

# Afterword

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Although the universal declaration of human rights is often described as having been imposed from the top-down, and based on liberal, Euro-American values, the same cannot be said for the recognition of indigenous rights, which is the result of social movements operating from below.<sup>1</sup> Land is a common focal point of these struggles, given its central significance to the social reproduction of indigenous communities and the protections it affords them against the pressure to assimilate. As the contributors to this valuable collection attest, land rights continue to be of paramount importance to indigenous peoples, and increasingly end up being the focus of contestation in both domestic and international legal arenas.

The resulting legal proceedings have several distinctive features. Although they are similar to class action cases in that they represent a group of plaintiffs, they are intended to protect collective rather than individual rights. Consequently, lawyers must work closely with indigenous communities, including their political leaders and governing bodies. These relationships typically cross cultural and linguistic boundaries. Lawyers need to take local norms and understandings into account, although the tools they have at their disposal for interacting with plaintiffs from different cultural backgrounds and their experience explaining legal proceedings to the uninitiated stand them in good stead. However, an important dynamic of these interactions, albeit not unique to indigenous rights claims, is that the peoples they represent may regard the legal system as illegitimate, given that the law was previously an instrument of colonial dispossession and that the courts have a history of favouring other interests over theirs. Lawyers must be able to overcome these perceptions despite their legitimacy. Working in their favour is the fact that legal action may be the last recourse available to indigenous peoples, apart from violence, after other forms of intervention have been exhausted.<sup>2</sup>

Because of the linguistic and cultural differences between indigenous plaintiffs (or complainants) and members of the court, there may be significant challenges associated with translation. Inevitably, the burden of commensuration is shouldered by the indigenous plaintiffs and their legal representatives, who not only have

to convey their concerns to the other participants in the proceedings, but also have to justify why these alternative perspectives should be recognised by the court.<sup>3</sup> One strategy of persuasion has been to incorporate maps, which, despite their historical use as tools of dispossession, are increasingly appropriated by indigenous peoples and their NGO partners as a means of representing previously unacknowledged relationships to land and resources.<sup>4</sup>

Lawyers advocating on behalf of indigenous land rights may also engage anthropologists who are able to render local understandings and perspectives in terms legible to the court.<sup>5</sup> For example, in my own work on a case representing the Akawaio of Isseneru village in Guyana before the Inter-American Commission on Human Rights, the complainants were able to demonstrate that local place names were toponyms in their language, establishing historical ties to the land the state had denied.<sup>6</sup> But to the extent to which anthropologists may be seen to usurp the authority of community members to speak on their own behalf, they may find these interventions unwelcome or sidelined in favour of direct testimony by indigenous community members.<sup>7</sup> Nonetheless, anthropologists can help introduce novel concepts into legal proceedings, such as the equivalence between property rights and rights to subsistence resources in economies that lie partially or wholly outside of the commercial sphere, indigenous definitions of freedom as contingent on access to the forest, or the significance of culture loss resulting from environmental destruction.<sup>8</sup> Despite the high stakes of these cases, defection by some of the plaintiffs is possible, especially where there is coercion or attempts to alienate their participation in the legal proceedings through monetary means, whether through bribery or compensation agreements that seek to pre-empt the court case.<sup>9</sup> There is also a risk that political disagreements among the plaintiffs may derail legal proceedings, or even prevent them from getting started, as indigenous peoples do not always possess

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1. See R. Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (Berkeley: University of California Press) (2003).

2. See J. Eckert, B. Donahoe, Z.Ö. Biner, & C. Strümpell (eds.), *Law against the State: Ethnographic Forays into Law's Transformations* (Cambridge: Cambridge University Press) (2012).

3. E.A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham: Duke University Press) (2002).

4. See Anker, this issue; Gilbert, this issue.

5. S. Kirsch, *Engaged Anthropology: Politics Beyond the Text* (Oakland: University of California Press) (2018).

6. S. Kirsch, 'Expert Report, Akawaio Indigenous Community of Isseneru and the Amerindian Peoples Association of Guyana', Petition 1424-13, Inter-American Commission on Human Rights, 14 July (2016).

7. A. Ramos, 'Disengaging Anthropology', in D. Poole (ed.), *A Companion to Latin American Anthropology* (Oxford: Blackwell Publishers) (2005) 266.

8. See Kirsch (2018), above n. 5; see also Claridge, this issue.

9. S. Kirsch, *Mining Capitalism: The Relationship between Corporations and the State* (Oakland: University of California Press) (2014).

political organisation at a scale that is commensurate with the scope of their legal claims.

Another challenge is that indigenous rights to land and territories do not necessarily correspond with legal definitions of property ownership.<sup>10</sup> This extends beyond the difference between individual and collective rights. It may include fuzzy boundaries in which people make use of different resources from the same territory.<sup>11</sup> Shared access can be consensual and formalised, as in the case of a recognised commons, although overlapping land claims can also be the result of historical strategies of avoidance, where there is neither a need nor the ability to settle competing claims, resulting in a de facto commons. The kinds of resource mapping discussed in several of these papers can be an effective tool for indigenous communities to illustrate long-standing patterns of land use and help challenge claims made by the state about the appropriate use of resources.<sup>12</sup>

Another prominent feature of these cases is that they are building blocks for the larger, developing framework of jurisprudence that protects indigenous rights.<sup>13</sup> This can occur in domestic courts,<sup>14</sup> in regional human rights courts like the Inter-American court system and the African Court of Human and Peoples rights,<sup>15</sup> in international legal proceedings, and more generally in the circulation of valuable precedents across legal forums. A key example of this process is the gradual incorporation of the provisions of the U.N. Declaration of the Rights of Indigenous Peoples into judgments at all three levels of jurisprudence.<sup>16</sup> The hardening of soft law principles in this process also facilitates their recognition as norms that over time may acquire the force of international legal standards.

There is, however, a risk that the development of international law by piggybacking on indigenous claims occurs at the expense of the plaintiffs in these cases, or neglects other peoples whose rights have been violated,<sup>17</sup> by influencing the lawyers' choice of cases, courts, and legal strategies. This concern is magnified by the problems of implementation that occur when particular legal forums lack the power to enforce their judgments, yielding paper victories that enhance recognition of indigenous rights but do little to alter facts on the ground. Moreover, states may respond to these decisions by using strategies of foot-dragging, evasion, false compliance, feigned ignorance, slander, and sabotage

that are ordinarily described as 'weapons of the weak',<sup>18</sup> not to mention the criminalisation of legal proceedings, intimidation, and violence. In addition, as Maria Sapignoli points out in her new book, *Hunting Justice: Displacement, Law, and Activism in the Kalahari*, even a successful verdict may prolong rather than conclude interaction with the legal system.<sup>19</sup>

As several scholars have recently argued, legal activism on behalf of indigenous peoples is more likely to result in soft forms of political recognition than tangible forms of redistribution.<sup>20</sup> Nonetheless, political change is hard won and indigenous recourse to the law may have beneficial 'unlocking effects' that help to overcome stalemates in domestic arenas, 'participation effects' that enhance political agency, and 'reframing effects' that identify new political strategies and activate novel coalitions, in addition to potential 'socioeconomic effects' through compensation and the restitution of land.<sup>21</sup>

Legal proceedings on behalf of indigenous peoples may also have an advantage over other legal claims, in that the recognition of significant cultural differences between the perspectives of the plaintiffs and the assumptions on which the law is based may encourage judges to think more broadly about fundamental questions, such as concerns about culture loss, the importance of maintaining access to the forest for a people's freedom, and the rights of people whose subsistence practices are largely external to the commercial economy. For lawyers, advocates of indigenous rights, and indigenous peoples themselves, this means that legal proceedings, despite their past connections to colonial and imperial projects, may not only serve the interests of the peoples whose rights have been infringed upon, but also expand the law itself in ways that make these past trespasses against and violations of indigenous rights less likely to occur again in the future, the ultimate aim of human rights initiatives.

10. See Correia, this issue.

11. See Anker, this issue.

12. See Anker, this issue; see also Gilbert, this issue.

13. See MacKay, this issue.

14. See Subramaniam and Nicholas, this issue.

15. See Correia, this issue; see also Claridge, this issue.

16. See MacKay, this issue; see also Subramaniam and Nicholas, this issue.

17. Against the concern that the focus on the rights of indigenous peoples might disenfranchise others (J. Bowen, 'Should We Have a Universal Concept of "Indigenous Peoples' Rights"?', 16 *Anthropology Today* 12 (2000)), the Saramaka case in Suriname (see MacKay, this issue) and the Okiek case in Kenya (see Claridge, this issue) suggest that legal precedents concerning indigenous rights may be applied to other peoples who are similarly situated.

18. J.C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven: Yale University Press) (1987).

19. M. Sapignoli, *Hunting Justice* (Cambridge: Cambridge University Press) (2018).

20. M. Goodale, 'Dark Matter: Toward a Political Economy of Indigenous Rights and Aspirational Politics', 36 *Critique of Anthropology* 439 and J. Gilbert, *Strategic Litigation Impacts: Indigenous Peoples' Land Rights* (2017). <<https://www.opensocietyfoundations.org/sites/default/files/slip-land-rights-20170424.pdf>>.

21. C. Rodríguez-Garavito and D. Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (New York: Cambridge University Press) (2015), see also Gilbert, above n. 20, at 73.