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Decolonize or perpetuate: Realizing rights of nature through a critical property theory

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Abstract

This article discusses the legal and jurisdictional challenges to safeguarding Indigenous cultural property, understood as bioculture, and the extent to which colonialism influences the law, arguing that the current, arguing that the current legal system is inherently a colonial technology formed during the 1491 encounters era in the Americas and metastasized into contemporary society. The starting proposition is that a lack of safeguards is not the challenge, given the of institutionalization of the Rights of Nature framework, adopted and adapted by the Ecuadorian Constitution since 2008 (reaffirmed November 2025). The challenge is its implementation. The article attributes this operationalizing problem to the clash that arises when a Rights of Nature framework is adapted within a Western legal paradigm that upholds Western notions of “property” on Indigenous economy functionality of biocultural assets. We examine the Ecuador v. Tagaeri and Taromenane case, decided by the Inter-American Court of Human Rights in 2025, to illustrate this tension. Because, in its material and abstract expressions, the understanding production of property echoes the colonial legacy of Indigenous dispossession, the article suggests that a critical view of “property” is necessary to complement the Rights of Nature framework to address implementation issues.

Keywords: Rights of Nature; Indigenous Bioculture; Critical Property Theory; Ecocentric Law; Indigenous Data Sovereignty

Introduction

The absence of legal mechanisms to safeguard Indigenous cultural, tangible, and intangible property certainly poses a jurisdictional challenge to achieving this task in jurisdictions where none exist. However, we start from the premise that the Rights of Nature framework, part of emerging ecocentric law,¹ is a tool that permits safeguarding Indigenous cultural property when defined as *bioculture*. In this context, the realization of nature rights in practice, rather than in theory alone, is imperative not only for the sake of building

¹ Zelle et al. 2021, 1. Ecocentric law or Earth law is “the body of law for protecting, restoring, and stabilizing the functional interdependency of Earth’s life and life-support systems at the local, bioregional, national, and global levels.”

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ecocentric law but to safeguard Indigenous cultural property, which includes nature in all its tangible and intangible forms, and which cannot be protected through Western law, as we know it, since at its core is a conflicting logic that is articulated through the letter of property law.

When Ecuador adopted the Rights of Nature framework in its constitution in 2008, it made history by providing constitutional infrastructure to advance the protection of the natural world. While a lack of a similar constitutional framework may be a challenge in areas without one, Ecuador shows that where it exists, the challenge is its implementation. While the implementation challenges associated with Rights of Nature initiatives are often identified as stemming from the framework's so-called idealism, we argue that the problem lies in introducing a nature-centered framework into a legal system that systematically upholds private property and individual ownership. In turn, this structural breakdown, we argue, constitutes the main jurisdictional challenge to safeguarding Indigenous cultural property.

Part I of this article zooms in, using case law from the United States and Ecuador,² to highlight that implementation issues are symptoms of structural failures at the judiciary, executive, and legislative levels of government. Part II zooms out to connect these shortcomings to the history and theory behind our current understanding of property, which permits the structural commodification of nature and Indigenous culture through property law. The law, in its role of upholding Western notions of property, is inherently colonial and thus obstructs the realization of nature rights without a critical view of property. Part III expands on how we may move toward ecocentric conceptions of property to enable the stewardship of nature and, by implication, Indigenous cultural property without relying on colonial and capital-centric logics that perpetuate Indigenous dispossession and the commodification of nature through modern means.

Part I: Legal and jurisdictional challenges to safeguarding Indigenous cultural property

The Rights of Nature framework: The safeguard for Indigenous cultural property

Rights of Nature (RoN) is both a social movement³ and a legal tool that falls within the broader concept of ecocentric law – an emerging legal doctrine being developed with different scopes and applications worldwide. In the context of this article, the RoN framework, or “nature rights,” functions as a legal mechanism to safeguard Indigenous cultural property, as it protects ecosystems and territories that form a significant part of that heritage.⁴ Nature rights have evolved since 1969, gaining popularity since the mid-2000s, primarily in the Americas and in non-Western countries.⁵ At the core is the notion that nonhuman life, like human life, is in itself entitled to protection by the law. In 2008, the Ecuadorian government, for the first time in the world's history, recognized nature as

² The cases based in the United States are named for their relevance in the property law curriculum in US law schools. The cases based in Ecuador are named for their relevance in shaping Indigenous and nature rights jurisprudence in Ecuador.

³ Stone 1972. The notion of environmental legal rights was addressed in 1972 by Christopher Stone when he examined to what extent trees should have legal standing; Kauffman 2024. Furthermore, the Eco Jurisprudence Monitor team has accounted for both Western initiatives as well as Indigenous initiatives, even if their authority is not recognized by the Western state system. It has found that as of August 2023, already 353 RoN initiatives have been adopted by 31 countries. As of May 2024, RoN provisions of some sort can be found in 24 countries and 26 international policy documents.

⁴ Kauffman 2024. In the Western Hemisphere, RoN initiatives exist in the form of legal provisions that grant rights (positive rights), whereas in the Eastern Hemisphere, RoN initiatives are non-rights frameworks that, rather than grant rights, protect individuals from interference.

⁵ Kauffman 2024. Eco Jurisprudence Monitor is the leading organization accounting for RoN initiatives implemented across Western and Indigenous jurisdictions.

having the same status as persons and corporations, entitling it to fundamental rights protected by the constitution.⁶ Part of these include the ability for humans to sue on behalf of nature, otherwise known as legal standing.⁷

Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. [...] (Emphasis added.)⁸

This raised nature to the level of individuals and corporations as a subject of rights and transformed the law by encoding, without hierarchy, the inseparability of humans and the natural world.

This jurisdictional advancement fosters alignment between the law and Andean and Amazonian biocomplexity systems, which can be summed up in the concept *Sumak Kawsay*,⁹ a Kichwa principle that stands for wholesome, relational, and harmonious living with nature. Nature rights is “the Western legal translation of the more fundamental notion that everything is alive [...] and that law, science, and spirituality are not mutually exclusive. ...”¹⁰ Although antithetical to the current world order,¹¹ Ecuador’s nature-friendly constitution is “the first time that a notion expressing an ancestral practice of coexistence respectful of nature, societies, and human beings is being naturalized in political debate and firmly inscribed in the horizon of human possibilities.”¹² Thus, recognizing nature’s legal standing – though a Western construction in itself rather than a faithful translation of Indigenous cosmology – is helpful insofar as it demands a shift within the dominant legal systems in *apya yala* (i.e., the common and civil law).

This legal shift also implies one in the dominant culture – one that permits centering nature and, by extension, the importance of Indigenous cultural property, understood as encompassing the natural world given the interconnectedness between nature and Indigenous identity. When the law begins to articulate the legal personhood of nature, it challenges the legal assumptions that regard it as an artifact to be extracted from and exploited. *Sumak Kawsay* thus requires a new ecological consciousness to be (1) reflected, (2) sense-made, and (3) called forth. Confronting this tension requires decolonial praxis, which as Part II and III of this article will identify requires a robust challenge to Western notions of property and reconfiguration of the legal framework that upholds its ontology.

⁶ Ecuadorian Constitution 2008, Title II, Chapter 1, art. 10. “Persons and people have the fundamental rights guaranteed in this Constitution and in the international human rights instruments. Nature is subject to those rights given by this Constitution and Law.”

⁷ Ecuadorian Constitution 2008, Chapter 1, art. 10: Entitlement, Application and Interpretation Principles of Fundamental Rights.

⁸ Ecuadorian Constitution 2008, art. 71.

⁹ Ecuador’s Constitution’s preamble reads, “We, the sovereign people of Ecuador, have decided to build a new way of citizen coexistence, in diversity and harmony with nature, to achieve good living, the *Sumak Kawsay*.” Preamble, Constitution of the Republic of Ecuador, 2008.

¹⁰ Rodríguez-Garavito 2024.

¹¹ The world order we refer to here is the hegemonic modernity based on human–nature dualism, a capitalist economic model and liberal political regime born out of a history of settler colonialism, which centers a Western epistemological framework that positions humans over nature, racializes those humans through a lens of white superiority, and values economic growth, consumption, and scaling as separate from and superior to nature, reducing ecosystems to inert resource assets for exploitation.

¹² Davalos 2014.

In this article, we defend the rights of nature for the important purpose they serve, while recognizing that this mechanism is a rights framework and, as such, is inherently a liberal technology worthy of critique.¹³ We do not argue that nature rights should be the end-all, be-all. However, wholesome living, articulated in the rule of law, allows people to advocate for the fundamental notion that the natural world has equal agency to protect itself. This, we consider, curbs the continued objectification of nature and is valuable. The alternative – no nature rights – is not an option. We see nature rights not as a technology for precisely capturing Indigenous cosmology but as a Western construction that helps restrain the “neoliberal growth-without-limits agenda” that impedes the emergence of “alternative eco-centric potentialities for law.”¹⁴ In this context, we argue that the RoN framework is a tool that effectively safeguards Indigenous rights to land, knowledge, data, time, technology, and economic development among others outlined in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). This is because RoN promotes sustaining the life-giving nature of nonhuman entities and places value in the idea of oneness and interconnectedness that is at the core of Indigenous peoples’ culture and biocomplexity systems, that is, in the multi-dimensional interactions of Indigenous ontology, axiology, cosmology, and praxeology.

Although RoN is a twenty-first-century legal development and is still emerging in jurisdictions across the world, given its existence, one could not argue that a lack of legal mechanisms is the obstacle to safeguarding Indigenous cultural property. Encoded as rule of law, an RoN framework is a valid jurisdictional tool to safeguard Indigenous cultural property, tangible (e.g., lands, innovations, technologies – to name a few) and intangible (e.g., big data, time, knowledge, among others), because Indigenous culture, Indigenous relational sciences, Indigenous territory, and the natural world are one and the same. For this reason, while the absence of legal mechanisms may pose a jurisdictional challenge to safeguarding Indigenous cultural property where no clear framework exists, this is not the case when RoN frameworks are in place. In such a context, we identify the challenge lies elsewhere: in the juridical bodies – the courts, the legislature, and the executive branches of government – with the power to translate a new ecological consciousness into action.

Before discussing enforcement gaps in the juridical bodies of government, we define Indigenous cultural property.

Definition of Indigenous cultural property

Generally, cultural property refers to anything of great significance to a culture’s heritage. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict provides a definition, although it emerges from Western legal tradition. According to Article 1 of the Hague Convention, cultural property refers to items and sites of significant cultural heritage that are essential to a people’s identity.¹⁵ The Merriam-Webster dictionary provides that “cultural” means “of or pertaining to culture,” including the customs, arts, and beliefs of a particular society or group. Accordingly, Indigenous cultural property encompasses tangible and intangible items that carry historical, spiritual, and nonrenewable significance to Indigenous cultural heritage and are essential to present Indigenous traditions, self-determination, self-governance, future visions, and legacy.¹⁶

¹³ Kotzé and Villavicencio Calzadilla 2017.

¹⁴ Kotzé and Villavicencio Calzadilla 2017.

¹⁵ Included here is movable or immovable property (artworks, manuscripts, books, archaeological artifacts, and monuments [religious or secular], along with entire archaeological sites and historically or artistically significant groups of buildings), buildings dedicated to preservation or exhibition (including museums, libraries, and archival depositories designed to protect or showcase these movable cultural properties, including shelters intended to secure them in times of conflict), and centers containing monuments and collections.

¹⁶ For example, plants are a material expression of property, and their data is their abstract form.

Drawing from these definitions, this paper adopts a broad view of Indigenous cultural property, holding that nature is part of Indigenous *bioculture*. This is because for Indigenous peoples, the natural world, its five elements and all the manifestations of these elements in animate and inanimate form, and the interdependence of people, the natural world, and cultural identity constitute Indigenous cultural property. Being sensitive to developments in the digital realm, digital property also fits within this definition as a material manifestation of cultural property. Indigenous cultural property can thus be understood in terms of tangibles (e.g., lands, innovations, technologies – to name a few) and intangible (e.g., big data, time, knowledge, among others) because of the intimate connection between Indigenous culture, Indigenous relational sciences, Indigenous territory, and the natural world.

The Inter-American Court of Human Rights (IACHR) opinion in the *Case of the Kichwa People of Sarayaku v. the State of Ecuador* (2012) affirms the inseparability of Indigenous culture and ancestral land, as described previously. The case addressed the Sarayaku peoples' right to due process and consultation,¹⁷ Indigenous communal property,¹⁸ cultural identity, self-determination, judicial guarantees,¹⁹ and judicial protection.²⁰ The court found that Ecuador severely jeopardized the Sarayaku peoples' right to life²¹ and to personal integrity,²² which bear relation to the state's obligation to guarantee the right to communal property.²³ The court's analysis of the Ecuadorian government's obligations to the Sarayaku people centered, in great part, on the inseparability between Indigenous culture and the land:

There is a close relationship between the land and the traditions, customs, languages, rituals, knowledge and other aspects of the identity of Indigenous communities, indicating that based on their environment, their integration with nature and their history, members of Indigenous communities transmit from generation to generation this intangible cultural heritage, which is constantly recreated by members of the Indigenous communities and groups. (Emphasis added.)²⁴

In the court's language, to preserve Indigenous cultural property, the law must guarantee the effective enjoyment and exercise of the rights to communal property over land.

Article 21 of the American Convention specifically provides protection for such a relationship, as well as for the sources of life²⁵ of their ancestral lands and the intangible aspects that arise from them. The court's reasoning confirmed that the protection of Indigenous peoples' right to property is essential for ensuring not just their physical but their cultural survival:

[T]he protection of [Indigenous peoples'] right to property is necessary to guarantee their physical and cultural survival, and also guarantee their cultural identity, social structure, economic system, customs, beliefs and distinctive traditions are respected, guaranteed and protected by the States. [...] [given] the profound cultural, immaterial and spiritual connection that they maintain with

¹⁷ American Convention, art. 21.

¹⁸ Art. 1(1).

¹⁹ Art. 8(1).

²⁰ Art. 25.

²¹ Art. 4(1).

²² Art. 5(1).

²³ Per the terms of arts. 1(1) and 2.

²⁴ *Case of the Kichwa Indigenous People of Sarakayu v. Ecuador*, Merits and Reparations, Ser. C. No. 245 (Inter-Am. Ct. H. R. June 27, 2012), https://corteidh.or.cr/docs/casos/articulos/resumen_245_ing.pdf.

²⁵ "Nonhuman source of life" is an ecocentric term to replace the common use of the phrase "natural resources."

their territory, in particular the specific characteristics of their “living jungle” (*Kawsak Sacha*) **and its intimate relationship with the members, which is not limited just to their subsistence, but integrates their own worldview, and cultural and spiritual identity.** (Emphasis added.)

This analysis demonstrates that Indigenous culture is protected insofar as their reliance on land for sustenance and sovereignty is protected.

Therefore, Indigenous cultural property includes the fundamental subsistence of Indigenous peoples, encompassing scientific, technological, social, spiritual, cultural, epistemological, digital, and economic aspects that contribute to a wholesome life in harmony with systems (ecological and cultural), upheld by preservation, protection, and regeneration. Territory, whether that be plains, mountains, or rivers, is at the core of Indigenous cultural heritage, and this is true in both physical and digital environments. In this sense, the protection of the natural world through frameworks like the RoN framework is paramount to safeguarding Indigenous cultural heritage, as it allows for legal advocacy to protect the natural world – a key element of Indigenous peoples’ cultural heritage, which revolves around a deep relationship with the land, time, data, and knowledge. Thus, this article adopts the understanding that nature constitutes Indigenous cultural heritage and names this *Indigenous bioculture*.

The enforcement gap is the jurisdictional challenge

Ecuador shows that constitutional rights of nature do not, on their own, resolve environmental and cultural property conflicts. Their effectiveness calls for further intervention to remove the jurisdictional barriers that arise when an ecocentric framework is enforced within a Western legal system that protects individual ownership and private property. To innovate, the challenges must be identified with precision. Here, Ecuador offers insight. The challenge to safeguarding Indigenous cultural property in Ecuador lies in what we call the *enforcement gap*: the tension that arises from adopting RoN (or similar ecocentric) legal mechanisms within traditional Western legal traditions. The enforcement gap takes two forms: judicial unwillingness and government noncompliance, discussed separately in the following sections.

Judicial unwillingness: Case studies in the United States

We refer to judges’ reluctance to formulate jurisprudence on an issue as *judicial unwillingness*. Two seminal cases in the United States²⁶ illustrate this challenge in connection with issues of protecting nonhuman life and the environment.

In 2018, in *Matter of Nonhuman Rights Project, Inc. v. Lavery*,²⁷ an intermediate appellate court in New York reviewed a lower court’s denial of habeas corpus relief to Tommy and Kiko, two captive chimpanzees confined in small cages by their owners. The issue was brought pursuant to a New York property statute that provides for the release of a person illegally imprisoned.²⁸ A writ of habeas corpus is a legal tool that allows bodily freedom if a

²⁶ In addition to the authors’ diasporic experience in New York City, we find it important to illustrate jurisprudence in the United States because this is where the field of earth law is expanding, as a North American companion to the growing RoN movement in South America. They further provide a glimpse into how deeply entrenched notions of property are in our legal paradigm, even in New York courts, one of the most progressive states in the country.

²⁷ *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 AD3d 73, 54 NYS3d 392 [1st Dept 2017], *denied* 31 NY3d 1054, 76 NYS3d 507, 100 NE3d 846 [2018].

²⁸ New York Civil Practice Law and Rules (CPLR), art. 70 § 7002(a).

judge determines that detention is unlawful.²⁹ The *Lavery* court denied relief to the chimpanzees, but it grappled with profound ethical questions in concluding that the chimpanzees were not a “person.”

The four concurring judges exposed the inadequacy of the law as a vehicle to address this issue. Although the habeas statute did not define a “person,”³⁰ the *Lavery* court’s majority reasoned that the *Black Law’s Dictionary* definition,³¹ which defines “person” as any “entity ... that is recognized by law as having most of the rights and duties of a human being” should guide the court’s conclusion. However, the concurring judges underscored that the question for the court should not have been framed as whether chimpanzees were persons but whether chimpanzees have the right to bodily freedom. Recognizing the limitations of the black-letter law and the jurisprudence that upholds it, one judge expressed deep ethical and moral concerns, stating:

The question will have to be addressed eventually. Can a nonhuman animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing? [...] The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus.³² **That question, one of precise moral and legal status, is the one that matters here. [...]** The reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a “person” or relegated to the category of a “thing” amounts to a refusal to confront a manifest injustice. [...] To solve this dilemma, we have to recognize its complexity and confront it. (Emphasis added.)³³

Here, she critiques the existing legal paradigm’s treatment of chimpanzees as mere property. The rhetorical questions she poses highlight the moral and ethical implications of this decision, which upholds nonhuman life as an artifact and reveals the dysfunction of the current legal paradigm. Judicial unwillingness, therefore, stands in contrast to an ecocentric approach that might have expanded habeas relief to a nonhuman species.

²⁹ Habeas relief relies on the assumption that “all human beings possess intrinsic dignity and value, and have, in the United States (and territory completely controlled thereby), the constitutional privilege of habeas corpus, regardless of whether they are United States citizens,” *Boumediene v. Bush*, 553 US 723, 128 S Ct 2229, 171 L Ed 2d 41 [2008]).

³⁰ *Nonhuman Rights Project, Inc.*, 152 AD3 (stating that petitioner’s argument “that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights ... ignores the fact that these are still human beings, members of the human community”) at 78.).

³¹ Garner 2014.

³² This decision contrasts the Ecuador’s Supreme Court’s Decision 253-20, which in 2019 addressed the question of whether wild animals should have legal rights, such as entitlement to habeas corpus relief. In 2022, Ecuador’s Constitutional Court issued its decision marking a historic shift by recognizing nonhuman animals as sentient beings and therefore subjects of rights – no longer mere property. By doing so, the court opened the door for jurisdictional guarantees, such as habeas corpus, to be applied to nonhuman animals. This landmark ruling affirms that nonhuman life holds equal value under the law as human life. The court also ordered that a legislative proposal be submitted to the National Assembly for approval by August 2024, establishing this recognition as formal policy. See <https://www.animallaw.info/case/253-20-jh22-case-estrellita>. As of June 2025, the bill’s review by the National Assembly’s Biodiversity Commission remains stalled, with no final vote or approval reported, and thus out of compliance with the court-mandated August 2024 deadline.

³³ *Matter of Nonhuman Rights Project, Inc. v. Lavery*, at 1058–59.

Judges' unwillingness to confront the limits of legal paradigms was similarly evident in *Matter of Nonhuman Rights Project, Inc. v. Breheny*,³⁴ where a New York appellate court denied habeas relief to Happy, a captive elephant. The court held that recognizing nonhuman animals as legal persons would raise a "labyrinth of questions that common-law processes are ill-equipped to answer," and reaffirming *Lavery's* stance that such questions are better left to the legislature.³⁵ This reasoning reflects a familiar pattern: Even when courts acknowledge the inadequacy of existing frameworks, they retreat rather than engage with their implications. That this occurred in a progressive jurisdiction like New York underscores how deeply entrenched the prevailing legal paradigm remains, which elevates property as the organizing principle in legal thought. This reluctance to engage moral complexity forecloses meaningful doctrinal evolution (a contrast with Ecuador, for example, and other countries where nature rights have taken hold). This shows that in the absence of a legislative nature rights framework, courts become even less willing to exercise their jurisprudential power to advance ecological and, by extension, decolonial justice. Judicial unwillingness, thus, preserves the status quo and obstructs the law's reorientation toward ecocentrism.

Government noncompliance: Case study in the Inter-American Court of Human Rights

The second way the enforcement gap manifests is through *government noncompliance* or a *defiance of the judiciary*, where state actors or agencies fail to comply with judicial orders from domestic or international courts, undermining legal protection by creating a disjuncture between the rule of law and its implementation. Government noncompliance creates a gap that frustrates attempts to bridge theory and praxis. When administrative bodies charged with enforcing rulings affirming Indigenous rights and nature rights fail to act, Indigenous peoples are left without recourse despite navigating complex legal systems that are time- and resource-consuming. Ecuador illustrates the challenges of government noncompliance.

Most recently, in 2025, the IACHR case *Tagaeri and Taromenane Peoples v. Ecuador*³⁶ showed a similar pattern of noncompliance that severely frustrated grassroots efforts to defend nature and Indigenous peoples' rights. In this case, the IACHR reiterated Ecuador's obligation to prevent intrusion by non-Indigenous persons into a protected area known as the Intangible Zone³⁷ and its surrounding buffer zone.³⁸ These had become severely threatened due to government-approved oil drilling and a lack of due diligence. Specifically, the court found that the government fell short on two fronts. First, it violated the precautionary principle required by the American Convention, which obliges governments to implement

³⁴ *Matter of Nonhuman Rights Project, Inc. v. Breheny*, 2020 NY Slip Op 07675, ¶ 1, 189 A.D.3d 583, 583, 134 N.Y.S.3d 188, 189 (App. Div. 1st Dept.).

³⁵ *Matter of Nonhuman Rights Project, Inc. v. Breheny*, 2020 NY Slip Op 07675, ¶ 1, 189 A.D.3d 583, 583, 134 N.Y.S.3d 188, 189 (App. Div. 1st Dept.).

³⁶ *Case of the Tagaeri and Taromenane Peoples v. Ecuador*, IACHR 2024. This case arises from a long history of territorial invasion and extreme violence against the Tagaeri and Taromenane peoples, Indigenous peoples in voluntary isolation (IPVI) in the Ecuadorian Amazon. Two decades ago, in 2006, the IACHR first addressed these violations by granting precautionary measures following reports of massacres linked to illegal logging and territorial encroachment within Yasuní National Park. Despite this judicial order, Ecuador failed over time to effectively protect the territory and, by extension, the rights of the Tagaeri and Taromenane Peoples. In the 2024 opinion, the IACHR held the state of Ecuador internationally responsible for violating Indigenous rights to self-determination, collective property, a dignified life, health, food, cultural identity, a healthy environment, housing, and life, as well as the rights to judicial guarantees and judicial protection, due to the state's authorization of extractive activity, tolerance of third-party incursions, and failure to prevent violent forced contact with two Tagaeri girls in 2013.

³⁷ In Spanish, Zona Intangible Tagaeri y Taromenane (ZITT).

³⁸ In Spanish, Zona de Amortiguación.

precautionary measures to mitigate intrusions into Indigenous territory and protect communities' health, culture, and sovereignty. Applying heightened scrutiny to Ecuador's measures, given this case concerned two uncontacted groups known as IPVI, the court found that while the government met its obligation to protect IPVI by creating the Intangible Zone and its buffer, it was insufficient because the Tagaeri and Taromenane are ecosystemic, seminomadic, and hunter-gatherer societies that require enhanced safeguards to ensure the preservation of their culture, given the mobility of a seminomadic culture.

Second, the court held that the government violated its duty to protect Indigenous property in allowing extractive activity. The court wrote that "[a] merely abstract or legal recognition of Indigenous lands, territories, or resources is practically meaningless if the property is not physically established, delimited, and demarcated" through legitimate measures.³⁹ Although the government created the Intangible Zone and buffer zones to uphold the Indigenous right to property, self-governance, and self-determination (internal autonomy), Ecuador had a duty to adopt legislative and administrative measures to create effective mechanisms of oversight and recognition of Indigenous property rights. Given the vital relationship and interdependence with the rainforest for IPVI's sustenance, the Ecuadorian government has a heightened obligation to protect Indigenous territory, as demanded by international law principles that uphold Indigenous rights to self-determination⁴⁰ and guarantee economic, social, cultural, scientific, technological, developmental, and environmental rights.

Government noncompliance in this case once again overshadowed the effort and resources required to pursue redress through domestic and international legal systems, which were led by grassroots environmentalist movement and Indigenous groups. Behind the favorable 2025 IACHR opinion stands a decade-long struggle by environmental and social activists and Indigenous groups to keep fossil fuels underground in Yasuní National Park, whose boundaries overlap with the ancestral territory of the Tagaeri and Taromenane peoples. YASunidos, a grassroots coalition and one of the representative plaintiffs in the IACHR *Case of the Tagaeri and Taromenane*, due to its historical community-led leadership in advocating for the protection of biodiversity for over a decade, mobilized unprecedented civic participation by collecting 757,000 signatures calling for a binding referendum surveying the country on whether to leave oil underground in the park. This campaign became a historic example of direct participatory democracy in the country, distinguished by its

³⁹ *Case of the Tagaeri and Taromenane Peoples v. Ecuador*, IACHR 2024 at 72–73.

⁴⁰ The principle of self-determination, as a legally binding principle, is enshrined in the Convention concerning Indigenous and Tribal Peoples in Independent Countries, International Labor Organization (ILO) Convention No. 169, adopted in 1989, which provides in relevant part:

[Indigenous people] shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.

Other instruments that affirm this principle include the following: United Nations Charter (1945), art. 1(2) ("To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ...," showing self-determination is one of the purposes of the United Nations; International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 1 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"); UN Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007, art. 3 ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

sustained national grassroots leadership on issues of climate change mitigation, Indigenous rights, and biodiversity protection. Here, the scale of civic engagement behind the litigation, combined with the resulting favorable jurisprudence, shows that the depth of public and juridical commitment to safeguarding Indigenous and nature rights exists, but it is obstructed by government noncompliance.

The 10-year grassroots struggle culminated in a national majority vote in 2023 to keep oil underground, a victory celebrated in August 2023, but not without numerous bureaucratic delays,⁴¹ domestic litigation, and government persecution of group members in 2025 and 2026. In May 2023, Ecuador's Constitutional Court approved the ballot measure, whose order became binding in August 2023 and authorized the referendum, whose results would be binding per the Constitutional Court's decision. Following these events, the government's oil company should have dismantled extractive infrastructure in Yasuní Park (Oil Block 43) within one year. Yet by August 2024, the executive branch, through its respective government agency, had not complied with the constitutional mandate and instead proposed a five-and-a-half-year phaseout, citing frivolous technical and financial concerns that had already been raised and resolved during the extensive litigation in this case.

The Ecuadorian government defies the judiciary domestically and internationally. Such defiance violates the law on multiple fronts: the country's constitutional rights to participatory democracy, Indigenous and nature rights, and international agreements. Refusing, nearly three years later, to implement a constitutional mandate reveals to the world not a dysfunctionality in the RoN framework but that, doctrinally, the realization of nature rights requires a structural shift. This shift must accommodate an economic development model beyond scaled extractivism so that the government's fixation with capital-centric extractive activities ceases to obstruct the just enforcement of this and other legal frameworks. The biggest challenge in this campaign is therefore not a lack of safeguards. The biggest jurisdictional challenge revealed by this case study is the government's noncompliance: state actors' (particularly those in the executive and legislative branches) refusal to act.

This recurring breakdown between judicial mandates and administrative enforcement reveals a deeper structural failure in the legal system. Nature rights, echoing *Sumak Kawsay*, are a direct challenge to Western legal tradition – whether that be the Franco-German civil law tradition used in Ecuador and other Latin American countries or the English common law tradition used in the United States and other anglophone countries. It rejects the human–nature dualism at the core of the Western epistemological framework, which positions humans as separate from and superior to nature, reduces ecosystems to inert resource assets for exploitation, and centers human life and capital.

This legal system's ontological orientation is incompatible with nature rights. This incompatibility causes implementation issues that persist in Ecuador, despite available safeguards to protect the Yasuní National Park and, thereby, the Tagaeri and Taromenane territory and their basic rights to housing, health, and self-determination. Despite domestic and international courts putting pressure on the Ecuadorian government to implement these rights, this gap in enforcement, we ought to recognize, is the jurisdictional challenge that impedes affirming the protection of nature and, by implication, Indigenous cultural heritage. The next section discusses this tension.

⁴¹ YASunidos 2020.

Part II: The ongoing influence of settler colonialism in shaping cultural property protection viewed critically

Property: A Western construct expressed through the law

Echoes of settler colonialism: The ideology of Improvement

Property is both an abstract concept and a material expression. Enlightenment-era thinker John Locke made influential contributions to the development of property as a concept. His theory underpins the normative proposition that land ought to be privately owned and improved. This logic reproduces the injustice of the settler-colonial project in two ways. First, it has justified violent Indigenous dispossession in favor of European expansion into the so-called New World. In *Colonial Lives of Property*, Brenna Bhandar refers to this logic as the “ideology of improvement”: the idea that European intervention added value to Indigenous land, which was considered “wasteland,” thereby entitling settlers to claim ownership of Indigenous territory. The result is an articulation of property through racial difference that justified Indigenous dispossession.⁴² It reinstated the Indigenous body as a nomad, rendering it “as lacking in the required degree of fixity and immobility to be legally legible as owners of their land.”⁴³ It created a social hierarchy in which some – including nonhuman life (i.e., nature) and nonwhite bodies deemed less than human (i.e., Indigenous, Black, and womb-bearing bodies) – could be owned or dominated by those with ownership power. “Being an owner and having the capacity to appropriate have long been considered prerequisites for attaining the status of the proper subject of modern law, a fully individuated citizen-subject.”⁴⁴ Thus, the ideological assumptions that framed “land” in terms of ownership and control created a specific Eurocentric standard of value, disregarded both Indigenous presence and the land-care practices that constitute Indigenous technology, epistemology, and relationality, and upheld a racial regime of property that dispossessed Indigenous peoples and commodified nature.

The second way in which injustice is reproduced through articulations of property per Western logics is inseparable from the first. Locke’s formulation of property undermined the value of nature and of wilderness, subordinating nature’s intrinsic value to Eurocentric agricultural intervention. He wrote that “[l]and that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, waste [sic]; and we shall find the benefit of it amount to little more than nothing.”⁴⁵ Today’s political economic ethos, that land ought to be worked on to gain worth and that it ought to yield benefit to humans, stems from here. Land without European intervention became the basis for waste, the legal canon that encouraged economic improvements, legitimized the supremacy of European cultivation,⁴⁶ and made nature a commodity to be extracted from and owned rather than stewarded. The ideology of improvement thus molded the modern legal system per colonial logics of extraction and dispossession.

⁴² Bhandar 2018, 48.

⁴³ Bhandar 2018, 182.

⁴⁴ Bhandar 2004, 5.

⁴⁵ Locke 1960, 40.

⁴⁶ Bhandar 2018. European forms of cultivation were foundational to the legitimization of settler colonialism and the creation of property systems that emerged in the New World and exist through today. In *Colonial Lives of Property*, Bhandar outlines the ways in which cultivation (per Western standards) would similarly play a key role in legally and ideologically determining social dynamics of land ownership in Israel/Palestine, being the “primary legal determinant of ownership in indigenous land claims because of its imputed quality as a defining characteristic of ownership and, indeed, modernity itself.” Bhandar 2018, 118. She notes: “Modern civilization meant modernizing agriculture, which was central to the early Zionist settlement mission in Palestine during the late nineteenth and early twentieth centuries ...” Bhandar 2018, 118. Cultivation is thus the prime basis for establishing a moral and legal right to Indigenous land.

Property law was instrumental here, permitting the doctrine of discovery to inscribe and reproduce notions of privatization, individual ownership, land commodification, and Indigenous dispossession. *Terra nullius* operated by undermining the intrinsic value of Indigenous people, culture, and land. The philosophical grounding of that doctrine – a juridical “finders keepers” logic skewed in favor of European colonization that rendered land, life, and knowledge available for appropriation – echoes to this day through property law and extends into a sort of *aqua* and *biological nullius* when we consider life beyond the soil. As Laura Brace writes, “not only was property law the primary means of appropriating land and resources, but property ownership was central to the formation of the proper legal subject in the political sphere.”⁴⁷ Thus, settler colonialism’s influence on the law can be seen in the interplay among settler-colonial expansion, Western understandings of property, Indigenous dispossession, and the emergence of property law.

History as helix: Recursive dispossession

Considering property’s philosophical roots, this article presents property as an inherently political legal institution that evolved from complex historical and legal processes of Indigenous dispossession. In *Theft Is Property!*, Robert Nichols exposes the long history of legal processes that permitted the settler to gain ground by creating positive property rights and by making the Indigenous legal subject a holder of a partial right: the right to alienate property to the settler,⁴⁸ often automatically and coercively.⁴⁹ What became “legally protected property” became so through a deeply political process of proprietization – the simultaneous taking and making of property. This legal structure was neither apolitical nor neutral. It is the direct result of a violent, colonial process that structurally negated Indigenous claims to property at law.⁵⁰ As Frantz Fanon said, “[t]he settler owes the fact of his very existence, that is to say his property, to the colonial system.”⁵¹ The articulation of political identities (e.g., white, Black, Native) occurred through specific legal processes governing the classification of land (an artifact for ownership and exchange). These categories “not only eventually congealed into a structure of domination in which the latter was subordinated to the former but was also buttressed by a whole vocabulary that served to set the terms of its own critique.”⁵²

Nichols calls this “the dilemma of dispossession,” which stands for the idea that if we are to raise criticism of the structural effects of property to resist further colonial injustice from

⁴⁷ Brace 2004.

⁴⁸ Nichols 2020, 145.

⁴⁹ Grillo 2009, 146; Cerutti and Pakkasvirta 2009, 146. In the face of conquest, “Indigenous Peoples had as alternatives to either adapt or die.” Ávila Santamaria 2019, 111; Bohórquez 1996, 88. “This, however, cost them the loss of cultural identity to make way for colonization at various levels including their being, knowledge systems, power structure, and territory.”

⁵⁰ This degradation of Indigenous rights to property is similarly discussed by Ramiro Ávila Santamaria with respect to Indigenous cultural property:

Latin America entered modernity through violent and traumatic means. The underlying objective was to impose upon Indigenous worlds the aspiration to transcend tradition in order to be recognized as “modern.” This process begins with the Conquest, marked by death, exploitation, forced conversion of Indigenous Peoples, and intense extractivism of nature. It continues with baroque modernity, characterized by ethnic and cultural *mestizaje* (the making of a mixed-raced subject); proceeds through a republican-national modernity; and culminates in the globalizing modernity of neoliberalism (Leon 2013, p. 83). Throughout all these stages, there has been resistance, struggle, and degradation of Indigenous cultures and nature. A striking feature in our region is that these various modalities of modernity are not strictly sequential—they coexist simultaneously in the present and constitute the multiple and overlapping configurations of modern identity. (Echeverría 2011, pp. 36, 96). (Ávila Santamaria 2019, 136.)

⁵¹ Fanon 2001, 28.

⁵² Nichols 2020, 145.

reproducing, we are limited to using the language and tools (the law, and by implication a rights framework) that the process of proprietization created. This contradiction, he suggests, should be embraced for the insight it provides. In the Land Back movement, for instance, the discourse around reclaiming land often uses the terms “ownership” and “dispossession,” which are necessary to decolonial justice. However, the very use of the word “dispossession” itself gives credence to the notion of land possession, inadvertently centering a Western construct. He suggests that “this operated not simply by denying proprietary interests of Indigenous peoples in their ancestral lands but, rather, more paradoxically, by recognizing those interests in a highly idiosyncratic manner.”⁵³ The law granted Indigenous peoples the sole proprietary right to alienate, which “could only be fully actualized in the moment of its extinguishment, that is, by transferring it to another.”⁵⁴ While Indigenous people participated in the process of proprietization, they obtained what Nichols calls a “structurally negated proprietary right.”⁵⁵ The so-called contradiction is therefore a productive insight, showing that property – a legacy of settler colonialism – binds decolonial justice within an unsatisfactory conceptual framework.

This framework, based on the ideology of improvement, found its epistemic counterpart in the scientific method, which developed during the Enlightenment and the Industrial Revolution. Structurally, property creation in the nineteenth and twentieth centuries resulted from a systemic theft that produced “that which it presupposes”⁵⁶ and was legitimized by the law. Together, they reinforced property logics and legitimized capitalist expansion in the modern world⁵⁷ and in the collective imaginary. Property is thus a deeply political structure, not only because of its Western philosophical origins but also because it is a social creation that has taken root and is reinforced by hegemonic Western science, law, and culture. From this perspective, because displacement preceded and continues to precede the legitimacy of property creation and development, property law was not applied equitably or neutrally since its inception. Adopting Nichols’s view, then, we hold that property structurally and recursively negates Indigenous claims to property and thus inherently limits the legal system’s capacity to safeguard Indigenous rights to cultural property.

The need for a critical view of property

Present tensions with capital-centric property

Western notions of property constrain the law’s ability to address issues of Indigenous cultural property because they necessarily require processes of commodification. The Tagaeri and Taromenane exemplify this tension. Not all humans organize their lives and sense of safety around Western notions of property. The way society has been organized, therefore, has not been neutral. In *A Systems View of Life*, Fritjof Capra and Pier Luigi Luisi reference the influence of the modern industrial age on society’s adoption of a mechanistic

⁵³ Nichols 2020, 117.

⁵⁴ Nichols 2020, 117.

⁵⁵ Nichols 2020, 142.

⁵⁶ Nichols 2020, 116–17, contextualizing the dispossessive processes of the nineteenth and twentieth centuries as part of a system of land ownership generated in the Anglo settler world that “was recursive in the sense that it used a form of widespread and systemic theft as a means to generate property, thereby producing that which it presupposes.”

⁵⁷ Wallerstein 1974. Immanuel Wallerstein used the phrase “the modern world-system” to refer to the economic context of capitalist expansion that developed in the late fifteenth and early sixteenth centuries and continues today. Together with the ideology of improvement, science, particularly Western scientific rationalism, has been crucial in reinforcing property logics.

worldview.⁵⁸ This was especially impactful during the Industrial Revolution, from which the modern economy of the eighteenth and nineteenth centuries emerged.⁵⁹ Sociologist Immanuel Wallerstein affirms that this “world-economy” is an invention of modernity. Unlike other world economies that generally became empires, ours is formed without a unified political entity, expanding instead through the unifying techniques of modern capitalism, science, and technology.⁶⁰ Upheld by a Western legal system, colonial, settler-colonial, and global trade became the norm.⁶¹ Thus, capital accumulation and maximization, rather than any one political governing entity, function as the central organizing principle of the modern world. Because capital had to be generated, it excluded and extracted from a large segment of the world’s population and from nature. These economic development inventions, including the law, unequivocally center capital and those with the economic worth to be owners of it. The world system cannot, however, be said to be anthropocentric, as it neglects a large segment of people whose lifestyle resembles the Tagaeri and Taromenane of the Ecuadorian Amazon rainforest.

In fact, for some, property threatens their basic rights to housing, sovereignty, and self-determination. The IACHR’s decision in the *Tagaeri and Taromenane* case did not simply reflect a neutral reality. Its jurisprudence affirmed this tension when it acknowledged alternative forms of relating to land and culture:

For Indigenous communities, the relationship with the land is not merely a matter of possession or production; it is both a material and spiritual element that they must be able to fully enjoy, including for the purpose of preserving and passing down their cultural legacy to future generations. The culture of Indigenous community members corresponds to a distinct way of being, seeing, and acting in the world – formed from their deep relationship with their traditional lands and natural resources – not only because these resources are their main means of subsistence, but also because they are integral to their worldview, spirituality, and therefore, their cultural identity. (Emphasis added.)⁶²

Through the court’s inquiry, reasoning, dicta, and binding conclusions of law, this decision shattered a so-called neutrality of Western property systems and centered a non-Western view of property that considers a relationship to the land and the ways it figures into Indigenous peoples’ subsistence, especially for those in voluntary isolation. This decision showed that when economic development projects encroach on Indigenous cultural

⁵⁸ This worldview was advanced with full force by Newtonian mechanics in the seventeenth century, proliferating the notion that the natural world is a machine governed by exact mathematical laws, thereby building on the conceptual frameworks previously offered by Galileo Galilei and Rene Descartes in their respective areas of study.

⁵⁹ Ávila Santamaria 2019, 135. Ramiro Ávila Santamaria summarizes that “by the 18th century, a second phase of Modernity emerged – what hegemonic historiography would later refer to as “contemporary history,” which deepened the New World that begun emerging in the fifteenth century based upon “the ideological and technological nourishment from the Enlightenment and the Industrial Revolution. (Dussel 2000, 67).”

⁶⁰ Wallerstein 1974, 15–16.

⁶¹ Echoing Wallerstein’s perspective of the modern world-system, Ramiro Ávila Santamaria writes:

Modernity began with the so-called “Discovery” of the Americas, one of the most significant events in human history, as it marked the point at which the planet became the stage for a single universal history. Moreover, the Discovery “rounded off, definitively, the figure of the Earth for Man, and conveyed to him the measure of finitude within an infinite Universe” (Echeverría 2011, p. 145). Spain became the first modern empire, and the Americas entered Modernity under domination: exploited, concealed, denied, and subjected to the violence of the Conquest (Dussel 2000, p. 71). This marked the onset of globalization, created the conditions necessary for the development of capitalism, and inaugurated the colonization of the Global South (Dussel 2000, p. 66). (Ávila Santamaria, 135).

⁶² *Tagaeri and Taromenane*, IACHR at 70–71.

heritage, and the government fails to implement or comply with regulations established to safeguard Indigenous peoples' territory, it directly jeopardizes the Tagaeri and Taromenane's rights to bioculture, which implicate food and data sovereignty and cultural identity, and basic rights like housing and health.

The court's grappling with the tension between Western understandings of property and its incompatibility with Indigenous and nature rights further showed that Western understandings of property, which treat Indigenous cultural property, namely bioculture, as a mere artifact, are thus a threshold issue for realizing nature rights and, by implication, protecting Indigenous cultural heritage (tangible and intangible). The court stated:

Among Indigenous and tribal peoples, there exists a tradition of communal forms of collective land ownership, meaning that the land does not belong to an individual, but rather to the group and its community. Such notions of ownership and possession of land do not necessarily align with the classical concept of property, but the Court has established that they deserve protection under Article 21 of the American Convention. Ignoring the specific versions of the right to use and enjoy property – versions shaped by each people's culture, customs, and beliefs – would be equivalent to asserting that there is only one valid way to use and manage property, which would in turn render the protection of such rights meaningless for these communities. (Emphasis added.)

Notably, there can be no true decolonial praxis without a direct challenge to the Western foundations of property that organized society around capital maximization. Thus, a critical property theory is necessary to supplement the RoN framework and address the implementation issues laid out in Part I.

Contemporary legal definition of property

Property is the legally enforceable idea that you can use and exclude others from using that in which you have "property interests." In the legal sense, property has a dual nature: the *res* aspect, which refers to a right in a thing that is enforceable against the world (i.e., I own this thing, which is not yours); and the *personam* aspect, relating to the rights and obligations between legal subjects (i.e., I have these rights that I can enforce in relation to you). Legal formalism views property as a clearly defined legal concept with a physical character: a bounded "thing" that is governed by legal rules that recognize a person's ownership of, and dominion over, the thing owned (i.e., the owner's right to exclude). By contrast, legal realism views property more abstractly and relationally: It is not a fixed "thing" but a concept shaped by person-to-person relations rather than by person-to-thing relations.⁶³

Property's *personam* aspect developed in the late nineteenth century. Rather than being governed by a fixed internal logic, under legal realism, property became a fluid concept, adapting to socioeconomic and political contexts, with judges shaping property doctrine through their jurisprudence.⁶⁴ During this period, legal scholars decomposed property.⁶⁵ Influenced by Progressive thought, legal realists and legal pragmatists "attacked the physicalist and absolutist conception of property described in Sir Willam Blackstone's *Commentaries on the Laws of England*, published in 1765."⁶⁶ This shift allowed property law

⁶³ Arnold 2002, 284–91.

⁶⁴ Arnold 2002, 341–49.

⁶⁵ Grey 1980.

⁶⁶ Arnold 2002, 286.

to extend legal protection to intangibles (e.g., corporate shares, ideas) in ways analogous to its protection of tangibles (e.g., a house).⁶⁷ The result was that “property” became a collection of various rights rather than “property-as-thing-ownership.” The metaphor that captures this late-nineteenth-century and twentieth-century development is the “bundle of sticks,” which express legal realism’s normative proposal: Property is a relation between people, each of whom carries a bundle of sticks, where each stick represents a different right, such as the right to exclude, the right to use, and the right to alienate or transfer. These rights, because of how they get enforced *as against others*, are considered social relationships legible by the law. This metaphor draws on Wesley Newcomb Hohfeld’s work,⁶⁸ which emphasized property as a set of fundamental legal relations.

Hohfeld’s contribution was to dismantle the formalist assumption that property is the whole, dividing it into eight fundamental legal relations: jural opposites (concepts that negate each other) and jural correlatives (legal concepts that coexist with each other).

Jural opposites	Jural correlatives
Right – No right	Right – Duty
Privilege – Duty	Power – Disability
Power – Disability	Power – Liability
Immunity –Liability	Immunity – Disability

The jural correlatives are relationships that must exist together.⁶⁹ By contrast, the jural opposites describe concepts that negate one another.⁷⁰ By breaking property into these relational components, Hohfeld provided the foundations for conceptualizing property as a collection of legally constructed relationships between people *with respect to things*. Property, in the contemporary legal sense, is thus understood in terms of its components (the “sticks”).

Where the bundle-of-sticks theory ignores social context

We argue that, as much as legal realists recognize the influence of social context, they ignore a significant part of it. Since Hohfeld’s decomposition of property occurred within a regime governed by Locke’s ideology of improvement, capital maximization is central to definitions of property. This blind spot can obscure a critique of it.⁷¹ In *Reconstructing Property*, for example, Craig Anthony Arnold argues for a new metaphor to replace the bundle of sticks, naming many theoretical problems with it⁷² (he proposes a “web of interest” instead). He gets here by showing that when conceived as a bundle of rights, property is defined by the activities at the margins of property law rather than by a core or ideal.⁷³ Hence, contemporary understanding holds that property is not absolute nor a physical object, but a

⁶⁷ Merrill and Smith 2011.
⁶⁸ Hohfeld 1913.
⁶⁹ If one person has a right, another has a duty; if one has a privilege (or liberty), another has a no-right to prevent that action; if one has a power, another is subject to a liability; and if one enjoys an immunity, another suffers a liability.
⁷⁰ A right excludes a no-right, a privilege excludes a duty, a power excludes a disability, and an immunity excludes a liability.
⁷¹ See generally Arnold 2002; Grey 1980.
⁷² Arnold 2002, 291–306.
⁷³ Medin and Barsalou 1987, explaining that concepts get defined through a process of categorization that starts on one of three reference points: the boundaries, the core, or the ideal.

malleable, divisible set of rights held by and enforced against people.⁷⁴ Put simply, property law grants the owner broad rights (e.g., the right use, exclude, transfer) to protect legitimate uses (e.g., house renovation if it implies “progress”) from non-owners’ interference (e.g., trespass). The law can proliferate property rights as various needs for exclusion arise in society. For this reason, the legal realist lens views property as a fluid concept without a core.⁷⁵

By contrast, Arnold identifies this indeterminacy as a problem, as it confuses scholars and practitioners into thinking that property lacks a coherent structure.⁷⁶ He acknowledges that the contemporary definition of property evolved from the economic shifts of the late nineteenth and twentieth centuries, where property law – at the frontier of new wealth-maximizing technologies that evolved in that period (e.g., corporate shares, intellectual property) – became defined by capital, global trade, and a financialized economy.⁷⁷ But even his critique and proposed reconstruction are absorbed by the framework that obscures the inherent capital-centrism of property. We hold that the bundle-of-sticks theory margin definition coherently captures that property is a conceptual structure with a settler-colonial telos: a preordained framework that centers capital maximization and influences how people use their “sticks.”

The centrality of industry, economic development, and global trade implies a social context structured by racial capitalism. Thus, for critical legal theorists, the legal realist definition served the important purpose, which we uphold, of making clear that property sustained racial hierarchies and settler-colonial logics of dispossession. Undermining the fixity of legal formalism’s conception of property enabled critical legal theorists to show that legal social relations were hierarchized along the lines of institutional racism. In *Whiteness as Property*, Cheryl Harris argues that property law in the United States historically transformed white identity into a legally and socially protected asset with specific benefits unavailable to other races. Accordingly, courts and legal institutions treated whiteness much like property: something worthy of protection and defense. In turn, a racial regime emerged wherein white folk were owners and Black folk were commodities.⁷⁸ In *Colonial Lives of Property*, Bhandar adds that property doctrine further operated to legitimize a global regime of ownership rooted in Indigenous dispossession. From the trans-Atlantic slave trade and Indigenous genocide, legal doctrines systemically justified the oppression of certain identities. Structurally, then, while legal realism correctly captured property’s social dimension, the bundle-of-sticks definition is normatively bankrupt insofar as it permitted the commodification and dispossession of nonwhite folk. Bhandar suggests that a coherent theory of property must therefore comprise both the tangible “commodity” form of property and its “social” or “identity” relations, rather than detach “the material basis of producing property and the subjectivities which emerge in relation to it.”⁷⁹ Indeed, understandings of property cannot disaggregate the abstract from the material.

Critical property theory: Toward an integrative definition of property

Rather than absolutely rejecting the problematic logics of both the legal formalist conceptions of property, grounded in conservative thought, and its legal realist counterpart,

⁷⁴ Arnold 2002, 294.

⁷⁵ Arnold 2002, 294.

⁷⁶ Arnold 2002, 295.

⁷⁷ Arnold 2002, 295.

⁷⁸ Harris 1993, 1707–91: “White identity and whiteness were sources of privilege and protection; their absence meant being the object of property. Whiteness was the characteristic, the attribute, the property of free human beings.”

⁷⁹ Bhandar 2015.

grounded in progressive thought, property should be reassembled through an integrative approach to avoid reinscribing colonial legacy into its redefinition.

Embracing a formalist, pro-thingness view as a starting point

Property ought to encompass its tangible aspect, not merely at the point of legal recognition but also to acknowledge how capital shapes *people's interest in using something*. The bundle-of-rights theory neglects the formalist *thingness* aspect of property. Contemporary scholars criticize this. An “anti-thingness” view creates a gap in understanding inconsistent with how property is conceived by society and even by judges, who still meaningfully consider the specific *thing owned* in their analyses.⁸⁰ Henry E. Smith's contrasting work is helpful here. Drawing on legal formalism, he elevates property's thingness aspect, arguing that property's *res* aspect is like the architecture of the modern world, designed by various legal forms of exclusion, and thus resilient to change.⁸¹ Contrasting legal realism and critical theory, he holds that property is not merely about social relations or a collection of broad rights but about structured horizontal relationships *to things*. It is an “exclusion strategy [that] defines a chunk of the world – a thing – under the owner's control, and much of the information about the uses, their interactions, and the user is irrelevant to the outside world.”⁸² This perspective offers two insights.

First, it shows that property is a person's desire to use a thing. According to Smith and J.E. Penner, property law functions to legalize people's *use interests*.⁸³ The *right to exclude* is not itself property, as legal realism would have it; it is a use interest. Exclusion becomes a means to an end, and *property* is the end goal. We adopt this view as we find the recognition of the thingness aspect of property instrumental. It shows that while capital has predominantly shaped people's *interest in using something*, this can change through a shift in our value system. Viewed this way, property's resilience stems from a fixation with capital maximization, but the same property architecture can serve the purpose of life maximization. That the law can legitimize people's use interest is helpful for the proposition that ecocentric values can be legitimized, too.

Second, a focus on *thing-ownership* reveals a morally reprehensible logic. In *Reconstructing Property*, Craig Anthony Arnold provides strong support for a return to a *pro-thingness* understanding of property as inherently related to the objects of people's interest. Yet he hesitates to follow this logic to its endpoint when he considers how this conceptualization might apply to the ownership of a corporation, an entity the law considers a real person. Despite his robust critique of the bundle-of-sticks theory, at this point he hesitates about the implication of allowing a corporation to be treated as an object of property interests, acknowledging that owning a corporation in light of its legal personhood would entail “the morally reprehensible concept of slavery: ownership of another person.”⁸⁴ This discomfort finds a formalist parallel with William Blackstone, a prominent English jurist, who in 1766 recognized that:

⁸⁰ Arnold 2002, 313. “Even when using the bundle of rights metaphor, judges look for the specific object of those rights in analyzing their scope.” (quoting *Citizens Nat'l Bank of Cincinnati v. Durr*, 257 U.S. 99, 110–11 (1921) (identifying the object of a property interest in a seat on the New York Stock Exchange as the New York Exchange building and accompanying rights to enter it and transact business there, which was contended to be beyond the power of Ohio to tax, despite the acknowledgement that “[a]ll rights are intangible personal relations.”).

⁸¹ Smith 2015, 2058. “The system of property law endures. Because property law does what contract alone cannot – furnish a modular platform for horizontal interactions with respect to things – change in property law has largely taken place within this system.”

⁸² Smith 2011, 282.

⁸³ Penner 1997, 70.

⁸⁴ Arnold 2002, at 358–60.

there are very few, that will give themselves the trouble to consider the original foundation of this right [to property ownership]. Pleased as we may be with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.⁸⁵ (Emphasis added.)

Rather than overlooking the endpoint of a property logic that justifies and even promotes slavery, and rather than attacking Blackstone's conception of property as physical and absolute, we propose confronting them. For critical property theory, recognizing and interrogating these assumptions is the necessary starting point for a reconstruction of property outside the influence of a colonial paradigm and the realization of nature rights and the protection of cultural property. As Margaret Davis notes, "[t]he debate over cultural property underlines the limitations of the concept of property ... alternative conceptions also need to be evoked."⁸⁶ Without this starting point, decolonial legal technology is futile.

Embracing the bundle-of-sticks theory and its criticism within context

The contemporary recognition that property consists of social relationships should not be dismissed, as legal formalism would do. Yet the bundle-of-sticks theory alone remains inadequate and has been widely criticized, prompting some scholars to call for a new property metaphor.⁸⁷ Despite this, entrenched assumptions about improvement, privatization, and dominion continue to shape efforts to reconstruct property's legal meaning. In *Reconstructing Property*, Craig Anthony Arnold, echoing Michael Heller's work, proposes replacing the bundle of sticks with a "web of interests."⁸⁸ However, the criteria he retains ultimately reproduce the same foundational problems embedded in Western conceptions of property.

First, although scholars gesture toward stewardship principles in property's reconceptualization as a way to move beyond traditional ownership dynamics,⁸⁹ Arnold maintains that any redefinition must be functional for courts, legislatures, lawyers, and scholars. "[I]t must be built on theories and perspectives of non-environmentalists, as well as environmentalists, if it is to change the way we think about property."⁹⁰ While we agree on the need for functionality, a critical perspective rejects a redefinition confined to the system's limitations. Such an approach assumes that institutions (legal, academic) and the people within them would remain unchanged – that is, without embracing any systemic shifts or recognizing their role in advancing or thwarting decolonial justice in property. As Lavery's concurring opinion in Part I reveals, even judges acknowledge that, at some point, they will eventually be unable to rely on a paradigm that refuses to confront manifest injustice.⁹¹ As this occurs, institutions and jurisprudence will also need to evolve. Although Ecuador's legislative and executive branches demonstrate regression, its 2023 Constitutional Court mandate and the 2025 IACHR decision show this very progression.

Second, Arnold insists that a new metaphor for property must preserve property's distinctiveness as a legal category. He raises a plausible concern: Property rights should be differentiated from other rights because, if conflated with other rights, both property and

⁸⁵ Blackstone 1766.

⁸⁶ Davis 2007, 124.

⁸⁷ Grey 1980.

⁸⁸ Arnold 2002.

⁸⁹ See generally, Carpenter, Katyal, and Riley 2008, 1065-1079, Arnold 2002.

⁹⁰ Arnold 2002, 284.

⁹¹ See, *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 2018.

other areas of law will become impoverished, reinforcing the assumption that things gain value only when converted into property (understood as thing-ownership). In turn, this assumption undermines the ability of other legal categories, such as contract law, to encode value and protect interests. He asks, “Is the only way, or even the best way, to maximize wealth in market transactions to create property interests in the contract rights negotiated in these transactions?”⁹² While we agree that the prevailing definition of property is problematic because it forces valuable interests into logics of ownership and privatization, his questioning remains bounded by the framework that defines property precisely in those terms. Structurally, the fact that property constructs value through exclusion and dominion exposes the underlying commitment to wealth maximization in proprietization. Although Arnold seeks to avoid making everything we value into property, this reveals the limit of his critique. We should ask different questions – ones that cast doubt on the current purpose of proprietization.

While critical property theory embraces Hohfeld’s contribution and the bundle-of-sticks framework, it rejects the premise that capital accumulation should determine property’s use. We argue that the bundle of sticks should thus be contextualized differently. If, as Arnold suggests, property is defined by its margins, then reconstruction must recognize that nature now exerts a competing gravitational pull as capital did in the late nineteenth and twentieth centuries. Nature, therefore, must be taken seriously in any redefinition of property, not merely as another interest within an unchanged structure.

The bundle of sticks can operate within both capital-centric and ecocentric worlds; the question is which ontology it serves. Part III considers what such a reconstruction might entail.

“Property” through a critical lens

Through this critical lens, this article views property as people’s claimed interest in using land, objects, other people, and nature to generate and accumulate capital, even when doing so must reduce them to artifacts for market exchange and undermine their intrinsic, noneconomic value. This account builds on contemporary understandings of property while recovering Blackstone’s insight that property entails illegitimate dominion. Viewed this way, property law structurally sustains Indigenous dispossession and racial capitalism, and therefore even well-intentioned decolonial efforts, such as nature rights or approaches to protect cultural property, risk replicating the very issues leading to these efforts. Reconstructing property thus requires reconsidering its recursive logics to avoid this corruption.

This article uses property scholars’ accounts as diagnostic tools: They clarify how property continues to depend on the commodification of nature and the dispossession of those deemed less than human. It is thus necessary to elevate the person–object relation attributed to legal fundamentalism, just as it is necessary to recognize that legal realism’s person–person relation exists within the context of capitalism, and that person–person relations with respect to things are infused, by and large, with the specific purpose of wealth maximization, even at the cost of dehumanization, culture museification, and nature reification.

Part III: Decolonize or perpetuate: Ecocentric property

An ecocentric intervention

Critical property theory, as laid out in Part II, is an ecocentric intervention that offers a lens to evaluate the colonial logics that permeate our understandings and use of property, and to

⁹² Arnold 2002, 332.

reimagine property relations in ways that safeguard nature and, thereby, Indigenous cultural property. Structurally, it makes clear that the ongoing influence of settler colonialism in shaping legal approaches to safeguarding Indigenous cultural property is entrenched and, thus, bound to be perpetuated if left unquestioned. Its intervention is to supplement the Rights of Nature initiative to address the issues underlying the enforcement gaps discussed in Part I that hinder its implementation. To realize nature rights and bring forth *Sumak Kawsay* means to use the law to affirm life, relationships, personal dignity, and harmony between humans and nature. Leaving property as is would produce the opposite, *Llaki Kawsay*: “a world without wisdom or personal experience, lacking in communal living, without values, and without a relationship to nature.”⁹³ This reorientation requires moving away from scientific rationalism, coloniality, and capitalism’s benefit-value metrics for progress and toward a systemic view of life in which relationality, reciprocity, responsibility, care, and affectivity are at the center.⁹⁴ Moreover, because *Sumak Kawsay* requires harmony with the natural world, the metric for development must center on life-generation and collective well-being. The law ought to respond to this shift in creative, relationship-affirming, and ecocentric ways. This is the intervention of a critical property theory.

A path forward requires legal infrastructures rooted in collective governance, relational ethics, and the dismantling of property paradigms that treat land, life, and knowledge as assets to be enclosed and individually owned for profit. A critical property theory lens suggests that people can opt out of financial returns and prioritize affordability and dignity. Thus, property can be redefined outside of the ontology that created the concept. This intervention helps to advance an ecocentric definition of property that aligns with and enhances the adoption of the RoN framework. Just as the RoN framework functions as a Western legal translation of the *Sumak Kawsay* cosmology (despite relying on liberal constructs such as the concept of “rights”), critical property theory supports a similar translation of Indigenous ways of relation to land into the language of property. Although a reliance on the vocabulary of “property” persists, this critical lens calls for redefining that concept in accordance with three ordering principles: relationality, reciprocity, and responsibility, so that the law can begin to respond to a systemic view of life, Indigenous values systems, and decolonial justice.

Refuse to reimagine

To protect Indigenous cultural property, we ought first to refuse to use frameworks that reinforce individual ownership as the only form of protection. Intellectual property, for example, relies on patents that privilege individual rather than collective rights and fail to capture Indigenous relationships to traditional knowledge and genetic material.⁹⁵ In research, development, and the bioeconomy, biological resources (such as plants) become commercially valuable for the intangible information they contain: genetic material and traditional knowledge of use, preparation, and application. This commodification of nature, when extracted for innovation and patenting, often entails Indigenous dispossession. Biogenetic data and ecological knowledge fuel biotechnological research in the pharmaceutical and agricultural industries. Corporations seek ownership of this biodata through patents that confer exclusive property rights (to use, exclude, transfer), thereby reinforcing market influence and profitability. The patenting process, however, similar to land enclosure, is not neutral.

⁹³ Hidalgo-Capitán 2014, 51.

⁹⁴ Ávila Santamaria 2019, 224.

⁹⁵ WIPO 2020.

In *Figures of Invention*, Alain Pottage and Brad Sherman show that what becomes an “invention” is not simply discovered and then protected by law. Rather, it becomes so through the legal and representational practices that inscribe information and bias throughout the so-called discovery, extraction, analysis, communication, and legalization processes.⁹⁶ The legal inquiry in a patent application does not begin with the provenance of the so-called invention. “The actual operations which have taken place in the mind of the inventor,”⁹⁷ such as the context and relational knowledge, technique, care, and stewardship, which constitute the so-called invention, are made invisible under the law. In ignoring the invention’s provenance, then, intellectual property (IP) doctrine fails to recognize biological data’s cultural context, its system of care, and the web of relationships attached to it.

When we see biological data as constitutive of Indigenous cultural heritage, we ought to recognize data’s provenance to avoid recursive dispossession of intangibles. Yet IP law overlooks it and therefore structurally devalues Indigenous and local knowledge, denying it “legitimacy as a protectable interest,” and “allowing others to use it freely.”⁹⁸ This makes Indigenous cultural property “up for grabs” until it is patented by an inventor with access to the patent application (typically from Western, educated, industrialized, rich, and democratic, or “WEIRD,” backgrounds). As Harris notes, “[i]ntellectual property was created historically always in societies in which advanced property institutions over tangible resources were entrenched, and, to varying degrees, absorbed the existing mental frameworks of those institutions.”⁹⁹ Once again, the law does not assign protection neutrally. As land-based property doctrine deems so-called uncultivated territory *waste*, intellectual property doctrine deems raw materials *wild*, converting local ecologies and traditional knowledges into underutilized raw materials, valuable only when transformed through biotechnological innovation, echoing Locke’s ideology of improvement. Thus, to move beyond the patent, we should creatively reject the individual ownership framework by, for example, ensuring that, if patents are granted, the proprietary is not an individual but a community, which could be represented through an incorporated entity with an internal governance structure that faithfully reflects a majority Indigenous, community-elected leadership and a democratically governed membership.

Second, we ought to refuse limited definitions of Indigenous cultural property. In the context of this article, biological resources are viewed as Indigenous bioculture because Indigenous peoples are the guardians of the biological tangibles and intangibles:¹⁰⁰ plants, animals, and even Indigenous bodies themselves,¹⁰¹ as well as Indigenous technical knowledge. Viewed this way, bioculture must be recognized as Indigenous cultural property to prevent modern-day colonization through modern technology. To meaningfully protect Indigenous knowledge and sovereignty in the context of the bioeconomy, the newest frontier of extraction, international legal frameworks should provide protection for Indigenous data. Legal frameworks should thus recognize biodiversity, seed knowledge, and ecosystems as material expressions of relational cultural inheritances inseparable from Indigenous cultural heritage.

⁹⁶ Pottage and Sherman 2010, 1–18.

⁹⁷ Robinson 1890, 157.

⁹⁸ Roht-Arriaza 1996–97, 942.

⁹⁹ Harris 1996, 47.

¹⁰⁰ Roht-Arriaza 1996–97. The link between the tangible and the intangible is evident in the context of Western appropriation of Indigenous peoples and local communities’ scientific and technical knowledge of agriculture.

¹⁰¹ Wu 2020. Not only is animal and plant genetic information extracted for research and commercial purposes, recently increasing interest exists in researching Indigenous peoples’ microbiota as researchers attempt to develop therapies to diversify the human microbiome of industrialized populations predominantly from the Global North or those following predominantly Western nutrition and lifestyle.

One concrete step toward this transformation is to expand the scope of UNDRIP. Specifically, Articles 11, 12, and 31 of the UNDRIP should be broadened to explicitly include natural and biogenetic resources, seed knowledge, and ecosystems, not merely as artifacts of traditional knowledge but as living cultural relations. This reframing would acknowledge that the natural world is inextricably linked to Indigenous culture and governance systems. While the nonbinding nature of UNDRIP rights may pose implementation challenges, it also presents opportunities for Indigenous communities to redefine fairness, governance, and economic justice through community and political organization and self-determination. This reorientation becomes especially urgent in the context of the bioeconomy, where biodiversity is commodified without regard to the specific relationships, histories, and meanings embedded in the biodiverse material itself. Because decolonization is primarily limited by the same language that echoes and encodes colonial logics of Indigenous dispossession, explicit legislative language is thus a meaningful starting point.

Decolonial justice in property systems thus means protecting Indigenous cultural heritage in the broad sense of the term. In doing so, we come to terms with the need to assert Indigenous sovereignty in alternative ways that do not rely on a system that fundamentally promotes Indigenous dispossession. Continuing to use patent law to validate a type of taking that allows “the expropriators [to] benefit from a kind of unjust enrichment – reaping profits which are disproportionate to their (minimal) inventive effort” while profiting from Indigenous knowledge and technology, which is accumulated over centuries,¹⁰² creates more insecurity. It perpetuates the expansion of economic injustice through practices like biopiracy, bioprospecting, and cultural appropriation, which either divest Indigenous communities entirely or force them into negotiation within the same paradigm that upholds colonial legacy. A critical property theory lens enables us to recognize the risks of participating in the bioeconomy without interrogating the property relations that continue to disenfranchise Indigenous peoples. This guidance determines whether we decolonize or perpetuate colonial logics by modern means.

Property reimagined

A shared understanding of property’s legal definition has arguably been a helpful technology to organize complex societies. Normatively, this article takes the position that property, as defined currently, functions to objectify, control, and instrumentalize nature and, by implication, Indigenous bioculture. Nature and Indigenous rights violations caused by this core logic, we argue, cannot be undone simply by constraining property rights, such as through property doctrines including public trusts, natural use, and nuisance, which are thought to be more nature-friendly.¹⁰³ And, despite the RoN framework, Ecuador shows us that implementation issues trace back to the clash between Western notions of property and economic development and Indigenous values. While some scholars correctly identify the need to better accommodate other values, like stewardship and responsibility,¹⁰⁴ we reject attempts to retrofit these values into the current property framework. A coherent redefinition of property would cease to center on the best ways to maximize wealth (or attempt to derive the meaning of “value” through that end). With nature and, by implication, Indigenous bioculture at the center, property’s legal definition should focus on generating and maximizing life instead.

¹⁰² Wu 2020

¹⁰³ Arnold 2002, 349–50, identifying three property doctrines that articulate constraints on property rights that function to protect the environment with respect to certain types of land or water against certain uses. These include (1) the public trust doctrine, (2) the natural use doctrine, and (3) the nuisance doctrine.

¹⁰⁴ Arnold 2002, 281–84.

Such a transmutation would entail a semantic shift that genuinely captures the values underpinning Indigenous relationality. For example, understanding property more profoundly as *belonging* (verb) than as *a belonging* (noun) creates a substantive ontological shift. Rather than dominion over a thing owned, property becomes a responsibility for the thing we belong to. This, in turn, would create a different type of architecture. Atop it, we might continue to use the bundle-of-sticks metaphor, rooted in Hohfeld's theory.¹⁰⁵ The bundle of sticks worked in society due to its efficiency, but it allowed "property" to be defined by economic developments that promoted capital-maximization. The shift at this level would thus entail contextualizing the bundle of sticks within an ecocentric framework to legitimize the reality that today, nature is becoming central. In this view, the bundle-of-sticks metaphor would become problematized: *Who* holds the bundle, *how* the sticks are used, and for *what* purpose they are used would not be taken for granted. Said differently, while the property structure remains, the context or telos changes from capital-maximization to life-maximization. We get to choose.

Alternatively, if property remains unchanged, property law should be subordinated to contract law to ensure stewardship of cultural property is achieved without "ownership." Because property is fundamentally defined by ownership, commodification, and commensurability,¹⁰⁶ safeguarding Indigenous cultural property by infusing responsibility into property law is contradictory. Indigenous cultural property should not be subjected to a process of commodification that flattens meaning to market value and individual ownership authority. The protection of cultural property ought to rely on a legal design that decommodifies it and collectivizes ownership. The market cannot be the force that controls the value of that which is labeled "cultural property."¹⁰⁷ This contrasts with scholars who argue that cultural property should not be treated separately from other property, since it becomes property once people recognize its value.¹⁰⁸ This position assumes that the market should influence the value of culture. Moreover, it assumes that legal protection follows commodification, thereby centering on the utility of markets and the right to dominate. The opportunity here is to achieve cultural property protection outside of this paradigm.

Scholars have identified the importance of relating to something through *responsibility* and *obligation* rather than *dominion*.¹⁰⁹ Contract law accommodates this. Though usually a tool for business and capital accumulation, it permits encoding fiduciary duties, democratic governance, and principles-based legal social relations outside "the letter of ownership."¹¹⁰ Contractual agreements would serve a utilitarian purpose here: creating legal designs that protect, conserve, and maximize value without processes of commodification. Unlike property law, where authority is grounded in exclusion and control, in contract law, it is grounded in consent and relationship. Therefore, contract law permits subordinating the authority over a thing to the duty or responsibility to act in certain ways (i.e., according to stewardship principles) toward a thing.

For example, worker-owned cooperatives permit the exchange of labor (rather than capital) for decision-making power. One worker has one vote, regardless of their initial

¹⁰⁵ Cf. Arnold 2002, suggesting we need a new metaphor to replace the bundle-of-sticks metaphor for property.

¹⁰⁶ Carpenter, Katyal, and Riley 2008, 1045–46, where the authors' analysis concludes that while property critics, including Eric Posner, Michael F. Brown, Naomi Mezey, and Kwame Anthony Appiah, may differ in some respects, "they all converge on a similar underlying view of property itself as fundamentally defined by ownership – with its rights of alienability and exclusion and its norms of commodification and commensurability."

¹⁰⁷ Cf. Posner 1992, 225, arguing that "when art is significant enough on cultural grounds, it will usually be purchased by, or given to, a museum."

¹⁰⁸ Posner 1992, 222–24, that cultural property "is valuable to the extent that people care about it and are willing to pay to consume or enjoy it" and should not be regulated but rather be treated as normal property.

¹⁰⁹ Carpenter, Katyal, and Riley 2008, 1114.

¹¹⁰ Carpenter, Katyal, and Riley 2008, 1073–74.

capital investment. Through governance documents, policies, and agreements, these entities embody seven principles,¹¹¹ which foster cooperation, care, and democracy. Cooperatives align with *Sumak Kawsay* because of their legacy in Black tradition, which similarly recognizes cooperation as “one of nature’s most important schemes for survival.”¹¹² In the United States, cooperative economic development was essential to African American liberation as it provided “economic stability, camaraderie, resource and profit sharing, education and training, high-quality goods and services, and community development.”¹¹³ When structured according to Indigenous values or Ostrom’s commons governance principles,¹¹⁴ which similarly place cooperation as a tenet, contract law can design legal containers to protect Indigenous bioculture while advancing sustainable economic development in harmony with nature.

Contract law can scale collectivization. One example is through federations made up of allied cooperative entities with a diverse membership base. If a federation obtains a patent, it would structurally collectivize the patent. The entire ecosystem would gain ownership rather than a single entity or individual. Moreover, agreements can shape how entities relate to one another, ensuring a decommodified, principle-based exchange that promotes open access to so-called intellectual property. This can be facilitated by legal tools such as the Open Material Transfer Agreement (OpenMTA), which provides for the open exchange, access, nondiscrimination, attribution, redistribution, and reuse of biological materials.¹¹⁵ In this way, contract law would facilitate cooperative innovation in global biotechnology. Another example is through community land trusts (CLTs). These are nonprofit entities that hold real property for nonspeculative collective housing development. The CLT ensures housing affordability through the ground lease agreement, which enshrines limited equity provisions upon resale, thereby limiting the commodification of housing and encouraging land stewardship for community preservation. Similarly, contract law could create safeguards for protecting Indigenous bioculture through fiduciary duties and democratic governance rooted in cooperative or Ostrom’s principles. This approach bridges theory and praxis.

Conclusion

The Rights of Nature framework is instrumental for protecting Indigenous cultural property, understood broadly as *Indigenous bioculture*, as it promotes stewardship and responsibility rather than ownership and dominion. While often criticized as idealistic due to implementation issues, such challenges do not signify failure; they reveal the limits of retrofitting decolonial, ecocentric frameworks into a legal infrastructure shaped by a

¹¹¹ The seven cooperative principles include (1) voluntary and open membership, (2) democratic membership, (3) member economic participation, (4) autonomy and independence, (5) education, training, and information, (6) cooperation among cooperatives, and (7) concern for community. International Cooperative Alliance 2026.

¹¹² Williams 1993, 151.

¹¹³ Gordon Nembhard 2021, 213.

¹¹⁴ Ostrom 1990, 88–101. Elinor Ostrom’s design principles for governing commons include clearly defined boundaries for both resources and users; rules congruent with local conditions; collective-choice arrangements allowing users to participate in rule-making; monitoring by users or accountable parties; graduated sanctions for rule violators; accessible, low-cost conflict-resolution mechanisms; minimal recognition of the community’s right to self-organize; and nested governance structures for larger or interconnected commons.

¹¹⁵ Open Plant n.d. The OpenMTA is a material transfer agreement (MTA), a standardized legal tool that enables individuals and organizations to share their materials on an open basis created with the input from researchers, technology transfer professionals, social scientists, lawyers, and other stakeholders from across the globe to ensure the values of open communities and the practical realities of technology transfer are articulated in legally enforceable language. <https://www.openplant.org/openmta/>.

colonial legacy of property and Indigenous dispossession. As Ecuador shows, legislative and executive inertia creates enforcement gaps, which we identify as the real jurisdictional challenge to realizing nature rights and protecting Indigenous cultural property.

Viewed this way, legal approaches to cultural property are not merely influenced by settler colonialism; they inscribe and reproduce colonial logics through property law. As the recent IACHR case *Tagaeri and Taromenane v. Ecuador* confirms, protecting Indigenous rights to territory and culture requires confronting Western understandings of property. This article argues that a critical property theory supplements Rights of Nature. It questions the logics of the Western property and advances an ecocentric reconstruction of property that avoids reducing nature and Indigenous bioculture to artifacts. To bridge theory and practice and resolve remaining jurisdictional challenges, property must be reimagined.

Acknowledgements. We would like to express our sincere gratitude to water and land defenders in every corner of the world who advocate for nature's rights and risk their lives stewarding land and defending life against corporate interests; to grassroots communities and practitioners in Ecuador who provided guidance, insight, and feedback for this article and who have been at the forefront of the Ecuadorian case studies mentioned herein; to the organizers and practitioners in the solidarity economy and community land trust movements in New York City, whose work served as inspiration in reimagining property relations in the context of this article; and to the anonymous reviewers for their helpful feedback on an earlier version of this article. Any shortcomings or errors are the sole responsibility of the authors.

References

- Arnold, Craig Anthony. 2002. "The Reconstruction of Property: Property as a Web of Interests." *Harvard Environmental Law Review* 26.
- Astolfi, Maria C. T., Flores Warĩnkwi, et al. 2015. "Partnerships with Indigenous Peoples for an Ethical Bioeconomy." *Nature Communications*. <https://doi.org/10.1038/s41467-025-57935-y>.
- Ávila Santamaria, Ramiro. 2019. *La Utopía del Oprimido: Los Derechos de la Pachamama (Naturaleza) y el Sumak Kawsay (Buen Vivir) en el Pensamiento Crítico, el Derecho, y la Literatura*. Madrid: Akal/Inter Pares.
- . 2024. "The Systemic Theory of Law in Jurisprudence of Nature in Ecuador: From Machine to the Web of Life." In *More Than Human Rights: An Ecology of Law, Thought and Narrative for Earthly Flourishing*, 259. New York: New York University.
- Bhandar, Brenna. 2015. "Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony." *Journal of Law and Society*, June.
- . 2018. *Colonial Lives of Property*. Durham, NC: Duke University Press.
- Blackstone, William. 1766. *Commentaries on the Laws of England*. Vol. 2, *Of the Rights of Things*. Oxford: Clarendon Press.
- Bohórquez, Carmen. 1996. "Utopía y pensamiento liberador en América Latina." In *Utopía y nuestra América*, edited by Horacio Cerutti and Oscar Agüero, 88. Quito: Abya Yala.
- Brace, Laura. 2004. *The Politics of Property: Labour, Freedom and Belonging*. Edinburgh: Edinburgh University Press.
- Capra, Fritjof, and Pier Luigi Luisi. 2014. *The Systems View of Life: A Unifying Vision*. Cambridge: Cambridge University Press.
- Carpenter, Kristen A., Sonia K. Katyal, and Angela R. Riley. 2008. "In Defense of Property." *Yale Law Journal* 118: 1022.
- Cerutti, Horacio, and Jussi Pakkasvirta. 2009. *Utopía en marcha*. Quito: Abya Yala.
- Davalos, Pablo. 2014. "El Sumak Kawsay ('buen vivir') y las cesuras del desarrollo." In *Antología del pensamiento indigenista ecuatorino sobre Sumak Kawsay*, edited by Antonio Luis Hidalgo-Capitan, Alejandro Guillen Garcia, and Nancy Deleg Guazha, 142. Huelva: CIM/FIUCUHU/Pydlos.
- Davis, Margaret. 2007. *Property: Meanings, Histories, Theories*. London: Routledge-Cavendish.
- Dernbach, John C., James R. May, and Kenneth T. Kristl. 2015. "Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications." *Rutgers University Law Review* 67: 1169, 1171–75, 1177–79, 1181–83.
- Dussel, Enrique. 2000. "Europa, Modernidad y eurocentrismo." In *La colonialidad del saber: eurocentrismo y ciencias sociales*, edited by Eduardo Lander. Perspectivas latinoamericanas, Caracas, Unesco – FACES.
- Fanon, Frantz. 2001. *The Wretched of the Earth*. London: Penguin. Originally published 1961.
- Garner, Bryan A., ed. 2014. *Black's Law Dictionary*. 10th ed. St. Paul, MN: Thomson Reuters.
- Gordon Nembhard, Jessica. 2021. *Collective Courage: A History of African American Cooperative Economic Thought and Practice*. University Park, PA: Pennsylvania State University Press.

- Grey, Thomas C. 1980. "The Disintegration of Property." In *Property: Nomos XXII*, edited by J. Roland Pennock and John W. Chapman, 69–85. New York: New York University Press.
- Grillo, Rosa María. 2009. "La utopía de los jesuitas en la literatura paraguaya contemporánea." In *Utopía en marcha, Quito, Abya Yala*, edited by Horacio Cerutti and Jussi Pakkasvirta. Quito: Editorial Abya Yala.
- Harris, Cheryl I. 1993. "Whiteness as Property." *Harvard Law Review* 106(8): 1707–91. <https://doi.org/10.2307/1341787>.
- Harris, J. W. 1996. *Property and Justice*. Oxford: Clarendon Press.
- Hohfeld, Wesley Newcomb. 1913. "Fundamental Legal Conceptions as Applied in Judicial Reasoning." *Yale Law Journal* 23: 16.
- Hidalgo-Capitán, Antonio Luis. 2014. "Seis debates abiertos sobre el Sumak Kawsay." *FLASCO Ecuador, Revista de Ciencias Sociales* 48, Dossier: En busca del Sumak Kawsay, 51.
- International Cooperative Alliance. 2026. "Cooperative Identity, Values, and Principles." <https://ica.coop/en/cooperatives/cooperative-identity>.
- Kauffman, Craig M. 2024. "Global Patterns and Trends in Rights of Nature Legal Provisions: Insights from the Eco Jurisprudence Monitor." In *MOTH Project*, May. New York: NYU MOTH Project (The More-Than-Human-Rights-Project).
- Kotzé, Louis J., and Paola Villavicencio Calzadilla. 2017. "Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador." *Transnational Environmental Law* 6(3): 401–33. <http://doi.org/10.1017/S2047102517000061>.
- Locke, John. 1960. "Of Property." In *The Two Treatises of Government*, 40. Cambridge: Cambridge University Press.
- Medin, Douglas K., and Barsalou, Lawrence W. 1987. "Categorization Process and Categorical Perception." In *Categorical Perception: The Groundwork of Cognition*, edited by Stevan Harnad, 455, 463–65, 474–79, 484 tbl. 16.3. Cambridge: Cambridge University Press.
- Merrill, Thomas W., and Henry E. Smith. 2011. "What Happened to Property in Law & Economics." *Yale Law Journal* 111: 357.
- Open Plant. n.d. "OpenMTA." <https://www.openplant.org/openmta/>.
- Ostrom, Elinor. 1990. *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge: Cambridge University Press.
- Penner, J. E. 1997. *The Idea of Property in Law*. Oxford: Oxford University Press.
- Posner, Richard A. 1992. *Economic Analysis of Law*. Boston: Little, Brown and Company, 4th ed.
- Pottage, Alain, and Brad Sherman. 2010. *Figures of Invention: A History of Modern Patent Law*. Oxford: Oxford University Press.
- Nichols, Robert. 2020. *Theft Is Property! Dispossession and Critical Theory*. Durham, North Carolina, U.S.: Duke University Press.
- Robinson, William. 1890. *The Law of Patents for Useful Inventions*. Vol. 1. Boston: Little & Brown.
- Rodriguez-Garavito, Cesar. 2024. *More Than Human Rights: An Ecology of Law, Thought, and Narrative for Earthly Flourishing*. New York: NYU MOTH Project.
- Roht-Arriaza, Naomi. 1996–97. "Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities." *Michigan Journal of International Law* 17: 920–42.
- Schroeder, D., R. Chennells, C. Louw, L. Snyders, and T. Hodges. April 2020. "The Rooibos Benefit Sharing Agreement —Breaking New Ground with Respect, Honesty, Fairness, and Care." *Cambridge Quarterly of Healthcare Ethics* 29(): 285–301. <https://doi.org/10.1017/S0963180119001075>.
- Smith, Henry E. 2011. "Property Is Not Just a Bundle of Rights." *Economic Journal Watch* 8, no. 3 (September): 279–91.
- . 2015. "The Persistence of System in Property Law." *University of Pennsylvania Law Review* 163: 2053–93.
- Stone, Christopher D. 1972. "Should Trees Have Standing?—Towards Legal Rights for Natural Objects." *Southern California Law Review* 45: 450–501.
- Unceta, Koldo. 2011. "El buen vivir frente a la globalización." In *Acerca del Buen Vivir*, Ecuador Debate N. 84, edited by Centro Andino de Acción Popular. Quito: CAAP.
- Waldman, Laura. 2023. "No Settled Law on Settled Land: Legal Struggles for Native American Land and Sovereignty Rights." *CUNY Law Review* 26: 220–59.
- Wallerstein, Immanuel. 1974. *The Modern World-System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century*. New York: Academic Press.
- Williams, Chancellor. 1993. *The Rebirth of African Civilization*. Chicago: Third World Press.
- World Intellectual Property Organization (WIPO). 2020. "Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions." <https://www.wipo.int/publications/en/details.jsp?id=4504>.
- Wu, Katherine J. 2020, April 6. "In Collecting Indigenous Feces, A Slew of Sticky Ethics." *Undark*. <https://undark.org/2020/04/06/microbiome-feces-indigenous-ethics/>.

- YASunidos. 2020. "The Collective Process to Defend Yasuní National Park." <https://www.yasunidos.org/the-collective-process-to-defend-yasuni-national-park/>.
- Zelle, Anthony R., Grant Wilson, Rachelle Adam, and Herman F. Greene. 2021. *Emerging Ecocentric Law – A Guide for Practitioners*. Wolters Kluwer.

Cite this article: Grijalva, Sulafa Victoria and WarĩN K. Flores. 2026. "Decolonize or perpetuate: Realizing rights of nature through a critical property theory." *International Journal of Cultural Property* 33, e9, 1–28. <https://doi.org/10.1017/S0940739126100307>