Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada

By Sakshi

ABSTRACT

This paper deliberates on the nature of justice in Indigenous engagement with settler-colonial legality. I use the case law-based evidence from the three jurisdictions, Australia, Brazil, and Canada, to reflect on the abstract and material representations of Indigenous environmental justice in contemporary settler-colonial societies. There are two elements at play here. While some of the constituent elements of 'Indigenous environmental justice' may remain undefined in the legal system, they function as an invitation to the courts for interpreting them widely. How far has this been used, and in what manner speaks to the nature of juridical engagement with indigeneity? Second, the need for certainty and procedural integrity within the legal interpretation often belies the assumption of neutrality. This is pronounced when political and historical questions are antecedents to the legal questions to be determined by a court. Settler colonial nations illustrate this contradiction by laying bare the past and present historical injustices that accompany Indigenous rights and sovereignty. To think about 'justice' in these cases requires principle-led juridical innovations. I argue that courts are yet to recognize their key role in identifying and remedying the violence scripted by the law on Indigenous people. While it may be a difficult and complex task to develop a radical jurisprudence without violating the separation of power, courts continue to be the final altars of justice with a wide range of creative and untapped powers. The responsibility to articulate Indigenous environmental justice as a legal principle in the Anthropocene[1] calls for deploying those powers.

Key Words: indigenous peoples, sovereignty, environmental justice, courts, environmental litigation.

In the last week of May, the mining conglomerate Rio Tinto destroyed 46,000 years old Aboriginal site during the expansion of its operation in Western Australia's Juukan Gorge.[2] Rio Tinto may

[1] Anthropocene is the term coined by Crutzen and Stoermer in 2000 to capture how human beings are now the dominant force on the planet, whose actions are constituting the new geological period, following the Holocene. The term has since then evolved to include political, social, environmental effects of human actions alongside its geological connotation. Cf: Crutzen PJ (2006), "The "Anthropocene", in Ehlers E & Krafft T (eds) Earth System Science in the Anthropocene, 13-18 (Springer).

have hoped for the furor to die in due course, given the corporation had a nefarious history of getting away with environmental destruction elsewhere, especially in Bougainville.[3] Yet, the aftermath of the destruction in Juukan Gorge lasted longer and drew international attention to the routine treatment of Indigenous heritage and rights in a settler-colonial country. While the crucial lessons are drawn in this destruction involved reckoning with Western Australian heritage law's inadequacies to uphold Indigenous heritage, reflections on the unfailing nature of the violence of the law and settler-colonial legality lingered alongside. The destruction of the ancient Aboriginal site in Juukan Gorge was not a simple event. It mirrored the many sub-structures of the superstructure called settler colonialism that keeps the cycle of dispossession and erasure of indigeneity alive.[4] The experience of the destruction is not unique to Australia, even though its magnitude drew attention to the workings of extractive industries in the country. The 'event' testified to the operations of the 'structure' and is an experience that is replicated worldwide where Indigenous sovereignty has been on the decline.

Understanding Environmental Injustices

Defining what is an 'environmental injustice' ought to precede any attempts to understand Indigenous environmental justice. Existing environmental justice scholarship has studied the intersectional nature of environmental harms, especially with respect to race and class. Similar work needs to be done with greater thoroughness in places where indigeneity, settler colonialism, and environmental injustices have crossed paths. For instance, the framing of environmental justice has undergone several transformations since its genesis in the critical inquiries around environmental regulatory laws. While the 1980s in the US mark the inception of attempts to define environmental justice in the backdrop of racial inequalities, the subsequent decades have witnessed a substantial expansion in its meaning.[5] Robert Bullard's classic Dumping in the Dixie in 1990 opened up the conversation based on distributional inequality stemming from racial inequalities and leading towards the formulation of environmental racism.[6]

---

[2] "Pilbara mining blast confirmed to have destroyed 46,000yo sites of 'staggering' significance". https://www.abc.net.au/news/2020-05-26/rio-tinto-blast-destroys-area-with-ancient-aboriginal-heritage/12286652 (Last accessed: 23 November 2020). In the Rio Tinto case, the blasts were a part of the expansion of the iron ore mine. Rio Tinto was shown to be aware of the significance of the site. Yet, it obtained permission to carry out the blast under S.18 of the Aboriginal Heritage Act, 1972 (WA), which neither requires consultation with traditional owners of the land nor a review of the permission at a later stage. The ongoing inquiry has heard evidence to the effect that Rio Tinto had even made efforts to prevent the Indigenous group from bringing an injunction against the blasting.

[3] "Rio Tinto accused of violating human rights in Bougainville for not cleaning up Panguna mine". https://www.theguardian.com/world/2020/apr/01/rio-tinto-accused-of-violating-human-rights-in-bougainville-for-not-cleaning-up-panguna-mine (Last accessed: 29 November 2020).

[4] Veracini L (2010), Settler colonialism: A Theoretical Overview. Palgrave Macmillan.

[5] Bullard, Robert D., and Evans, Bob (eds.) (2003). Just Sustainabilities: Development in an Unequal World. Cambridge, MA: MIT Press.

[6] Bullard, Robert (1990). Dumping in Dixie: Race, Class, and Environmental Quality. Boulder, CO: Westview Press; (1993). Robert Bullard, Confronting Environmental Racism: Voices from the Grassroots. Boston, MA: South End Press.

Post-1990s, following Bullard's theorization of environmental justice, Laura Pulido,[7] David Pellow,[8] Julian Agyeman,[9] and others contributed to the strengthening of discussions on environmental racism by elaborating the power relations embedded in social and political inequities and examining its contributions to the disproportionate environmental impact on marginalized communities. Their contribution aimed to emphasize that environmental injustice. It was not merely a distributional problem but an amalgamation of diverse forms of environmental harms mirrored in cultural oppression and erasure, with economic forces perpetuating domination, exploitation, and material inequalities.[10]

As the idea of environmental justice emerges from a broad and ever-evolving understanding of intersectional injustices, it did not merely remain as a definition. Instead, it transformed into a coherent concept distilled by a theoretical understanding of race and capital-led inequalities. The concept in itself is so versatile that it found purchase in juridical analysis, making its way into cases and informing judicial decisions. Arguably, material representations of environmental justice in international and domestic legal instruments provided it with a sense of essential principles that courts and other decision-making bodies can fall back on clarity and consistency. The definition of environmental justice by The United States Environmental Protection Authority[11] and the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters in 1998 ("Aarhus Convention") are some examples in this regard.

Should one look for such a clear trajectory of Indigenous environmental justice concerning a well-conceived definition and application in the legal realm, it would end in disappointment. The difficulty lies not so much in inventing the concept as much in giving it a form outside of its known expressions. A significant body of Indigenous scholarship has already elaborated on the idea of Indigenous environmental justice as an inevitable extension of Indigenous sovereignty and identities. Yet, the iterations of the concept in juridical spaces as an analytical tool and an end in legal reasoning are in the nascent stage.

---

[7] Pulido, Laura (1996). Environmentalism and Social Justice: Two Chicano Struggles in the Southwest. Tucson, AZ: University of Arizona Press.
[8] David Pellow, What is Critical Environmental Justice, (Cambridge: Polity Press, 2017).
[9] Agyeman, Julian (2005). Sustainable Communities and the Challenge of Environmental Justice. New York: New York University Press.
[10] Randolph Haluza-Delay et al.(eds), Speaking for Ourselves: Environmental Justice in Canada, (2009).Vancouver: UBC Press.
[11] "Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work." http://www.epa.gov/environmentaljustice/

Settler Colonialism as Environmental Harm

Every discourse on Indigenous environmental justice must begin with the recognition and contextualization of settler colonialism as a structure within which State and its legal apparatus are embedded. As Kyle Whyte argues, settler colonialism is the main form of environmental injustice. Whyte examines the ecological impact of settler colonialism in the context of Canada's Anishinaabe peoples and the means through which it works systematically to undermine the 'social resilience and self-determining collectives' of the Indigenous peoples.[12] Settler Colonialism tries to absorb the land into a new sovereign arrangement and occupy it spatially and disrupts several social, cultural, spiritual, and economic relationships that characterize the First Nations.[13]

While documenting the Standing Rock movement, Nick Estes elaborates that the Indigenous resistance has been at the intersection of multiple environmental injustices.[14] Standing Rock movement was conceived against the proposed Energy Transfer Dakota Access Pipeline running between Northern Dakota and Illinois because it adversely affected drinking water and irrigation near the Indigenous reserves. Besides, it also threatened to destroy the burial sites and sites of cultural significance. The environmental justice movement at Standing Rock also became the face of Indigenous sovereignty as they contested the pipeline project in the District Court in a prolonged legal battle.[15] These injustices arise out of the operation of settler colonialism that ghettoes First Nations into 'reserves' while also promoting tropes of development that disregard environmental risks disproportionately affecting the community's health, welfare, and sovereignty. A similar sentiment is reflected in Eve Tuck's work. It studies settler colonialism's disruption of Indigenous land relations with 'profound epistemic, ontological, and cosmological violence'.[16] Environmental injustices in settler colonialism would then be invariably seen as a clash of sovereignties between Indigenous peoples and the Settler.

Settler Colonialism as a Disruptive Force

Patrick Wolfe and Lorenzo Veracini speak about the violent interjections of settler colonialism and the means through which it distinguishes itself from colonialism and capitalism.[17] Settler colonialism differs from the latter in how it

[12] Kyle Whyte (2018) "Settler Colonialism, Ecology, & Environmental Injustice" Environment & Society 9, 125-144.
[13] Kyle Whyte (2018) "Indigenous Experience, Environmental Justice and Settler Colonialism" in Nature and Experience: Phenomenology and the Environment. Edited by B. Bannon, 157-174 Rowman & Littlefield (2016).
[14] Nick Estes, Our History is the Future. Verso Books.
[15] Standing Rock Sioux Tribe et al. v US Army Corps of Engineers et al. Civil Action No. 16-1534 (JEB).
[16] Tuck, Eve, and K. Wayne Yang (2012) "Decolonization Is Not a Metaphor." Decolonization: Indigeneity, Education and Society 1 (1).
[17] Patrick Wolfe (2006) Settler colonialism and the elimination of the native, Journal of Genocide Research, 8:4, 387-409; (Wolfe 2016) Lorenzo Veracini (2015) The Settler Colonial Present. Palgrave Macmillan.

uses both time and space on occupied lands. It uses the environment as a resource while systematically erasing the people who occupy the land and the relations that define the human and the nonhuman world. These spatial and temporal acts of erasure justify Wolfe and Veracini's articulation of settler colonialism as a structure that is ongoing than a single identifiable event.[18] Deborah McGregor, while defining EJ in her work, draws on the idea of responsibility, observes:

> ...(environmental justice) is about justice for all beings of Creation, not only because threats to their existence threaten ours but because from an Aboriginal perspective justice among beings of Creation is life-affirming...In the Anishinaabe world view, all beings of Creation have spirit, with duties and responsibilities to each other to ensure the continuation of Creation. Environmental justice in this context is much broader than 'impacts' on people. There are responsibilities beyond those of people that also must be fulfilled to ensure the process of Creation will continue.[19]

Together, these existing interplays of meanings between settler colonialism and environmental injustice form a framework within which Indigenous environmental justice must come to life, especially in specific contexts such as environmental litigation. Justice is best articulated when the realities of physical erasure and cultural and spiritual erasure of Indigenous peoples are recognized and acknowledged in the juridical space. Contemporary forms of liberal constitutions only partly fulfill 'recognition' within the Indigenous rights framework. As Glen Coulthard and Audra Simpson[20], amongst others, observe, politics of recognition in settler colonies is limited to acknowledging Indigenous peoples' cultural differences.[21] This process goes only so far as setting apart the First Nations for certain kinds of treatment, however inclusive it may be, without acknowledging the extent of the inherent violence of the structure or the question of land-based sovereignty.

Land, Sovereignty, and Environmental Injustice

It is imperative to understand the centrality of the land and First Nations sovereignty in judicial decision-making, especially in environmental and cultural heritage litigation. Building on Wolfe and Veracini's arguments around the nature of settler colonialism, physical dispossession, and erasure (manifest through numerous modes, such as genocide) are accompanied by cultural and spiritual erasure. Often, in popular vocabulary, this translates into ideas such as *cultural genocide*.[22] While it may be hard to define these

[18] Lorenzo Veracini (2010) Settler Colonialism: A Theoretical Overview. Palgrave Macmillan.
[19] Deborah McGregor (2009) "Honouring Our Relations: An Anshinaabe Perspective on Environmental Justice." In Agyeman et al, Speaking for Ourselves: Environmental Justice in Canada. UBC Press.
[20] Simpson, Audra. 2014. Mohawk interruptus : political life across the borders of settler states.Durham: Duke University Press.
[21] Coulthard, Glen Sean. 2014. Red skin, white masks : rejecting the colonial politics of recognition.Indigenous Americas. Minneapolis: University of Minnesota Press.
[22] Davidson L (2012) "Cultural Genocide". Rutgers University Press; Kingston, L "The Destruction of Identity: Cultural Genocide and Indigenous Peoples" (2015) Journal of Human Rights 14(1).

in certain terms, it is precisely this difficulty of capturing intangible and incommensurable losses generated from systematic dispossession. Contemporary scholarship on ecocide and cultural genocide attempted to capture this erasure resulting from violent operations of settler colonialism have also elaborated on the complicit of law in it.[23] For instance, Andrew Woolford terms this as an 'ontological destruction,' where Indigenous and more-than-human relationship, Indigenous cosmologies, and knowledge forms are gradually eroded by settler-colonial interventions.[24] A telling example would be Rio Tinto's destruction of Juukan Gorge that was carried on under the aegis of a capitalist State, whose laws were not equipped to protect the special relationships shared between the Indigenous communities of Western Australia and their heritage. Suppose Juukan Gorge tells us how a collaboration between extractive capitalism and settler colonialism can destroy First Nation sovereignty. The recent destruction of Djab Wurrung sacred tree in favour of developing a highway project testifies to the fact that the liberal State can be as corrosive as an extractive industry.[25]

Indigenous environmental justice is as complicated as it is intergenerational. It is difficult, nigh impossible, to develop a linear understanding of environmental and cultural harm to determine the redressal or compensation. Indigenous cosmologies, place-based pedagogies, non-linear conception of time, amongst others, are defining features of indigeneity. They are experienced most intimately in the past and carried on to the present and the future with the same rigour. An interruption in this continuity implies that the harm is felt not just by this temporality but the one emerging as well. Environmental wrongs are an incremental contribution to the historical processes and must form an essential backdrop for Indigenous environmental litigation. This sense of settler-colonial environmental injustices informs the plausible remedies suitable in the case. In his work *The Trouble with Tradition*, Simon Young elucidates how Native title jurisprudence has evolved in Australian courts to incorporate the demand for an expansive understanding of Aboriginal rights.[26] Inferring from a diverse corpus of case laws, Young argues that the Australian courts are now mindful of the absence of Aboriginal Title versus Aboriginal Rights distinction more than ever. The latter demands a broader and more generous reading than the former. A similar exercise ought to be carried out in the environmental context. In the absence of a clear distinction between land, environmental, and sovereignty claims, judicial decision making must straddle the past and the present and see these components differently. In the absence of an innovative judicial reading of Indigenous claims, the gulf between normative construction of Indigenous environmental justice radical rights jurisprudence's actual evolution would be intensified.

---

[23] Short, Damien. 2016. Redefining genocide : settler colonialism, social death and ecocide.Zed Books Limited.
[24] Andrew Woolford (2009) "Ontological Destruction: Genocide and Canadian Aboriginal Peoples," Genocide Studies and Prevention: An International Journal, 4(1).
[25] Sakshi Aravind (2020) "Justice Beyond Recognition: What Djab Wurrung Trees Tell Us". https://arena.org.au/justice-beyond-recognition-what-djab-wurrung-trees-tell-us/ (Last accessed: 29 November 2020).
[26] Young Simon (2005). Trouble with the Tradition, 28-32. Federation Press.

Courts and Indigenous Environmental Justice

An informed deployment of judicial discretion and creativity in developing jurisprudence of Indigenous environmental justice is neither novel nor an unprecedented leap. Some of these efforts have already been made to acknowledge that environmental/climate litigation requires unique treatment in the Anthropocene.[27] The contemporary social and economic realities of a highly capital-driven, market-centered liberal economies make it apparent that the resource pressures and distributive elements of social welfare are unevenly distributed. In its all-encompassing role, law often finds itself obliged to rethink the frameworks and ethical and moral compulsions on which the legal system rests. Although criminal liability for environmental harms and offenses against Indigenous peoples has not made its mark outside of critical legal scholarship, jurists have emphasized that even criminal law must be open and self-reflective to the values that sustain it.[28] While these propositions may appear abstract, a degree of abstraction and theorization has been vital to developing a robust Indigenous rights jurisprudence. In most cases, such as Australia, where a substantial Constitutional voice for First Nations continues to be absent, courts have been compelled to develop norms of recognition and justice from a clean slate. Admittedly, a constitutional provision has symbolic merit in protecting and advancing the interests of Indigenous peoples. Evidence from Canada and Brazil provides a contrast to the Australian experience.[29] Yet, express constitutional protection and treaties (Brazil and Canada respectively) or absent constitutionalism (Australia) have no effect on the past and present wrongs of settler colonialism. The absence of effect results unless the current legal apparatus acknowledges the pervasive nature of settler structures and the continuing harm endured by the Indigenous peoples without powers of self-determination. In the next part, I analyze three cases from the three jurisdictions - Australia, Brazil, and Canada - to examine the nature of the judicial treatment of the idea of Indigenous environmental justice (explicit or implicit), the extent to which courts have pushed the boundaries of discretion or creative engagement to achieve a contemporaneous understanding of Indigenous peoples' rights, and their implications for theoretical articulations of Indigenous environmental justice.

Australia

Aboriginal Areas Protection Authority v OM (Manganese) Ltd[30], popularly known as the Bootu Creek case, was decided in

[27] Eloise Scotford (2017). Environmental Principles and the Evolution of Environmental Law.Hart Publishing; Phillip Paiement (2020). "Urgent agenda: how climate litigation builds transnational narratives", Transnational Legal Theory, 11(1-2).
[28] Jeremy Horder (2016). Principles of Criminal Law. 8th Edition, OUP.
[29] S.35 of the Canadian Constitution Act states that the "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.". Similarly, Chapter VIII (Articles 231 and 232) of the Constitution of Federative Republic of Brazil deals with the rights of Indians, including the preservation of environmental resources necessary for their well-being and physical and cultural reproduction.

2013 by a summary magistrate court in the Northern Territory. It has acquired significant interdisciplinary attention compared to other cases that witnessed the destruction of Indigenous heritage. Anthropologists Elizabeth Povinelli and Benedict Scambary have studied the Bootu Creek litigation, throwing light on the legal and anthropological ramifications it bore for the protection of sacred sites.[31] It is Northern Territory has relatively strong state heritage protection laws, such as the Aboriginal Sacred Sites Act 1989 and Heritage Conservation Act 1991, that made prosecution in a court of law possible. It is also important to note that historically, there has been a steady opposition to uranium mining in the region.

The OM (Manganese) Ltd operating the Bootu Creek manganese mine was fined $120,000 and $30,000 for offenses under Northern Territory Aboriginal Sacred Sites Act, 1989 (Sacred Sites Act). The defendant mining company had contested the charges of desecration under the Sacred Sites Act but had pleaded guilty to contravening the condition of an authority certificate by damaging the same sacred site. That it was a sacred site remained uncontested. The court reiterated the testimony of one of the traditional owners of the area, Gina Smith, who stated that the defendant knew about the significance of songlines and dreaming.[32] The traditional owners had also informed the mining company of the existence of the sacred sites. The sacred site's story is that of two women, the bandicoot, and the rat, who are the female Dreamtime ancestors. While the Dreamtime or the sacred site is not contested, the court delved on the significance of the story, affirming the evidence of the consulting anthropologist. The court recognized that it is likely that inconsistencies in the story are a result of older informants having passed away, altering the contemporary relevance of the site.[33] It also observed that the land's cultural significance had been eroding since the 1950s due to extractive activities.[34]

There are two critical parts to the decision, and it has significant consequences for how judicial treatment of Aboriginal heritage issue can be carefully devised to achieve the best outcome. In the first part, Magistrate Sue Oliver addresses the question of exceeding the authority certificate. The initial mining plan allowed the defendants to mine at an angle of 36 degrees. Instead, they chose to extract the site at a steeper angle, at 55 degrees, to maximize the amount of ore extracted.[35] The sacred site was adjoining the Masai pit, where the mining was to take place and was already at risk. There was no authorization, explicit or implicit, by the local custodians of the land for altering the angle of mining. Instead of an authorization, the defendants invited

[30] 2013 NTMC 01.
[31] Povinelli E (2016) Geontologies: A Requiem to Late Liberalism. Duke University Press; Scambary B (2013) My Country, Mine Country: Indigenous People, Mining and Development Contestation in Remote Australia, CAEPR Research Monograph, No.33.Australian National University.
[32] Bootu Creek n (28), Para 4.
[33] Bootu Creek n (28), Para 5-7.
[34] Bootu Creek n (28), Para 6.
[35] Bootu Creek n (28), Para 18.

two traditional owners and a local employee of Northern Land Council (NLC) for a meeting to discuss the altered plans. The court observed that this meeting's implicit intention was to obtain permission for mining at a steeper angle even when the defendants were fully aware that the people consulted neither had expertise in mining to appreciate the risks nor the authority to grant such consent.[36]

Interestingly, the court delves into each element contributing to the site's destruction even though the defendant entered a guilty plea. At one point, Magistrate Oliver observes, *"In my view arranging a meeting with the three gentlemen to essentially obtain approval for the steeper batter angle approach was either cynical or a naïve exercise on the part of the defendant. The custodians had no individual authority to approve a mining plan that posed a risk to the integrity of the Sacred Site…"*.[37] She emphasizes that the consent process was flawed and that the decision-making authority or whose voice counts is a crucial element in protecting the sacred site. By allowing these observations and reflections in a seemingly straightforward case, Magistrate Oliver reflects on both the case's legal and moral questions. This exercise may not have any significance in terms of precedence. Nonetheless, it is a critical signifier that courts ought to think in terms of 'principles.'

Following this discussion, the court considers the next important question of 'desecration' under Section 35 of the Sacred Sites Act. Since the defendant contested the charge, the judge dealt with 'what is a desecration' elaborately. S.35 of the Act only creates an offense of desecration without providing a functional definition of 'desecration'. S.35 merely states, 'A person shall not desecrate a sacred site.' Magistrate Oliver decided to rely on the legislation's apparent intentions, that is, to preserve and protect the sacred and spiritual value of the site. Although the summary judgment does not suggest that the judge has consulted any preparatory materials that went into the making of the legislation, purposive construction dominates the decision's language.[38] The judge refuses to accept the defendant's claim that an act of desecration requires an element of contempt and is a matter of attitude and disposition.[39] The sacred site's significant feature was a horizontal rock arm extending from the rocky outcrops on the site. The feature was very recognizable and represented the two women, forming the vital part of the sacred site. Kunapa traditional owner Gina Smith's testimony on why harming the site erodes the sacredness of the place is reiterated in the decision:

First, it greatly offends our law which says that sacred sites must not be disturbed or damaged. Second, the appearance and shape of the sacred site have been significantly changed. This makes it harder for me and other aboriginal people with traditional interests in the sacred site to recognise it and the dreaming that it represents and to teach

[36] Bootu Creek n (28), Para 20.
[37] Bootu Creek n (28), Para 22.
[38] Bootu Creek n (28), Para 32.
[39] Bootu Creek n (28), Para 33-34.
[40] Bootu Creek n (28), Para 38.

our young people about this. This is likely to stop people from visiting the sacred site any longer. This damage has greatly offended the sacredness of this site and has made it much less sacred.[40]

Magistrate Oliver concluded that removing the horizontal arm of the sacred site amounted to desecration beyond a reasonable doubt. The decision highlights that the defendant's conduct throughout, including the attempts to obtain approval from the two traditional owners, suggests that they knew the site was a sacred and the horizontal arm was not a mere geological feature. Even if it is inferential, anyone whose conduct subjected the site to a substantial risk contributes to eroding it's sacredness. Moreover, the judge finds this to be a reasonable burden on any ordinary corporation to understand the intention of the Sacred Sites Act and obligations under it. Interestingly, the judge calls the defendant's actions a product of 'wilful blindness' and 'illogical' to not *"appreciate that preservation of the sacredness and spiritual significance of the Sites was central to the system of protection"*.[41]

In Bootu Creek, the court was constrained by the level of authority and lacked the freedom that a superior court may cherish in expanding the jurisprudence. However, the judgment opens up the space and meaning of desecration by reading into the legislature's intention. This in itself is a significant and radical departure from an ordinary judicial process that treats Indigenous environmental or heritage litigation within a limited matrix of issue-resolution. While the destruction of Sacred Site in cases such as these result in intergenerational and utterly disproportionate loss, a court of summary jurisdiction will be hard-pressed to provide adequate compensation. For a legal theory to flourish, the leap in judicial imagination would be radical and welcome only if it does not violate the demands of consistency and legitimacy. This particular court was ill-equipped to answer the political questions of whether Indigenous heritage is valued adequately or whether the decades of environmental and cultural opposition to uranium mining compounds this specific incident. Yet, it stands as one of the promising decisions among the recent decisions and is often recognised as a significant success in Indigenous peoples' litigation.

Brazil

Raposa Serra Do Sol (Raposa)[42] is an oft-cited case in Brazilian Indigenous rights jurisprudence. Before the Supremo Tribunal Federal (STF) the petition came in the heels of violent domestic unrest between Indigenous communities that were in favour of demarcation of Indigenous territories and pastoralists who were against it. Fundação Nacional do Índio (FUNAI) put forward the land's proposed demarcation in 2004 before the concerned minister. Simultaneously, there were many petitions and applications by the farmers who sought to remain within the Indigenous territories. The presidential ordinance accepting the demarcation was passed in 2004 and was challenged in the Superior Tribunal de Justiça (STJ). STJ's decision upholding the ordinance eventually found itself appealed in

[41] Bootu Creek n (28), Para 72.
[42] Petition 3388 / RR - Petition RORAIMA.

the STF. STF upheld the demarcation to be valid and directed the non-indigenous people from the region to be removed. Superficially, the decision appears unproblematic and may even be considered positive.

The decision is overshadowed by an anachronistic and tellingly egregious understanding of indigeneity. The social situation around Raposa litigation was marred by arguments for internal colonization and assimilation, which, in this case, was endorsed by the court.[43] While deciding the constitutionality of the presidential decree on demarcation, STF was only tasked with interpreting Indigenous peoples' rights under Article 231. Instead, STF narrowly constructed the rights embedded in Art.231 to exclude every right attached to the land except the right to stay on the demarcated territories. In recognizing the decree's validity, the court laid down nineteen qualifications to the Indigenous communities' rights. Amongst these, some of the critical conditions included:

> 1. The enjoyment of natural resources, soil, and water bodies can be extended according to the public interest by the operation of Federal or State law. The Indigenous communities will only have the usufructuary right over the resources and will not exercise the right to veto these decisions.
>
> 2. The usufructuary rights of the communities do not extend to using the mineral wealth or entering into mining agreements.
>
> 3. Indigenous interests do not outweigh national defense policy, and militarisation of Indigenous territories does not require prior consultation.
>
> 4. The Federal Government may install any public equipment, communication networks, roads, and transport routes and to the constructions necessary for the provision of public services by the Union, on Indigenous territories.[44]

On the face of it, the decision violates all principles of United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") with abandon. Brazilian Constitution goes only so far as grandstanding concerning Indigenous connection to the land. By conflating Indigenous rights over territory with the possessory or usufructuary right, the constitutional court aggravated the existing inequities. First, the court created a spurious distinction between land as political territory and Indigenous territory. The political territory in this distinction reinforces the narrow imagination of the State's political territory as the only possible category while erasing the Indigenous sovereign, political

[43] The idea of internal colonisation is defined here as used in Pinderhughes' premise: "a geographically-based pattern of subordination of a differentiated population, located within the dominant power or country.". See: Charles Pinderhughes (2011) "Toward a New Theory of Internal Colonialism," Socialism and Democracy Online 25, no. 1.
[44] Petition 3388 n (40), p.5.
[45] Petition 3388 n (40), p.3.

space. The judgment holds that the Indigenous territories are only limited to ethnic and cultural features and cannot override the political territory even if it has been long occupied by Indigenous people.[45] Second, the court mandated conditions violate Indigenous self-determination and leaves nothing for the notion of 'exclusive Indigenous enjoyment.' Even the much hailed UNDRIP has failed Indigenous peoples in this regard as it recognises Indigenous self-determination only insofar as it does not antagonise State's territorial integrity and sovereignty. While this may have been Brazil's contemporary political reality, a court reproducing it only legitimizes the violence of the law.

What is worse, the STF mulls over the question of what can be reasonably defined as 'citizens', to merit absolute control over the territory under the Constitution. It concludes that Indigenous people do not qualify under any of the social and political categories of organization.[46] The court also asserts the importance of 'assimilation' of Indigenous communities into a sense of 'Brazilian-ness' and isolate them from 'unhealthy influences of foreign non-governmental organizations.' Under the guise of positive treatment, STF subtly disenfranchises Indigenous people from making claims to their constitutional rights in a manner that expresses sovereign control. As scholars have remarked, behind the veil of a positive decision, the STF's opinion in Raposa has damaged Indigenous self-determination in an unprecedented fashion.[47]

Raposa provides a startling contrast to *Bootu Creek* decision in many ways. First, STF was a constitutional court and was within its powers to develop a constitutional, expansive, and revolutionary jurisprudence. The Superior Court was considering a principle-based question that would have implications for constructing of Indigenous rights in the future. In *Bootu Creek*, the summary court had to navigate narrow spaces of procedural limitations to create room for making a principle-based argument. Second, *Bootu Creek* revealed that what is implied and ruminated in a decision has as much heft as explicitly stated observations. The evolving nature of law corresponds with courts' evolving responsibility, especially in light of settler colonial/colonial realities. Courts ought to be conscious of not perpetuating the primeval conceptions of indigeneity, particularly when they are difficult to be dislodged from everyday social and political discourses. Brazil's STF fails where a small summary court of Northern Territory does an exceptional task.

Canada

In *Ktunaxa First Nations v British Columbia*,[48] the First Nation territory was in British Columbia in the region they had identified as Qat' muk. The Qat' muk region held the Grizzly bear spirit, which was sacred in the First Nation cosmologies.

[46] Petition 3388 n (40), p.7.
[47] Erica Yamada and Fernando Villares, "Julgamento da Terra Indígena Raposa Serra do Sol: todo dia era dia de índio", Rev. direito GV vol.6 no.1 São Paulo Jan./June 2010. Available at: https://www.scielo.br/scielo.php?script=sci_arttext&pid=S1808-24322010000100008 (Last accessed: 20 June 2020).
[48] 2017 SCC 54.

A year-round ski resort was proposed to be built in the area. The proponents sought government approval. The Ktunaxa First Nations expressed reservations because it would impact land and environment that was of cultural significance. Following this, the project was amended to accommodate some of the Indigenous concerns. The First Nations did not feel that their concerns were adequately addressed but were willing to engage in further consultation. After multiple consultations, the approval was granted by the relevant Minister. However, the First Nations felt that their objections were not correctly addressed. They asserted that the project would permanently drive away the Grizzly Bear spirit from the mountains and impair their right to hold and practice religious beliefs. Ktunaxa First Nations filed an application for judicial review, challenging the approval on the grounds that it violated their constitutional right to religion. Ktunaxa's submissions consisted of a Qat' muk Declaration, which involved a unilateral declaration based on pre-existing sovereignty.[49] The Qat' muk Declaration identified "refuge areas," where the building of permanent foundations or permanent human habitation was forbidden.

The court dismissed the appeal with a part concurring opinion by Moldaver J. The majority opinion held that the claim did not fall within the violation of S.2 of the Charter, i.e., freedom of religion. Since the appellants could not prove that the Minister's decision to approve the project had in any way interfered with the First Nation's ability to hold and practice their cultural and spiritual beliefs. The decision focussed more on the grounds that Ktunaxa First Nations were using judicial review 'to pronounce on the validity of their claim to a sacred site and associated spiritual practices.'[50] MacLachlin CJ et al. opined that the Minister's assessment, through consultation and accommodation, had sufficiently recognized the Ktunaxa's spiritual claims to Qat' muk. The court considered Ktunaxa's invitation to interpret S.2 widely, preserving land as integral to sustenance of religious beliefs, had to be declined as the State's duty was only to protect everyone's right to hold diverse beliefs.

Throughout the majority opinion, very little attention is paid to the significance of the site to Indigenous believes or the claim that the necessity to veto the project is an expression of Ktunaxa's self-determination. Only in one instance does the court identify the Ktunaxa claim as expressing concerns beyond something that can be offset by land reserves, economic payments, and environmental protections.[51] In explaining the reasons for dismissal, the court pays considerable attention to the scope of freedom of expression.[52] It draws instances from the European and American Convention of Human Rights in how those instruments have interpreted and defined freedom of religion but remain agnostic to how freedom of religion in Indigenous contexts is different or demand novel treatments. The majority opinions wade in

[49] Ktunaxa n (46), para 38.
[50] Ktunaxa n (46), para 71.
[51] Ktunaxa n (46), para 45.
[52] Ktunaxa n (46), para 61-67.

safe waters, never considering the relationship between Ktunaxa's beliefs and its relation to land or self-determination but taking refuge in the pedestrian rationale of Charter rights and S.35 of the constitution.

Moldaver J's partially concurring opinion contrasts the majority opinion by engaging with the submissions of Ktunaxa at length. While Moldaver J and Côté J agree that the duty to consult was fulfilled, they differ on whether the Minister's decision to approve the ski resort infringed on the freedom of religion of Ktunaxa First Nation. Moldaver J's opinion is interesting not only for the critical point on which he disagrees with the majority opinion but also on how he considers this vital breach to be balanced against other interests. He says:

> "In my respectful view, where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, this infringes a person's right to religious freedom. Religious beliefs have spiritual significance for the believer. When this significance is taken away by state action, the person can no longer act in accordance with his or her *religious* beliefs, constituting an infringement of s. 2 (a)…The Minister's decision to approve the ski resort will render all of the Ktunaxa's religious beliefs related to Grizzly Bear Spirit devoid of any spiritual significance. Accordingly, the Ktunaxa will be unable to perform songs, rituals, or ceremonies in recognition of Grizzly Bear Spirit in a manner that has any religious significance for them. In my view, this amounts to a s.2 (a) breach."[53]

Moldaver J, asserts that with the loss of land, both the connection and the ability to pass on the spiritual knowledge to future generations are lost. He proceeds to contend that while it may be necessary for courts to be impartial in religious matters:

> To ensure that all religions are afforded the same level of protection under s. 2(a), courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices.[54]

Thus, Moldaver J's reading of S.2 in Indigenous contexts makes an interesting and innovative case against a restrictive reading of Freedom of Religion and the risk of foreclosing the said section's protection to Indigenous beliefs. The concurring opinion, in its attempt to recognise the distinctiveness of Indigenous beliefs, also opens up avenues to negate land claims. *Ktunaxa* is a fine example of deviating from the standard practice of reading duty to consult as the only framework for Indigenous contestations and moving towards understanding Indigenous claims and ontologies. Irrespective of what the outcome turned out to be *Ktunaxa* comes close to *Bootu Creek* in attempting to open up interpretative spaces for accommodating unique experiences of Indigenous communities that also define the nature of harms against them.

---

[53] Ktunaxa n (46), para 118.
[54] Ktunaxa n (46), para 127.

Tailoring the Understandings of Indigenous Environmental Justice

While conceptualization of settler colonialism and the case law analysis of Indigenous environmental legality leaves us in an expansive theoretical field, few necessary normative elements can be gleaned out of such discussion. In ways similar to environmental justice, there is a need to recognize that the idea of Indigenous environmental justice is unique and intersectional. Environmental law at this stage must aim to integrate the new pressures in its jurisprudence—both on the environment and the people whose identities are closely interconnected with it. The Anthropocene has been exacting and creating new demands on humanity's responsibilities towards the past, the present, and the future. This is ever more pronounced in settler colonies that continue to operate with an uncritical approach to everyday realities of racism, discrimination, economic inequality, and capital-led dispossession. Courts share a greater burden of expanding and articulating meanings of justice where other avenues fail. Indigenous environmental justice not being a coherent, enforceable legal principle can hardly be mooted as an excuse for not recognizing Indigenous peoples' right to land, environment, and resources. The idea of 'substantive recognition', as opposed to mere recognition of cultural differences, must be emphasized in judicial processes. Following elements may contribute to developing a radical jurisprudence while remaining faithful to the rule of law and other principles that hold up the legal system:

• Indigenous environmental justice is an expression of sovereignty over the land. The two sovereignties that of First Nations that was never ceded and of the State may co-exist without contradictions.

• Indigenous communities must be endowed with the right to self-determination over social and economic policies that affect them. The possibilities in this realm are limitless and may range from their relationship with extractive companies to health, education, and everyday governance policies.

• Sovereignty and self-determination also imply that indigeneity must be sustained and continued to be handed down for the emerging generations. The Indigenous ways of living, knowledge systems, and cosmologies must be preserved and allowed to thrive to facilitate generational knowledge.

There are no grand gestures to achieve this within the existing juridical apparatus. Justice is a sustained practice than a single, noteworthy event. Environmental litigation has often provided an opportunity to revise and revisit the predominantly positivist assumptions that guide the legal mechanisms. Any leap in progressive jurisprudence has been episodic and left to the judges and courts' individual discretion. As interdisciplinary work in environmental and multi-species justice advance towards a better and more inclusive understanding of more-than-human world, it is imperative on courts to move towards more-than-juridical articulations of Indigenous environmental justice.

This Article may be cited as:
Sakshi (2021) Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada. *Fourth World Journal*. Vol. 20, N2. pp.115-130

ABOUT THE AUTHOR

Sakshi

Sakshi is a PhD student in the Department of Land Economy, at the University of Cambridge. Her thesis focuses on Indigenous environmental litigation in Australia, Brazil, and Canada and the legal framing of environmental justice in courts. Her research areas include legal and Indigenous geographies, legal anthropology, comparative environmental law, constitutional law, and political ecology.