</sup> See generally ILO, *Indigenous Peoples and Climate Change. From Victims to Change Agents through Decent Work*, Geneva, 2017.

and sacred TK they possess. On the other hand, the United Nations regime on CC has tended to ignore the virtuality of indigenous TK in achieving its objectives. This situation has already undergone a significant change and the importance of using the traditional techniques and practices of these peoples along with those of western scientists is increasingly recognized. The advances achieved in these two areas of international environmental law are, therefore, more than evident and everything indicates that future efforts will continue along the same lines. However, it remains to be seen whether the greater recognition already achieved will translate into their real, effective participation in decision-making processes, which is their main current claim in this field.

14. International human rights law has not considered TK as being included under the scope of protection of the FORB. Rather, it has frequently protected it under the coverage of the more generic right to culture. However, TK finds its deepest origin in the spiritual value systems of its holders, all of which is conceived as an inseparable unit. It is essential that it is firmly recognized that indigenous TK is an essential part of the spirituality of its owners and that, therefore, it is protected by their right to FORB.

15. The effective guarantee of indigenous peoples' right to FORB is the cornerstone around which the two great challenges these peoples face today revolve. Their religious convictions lay at the core of their worldviews. They encourage them to fight with all the means at their disposal for their human rights and sustain their systems of traditional practices in spiritual harmony with the environment, which has proven to be crucial for the prosperous future of all humankind. Therefore, the key role these beliefs play in these peoples' ways of living and acting must be at the forefront of their struggle for their rights.

16. It is clearly evident that the rights that are being violated by land-grabbing practices that threaten the integrity of their territories are numerous, but this cannot belittle the uniqueness of these peoples' right to FORB. The historical tradition of the first freedom and its fundamental role in the consolidation of the plural societies we know today immeasurably strengthens the claims of these peoples and gives them, in turn, an unquestionable robustness and consistency. Hence, guaranteeing the effective enjoyment of the right to FORB of these peoples in all its dimensions constitutes the most effective action to ensure their very survival.