Sacred Justices: Seeking Indigenous Environmental Justice in Courts

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Declaration

- This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text.
- It is not substantially the same as any work that has already been submitted before for any degree or other qualification except as declared in the preface and specified in the text.
- It does not exceed the prescribed word limit for the Department of Land Economy Degree Committee.

Dedicate to Ngunnawal, Ngunawal and Ngambri Country and to the Indigenous Peoples fighting for their sovereignty.

Abstract

This thesis studies how courts encounter and engage with Indigenous environmental justice (IEJ) in litigation pursued by Indigenous communities in Australia, Brazil, and Canada. The thesis advances IEJ as a principle that may be framed, used and developed in juridical spaces. The research draws from existing scholarship, primarily Indigenous scholarship, and offers an intellectual map of IEJ that is a receptacle for, amongst others, plural sovereignties, Indigenous epistemologies, and land-environment-cultural relationships. To this end, the thesis proposes a conceptual understanding of law as a narrative and adjudication as knowledge production. It argues that legal knowledge production enables courts to be a part of epistemic communities that remedy present environmental harms and past injustices that are engendered in settler colonialism.

Indigenous voices become paramount for such knowledge production. The thesis explores how Indigenous voices are received within adjudication through doctrinal analysis of Indigenous environmental litigation in the three jurisdictions. Further, it examines what implications such reception has for the outcome of the litigation and the framing of IEJ. The materials studied here testify to the innate ability of courts to draw from existing laws generously and innovate where necessary in order to answer the difficult questions of justice and sovereignty raised by Indigenous environmental litigation. Whilst courts are accustomed to certain forms of litigation, contemporary environmental pressures demand conceptual apparatus of a different kind. Although legitimacy and integrity are highly valued within juridical spaces, they are not immutable concepts. The thesis argues that IEJ provides an opportunity to reconfigure juridical integrity by including Indigenous voices and challenging settler colonial legality through settler courts. In addition, it also makes a case for juridical openness, where present courts may deal with questions of Indigenous sovereignty more sympathetically to allow future jurisprudence to assume more radical standpoints.

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Table of Contents

Table of Cases

Tickner v Bropho [1993] FCA 208.

Tickner v Chapman (1995) 57 FCR 451.

Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors [2020] QLC 33.

Wik Peoples v Queensland [1996] HCA 40.

Brazil:

Belo Monte Hydroelectric Dam Pet 2604 / PA - TO PETITION (Presidency decision).

Case ADPF 708 (Climate Fund Case).

Onca Puma Rcl 29162 / PA - PARA CLAIM.

PSB et al v Brazil (Deforestation case 2020).

Public Civil Action for demarcation of Piripkura Indigenous Land Public Civil Action (65). Process: 0005409-02.2013.4.01.3600.

Raposa Serra Do Sol Petition 3388 / RR - Petition RORAIMA.

Serra Do Padeiro 2006.33.01.000722-7.

Canada:

Ahousaht Indian Band, and Nation v. Canada (Attorney General) 2018 BCSC 633.

Anderson v Alberta (Attorney General) 2019 ABQB 746.

Anderson v Alberta (Attorney General) 2020 ABCA 238.

Calder v British Columbia (AG) [1973] SCR 313.

Chippewas of Thames First Nation v Enbridge Pipelines & Anr 2017 SCC 41.

Coastal GasLink Pipeline Ltd v Huson 2019 BCSC 2264.

Delgamuukw v British Columbia [1997] 3 SCR 1010.

Dini Ze' Lho'imggin et al. v. Her Majesty the Queen 2020 FC 1059.

Ecology Action, et al. v. Minister of Environment and Climate Change 2020 FC 663.

Hamlet of Clyde River and Ors v Petroleum Geo-Services & Anr 2017 SCC 40.

Highwood Congregation of Jehovah's Witnesses 2016 ABCA 255.

Ktunaxa First Nations v British Columbia 2017 SCC 54.

R v Côté [1996] 3 S.C.R. 139.

R v Horseman [1990] 1 SCR 901.

R v Marshall [1999] 3 SCR 456.

R v Sparrow [1990] 1 SCR 1075.

R v Van Der Peet [1996] 2 SCR 507.

R v. Desautel 2021 SCC 177.

R. v. Kirby Offshore Marine Operating LLC 2019 BCPC 185.

Sikyea v The Queen [1964] S.C.R. 642.

Smerek v Areva Resources Canada Inc 2014 SKQB 282.

Snuneymuxw First Nation et al. v. R *2004 BCSC* 205.

Teal Cedar Products Ltd v Rainforest Flying Squad 2021 BCSC 1903.

Tsilhqot'in Nation v. British Columbia 2014 SCC 44.

Yahey v British Columbia 2021 BCSC 1287.

United States:

Navajo Nation v US Forest Service 479 F.3d 1024

United States v Shoshone Tribe of Indians 299 U.S. 476.

Table of Statutes

US:

Religious Freedom Restoration Act, 1993

The Oregon Boundary Treaty, 1846

International Instruments and Declarations:

Kari Oca Declaration I, 1992

Kari Oca Declaration II, 2012

The American Convention on Human Rights

United Nations Declaration on the Rights of Indigenous Peoples, 2007

Introduction

"Climate justice", "ecological debts", and "Indigenous knowledge to avert planetary collapse" are now familiar terms in mainstream climate discourses. Critical inquiries into climate change have provoked new ways of thinking about global and local socio-economic relations, legal institutions, power structures, and our collective past and futures. While climate change may be an urgent question, it is, in part, a cumulative outcome of the racial and colonial injustices of the past. The overwhelming destruction wrought by colonial and capitalist expropriation has devastated land, resources, and communities while enriching the very apparatus of destruction.

There are no straightforward solutions to this climate crisis. Imagining our way out of the planetary catastrophe demands, amongst other things, interrogation of the past and present of settler colonialism. Such interrogation is complex. Questions of climate change, climate justice, and the role of knowledge production in perpetuating or resisting colonialism are the purview of many disciplines. Nevertheless, the role of law and courts has been decisive in shaping the nature and course of Indigenous rights. This research shows why the legal articulation of, and engagement with, Indigenous environmental justice ("IEJ") matters. It will be shown that achieving IEJ depends upon open-minded and proactive courts, and innovative adjudicative practices that can achieve significant steps in the integration of the principle of IEJ into our legal systems.

Positioning the thesis

Before proceeding any further the researcher's positionality must be clarified given the nature of the subject matter. The thesis argues that that IEJ can only be achieved by prioritising Indigenous voices in adjudication. The thesis does not however usurp Indigenous voices, nor can it claim to speak on behalf of First Nations. Through rigid disciplinary frameworks of history, anthropology, law, and other fields, the knowledge production in the West has often perpetuated epistemic erasure.[1]

[1] Christine M. Koggel, "Epistemic Injustice In A Settler Nation: Canada's History Of Erasing, Silencing, Marginalizing", *Journal of Global Ethics*, 14:2, 240-251(2018); Walter Mignolo, "Epistemic Disobedience, Independent Thought And Decolonial Freedom", *Theory, Culture & Society* 26 (7–8): 159–181(2009).

How we understand theories, laws, and courts cannot be entirely free from how we have been trained to understand legal research. Further, the courts operate in a settler colonial space. This research (only) aims to analyse how settler courts perceive and engage with Indigenous environmental litigation. It studies the outcomes of such litigation. Any arguments made or conclusions drawn as a part of this research reflect its engagement with the settler juridical space and in no way overrides Indigenous self-determination in the social, economic and legal spheres. Academic research and knowledge production are tied to the moral and ethical concerns of researching Indigenous issues as much as any other. As well as answering the specific questions, it is important that this research pass the scrutiny of Indigenous scholars and communities.

This introductory chapter has four main objectives. First, it outlines the aims of this research, explaining the research question and the methods used to answer it. Second, it demonstrates the importance of scholarly, and judicial, engagement with IEJ and its implications for the integrity of the law. Third, it provides an overview of the existing literature to demonstrate where this thesis fits into the scholarly landscape. Fourth, this chapter shows the 'skeleton' of the arguments presented in the thesis as a whole.

A. Aims and methods

This thesis answers the following question: How do courts encounter and engage with IEJ in litigation pursued by Indigenous communities in Australia, Brazil, and Canada? The overarching question contains the following secondary questions:

1. What are the elements of IEJ?
2. How do judgments from Australia, Brazil, and Canada engage with IEJ through inclusion/exclusion of Indigenous voices?
3. What aspects of the outcomes of adjudication indicate express or implied judicial engagement with IEJ?
4. What do comparative lessons from the three jurisdictions hold for the framing and the future of IEJ? and,
5. What significance does judicial treatment have for IEJ more generally?

These questions are answered in the five main chapters that make up the thesis.

This thesis studies claims pursued by Indigenous communities where the central question concerns environmental harm. The term ‘environmental’ is defined as broadly as the idea of Indigenous environmentalism to reflect the many forms of relationship between First Nations and the environment. These include cases related to cultural heritage, sacred sites, land rights, just and fair compensation, and Indigenous sovereignty. Further, environmental cases, such as new strands of strategic climate litigation, which demonstrate the willingness and ability of courts to adopt new vocabularies and test the boundaries of common law are also studied. The fundamental aim of the research is to explore how courts understand specific events of environmental harm in the context of historical trauma and by reference to the question of intra- and intergenerational justice. Indigenous sovereignty; epistemic justice and knowledge forms; cultural and spiritual connections to land; and adequate reparation are all elements that are examined in this doctrinal study.

There are two reasons why the research was designed around environmental litigation rather than land rights litigation. First, the inorganic distinction between environment, land, natural resources, and ecology is non-existent in Indigenous thoughts. Consequently, unless shoehorned into specific categories of western epistemologies, Indigenous environmental relations have been invariably entangled with their cultural and spiritual existence. Second, the existing land rights legislation is a fragment of what Indigenous scholars have termed ‘liberal recognition’ of Indigenous rights. The Native Title or Aboriginal title litigation has itself limited Indigenous knowledge and sovereignty, while also defining land rights in the narrow framework of possession and ownership. Environmental adjudication is more imaginative and innovative and demonstrates greater openness to accommodating plural and epistemic sovereignties.

A brief example here will give some context to what this thesis aims to examine. The destruction of Juukan Gorge in Western Australia by Rio Tinto in 2020 was one of the devastating events that unfolded during this research. Juukan Gorge was a place of cultural and spiritual significance to the Puutu Kunti Kurrama and Pinikura people. The initial mandate of the Parliamentary committee’s inquiry into the destruction was later expanded to include scrutiny into the operations of other extractive industries and the effectiveness of laws in protecting the interests of First Nations in Australia. The Gudanji, Garrwa, Marra and Yanyuwa peoples of the Northern Territory have long fought against the expansion of McArthur River

Mine (MRM) by Glencore in the course of its zinc mining project. The community Elder, Mr Jack Green, made submissions before the Parliamentary committee.[2]

Parts of his submission are useful for thinking about how Indigenous voices are systematically excluded from court (notwithstanding the difference of forum here) because of their unfamiliar languages and modes of expression:

> I was taught our Law by my grandfathers, father, uncles and other senior kin from the Garrwa, Gudanji, Marra and Yanyuwa peoples. Knowledge came to me through our ceremonies, songs, stories, hunting, fishing and gathering and travelling through the country with the old people visiting sacred sites, as well as the places where our people were massacred by settlers when they invaded our country. We sing the country. All my life I have fought hard for our country, culture and our Law…When these places are damaged it hurts us. We feel cut open.
>
> I wish to submit my paintings to the Committee because over the past decade I have been documenting what mining companies, like Glencore, have been doing in the Gulf country…I have done this because Glencore, with their power and money, want to be the ones that tell the story and make everything look good…When I was young there was no whitefella schooling for us Aboriginal kids. My school was the bridle and the blanket, learning on the pastoral stations and country where my father worked. This is the reason I don't read and write. I'm not ashamed of this. I started painting to record what was happening to us. With each painting I record its story so that people clearly understand what is going on here…No one is listening to us, how we want to live, or how we want to look after our country and build a strong future for our young ones to care for country...I want government to listen to Aboriginal people, to respect our culture and Law and our rights as Indigenous peoples.[3]

Mr Green's submission is an earnest reflection of the sense of loss and grief experienced by Indigenous communities due to the loss of their land and environment. The testimony is not in a language or form that is automatically comprehensible within a court. Courts do not usually

[2] Submission No.154, "Submission to Joint Standing Committee on Northern Australia inquiry into the destruction of Indigenous heritage sites at Juukan Gorge". Available here: https://www.aph.gov.au/DocumentStore.ashx?id=16f7c3be-086e-4372-8212-9752a68a504c&subId=706218 (Last accessed: 15 October 2021).
[3] Mr Jack Green, n (3).

permit artwork as evidence of environmental harm. Rather, such ways of expressing harm requires interlocutors and translation into a form understood by courts. In the contemporary adjudication processes in Australia, Brazil, and Canada, Mr Green's submission may be admissible since domestic precedents have already established the parameters for admissibility and relevance of Indigenous testimonies.

How are these questions examined in this thesis? The cases studied here cover a period of nearly two decades, starting from 2005 until 2021. The jurisprudence has evolved a great deal since the influx of climate-related litigation, and some of the newer cases significantly influence this research. This thesis uses doctrinal methods to answer the research questions. Unlike traditional doctrinal methods, however, the approach here aims to look not only at the reasoning in terms of the law articulated, but also to respond to the choice of language in judgments and the existing power relations and imbalances within and without judicial spaces. Furthermore, while the methodology is a 'legalistic' one, engagement with interdisciplinary literature has shaped the questions asked in this thesis. Literature exploring settler colonial legal systems has been drawn from Indigenous legal philosophy, settler colonial studies and legal geography. This research acknowledges the many ways similar projects may adopt a different methodologies that foregrounds Indigenous knowledge forms.

To delve deeper into the precise methodological approach taken in this thesis, it uses doctrinal methodology from the perspective of law as a set of narratives. This 'narrative' emerges from the following:

- the decision between claimant and defendant itself;
- the text of the judgment and the reasoning expressed therein; and
- the next steps emerging after litigation leading to changed future behaviour.

How judges reason in majority, concurring, and dissenting opinions linger in the judicial spaces as fragments of knowledge that may be used in the future. Historically, the Indigenous voice is not the primary voice in the story that emerges from the court's reasoning but in places we can start to see this voice appearing in the story of the law. IEJ cannot emerge from merely repeating past jurisprudence but can instead be built from particular historical judgments with an open attempt to account for voices that are systemically excluded. This tension between the narrative of the law of the past, and the potential that law has to develop, means that the system is both open to change, and closed to radical departures. Furthermore, the process of

adjudication is still a perfunctory process in many ways. How courts reason depends on the materials that are presented to them and individual judge's attitudes to that material. However, the chapters that follow show how outstandingly progressive decisions have made it easier for future courts to consolidate jurisprudence or even persuade them to move towards expansive iterations of justice.

Australia, Brazil and Canada are the relevant jurisdictions for this study because of the similarities between the nations regarding social, political and legal complexities concerning relationships between the state and the Indigenous peoples. The three countries may appear distinct when analysed through the existence of treaty rights or constitutional recognition. However, when perceived through the similarities of land-people-environmental relationships and the constancy of settler colonialism in the everyday political life of the nation, the three countries have much to offer to comparative legal theory. While Australia and Canada are two of the oft-compared examples of settler colonial nations, Brazil provides useful contrast by demonstrating that settler colonialism has many forms and complex domestic mechanisms that affect Indigenous people. In addition, perspectives from the Global South, through knowledge forms and workings of settler coloniality, make important contributions to legal knowledge production. Australia, Brazil and Canada, whilst having varying degrees of land rights, constitutional rights, and treaty rights, share a violent history of dispossession and erasure. Dispossession and erasure are also vital characteristics of settler colonialism.[4] With settler colonialism as a guiding framework, studying settler colonial legality and principles of IEJ in the three countries will yield constructive outcomes to the legal scholarship.

An increase in the number of judgments across the three jurisdictions, which acknowledge the violent impact of colonialism on indigeneity and Indigenous peoples, suggests a shift in judicial attitude towards conceptions of justice. Further, the contemporary challenges posed by a new class of environmental litigations, such as climate litigation and implicit sovereignty claims before the courts, are testing the remit of settler juridical spaces. This research is a systematic effort to register and examine such changes and discern the value they may hold for comparative rights jurisprudence emerging from settler courts.

[4] Lorenzo Veracini, *The Settler Colonial Present*, (Palgrave Macmillan, 2015).

B. The Responsibility to examine Indigenous environmental justice

Having established the method by which the research question is to be answered, this section now turns to explaining why it is important to do so. The legal system, and those studying it, have a responsibility to examine the ways in which the legal system causes injustice to members of Indigenous communities. Indigenous sovereignties and environmental relationships have been eroded due to the onslaught of colonialism and exertions of extractive capitalism. As many Indigenous scholars have demonstrated, settler laws have been imposed to facilitate and oversee the functioning of institutions and systems that eliminate Indigenous self-determination.[5] Policies of forced assimilation; creation of residential schools; systemic racism in social, economic, penal, and judicial spaces; and sanctioning of new exploitative economic orders that disrupt Indigenous-environmental relationships have all contributed to the cultural and physical destruction of Indigenous peoples.[6] Settler colonialism has entrenched itself, in its less severe forms, by turning land and resources into commodities to be owned and traded.

Even an eventual recognition of Indigenous rights within settler legal systems draws Indigenous people away from their cultural and spiritual ties to land and into a system where they must claim limited rights in an unfamiliar language while forfeiting their sovereignty.[7] Australian scholar and Tanganekald and Meintangk woman Irene Watson questions the relentless exclusion of First Nations from every socio-political and legal space within settler colony when she asks, "to what extent is our sovereign Aboriginal being accommodated by the nation state's sanctioned native-titled spaces?".[8] Watson poses an open-ended question when she demands to know if there is any 'settled or unsettled space' for Indigenous people to 'roam'.[9] The metaphorical roaming suggests the possibilities (or lack thereof) of movement

[5] Aileen Moreton-Robinson, The White Possessive: Property, Power, and Indigenous Sovereignty, (University of Minnesota Press 2015); Attwood, Bain. *Empire and the Making of Native Title: Sovereignty, Property and Indigenous People.* Cambridge University Press, 2020.; Sandy Grade, *Red Pedagogy: Native American Social and Political Thought* (Rowman & Littlefield 2015).
[6] Estes, Nick. *Our History Is the Future : Standing Rock Versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance*. Verso,, 2019.
[7] Lois McNay, *Against Recognition* (Polity 2008); Taiaiake Alfred, "Sovereignty," in Sovereignty Matters: Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination, ed. Joanne Barker (University of Nebraska Press 2005).
[8] Irene Watson, "Settled and Unsettled Spaces: Are We Free To Roam?" *in* Aileen Moreton-Robinson(ed), *Moreton-Robinson, Aileen. "Sovereign Subjects : Indigenous Sovereignty Matters." 2020 https://www.taylorfrancis.com/books/9781003117353.*(Routledge 2012).
[9] Watson, n (8) at p.16

within the legal structures of the settler state. However, Indigenous people have been able to roam a little more within the judicial spaces than elsewhere. The gradual but promising development of Indigenous rights jurisprudence may not uphold Indigenous sovereignty unequivocally but courts can deliver newer iterations of justice and to help consolidate existing rights. The historical and on-going promise of the law to innovate, and the lasting effect of judgments on the remit of Indigenous sovereignty, demands engagement with the role that a principle of IEJ can play in law. This section demonstrates this responsibility to examine the role of IEJ.

When thinking about the responsibility of present generations and institutions in relation to historical injustices, Iris Young argues that where past injustices have congealed into the structural injustices of the present, the responsibility to remedy them assumes many forms.[10] Even where a direct personal responsibility to remedy the present injustices is hard to establish, Young argues that those who benefit from the system and are a part of it ought to "organise collective actions" to reform the apparatus of injustices.[11] While past injustices cannot be undone, recognising them and narrating them in the present becomes a vital part of the responsibility to redress. As Young contends, "the mere unchangeability of historic injustice, however, generates a present responsibility to deal with it as memory. We are responsible in the present for how we narrate the past".[12] In effect, Young helps us understand responsibility as generated from within, resulting from being a part of and extracting benefit from a historically unjust system. The responsibility to remedy past and present injustices includes a responsibility towards truth-telling. Such reconciliation and truth-telling are palpably within the province the law, and courts in particular. To put this another way, courts have a responsibility to consider explicitly how past injustice is built into the current court structures, and further, to consider how these injustices can be undone.

Therefore, those who interpret the law and develop jurisprudence have a responsibility for interpreting the text of the law in line the broader objectives of justice, as well as giving concrete meaning to those objectives themselves. Through this process of interpretation, courts

[10] Iris Young, *Responsibility for Justice*, (OUP 2011).
[11] Young, n (10) at p.180
[12] Young, n (10) at p.182.

have an opportunity to develop radical jurisprudence in response to contemporary crises. According to James Boyd White,[13] law is a:

> form of life that must work with the rules and other materials of law but is not reducible to them. It has the value of justice at its heart. It is a process, built upon a set of internal tensions, by which the old is made new, over and over again.[14]

A critical part of this process of interpretation is the construction of legal knowledge. White argues that such knowledge is "a way of claiming meaning for experience".[15] In other words, when a particular form of knowledge is prioritised within interpretation of legal rules, that prioritisation may exclude other ways of understanding the world. Legal knowledge production is, therefore, also responsible for continuing the historical injustices suffered by Indigenous people, which are reflected in, and also compounded by, the present injustices[16] but also represents an arena in which those injustices can be (partially) remedied.

There is, as a result, an internal tension in the resolution of claims brought by Indigenous communities in relation to the environment. Such claimants must express their claim within settler courts, applying settler laws, whilst relying on Indigenous voices and knowledge to explain the nature of the harms done.[17] Negotiating and resolving these contradictions and tensions is a challenge that the law must face head on. How to achieve this resolution is not discussed in detail in the existing literature. This research aims to resolve some of the issues with theory and reformulation by studying the exact point of contact between the legal issue, questions of sovereignty, and an overarching framework of radical jurisprudence in each jurisdiction.

However, in doing so, the limits of judicial power must be recognised. Whilst the interpretative and discretionary powers that characterise adjudication can foreground plural sovereignties without breaching the limitations on judicial powers, this power is clearly not limitless. As a result, in this research, IEJ is something to strive for through the micro-practices of adjudication as much as through grand or sweeping changes. Furthermore, this research recognises that many environmental claims by Indigenous peoples in Australia, Brazil, and Canada do not reach the courts. Examining how courts are moving away from the past practices of merely

[13] White, James Boyd. *Keep Law Alive.* Carolina Academic Press, 2019.
[14] White, n (13) at p.81.
[15] White, n (13) at p.84
[16] Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing*, (OUP 2007).
[17] White, n (13) at p.5.

resolving a legal question towards making a constructive contribution to iterations of justice provides insights into how legal knowledge can be an ally in Indigenous peoples' everyday resistance but is clearly not the whole picture.

The novelty of the environmental challenges facing us grounded in historical wrongs is a persuasive reason to analyse if the legal system can explore complementary ways of responding to these crises. Whilst there may not be adjudicatory power to override the legislative power, there is always power to speak and listen to different languages and rebuild jurisprudence as narratives of justice.

C. Existing Literature and the place of this thesis

Before continuing to answer to the research question, it is important to explore where this thesis sits within the wider literature. The thesis is fundamentally a comparative work but there are different realms of comparison around which the literature, as well as the conceptual frameworks, are organised. First, it is necessary to understand the social and political contexts of the domestic legal systems in the three jurisdictions considered here. The literature on these legal cultures, and how these interact with the argument in this thesis, is examined in section one.[18] Second, the existing categories of literature on critical legal theory, jurisprudence, legal geographies, and the frameworks they offer, provide a fine starting point for thinking about environmental justice and settler colonialism. These are explained in section 2.

Extractivism, Indigenous Communities, and Settler Legal Systems

As explained above, the three jurisdictions explored here are enmeshed in similar political economies, reliant to some extent on exploitative and destructive mining industries. This section explores some existing writing on how the law does or should respond to such industries, to situate this thesis within that wider literature.

[18] David Nelken, "Comparative Legal Research and Legal Culture: Facts, Approaches, and Values", *Annual Review of Law and Social Sciences*, Vol.12, 45-62, (October 2016); Reza Banakar, The Politics of Legal Cultures. in *Normativity in Legal Sociology* (Springer 2015); Jacqueline Hodgson, "Comparing Legal Cultures: The Comparativist as Participant Observer" in David Nelken (ed), *Contrasting Criminal Justice: Getting from Here to There,* (Routledge 2017).

First, there is an important strand of literature which explores the role of Indigenous participation in decision-making around such industries. In particular, this literature considers the role of mining agreements. Richard Howitt argues that Indigenous resource struggles can be tackled by strengthening social impact assessments and community participation at all levels of decision-making.[19] Howitt suggests that for 'recognition, respect, and reconciliation' to be meaningful, they require Aboriginal relations to be considered not as an externality but as integral to decisions.[20] The publication of Benedict Scambary's ethnographic monograph on mines and mining agreements was the defining moment in understanding domestic environmental conflicts and the role that legally-determined decision-making processes may play.[21] However, discussions in this literature are mostly based on understanding the disproportionate health and economic welfare consequences of extractive industries on the Aboriginal population rather than the environmental consequences generally. Mining agreements are still a matter of great interest in academic work. Scholars such as St-Laurent GP and Le Billon, Richard Howitt, and Fiona Solomon have examined the intricate relationships shared by Indigenous communities with mining in Victoria, Northern Territory, and elsewhere.[22] However, the most important contribution is from Ciaran O'Faircheallaigh, who studies mining agreements as legal documents and examines the consequences they may have on the pursuit (rather, hindrance) of legal remedies in cases of adverse environmental and health impacts.[23] In the Latin American contexts, Markus Kröger, Anthony Bebbington, Marta Conde, Diego Andreucci, and Murat Arsel have explored the overlaps between law and Indigenous resource governance, mining agreements, participatory monitoring, amongst others.[24] The key literature in the field has often focused on the social movements or aspects of political mobilisation rather than examining the legal theory or the role of litigation in

[19] Howitt R, *Rethinking Resource Management: Justice, Sustainability and Indigenous Peoples* (Routledge 2001).
[20] Howitt, n (19).
[21] Benedict Scambary, *My Country, Mine Country: Indigenous People, Mining and Development Contestation in Remote Australia*, CAEPR Research Monograph, No.33, (Australian National University, 2013).
[22] St-Laurent GP and Le Billon P, 'Staking Claims and Shaking Hands: Impact and Benefit Agreements As A Technology Of Government In The Mining Sector' 2 Extractive Industries And Society-An International Journal 590 (2015); Solomon F, Katz E And Lovel R, 'Social Dimensions Of Mining: Research, Policy And Practice Challenges For The Minerals Industry In Australia' 33 Resources Policy 142 (2008).
[23] Ciaran O'Faircheallaigh, *Negotiations in the Indigenous World: Aboriginal Peoples and the Extractive Industry in Australia and Canada* (Griffith Press 2016).
[24] Markus Kröger, *Iron Will: Global Extractivism and Mining Resistance In Brazil and India*, (University of Michigan Press 2020); Bebbington, Anthony and Jeffrey Bury. *Subterranean Struggles : New Dynamics of Mining, Oil, and Gas in Latin America*. First edition. ed., University of Texas Press,, 2013. EBSCO eBooks http://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&AN=633446, Conde, Marta and Philippe Le Billon. "Why Do Some Communities Resist Mining Projects While Others Do Not?" vol. 4, no. 3, 2017, pp. 681-97.

challenging extractive industries. Thus whilst this thesis engages with such literature, it adds to that discourse by focusing on these themes within courts.

Secondly, settler colonial studies contain an extensive body of scholarship that invariably explores law, environment, land, violence, and Indigenous rights. These provide many analytical infrastructures to this thesis but again do not necessarily focus on the question of environmental justice. Anishinaabe scholar John Borrows, for example, has worked extensively on the shaping of the relationship between Indigenous communities and modern legal institutions in settler colonial Canada. Borrows lays down the ground for Indigenous constitutionalisms and jurisprudence.[25] The idea of legal institutions as continuity of colonial rule and violence and the imperviousness of legal theories to Indigenous methods, relations and values, influences a large part of contextual and methodological inquiries of this thesis. A range of insightful literature by Lorenzo Veracini, Patrick Wolfe, Glen Coulthard, Sandy Grande, and Nick Estes provides useful insights into settler-colonial past, environmentalisms, the economy of dispossession, and the violence of laws, amongst others.[26]

Finally, the huge body of critical literature on Indigenous sovereignty, race, and settler colonialism provides the necessary tools for undertaking this research. Aileen Moreton-Robinson, Irene Watson, Leanne Simpson, Zoe Todd, Bain Attwood, Asmi Wood, amongst others, have illuminated the nature of law, power, and institutions in settler colonies.[27] Their scholarship demonstrates how law constructs legitimacy for settler colonialism and lopsided justice dispensation mechanisms while fundamentally excluding Indigenous voices and worldviews. Even if the Indigenous sovereignty scholarship is not legal theory in the strictest sense within the western epistemic framework, without it, the reader cannot comprehend the idea of epistemic justice and the pertinence of Indigenous sovereignty to IEJ. This work therefore utilises the very important lessons from this literature, and directs it to the specific research question addressed.

[25] Borrows, John. *Freedom and Indigenous Constitutionalism.* University of Toronto Press, 2016.
[26] Sandy Grade, *Red Pedagogy: Native American Social and Political Thought* (Rowman & Littlefield 2015); Lorenzo Veracini, The *Settler Colonial Present,* (Palgrave Macmillan 2015); Patrick Wolfe, *Settler Colonialism and The Transformation of Anthropology,* (Cassell 1999).
[27] Aileen Moreton-Robinson, The White Possessive: Property, Power, and Indigenous Sovereignty, (University of Minnesota Press 2015).

Critical Legal Interventions

Just as the above literature has developed in the context of extractive industries and settler legal systems, the three jurisdictions have also generated significant scholarship in legal and Indigenous geographies. David Delaney, Mariane Valverde and Nick Blomley deal with the distribution and flows of power in litigation, the rule of law, and legal institutions.[28] The legal geography literature provides useful viewpoints on alternative values in environmentalisms, justice, governance, and democracy. However, most of the legal geography literature from the three jurisdictions are by non-Indigenous scholars and do not engage specifically with Indigenous environmental justice. This thesis melds this legal geography literature with that above to show how courts respond to Indigenous environmental litigation.

Furthermore, Irus Braverman, Alexandre Kedar and Philippolous-Mihalopolous have produced several bodies of work about nomospheres (the interactions between geography and law); rules of procedure which bely claims of neutrality; and legal rules of engagement that reflect 'cultural values and power worthy of examination' in Indigenous litigation.[29] While most of the key works invariably rely on land rights litigation, more recently, scholars such as Timothy Neale and Eve Vincent have moved towards understanding the evolution and import of environmental justice and social engagement with law, studying granular issues such as health, water, mining etc.[30] In a more specific engagement with Indigenous laws, treaty rights, constitutional law, and implications of UNDRIP, the works of Megan Davis, Harry Hobbs, Stephen Young, Simon Young, Brian Slattery, Kent McNeil are particularly illuminating as they deal with the many textured relationships between the courts and Indigenous peoples.[31]

Indigenous experiences in courts have also been considered as useful archives of legal materials with ramifications for judicial engagement with Indigenous claims on land, sovereignty, and traditional practices. Kyle Whyte, and Dallas Goldtooth, et al. have argued

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[28] Nick Blomley, "Learning from Larry"; Delaney D, "At Work in the Nomosphere"; Mariane Valverde, "Time Thickens, Takes on Flesh" – *all in* Braverman et al, *The Expanding Spaces Of Law: A Timely Legal Geography* (Stanford Law Books 2014).
[29] Braverman et al, *The Expanding Spaces Of Law: A Timely Legal Geography* (Stanford Law Books 2014).
[30] Timothy Neale et al, *Unstable Relations: Indigenous People and Environmentalism in Contemporary Australia*, (UWPA 2016).
[31] Megan Davis, 'Self-determination and the right to be heard', in Pearson N; Morris S (ed.), *A Rightful Place: A Roadmap to Recognition*, (Melbourne 2017); Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia*, (Hart Publishing 2021); Brian Slattery, Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title (University of Saskatchewan Native Law Centre 1983); Kent McNeil K, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Native Law Centre of Canada 2001).

that there is a need for interdisciplinary materials and specialist approaches to allow such consideration to be extended to climate change and its impact on Indigenous communities.[32] Elizabeth Povinelli's contribution to understanding the intersections between law, race and indigeneity provides an indispensable supplement to the work of Indigenous scholars in the field.[33] Povinelli's anthropological insights into legal processes present new ways of studying and processing jurisprudence.[34] More than 'what jurisprudence is', such novel readings help the reader think 'what jurisprudence ought to be' regarding Indigenous rights. Similar approaches have been adopted in how this research reads and assimilates case laws into its propositions for radical jurisprudence. Historians such as Arthur Ray and Ann Curthoys have looked at First Nations' rights litigation while studying the reception of Indigenous evidence in adjudication processes. While their work has been ground-breaking from an ethnographic standpoint, theorising justice to benefit future jurisprudence requires a different approach.[35]

Brazilian socio-legal theory, or that part of it which is accessible in English, is dominated by Santos' work on the domestic legal apparatus. Santos provided the foundation for understanding power and the architectures of law well before legal geography made a formal appearance in the Global South.[36] Santos' work on the poor and the marginalised in Brazil, and their encounters with the law, gradually steers its way into discussion of environmental justice, but that is not the core of the work. Subsequently, Hoekema and Costa et al. have explored 'interlegalities' (intersections between law, anthropology, and ethnography in Indigenous studies and legal pluralism), encounters with native cultures and spiritual/environmental relations, and the freezing of differences and cultural diversities in politics and law in Latin America.[37]

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[32] Kyle Whyte, Settler Colonialism, Ecology, & Environmental Injustice *Environment & Society* 9: 125-144 (2018).
[33] Povinelli, Elizabeth A. *Geontologies : A Requiem to Late Liberalism.* Duke University Press, 2016.
[34] Povinelli, n (33).
[35] Ann Curthoys, Genovese A and Reilly A, *Rights And Redemption: History, Law And Indigenous People* (University Of New South Wales Press Ltd 2008); Arthur Ray, *Telling it to the Judge: Taking Native History to Court,* (McGill-Queen's University Press 2012).
[36] Boaventura de Sousa Santos, "Law, A Map of Misreading: Toward a Postmodern Conception of Law", *Journal of Law and Society* Vol. 14, No. 3 (Autumn, 1987), 279-302.
[37] Hoekema, "European Legal Encounters Between Minority and Majority Culture: Interlegality", 37 Journal of Legal Pluralism and Unofficial Law, (2005); Costa S, "Freezing Differences: Politics, Law, and the Invention of Cultural Diversity in Latin America", in Aldo Mascareno et al (ed), *Legitimization in World Society,* (Routledge 2012).

Again, this thesis works between these kinds of literature – the focus on Indigenous rights and extractive industries/ environment more generally, and critical analyses of the operation of courts and the law in relation to Indigenous populations – to produce a work accessible to courts and legal theory simultaneously. Furthermore, most of the existing scholarship is limited to one jurisdiction, while some of them are less perceptive of the conditions of the Global South. Consequently, this research negotiates the complex terrain of comparative work, which is rewarding in developing a common vocabulary that aids both jurisprudence and social movements. It also establishes the critical relevance of courts as key actors in developing IEJ. As a result, it contributes to the knowledge built up within that existing literature, as well as providing guidance to how courts should develop a more sensitive narrative that encompasses multiple knowledge forms and understandings of land-environment-culture relationships.

D. Summary of Chapters

The thesis achieves this overall contribution through five main chapters. This section explains the content of those chapters, so as to demonstrate how the overall argument is built through the thesis.

Chapter 1

The first chapter provides a novel intellectual map for understanding IEJ in court – both in terms of what it is, and in terms of how the principle should be used. To this end, the chapter proposes the frameworks of 'epistemic communities' and 'narratives' through which judgments may be understood. It does so, first, by exploring in more detail the nature of legal knowledge production and the understanding of law as a narrative enterprise. It shows that thinking about law as a narrative allows us to parse it of oppressive hierarchies. Here, the reader is also invited to think about law as actively labouring to achieve epistemic justice and producing legal knowledge as a part of its responsibility to confront settler colonialism. The arguments draw from range of scholars, from Peter Fitzpatrick to James Boyd White, who have written about the coloniality and transformative potentials of the law and jurisprudence.

The chapter then explains the role of IEJ as a principle and articulating its main components. It considers some of the core constitutive ideas of IEJ common to Australia, Brazil, and Canada. These ideas are drawn from Indigenous scholarship on law, justice, land rights, and

environmental relationships. It shows that IEJ emerges as a collective of practices in adjudication. Invariably, such adjudicative practices vary according to the circumstances and claims of the Indigenous communities. The chapter then illustrates how law operates in settler juridical spaces to the exclusion of certain knowledge forms and land-environment-cultural relationships. It engages with the existing Indigenous scholarship to elucidate the primacy of land, time, and indigeneity within IEJ. It also suggests how these individual constitutive ideas of IEJ can facilitate what is previously termed as 'narratives' or 'epistemic communities' to achieve IEJ.

Chapter 2

The second chapter then moves to answer two specific questions which emerge from the framework built in the first chapter. First, it asks how Indigenous voices are represented in the litigation process. Second, it then asks that if Indigenous voices are represented through evidence, how do particular judgments address these voices.

The analysis in chapter two is developed to allow the reader to understand the barriers to presenting Indigenous voices in the litigation process. Courts will have to make several decisions in the course of litigation, other than deciding which law applies to the issue at hand. Some of these decisions include recognising (or not recognising) Indigenous cultural relations and philosophies that may come across as counter-intuitive to the scientific certainty demanded by legal process and the rules of evidence. Further, there is an overwhelming question as to whether Indigenous cultural and environmental relations are a question of legal fact or distinct materials that are still unfamiliar within juridical spaces. The courts have struggled to resolve these tensions in novel ways in recent years, and the cases used in this chapter demonstrate those trends.

The cases discussed here show the diverse judicial approaches to Indigenous testimonies and evidence that help unpack the future jurisprudence of IEJ. Among the Australian cases explored in this chapter, *Gloucester Resources Limited v Minister for Planning*[38] illuminates a body of case law emblematic of anti-coal jurisprudence. It also effectively captures the field occupied by what is denominated as essentially an 'extractivism versus environment' binary.

[38] [2019] NSWLEC 7.

Adnyamathanha Traditional Land Association v Minister for Energy and Mining,[39] *Darkinjung Local Aboriginal Land Council v Minister for Planning,*[40] and *Dempsey v State of Queensland*[41] capture the intersections between mining, environment, and cultural heritage. *Buzzacott v Morgan*[42] is exceptional but an instance where an Aboriginal Elder unsuccessfully sued a mining corporation on the grounds of genocide and destruction of ties to the land. The failed attempt to engage the court in a novel claim is later contrasted by the willingness of recent courts to understand the responsibility of laws and courts more generously.

As the chapter shows, Brazil has a less disparate set of cases. Most cases are either claims for an injunction or claims for compensation. The cases of *Raposa Serra Do Sol*[43] on the demarcation of Indigenous territory and *Onca Puma*[44] on granting an injunction against the mining of Indigenous territory demonstrate the extent of judicial engagement with Indigenous land relations. The claim for an injunction in *Belo Monte Hydroelectric Dam*[45] and *Serra Do Padeiro*[46] speaks to specific land and cultural connections as recognised by the Brazilian Constitution.

Finally, the Canadian cases examined in chapter two emerge through the 'duty to consult' as a placeholder for IEJ because of constitutional boundaries, later explored in Chapter four. The combined decisions of the Canadian Supreme Court in *Hamlet of Clyde River and Ors v Petroleum Geo-Services & Anr*[47] and *Chippewas of Thames First Nation v Enbridge Pipelines & Anr*[48] represent the conflicts between extractive industries and Indigenous territories. Finally, the chapter focuses on the dissenting opinion in *Ktunaxa First Nations v British Columbia,*[49] which foregrounds Indigenous spiritual connection with the land alongside environmental rights protected under section 35 of the Canadian Constitution.

[39] [2018] SASC 142.
[40] [2014] FCA 528.
[41] [2015] NSWLEC 1465.
[42] [1999] SASC 149.
[43] Petition 3388 / RR - Petition RORAIMA.
[44] Rcl 29162 / PA - PARA CLAIM.
[45] Pet 2604 / PA - TO PETITION (Presidency decision).
[46] 2006.33.01.000722-7.
[47] 2017 SCC 40.
[48] 2017 SCC 41.
[49] 2017 SCC 54.

Chapter 3

Having established the role that Indigenous voices have in litigation in the three jurisdictions, chapter three then examines what remedies emerged from such litigation. There are three main questions answered in this chapter. First, it assesses whether the courts reason in terms of an attempt to correct legal and more-than-legal issues which arise in the case. Second, it asks whether the remedies awarded effectively capture the effort made by the judges to consider these wider issues. Finally it examines whether the nature of the remedy reflects IEJ.

It answers these questions by acknowledging that the specific consequences of Indigenous environmental litigation may be expressed in terms of, amongst others, the granting of injunctions, the cancellation of permits for extractive projects, awarding of compensation, or in directing defendants to undertake remediation efforts. In some cases, there may be a possibility of courts directing parties to restorative justice processes in addition to other remedies. It will be seen that these outcomes may not necessarily address the consequences of environmental litigation for the communities themselves. However, some outcomes, such as court decisions discouraging certain forms of Indigenous rights litigation led by non-Indigenous parties, or creating novel categories of compensation, are distinct to the kind of litigation analysed here. This chapter demonstrates that what a court decides to be an 'ideal solution' tends to have a more direct and weighted bearing on ideas of justice than what precedes the decision-making process.

Again, case law is examined to address these issues. In Australia, the chapter draws from *Aboriginal Areas Protection Authority v OM (Manganese) Ltd,*[50] *Northern Territory v Griffith & Ors,*[51] *Dolly Talbott and Steve Talbott on behalf of Gomeroi Traditional Custodians v Minister for the Environment,*[52] *Garret v Williams and Chief Executive,*[53] *Office of Environment and Heritage v Clarence Valley Council*.[54] From Brazil, the chapter looks at the Mariana Dam collapse settlement accord and the 2020 compensation claim by the Ashaninka people of Acre. Canadian cases include *Snuneymuxw First Nation et al. v R*[55] and the

[50] 2013 NTMC 019.
[51] [2019] HCA 7.
[52] [2020] FCA 1042.
[53] [2007] NSWLEC 96.
[54] [2018] NSLEC 205.
[55] *2004 BCSC* 205.

unsuccessful litigation in the case of the *Mount Polley* remediation. While being mindful of the domestic variations in the judicial process, the chapter measures how the judgments address the magnitude of environmental and cultural loss, and the creation of amicable spaces for future litigation to explore ideas of justice beyond the conventional definition.

Chapter 4

Chapter four then illustrates the lessons that may be drawn from this comparative study of environmental and Indigenous rights jurisprudence carried out in chapters two and three. The aspects that make comparisons between jurisdictions and courts productive are not limited to the inherent difference in methodology and principles with which they approach the question of Indigenous environmental justice. At least in some jurisdictions, for instance, in Australia, the principle-based approaches to judicial interpretation of Indigenous rights have been evolving at an unprecedented pace, taking into account contemporary social and political movements, challenging power structures, and demanding constitutional recognition.

The lessons come in two parts. In the first, the chapter examines why the three jurisdictions may have resisted substantial progress in achieving IEJ. This is conceptualised in three broad categories: institutional limits, constitutional limits, and epistemic limits. In the second part, the chapter lays down three broad heads of jurisprudence developed by courts which help structure the decisions explore. These are:

1. Understanding justice-oriented jurisprudence within existing laws and constitutional rights framework. These may include contextualising Indigenous rights within the wider legal apparatus, such as Treaty rights.
2. Judicial understanding of existing laws and constitutional rights has broader import and boundaries than conventionally acquiesced. Consequently, courts tend to be more welcoming of Indigenous claims and IEJ, presuming that the existing frameworks already support such interpretation.
3. Creation of a new and invigorated jurisprudence, which responds to and is considerate of the ongoing Indigenous struggle for political empowerment and legal recognition.

The analysis in this chapter understands the adjudicatory process as a whole, including the contemporary developments in the socio-legal front since judgments do not exist in isolation. Such a grounded analysis makes a compelling case for addressing the three limits advanced in the thesis so as to develop a holistic conception of IEJ.

Chapter 5

Having reached comparative conclusions in chapter four, chapter five then returns to the wider picture. It addresses three broad arguments. First, it shows that the expression of IEJ in law, either implicit or explicit, is significant for the integrity of law as much as it is for the social movement outside of judicial decision-making. Second, it argues that a plurality of legal principles and frameworks can address the structural injustices entrenched in the law but that the recognition of the principle of IEJ in settler courts is a critical component of the reconciliation process. Finally, it shows that conceptualising and articulating justice remains one of the vital tasks of the courts even where it is not explicitly pronounced and expressed. IEJ in the form of a continuing narrative, manifest through judgments improving on the rights established by their predecessors, contributes to the radical reformation of the settler legal systems. This chapter is therefore an invitation to think widely about conceptualising and theorising justice in court. While the methodology adopted in courts is likely to be faithful to conventional legal processes and doctrines, the provocations from the lessons learnt aim to advance newer iterations of justice.

Four recent decisions from the three jurisdictions make a momentous intervention in the existing environmental and Indigenous rights jurisprudence and demonstrate this potential. These judgments are indicative of proactive judicial engagement with existing laws that are not adequately equipped to deal with Indigenous sovereignty (*Love and Thoms v Commonwealth of Australia*[56]), climate change (*Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment*[57]), customary rights (*R v Desautel*[58]), and novel pressures on Indigenous land (*Public Civil Action for Demarcation of Piripkura Indigenous Land*[59]).

This chapter concludes that judicial knowledge production is vital for shaping social movements since a significant part of adjudication consists of processing knowledge through facts, principles, and collective values. When courts provide platforms and prominence to Indigenous claims, they will enable more polished litigation in the future. Narratives of justice

[56] [2020] HCA 3.
[57] [2021] FCA 560.
[58] 2021 SCC 177.
[59] PUBLIC CIVIL ACTION (65). Process: 0005409-02.2013.4.01.3600.

cannot be found in a single instance or an episode of history. Courts have implicitly contributed to the building of these narratives. Indigenous environmental justice is an invitation to deliberate on and contribute to the narratives of justice consciously.

E. Conclusion

This introduction has outlined the research carried out in this thesis. It has explained the research question and the components that make it up; the methodologies to be employed; the justification for the research; and its place within the wider literature. It then gave an overview of the thesis as a whole to explain the structure of the argument presented here.

Overall, it is clear that IEJ merits a closer look from the vantage points of: changing nature of environmental litigation, claims by communities, plural sovereignties, and the range of remedies available. Environmental injustices experienced by the First Nations are both profoundly contemporary as well as historical. However, courts have never been more equipped to see these forms of injustices and even address them as much as they are at present. In light of settler nationhood's deeply violent nature in Australia, Brazil, and Canada, there is an innate resentment and distrust associated with interactions with domestic courts and laws. However, sincere attempts at acknowledging settler colonial violence, constructive recognition of Indigenous voices, re-thinking the boundaries of justice go a long way in determining how courts can be imagined as an ally of the Indigenous struggle for justice. While talking about justice in the context of residential schools in Canada, Squamish woman Shellene Paull observers: “Justice is something that, in theory, is out there. But it’s a real challenge when you try to look for justice”.[60] This thesis takes up the difficult task of looking for justice in a complex, seemingly unyielding system. However, such a task is unlikely to be futile when hope is both a responsibility and an ally.

[60] Stephanie Wood, “Stories from Auntie”, *The Narwhal*, (September 30 2021).

Chapter 1: Mapping Indigenous Environmental Justice

A. Introduction

In the movie 'Where the Green Ants Dream' two moments from the scene involving a court trial stand out. The film was loosely based on the case *Milirrpum v Nabalco Pty Ltd*.[61] The plaintiffs in the theatrical trial present an artefact that signifies the ancient relationship with their land. The judge, however, cannot register it in the proceedings even though he is sympathetic to their beliefs. Instead, the judge dictates that the artefact be recorded as a "sacred object whose relevance was not clear to this court". In the following sequence, an Indigenous witness tries to testify before the court. He appears to be the only surviving member of his community and speaking the language of that community. In the absence of translators, the court cannot accept his evidence. As the trial is portrayed in the film, the lack of appropriate language to communicate with the court is devastating. When legal processes exclude a large segment of knowledge that is important to Indigenous peoples because it is termed as 'legally inadmissible', it is unlikely that the outcome of litigation achieves justice.

While it is interesting to examine the jarring differences between procedural outcomes and aspirational justice, the analysis should not end there. Consideration of litigation through the lens of Indigenous environmental justice (IEJ) raises several complex moral and ethical questions. How have courts dealt with Indigenous subjects in environmental litigation? Does environmental litigation involve, reason with, ensure, or enhance IEJ, and if so, how is such justice articulated through adjudication?

The purpose of this chapter is to explore IEJ in more detail, and to explain how it is understood in this thesis as a (potential) principle of law. As explained in the introduction, this chapter provides a novel intellectual map for exploring IEJ in court – both in terms of what it is, and in terms of how the principle should be used. In doing so, it will become clear that this acceptance of IEJ must entail a recognition of law's (and by implication, courts') complicity in settler colonialism but that it also represents a means through which adjudication may remedy such complicity.

[61] (1971) 17 FLR 141. Milirrpum pre-dated Mabo and was one of the first cases where the Yolngu people, traditional owners of Arnhem Land in the Northern Territory, sued the Nabalco Corporation, which obtained the bauxite mining lease on the traditional lands.

In summary, the argument presented in this chapter is as follows. First, law should be understood as a narrative enterprise. This approach to the way law develops emphasises the role of interpretation, and the importance of law to the production and recognition of knowledge. As a result, second, we must see the legal system as a community through which knowledge is produced. Against this background, the relationship between law and justice for Indigenous communities becomes apparent. Simultaneously, the chapter explains the meaning of environmental justice, focusing on the need for distribution and participation. It will become clear that such a concept is insufficient to include the struggles for sovereignty that affect Indigenous communities and their relationship with the natural world. It is therefore necessary to rely on IEJ as a moral principle to combine these two threads. The history of and literature relating to IEJ will then be examined to give concrete meaning to that concept so that a working definition is proposed. Finally, the chapter explains some hallmarks of IEJ which act as a framework through which the case law is examined in the rest of this thesis.

Some Terms Used in This Thesis

To set the groundwork for this discussion, it is useful first to consider some of the terminology used in this thesis. In particular, it is helpful here to explain how 'epistemology' and concepts derived from the word—epistemic injustice and epistemic responsibility – are understood *in this thesis.*

Epistemology: A general, philosophical definition of epistemology states epistemology to be a theory of knowledge regarding its methods and scope.[62] Epistemology is about *knowing* and as well as being aware of *how* and *what* we know. The task of this thesis is not to offer more theories of knowing but to draw attention to the politics of what is considered as (legal) knowledge and what also needs to be considered as knowledge, legal or otherwise. Effectively, the use of epistemology in this thesis draws attention to the politics of knowledge in courtrooms. More importantly, one of the objectives of the research is to highlight how Indigenous voices, which do not strictly confirm with the western, colonial knowledge forms, are also knowledge forms that courts must recognise and adopt in adjudication. If adjudication in its simplest form may be determined as *knowing* (facts and principles) and determining (remedies), including epistemologies that are not mainstream or western help in 'raising

[62] Paul Horrigan, *Epistemology: An Introduction to the Philosophy of Knowledge,* p.viii, (iUniverse, 2021).

consciousness' and empowering marginalised voices within spaces (courts) that are not adequately inclusive.[63]

Epistemic injustice: An issue before the court can be legal or political or both. Indigenous environmental litigation is invariably a mix of both legal and political questions. They may even raise moral questions at times even though a traditional court may not frame it as such. Erasing Indigenous voices in the process of adjudication and refusing to recognise the settler colonial contexts in which the issues are contested is an instance of epistemic injustice. While the adjudication may be *legally* sound, it ignores the opportunity to strengthen legal integrity by including historically oppressed voices and may even perpetuate ongoing injustices against Indigenous peoples.

Epistemic responsibility: If we understand epistemic injustice as a wilful or inadvertent exclusion of marginalised voices, then *epistemic responsibility* may be defined as the recognition of the need to remedy epistemic injustices and exclusion of (Indigenous) voices. An epistemically responsible judicial action must take into account the duty to frame issues and apply principles that will result in just outcome for Indigenous claims, address the present wrong and at least acknowledge the past harms.

B. Law as a Narrative Enterprise

IEJ is not, currently, a principle within the legal systems studied here. It is not well defined legislative or judicial processes. It is at a protean stage. It has neither the legal status nor the required clarity to act in a similar way to other principles of environmental law, such as the precautionary or polluter pays principles. However, that does not make IEJ ineffective or legally irrelevant. Indeed, since litigation has such a profound influence on IEJ in practice, even where courts do not explicitly engage with - or aim for - justice for Indigenous communities, through litigation courts are inevitably affecting this position. Therefore, as a moral principle, IEJ has a natural connection to the legal system. As such, it has the potential to act in the form of legal principle if sufficiently developed. Importantly, this thesis does not claim that this is *currently* the position. Rather, the thesis explains what IEJ means as a moral principle, how that moral principle can, and in some ways already is, be translated into a

[63] Lorraine Code, "Epistemology" in Alison Jaggar and Iris Young, *A Companion to Feminist Philosophy*, (Routledge 2017).

principle of law. It then examines the current judicial position in respect of the fundamental components of IEJ and assesses the potential of this moral principle to develop into a legal principle. This chapter allows for this analysis by developing a theoretical framework of law as a narrative enterprise.

The starting point of this thesis therefore is this understanding of law as a narrative enterprise. This means that law is a social structure which, through its own development, hard-wires certain 'givens' into how the system works which then set the 'plot' for future legal developments. As will be seen below, this understanding of the legal system emphasises the role of interpretation, demonstrates the opportunity for development, and reveals certain criticisms of the legal system as it currently stands.

Peter Fitzpatrick explores the idea of law as a collection of certain mythologies generated from both within and outside its own power structures.[64] These 'mythemes' may originate in courts to keep up the notions of certainty, integrity, and law as a self-sustaining entity.[65] According to Fitzpatrick, the mythology of the law is "the mute ground which enables 'us' to have a unified 'law' and which brings together law's contradictory existences into a patterned coherence".[66] These mythemes may also originate in attempts to advance the State's legitimacy. If such a characterisation of law is accepted, then it follows also that law is an epistemic exercise: as a process, litigation creates knowledge and prioritises certain kinds of knowledge through its self-defined hard-wired standards as to what constitutes 'evidence worth the name' as presented in court. This section explores both of these arguments further.

A narrative, in the sense used here, is something distinct from the system of precedent (although of course precedent is part of it). Precedents are integral to legal knowledge production within common law systems. However, understanding law as a narrative overcomes the problem associated with the system of precedent itself, i.e. that the very rules which are under consideration also includes those rules of when a precedent is binding. In other words, the notion of precedent is part of law's own mythology. The theory of law as a narrative draws from the incremental addition to rights jurisprudence and legal thought emerging from scholarship without the western legal scholarship paradigm and attempts to examine not only

[64] Peter Fitzpatrick, *The Mythology of Modern Law*, (Routledge 1992).
[65] Luhmann, Niklas et al. *Law as a Social System.* Oxford University Press, 2004.
[66] Fitzpatrick, n (64) at p.2.

the rules and principles that emerge, but also the myths that support them. It helps us to also account for structural injustices recognised and redressed over the years and to challenge our own potential pre-conceptions relating to the neutrality or 'ideal' of law. As White explains:

> The process of legal thought simultaneously resists simplicity and appeals to the side of us that wants to imagine the world, and ourselves and others within it, in a coherent way. A case is a bright moment, at which we have the opportunity to place at once the language we are given to use and the particulars of the case before us, and in both directions, we are drawn into real struggles of mind and imagination. The object of law is justice; but the law teaches us, over and over again, that we do not have unmediated access to the pure idea of justice in the heavens, which we can apply directly and with confidence, but rather live in a world in which everything has to be…argued out and reimagined afresh.[67]

The narrative of the law under our lens, which emerges through this thesis, is one where an imaginative re-reading of the remit of law and a sense of responsibility in contemporary settler jurisprudence is possible.

An understanding of law as a narrative is important for this thesis. First, the origin of many of law's myths lies, as explained above, in the justifications developed by the legal system relating to the legitimacy of the State. The effect of these 'myths' in the hard-wiring of the law has had profound effects on the relationship between settler legal systems and Indigenous communities. In the settler colonies, law was required to navigate the process of acquiring new territories and claiming dominion over them. A good example of this hard-wiring can be found when considering the concept of *terra nullius*. This rules itself may have been overturned through judgments, but the organisation of legal and historical memories of a nation retain other consequences that follow from the doctrine since the concept has become 'hard-wired' into the system, creating a kind of path-dependency even when the explicit concept is removed. These memories of legitimate possession in Australia or Canada colour the ways the narrative around nation-building is organised. Turning land into a 'property' that can be owned and alienated

[67] James Boyd White, *Edge of Meaning*, p.222 (University of Chicago Press 2001).

requires assembling legal structures and institutions that validate state actions and the legal system then adopts this framing as *the* mode of understanding the world.[68]

Second, the effect of law's narrative on Indigenous communities is clear. Settler law narratives exclude Indigenous voices through material dispossession and epistemic erasure. Legal historian Bain Attwood argues that even if the narratives are assumed to be increasingly progressive, a significant epistemic shift in the representation of Indigenous peoples through their voice is less likely.[69] Indigenous people continue to remain as mere historical subjects rather than as individuals telling their own stories in courts. Law's narratives allow few opportunities to accommodate interpretations and changes to the narrative from external agents, especially when there are no pre-recognised platforms to accommodate the claims of the litigants. The likelihood of success in terms of an epistemic shift is greater if conceived and advanced from within, such as through strategic litigation (p.43). This section explains these factors further.

Role of interpretation

First, it is useful to explore the role of interpretation. Thinking of law as a narrative enterprise brings this role to the fore. Ronald Dworkin imagines law as an expansive empire. Although Dworkin's interpretative empire has a diverse range of actors, it treats interpretation as an ultimate end in itself and immune from the power hierarchies manifest through race, class, gender etc. Fitzpatrick differs from Ronald Dworkin in thinking about law as an empire, an "interpretive and self-reflective terrain that has no other objective but to interpret".[70] Ironically, like all colonial empires, imagining law as an empire has undertones of wilful epistemic erasures. Empires are not accountable to justice, inclusion, and recognition. The need to construct law as 'independent' is necessary and understandable given the range of functions performed by courts. However, the need for independence in this sense cannot be used as an excuse not to include other approaches to interpretation of the norms concerned. The contemporary pressures of social, economic, and environmental challenges provide a moment in which the usual approaches to interpretation, which are driven and directed by the myths of

[68] Bain Attwood, "The Batman Legend: Remembering and Forgetting the History of Possession and Dispossession", in Lessard Hester et al (eds), *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community,* (UBC Press 2011).
[69] Attwood, n (68).
[70] Fitzpatrick, n (64) at p.5.

neutrality and justice in (and only in) certainty and predictability as understood by the settler state. Herein lies the significance of understanding law as one of the epistemic communities (p.42) that contributes to knowledge production. The role of courts in interpretation can therefore be one of the places in which IEJ can be acknowledged.

Opportunities

Meanwhile, in thinking about law as a *narrative* (p.35), we can more actively consider the identities of the narrators, and the overall 'plot' and the opportunities that exist for change. This will allow us to take a position that can divorce law from its oppressive hierarchies and which could allow for reckoning with the ongoing violence of settler colonies. Even though narratives can be hierarchical and complicit in the erasure of a plurality of voices, this chapter uses them to communicate how courts can build on the few opportunities of radical jurisprudence tendered in domestic legal spaces to develop a new storyline. Just as courts learn from and add to precedents, notions of justice build on previous iterations of court-led law reforms and advance incremental changes in the rights framework.

James Boyd White's articulation of 'justice as translation' illuminates what such a plurality of narrators can achieve in the development of the law.[71] In his *Justice as Translation: An Essay in Cultural and Legal Criticism*, White makes a convincing case for the transactional nature between law, justice, and translation. 'Translation' in White's argument includes recognition and response to another language, assertion of one's language in the process, and identifying the limits of the institutional language and loss of meaning in the act of translating.[72] The achievement and whole-hearted pursuit of IEJ is in many ways an act of translation, such that it can be best termed as an epistemic response to the social and economic cues offered. The legal narrative around IEJ must first face the Indigenous critique of legal systems and juridical spaces. White also suggests that one who participates in legal interpretation must perceive the way litigants with less power and resources consider the juridical spaces oppressive.[73]

Reveals pertinent criticisms

[71] James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism,* (The University of Chicago Press 1990).
[72] White, n (71) at p.
[73] James Boyd White, *Edge of Meaning,* p.222 (University of Chicago Press 2001).

Finally, considering law as a narrative, reveals pertinent flaws in our legal practice from the perspective of justice in general, and IEJ specifically. In everyday litigation, exclusion of certain forms of narratives are inevitable. Nonetheless, to exclude representation and the voice of certain communities consistently, as a matter of judicial practice, or to make a system impenetrable to parties contesting the claim amounts to structural discrimination. John Borrows indicates these forms of exclusion as one of the significant failures of the settler legal system.[74] However, this also provides an opportunity to develop future jurisprudence with elements of Aboriginal and non-Aboriginal legal philosophies. Borrows argues that the differences of Aboriginal law or voices must be used not just to register them as a mere 'difference' or create more discriminatory juridical spaces.[75] Instead, they provide the opportunity for what decolonisation literature refers to as 'epistemic restructuring'—representing newer forms of knowledge production that encounter systemic injustices while also working within the system towards redressing them.[76] The abstractions of *epistemic restructuring* find more material grounding later in Chapter 4 (p.136), which looks at epistemic and institutional boundaries that limit Indigenous voices in court.

Reflecting on language and law, White argues:

> The lawyer and judge live constantly at the edge of language, the edge of meaning, where the world can be, must be, imagined anew; to do this well is an enormous achievement; to do it badly a disaster of real importance, not only for the lawyer or judge but for the social world of which they are a part, including the particular people whose lives they affect.[77]

Much of White's work is situated in observing and thinking about law as an intellectual exercise. This research carries forward the task and departs from White's aesthetics while acknowledging the tremendous importance of similar intellectual exercises. Understanding and restating IEJ in court is partly for the sake of reforming the settler jurisprudence. But for the most part, it is undertaken in order to expand legal processes to include voices that have been deliberately or unconsciously excluded. The existing tools do not empower the courts to bring about the radical transformation demanded by current social and environmental challenges.

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[74] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law,* (University of Toronto Press 2007).
[75] Borrows, n (74) at p.25-30.
[76] Walter Mignolo, "Key Concepts: Decoloniality", (21 January 2017). Available at: https://www.e-ir.info/2017/01/21/interview-walter-mignolopart-2-key-concepts/ (Last accessed: 23 August 2021).
[77] White, n (73) at p.223

Here, 'radical' does not require courts to breach the separation of powers. It only demands that they disrupt the banalities and false boundaries, which have prevented the legal system as a whole from understanding the nature and extent of harm to Indigenous rights or the existence of plural sovereignties.

Conclusions on Law as Narrative

This thesis, which relies on and draws substantially from Indigenous scholarship articulates *narratives* in Indigenous environmental litigation as those similar to songlines that dominate Australian Aboriginal cultures and Indigenous ways of story-telling.[78] In a literal way, Indigenous story-telling or storying is not a fictional task. It reflects and embodies the lived experiences of people and their connection to land. Author Claire G. Coleman describes songlines as tracks that connect Indigenous traditional lands and hold the knowledge of the Dreaming (laws of the land).[79] Songlines are songs that allow individuals of one group to map and find their way across the land to water, food, cultural and sacred sites. Once the individual reaches the boundary of another Indigenous Nation, they must either seek permission to continue or request the other group to carry on the journey, while singing in the language of the new Country. The idea of legal narrative through courts is similar. Legal knowledge is created and carried on from one court to another. This thesis envisages judgments as traversing from one to time period to another, seeking concrete expressions of justice. It also argues for the merging of world views, sharing vocabularies with the Indigenous world and allowing for what White refers to as 'translations' (p.39justice as translation) in and through courts. Where a single court cannot carry out such a task, it must be passed on to future jurisprudence. We might wonder how one court may pass on such responsibility or what is the basis for assuming it is the responsibility of the courts at all.

Acknowledging IEJ within the legal system is not a one-time exercise. At a specific historical period, a particular court can only bear a small part of the burden of contributing to IEJ. Doing so may even result in a negative outcome. Nonetheless, where courts have taken IEJ seriously, they are still constrained by the country's social, political, and legal limitations. Should courts consciously adopt the role of allies, more specifically *epistemic allies*, they will enable future

[78] Margaret Kovach, "Doing Indigenous Methodologies: A Letter to a Research Class" in Norman Denzin et al (eds.), *The SAGE Handbook of Qualitative Research*, 214-232, (SAGE publications 2017).
[79] Claire G Coleman, *Lies, Damned Lies: A Personal Exploration of the Impact of Colonisation*, (Ultimo Press 2021). See: Deborah Bird Rose, *Wild Dog Dreaming: Love and Extinction*, (UVA Press 2011).

generations to achieve radical jurisprudence. Being an ally means acknowledging the present limitations of legal institutions and knowledge production while also remaining hopeful that the judges are doing their best to overcome these and to include historically suppressed voices.

C. Law as an Epistemic Community

Emerging from the understanding in this thesis that law is a narrative enterprise, comes the important concept that law is itself an epistemic community. As explained above, this means that the legal system itself creates knowledge, and also explains what constitutes 'sufficient' or 'valuable' knowledge, generating a community of which is held together in part by its understanding of knowledge in this sense. Considering law as an epistemic community also emphasises that knowledge exchange is cumulative and continuous. Courts form a community, through systems of precedent, judicial dialogue, and the interplay between majority and dissenting judgments and the use of obiter remarks to develop the law. But this method of knowledge production is like any other. It does not have authoritative exclusivity or epistemic high ground in the same that way science, whilst a being a practice of knowledge production, is not the exclusive method by which information can come to be known. Consequently, legal knowledge has no claims of superiority over other forms of knowledge.

In short, courts are sites of knowledge production and such production takes place through adjudication. Consideration of such knowledge and the way it emerges is critical if we want to understand how present and future courts may contribute to the achievement of IEJ through adjudication. For example, as discussed above, judges may look for materials and voices outside of doctrinal legal knowledge to interpret and apply the law. Hence, the juridical space appears as a community in conversation with other communities, such as First Nations. We also need to understand that apart from courts existing within and among several communities of knowledge production, they have an innate ability to draw principles and critiques while maintaining their legal integrity. This is what this thesis considers as epistemic affinity. *Affinity*, here, alludes to the shared language between jurisdictions and the potential to learn from different epistemic worlds in the course of adjudication (p.161). However, some courts have and have shown greater potential to accommodate and make room for external sources of knowledge. As Chapters 4 and 5 of this thesis illustrate, studying how courts in three jurisdictions engage with the Indigenous environmental and sovereignty question can also aid in developing collective strategies for overcoming each other's shortcomings as creators and

interpreters of knowledge. Some scholars have argued that common law itself has the ability to learn and reform itself constantly.[80] Epistemic affinity argues that similar arguments may be extended to suggest that courts have the infrastructure and means to be self-reflective in legal knowledge production.

Therefore, whilst courts do not have the power to overturn or even deal with political sovereignty, recognising and foregrounding the sovereignty of Indigenous peoples through understanding the concept of plural sovereignties is possible (p.138). The thesis deals with many instances of such foregrounding in part or throughout the judicial processes. Current environmental crises are also crises of indigeneity, Indigenous cultural and spiritual existence, and a sovereignty that is intimately tied to the land. The overwhelming role of extractive capitalism and settler colonialism in these crises now made clear through specific Indigenous environmental litigation. Handling such crises in court has required courts to define, for example, environmental harm through analysis not only of scientific material but also by engaging with the spiritual, cultural and other losses expressed through Indigenous voices. These crises have also required courts to attempt to understand the loss, present and intergenerational, in engagement with Indigenous knowledge forms. The existing vacuum in adjudication in how it understands racial injustices and injustices against Indigenous people has been examined in previous literature regarding race, where scholars like White have observed that the language used by the courts always sound 'smooth, plausible and honorable', but it feels 'something deeply wrong' in how they imagine the world.[81] Current crises have, and continue to prompt, courts to move beyond this limited imagining.

Since the analytical framework used in the thesis accentuates the role of courts as an "epistemic ally" (p.34) and treats adjudication as a matter of "responsibility" (p.18), the judicial trends in radical approaches towards environmental law must be drawn from diverse sources not only to demonstrate epistemic affinities in action but also to show that such understanding of legal knowledge production may make meaningful impact for Indigenous communities. While we cannot treat all Indigenous litigation as strategic litigation, the instances of climate litigation, such as the *Amazon fund* case and *Sharma,* are clear and helpful examples of strategic litigation.

[80] Charles Barzun, "The Common Law and Critical Theory" University of Colorado Law Review, Vol.92, 1221-1236; Emilios Christodoulidis, "Critical theory and the law: reflections on origins, trajectories and conjunctures" in Ruth Duke et al (eds.), *Research Handbook on Critical Legal Theory,* (Edward Elgar 2019).
[81] James Boyd White, *Keep Law Alive,* p.47 (Carolina Academic Press 2019).

Here, the term 'strategic litigation' indicates the type of litigation that makes productive use of the issue and the court as a tentative forum for knowledge production. Such strategic litigation also allows a comprehensive understanding of participation-distribution-recognition in Schlosberg's tripartite framing of justice, to which this thesis turns shortly.[82] Judgments, such as in Sharma, open jurisprudence to wider possibilities. IEJ relies extensively on such openings to make an impact.

D. Understanding Indigenous Environmental Justice

The above analysis of law as a narrative enterprise and as one amongst the epistemic communities provides a structure for why and how IEJ may emerge to be shaped by, and in some cases achieved, through courts. However, to do so it is important to take a closer look at what IEJ is and to understand its place within concepts of justice as a whole. This section first explores the nature of environmental justice. It does so in order to set the framework for some of the core components of IEJ. However, it will become clear during this discussion that environmental justice as a principle is insufficient to encompass the relationships between Indigenous communities and nature, and their treatment in law. IEJ requires an understanding of the role of Indigenous sovereignty and its relationship with environmental justice. The notion of indigeneity encompasses, amongst others, the connection to the land and the ability to determine the collective futures of Indigenous peoples and so cannot be subsumed into a concept of environmental justice alone. The section will then explain how IEJ seeks to meet that insufficiency, before using this a spring board to consider what, in more concrete terms, IEJ means and how it is discussed in literature and in practice.

Environmental Justice

The first step, therefore, is to explore environmental justice. Scholarship from the US in the 1980s defined environmental justice as an offshoot of distributive justice. The foundational scholarship on environmental justice, especially by Robert Bullard, highlighted the role of racial inequalities and scholarship in the subsequent decades has substantially developed the meaning and import of the concept.[83] Most of the existing work traces the historical trajectory

[82] The framing of intergenerational justice and duty of care towards children and future generations propels the understanding of "participation" to include future generations. "Distribution" accommodates considering amorphous entities sharing the burden of present and tentative harm. Whilst "recognition" maintains a somewhat vague hold over the matter, and it aims to recognise the prospective relationships that the present generation may hold with the planet and its resources.
[83] Robert Bullard and Bob Evans, *Just Sustainabilities: Development in an Unequal World*, (MIT Press 2003).

of environmental justice from its manifestation at the grassroots to its gradual ascendency to executive decision-making and even the academic sphere.[84] Robert Bullard's classic '*Dumping in the Dixie*' in 1990 opened up the dialogues on environmental justice based on distributional inequalities resulting from racial inequalities and extended the conversations to environmental racism.[85] Post-1990s, following Bullard's theorisation of environmental justice, Laura Pulido,[86] David Pellow[87] and Julian Agyeman[88] amongst others contributed to the bolstering of the understanding of environmental racism by exposing the power relations embedded in social and political inequities. These scholars also showed how such inequalities contribute to the disproportionate environmental impact on marginalised communities. Their work aimed to emphasise that environmental injustice was not merely a distributional problem but extended to aspects of recognition and participation in environmental decision making.[89]

The United States Environmental Protection Authority ("EPA") has gone so far as to provide a concrete definition of EJ:

> 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.[90]

However mere adoption of a definition has (unsurprisingly) been insufficient for the realisation of environmental justice given the scale of ongoing environmental injustices suffered by People

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[84] Ole W. Pedersen, Environmental Justice in the UK: Uncertainty, Ambiguity and the Law, 31 Legal Stud. 279 (2011).
[85] Robert Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality*, (Westview Press 1990); Robert Bullard, *Confronting Environmental Racism: Voices from the Grassroots*, (South End Press 1993).
[86] Laura Pulido, *Environmentalism and Social Justice: Two Chicano Struggles in the Southwest*, (University of Arizona Press 1996).
[87] David Pellow, *What is Critical Environmental Justice,* (Polity Press, 2017).
[88] Julian Agyeman, *Sustainable Communities and the Challenge of Environmental Justice*, (New York University Press 2005).
[89] Randolph Haluza-Delay et al.(eds), *Speaking for Ourselves: Environmental Justice in Canada,* (UBC Press 2009).
[90] http://www.epa.gov/environmentaljustice/

of Colour, Black and Latinx communities in the US, a country which refuses to reckon with its colonial and capitalist foundations.[91]

David Schlosberg's tripartite definition of environmental justice offers a more satisfactory understanding of the concept in light of the past and present environmental challenges.[92] Schlosberg explains a 'Distribution-Participation Recognition' paradigm, which fosters an integrated theory of justice while maintaining that the concept embodies the pluralities generated by the 'differences' in cultural and political identities. While the concept of 'distribution' of harms aims to recognise the differences in identities and capabilities in the Nussbaumian sense of justice (across racial, class and gendered lines), the 'participation' of stakeholders examines who gets to participate in stating and remedying a problem.[93] 'Recognition' has been a recurring theme in political theories of justice and speaks for the 'flourishing' of the individual as a consequence of fairness in distribution, equity in participation, and heterogeneity in remedies that address capabilities.[94]

Schlosberg's model aspires to illuminate more than what is bracketed by wrongs and remedies.[95] It is imperative that the conceptions of 'difference' are not only applied to human communities but also extended to the nonhuman and the multispecies world, thereby forming the idea of ecological justice. The terms "unity with uniformity" and "pluralist solidarity" advanced by Schlosberg not only allow for the construction of individual differences while maintaining a coherent definition of environmental justice, but also hold the potential to develop the concept in response to future movements and political necessities.[96]

The Limitations of Environmental Justice

Environmental justice helpfully lays down how race, class, ethnicity, and geographical differences between individuals and communities adversely affect their enjoyment of life and access to resources. Existing scholarship on environmental justice demonstrates that the

[91] Michael Méndez, *Climate Change from the Streets: How Conflict and Collaboration Strengthen the Environmental Justice Movement*, (Yale University Press 2020).
[92] David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature,* (OUP 2007).
[93] Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach*, (OUP 2000).
[94] Nancy Fraser, "Recognition without Ethics?", *Theory, Culture, and Society*, 18: 21–42 (2001).
[95] Stephanie A. Malin & Stacia S. Ryder, "Developing deeply intersectional environmental justice scholarship", *Environmental Sociology*, 4(1), 1-7, (2018).
[96] David Schlosberg, *Environmental Justice and the New Pluralism: The Challenge of Difference for Environmentalism,* (OUP 2003).

disparities, inequalities and exclusions in the case of environmental outcomes are both structural and systematic. As previously illustrated, Schlosberg's tripartite framework of participation-distribution-recognition provides a useful understanding of environmental justice. While drawing attention to the inclusivity issues (participation and distribution), the framework also emphasises the need to recognise the diverse nature of relationships between people and the environment (recognition). If this tripartite understanding of the environmental justice concept is comprehensive and holistic of the existing framings, why do we need to consider a concept of IEJ? In short, this is because the participation-distribution-recognition framework does not reflect the knowledge or political context from which it emerges. The element of "recognition" does not overcome the limitations of what Coulthard expresses as "liberal recognition". Schlosberg's use of the tripartite framing and his larger body of work on environmental politics are alert to this limitation and effectively overcome them substantially. However, there are two reasons why environmental justice cannot be treated as synonymous with IEJ.

First, IEJ is categorically an offshoot of Indigenous self-determination and sovereignty. Environmental justice may recognise Indigenous people as a unit affected by the same issues as other racial and ethnic minorities. However, there is little room for the complexities of Indigenous sovereignty. Recognising that people hold diverse relationships with the land and natural resources is distinct from recognising plural sovereignties or existing sovereignty of the community over land and resources. Indigenous sovereignty may even exclude other people that are of primary concern to environmental justice, such as people of colour who are dependent on the land.[97] IEJ unequivocally expresses Indigenous sovereignty over the land-—sovereignty that is expressed not through domination and ownership but through values of kinship, reciprocity, and intergenerational responsibility. Materially, IEJ is tied to the explicit claim of 'land back' to the Indigenous communities.[98] Further, Indigenous sovereignty, and consequently, IEJ will always attract hostile reception from state sovereignty. It will be left for the courts to reconcile and strategically adopt expressions of plural sovereignty without breaching the limits on judicial powers. Environmental justice does not capture this.

[97] The landless workers in Brazil are an instance of how Indigenous relations with the land clash with other claims over land, thereby making solidarity against extraction difficult. See: Yogi Hendlin, "Environmental justice as a (potentially) hegemonic concept: a historical look at competing interests between the MST and indigenous people in Brazil", Local Environment, 24:2, 113-128 (2019).
[98] Pieratos, N. A., Manning, S. S., & Tilsen, N., "Land Back: A Meta Narrative To Help Indigenous People Show Up As Movement Leaders", Leadership, 17(1), 47–61 (2021).

Second, whilst environmental justice recognises the problems of environmental inequality and injustice, recognition of the culpability of capitalism and colonialism in such injustices is not prominent. Even then, such theorisation remains partial and inadequate to address contemporary environmental challenges. Theoretically, the issue of environmental justice can be resolved even within strictly liberal, capitalist societies. Similarly, it is possible to achieve environmental justice within settler colonial nations through token deference to tripartite framing. Even after addressing distribution and participation, the structural factors that reproduce the injustices remain intact in a settler colonial capitalist state.

By contrast, IEJ is a direct resistance to the capitalist and colonial apparatus enabled by the state. IEJ demands at least an acknowledgement that the systems, institutions, and vocabularies of rights are steeped in colonial and imperial violence. Indigenous peoples have developed knowledge and relationships with the land and the environment outside of pervasive settler colonialism. Consequently, courts must deploy newer tools and language to accommodate and engage with Indigenous claims.

Schlosberg's model only indicates how capitalism, extractivism and colonialism operate to the detriment of a range of rights but do not confront them. The concept helps recognise the problem and fails to name the violence of colonialism. Therefore, attributing injustices to historical (and contemporary) violence and dispossessions becomes an important aspect of IEJ. Since this research deals with courts, and since courts possess greater power in knowledge production, naming and recognising Indigenous relationships with the colonial structures while recognising their environmental/land relationships becomes a key part of adjudication.

Finally, unlike environmental justice, IEJ is tangible at every stage of adjudication precisely because of the role that law plays as an epistemic community, as explained above. Chapters 2 (p.65), 3(p.101) and 5(p.167) of this thesis allude to some of the strategies adopted by courts to overcome the limitations of settler legality. These include recognising the effect of dispossession on land-Indigenous relationships (p.107); the durability of indigeneity (p.168); intergenerational justice (p.193); and recognising the extent of incommensurable loss through emphasising the need for restorative justice (p.118). Even if we rely on Schlosberg's tripartite framing, those categories must be either improved by innovative jurisprudence (as evidenced by climate change litigation) or by factoring in Indigenous sovereignty and self-determination.

E. What is Indigenous Environmental Justice?

It is therefore clear that IEJ has a distinctively different content from environmental justice. Before arriving at a functional definition of IEJ, however, it is also necessary to acknowledge the limiting role of definitions. IEJ itself is a principle of plurality. 'Plurality' suggests a blend of practices, constructive recognition of individual and institutional memories, aspirations, the assertion of sovereignties, resistance to western canon, and principles for just futures. Plurality also demands that there is adequate room for expansive imagination of concepts and rights that have tremendous implications for, in this case, the lives of Indigenous peoples. However, it is possible to provide a form and certainty to the principle of IEJ without compromising its ability to expand in future jurisprudence. To achieve this, one must consider IEJ as a product of exclusions in the existing concepts, such as environmental justice, and articulation of greater values it seeks to represent.

For the purposes of this thesis, therefore, IEJ is defined as: *a constructive recognition of the idea of plural sovereignty through tendering primacy to Indigenous sovereignty and self-determination, Indigenous knowledge forms, and Indigenous peoples' connection to land in adjudication. Further, it also requires understanding of adjudication as a process that allows for legal knowledge production and a self-reflexive allyship, which accounts for the past and present violence of colonialism against Indigenous peoples*. The following section explains and expands upon this definition and considers its current status in practice in general terms. It begins by considering the history of IEJ as a protean legal principle.

IEJ: A History of Success and Failures

There have been some substantive attempts at giving 'form' to the idea of IEJ both in practice and in the literature. The First National People of Colour Environmental Leadership Summit in 1991 was the first to discuss the notion of IEJ.[99] The summit built a plural network of voices, not only from the Indigenous communities around the world, but also many from labour movements and movements for racial justice. The summit drafted and adopted seventeen principles of environmental justice for the First Nations, advocating for recognising and re-

[99] First Nation People of Colour Environment Leadership Summit "The Principles of Environmental Justice", https://www.nrdc.org/sites/default/files/ej-principles.pdf (Last accessed 19 April 2020).

establishing a cultural and spiritual connection between the communities and their environment. These principles emphasised Indigenous sovereignty; opposition to the occupation and militarisation of Indigenous land; the anticapitalistic character of the environmental movement; firm opposition to extractive industries; recognition of ecocide; and reparations for environmental damage.[100] It also proposed a healthy working environment for the labourers; racial and reproductive justice; and plans for the upkeep of the environment through education and creation of awareness.[101] The document aimed at building momentum from across marginalised and vulnerable classes subjected to environmental injustices.

The two Kari-Oca Declarations of 1992 and 2012 respectively were precursors for more assertive Indigenous voices. The Kari-Oca I charter, with 109 principles, was drafted by 92 Indigenous organisations. The charter stated the intersections between human rights, land rights, and biodiversity conservation, and the critical role of the Indigenous communities in upholding them. According to the Declaration, the defining feature of justice was in recognising the significance of Indigenous knowledge and self-governance.[102] The Declaration is anti-capitalist and anti-racist and unpacks a comprehensive understanding of how environmental disparities impact First Nations. Another remarkable feature of the Declaration is in ways it contests the Eurocentric property paradigm of land ownership and land rights. It also coincided with Australia's recognition of Indigenous land rights through Native Title, which was the first legislative attempt to address the discontent over dominium and the sovereignty questions.[103]

Kari Oca II was vocal against the commodification of environmental resources and relations.[104] The Declaration articulates 'justice' as a higher value than aspiring to achieve 'green economy', which continues to endorse capitalist modes of production. The language in the second Declaration is intersectional. It shows how colonialism/settler colonialism and capitalism have a close and mutually beneficial relation, thereby sabotaging the prospects of

[100] See: Clauses 4, 9, and 12, n (33) "The Principles of Environmental Justice", https://www.nrdc.org/sites/default/files/ej-principles.pdf (Last accessed 19 April 2020).
[101] See: Clauses 8,13, and 16, n (33) "The Principles of Environmental Justice", https://www.nrdc.org/sites/default/files/ej-principles.pdf (Last accessed 19 April 2020).
[102] Kari-Oca Declaration 2: "Indigenous Peoples Global Conference on Rio+20 and Mother Earth" https://www.ienearth.org/kari-oca-2-declaration/ Last accessed: 20 April 2020.
[103] *Mabo v Queensland (No.2)* [1992] HCA 23.
[104] Kari-Oca Declaration 2, n (102).

achieving social, economic, and environmental justice for the First Nations.[105] The Declaration also states that climate justice demands re-thinking of 'false solutions' for climate change mitigation, such as the construction of more hydroelectric dams, which have eroded Indigenous land and sovereignty. Kari Oca II also reasserts its opposition to making Indigenous land a dumping ground for nuclear waste; increasing the establishment of extractive industries; logging; and market-based solutions for environmental problems.

The United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007 was a notable political gesture from liberal democracies. Despite criticisms of its inadequacies and its watered-down provisions, the Declaration creates substantial opportunities for adhering to the 'participation-distribution-recognition' paradigm of environmental justice.[106] The UNDRIP recognises commitment towards Indigenous rights as an extension of existing human rights obligations (Art 1); protects First Nations from all forms of discrimination based on identities (Art 2); re-asserts the need for Indigenous self-determination (Art 3); protects the communities from forceful dispossession from Indigenous land (Art.8 and Art.10); and emphasises the right to free and prior informed consent in any economic/military activities on Indigenous lands (Art. 29, 30, and 32). At first glance, the UNDRIP appears comprehensive and just. However, it perpetuates the western epistemic construction of the environment as existing outside of human relations and communities, and fails to acknowledge the multifarious relationships shared by the First Nations and the environment.[107] Besides, the Declaration also falls short of articulating Indigenous sovereignty, which is vital to reinforcing Indigenous environmental relations. The word 'sovereignty' is only mentioned once in Article 45 to indicate that nothing in the Declaration allows for "dismembering or impairing" the political unity and sovereignty of the states. Unlike the Kari Oca declarations, UNDRIP is a document of compromise—it acknowledges the need for rights and remedies but ignores the historical wrongs that elicit these remedial gestures.

[105] Evadne Grant, "Indigeneity, Environment and Human Rights", *Journal of Human Rights and the Environment*, Vol. 9(2), 113-118, (September 2018).
[106] Steven Newcomb, "The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination." *Griffith Law Review* 20 (3), 578–607 (2011); Charles Ward, "A Travesty of a Mockery of a Sham: Colonialism as 'Self-determination' in the UN Declaration on the Rights of Indigenous Peoples." *Griffith Law Review* 20 (3): 526–556 (2011).
[107] Sheryl Lightfoot, "Selective Endorsement without Intent to Implement: Indigenous Rights and the Anglosphere." *The International Journal of Human Rights*,16 (1): 100–122 (2012).

Yellowknives Dene scholar Glen Coulthard warns against liberal regimes of rights, such as tokenistic recognition. A constitutional recognition that does not challenge the structures of settler colonialism or its ongoing violence is simply a more appealing disguise for colonialism.[108] These regimes of rights only aim to quell the discontent and legitimise the operations of contemporary settler colonialism. As argued earlier, UNDRIP is one of the instances where it seems possible to achieve environmental justice even within a settler colonial nation. The international dialogue on Indigenous rights, which does not have a concrete domestic mechanism to enforce it and which also treats state sovereignty as sacred, is often less effective. Further, domestic courts have to deal with specific and fundamental facts concerning Indigenous land and environmental relations. Therefore, illumination as to the precise nature of the harm is more helpful than a mere duty to consult. Therefore, what underlies the beneficial nature of Kari Oca Declarations but is missing in the UNDRIP? Whereas Kari Oca Declarations lacked the standing of a UN declaration, they were an outcome of collective Indigenous voices and deliberation. This suggests that genuine IEJ must encompass three interlinked factors: recognition of plural sovereignty; acknowledgement of Indigenous land relations; and acknowledgement of Indigenous knowledge forms. All three of these form central parts of the definition of IEJ outlined above. This section explains them in more detail.

Recognition of Plural Sovereignty

First, therefore, IEJ requires a recognition and contextualisation of settler colonialism as a structure within which the state and its legal apparatus are embedded. Patrick Wolfe and Lorenzo Veracini, write about the violent interventions of settler colonialism and the persistence of colonialism as a structure in Australia.[109] Settler colonialism makes use of both the time and space on occupied lands. It uses the environment as a resource, while systematically erasing (physical erasure, for instance through massacres) the people who have occupied the land and the relations that have characterised the human and the nonhuman world (spiritual and cultural erasure). Law has a key role in this spiritual and cultural erasure, if not a pronounced one in physical erasures. These acts of erasure reinforce Wolfe and Veracini's

[108] Glen Sean Coulthard, *Red Skin, White Masks : Rejecting The Colonial Politics Of Recognition*, (University of Minnesota Press 2014)
[109] Patrick Wolfe, "Settler Colonialism And The Elimination Of The Native", *Journal of Genocide Research*, 8(4), 387-409, (2006); Lorenzo Veracini, *The Settler Colonial Present* (London: Palgrave Macmillan 2015); See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", *Fourth World Journal*, Vol 20 Number (2), 115-130, (2021).

articulation of settler colonialism as a structure.[110] By referring to Peter Fitzpatrick's 'law as a mythology' (p.35), one can be reminded that the function of mythologising in settler colonialism allows settler colonial laws to provide the semblance of rule of law to legitimise the settler state and its sanctioned acts of Indigenous dispossession.[111]

As Potawatomi scholar Kyle Whyte argues, settler colonialism is the foremost form of environmental injustice. Whyte examines the ecological impact of settler colonialism in the context of the Anishinaabe people in Canada and how colonialism works systematically to undermine the 'social resilience and self-determining collectives' of the Indigenous peoples.[112] Settler Colonialism forces land and environment into new modes of governance and disrupts the social, cultural, spiritual, and economic relationships that characterise the First Nations (as is discussed further below).[113]

The history of settler colonialism in Australia, Brazil, and Canada may vary in time, but the logic of erasure remains integral to their operation.[114] In writing about the Dakota pipeline movement, scholar from the Lower Brule Sioux Tribe Nick Estes argues that the longest maintained Indigenous resistance at Standing Rock has been against multiple environmental injustices.[115] The Standing Rock movement was launched against the proposed Dakota Access Pipeline running between Northern Dakota and Illinois on the grounds that it adversely affected drinking water and irrigation near Indigenous reserves. The environmental justice movement at Standing Rock also became a voice for Indigenous sovereignty as the protestors contested the pipeline project in the District Court in a prolonged legal battle.[116] The environmental injustices in the form of denial of sovereignty and self-determination ghettoes First Nations into 'reserves' while also promoting tropes of development that sever the community's

[110] Wolfe, n (109).
[111] Brian Attwood, Bain. *Empire and the Making of Native Title: Sovereignty, Property and Indigenous People.* Cambridge University Press, 2020.
[112] Kyle Whyte, Settler Colonialism, Ecology, & Environmental Injustice *Environment & Society* 9: 125-144 (2018).
[113] Kyle Whyte, "Indigenous Experience, Environmental Justice and Settler Colonialism" in *Nature and Experience: Phenomenology and the Environment.* Edited by B. Bannon, 157-174 Rowman & Littlefield (2016); See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", *Fourth World Journal*, Vol 20 Number (2), 115-130, (2021).
[114] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" 8(4), *Journal of Genocide Research,* (2006).
[115] Nick Estes, Our History is the Future, (London: Verso Books, 2018); See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", *Fourth World Journal*, Vol 20 Number (2), 115-130, (2021).
[116] Standing Rock Sioux Tribe et al v US Army Corps of Engineers et al, Civil Action No. 16-1534 (JEB). The case was decided in the favour of the tribes in 2020.

interdependence with and responsibility towards the environment. The foundational premise of IEJ – that plural sovereignty must be recognised – is reflected in Eve Tuck's argument that settler colonialism's disruption of Indigenous land relations embodies "profound epistemic, ontological, and cosmological violence".[117] Whilst the elements of violent settler colonialism may appear less pronounced in Brazil's legal contexts due to the limits of Anglophone, Goebel suggests that the excessive focus on 'whiteness' in the historical analysis of settler colonialism eliminates the unique phenomena in Brazil where settler violence was gradual and manifest through multiple groups of arriving migrants from across Europe.[118] While Brazil is situated differently from Australia and Canada historically, its policies and governance have internalised the logic of Indigenous dispossession and are reflected in its current institutions, including the courts. A failure to recognise plural sovereignty is, nevertheless, common to all three.

As Anishinaabe legal scholar John Borrows identifies, the multiple modes of Indigenous environmental relationships become the foundation for governance within Indigenous communities. The communities aim for collective continuity while settler colonialism aims for collective erasure. Erasures do not always take place in the form of violent genocides. The more docile policies of 'assimilation' and integration of Indigenous communities through cultural and educational interventions serve a similar objective. Moreover, current environmental conflicts demand reassessment of how we understand assimilation. Through gradual legal reform, official policies of assimilation may have been done away with. However, subtler forms of assimilation into new economic orders and extractive economies continue to destroy flourishing of Indigenous ways of life.

As Kent McNeil states, while the government may wield legitimate power, it cannot "virtually obliterate" the Indigenous governing authority by law.[119] Indigenous sovereignty remains active and influential even within the structures of settler colonialism, which leads scholars like Shiri Pasternak to believe that sovereignty is still in the process of being perfected in the

[117] Tuck, Eve, and K. Wayne Yang. 2012. "Decolonization Is Not a Metaphor." Decolonization: Indigeneity, Education and Society 1 (1).
[118] Michael Goebel, "Settler Colonialism in Post-Colonial Latin America" 139-151, In Cavanagh et al. (Eds), *The Routledge Handbook of the History of Settler Colonialism,* (Routledge 2016).
[119] Kent McNeil, "Indigenous Land Rights and Self-Government: Inseparable Entitlements," in Between Indigenous and Settler Governance, eds. Lisa Ford and Tim Rowse (New York: Routledge, 2013), 145–46.

Canadian context.[120] Consequently, every form of Indigenous resistance, especially vocal demands for IEJ and land-back pose a threat to the national project of erasing differences, forging ideas of citizenship based on state sovereignty and commodification of the environment. The environmental injustices arising out of settler colonialism harm and erase incommensurable values. As a consequence, environmental harm does not remain as one identifiable event but triggers multiple injustices that snowball into an intergenerational loss. The concept of IEJ therefore includes, as a hallmark, recognition of plural sovereignties.

Indigenous Land Relations

However, such recognition is not itself enough if the complexities of Indigenous land relations are not also captured. Environmental injustice is at least partly constructed through what Whyte identifies as disruptions in Indigenous environmental relations due to settler colonialism—those of interdependence, responsibility, and migration. Whyte's mapping out of the three categories complements the intellectual mapping of IEJ in this research and gives concrete meaning to the need for recognition of Indigenous land relationship in a principle of IEJ. *Interdependence* in ecosystems extends to nonhuman living species as well as cultural emblems such as spirits and totems drawn from the living world and landscapes. These relationships are incommensurable, especially when considered in terms of damage and compensation. Some of the illustrative cases in this regard, such as *Aboriginal Areas Protection Authority v OM (Manganese) Ltd,* are discussed in Chapter 3 (p.102).[121]

The notion of *responsibility* addresses how extractive industries prevent the carrying out of the duty of care owed by the First Nations towards the land and its beings, along with subterranean resources and water. Such care also extends to ensuring the cultural continuity of the communities. Deborah McGregor, while defining IEJ in her work, draws on the idea of responsibility and 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

[120] Shiri Pasternak "Jurisdiction and Settler Colonialism: Where do Laws Meet", 29(2), *Canadian Journal of Law and Society,* (2014).
[121] [2013] NTMC 019.

> 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.[122]

These responsibilities and the ethics of care find resonance in many Indigenous legal systems.[123] Therefore, everyday realities of Indigenous life are determined by norms and rules that elude colonial legal systems and lack material recognition within settler juridical spaces.

What Whyte identifies as *migration* in the context of the Anishinaabe speaks to the multiplicity of environmental and reciprocal relations shared by the communities. Migration also embodies the seasonal element in environmental transactions, such as hunting and fishing. These multiplicities of relationships are disrupted by settler colonialism and consequently, have often been the subject of litigation. The 1962 case of *Sikyea v The Queen*,[124] popularly known as the Million Dollar Duck Case, throws light on the direct conflict between Indigenous land relations and the Western conceptions of environmental conservation.[125]

Sikyea, who was prosecuted for hunting a migratory bird that used to be traditionally shot by the communities, argued that the rule prohibiting out of season hunting under Canada's Migratory Birds Convention Act, 1917 was contradicting his traditional rights to hunt them at any time. Sikyea belonged to the Yellowknives Dene nation, which was a territory governed by Treaties 8 and 11. During the trial, Sikyea argued that the Treaty Indians held the right to hunt and fish throughout the year notwithstanding the text of the treaty or any subsequent legislation, such as the Migratory Birds Convention Act. At first, in the Northwest Territories Territorial Court, Judge Sissons held Sikyea not guilty of the offence on the grounds that the duck may have been a domesticated one and not a wild mallard as the prosecution had claimed. Historian Miranda Johnson documents the responses to the Territory court's decision and the speculations around Judge Sissons' intentions to "carry out a judicial crusade against Indigenous hunting convictions".[126] The Court of Appeal overturned the trial decision.

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[122] Deborah McGregor "Honouring Our Relations: An Anshinaabe Perspective on Environmental Justice." In Agyeman et al, *Speaking for Ourselves: Environmental Justice in Canada,* (Vancouver: UBC Press 2009).
[123] Kyle Whyte and Chris Cuomo, "Ethics of Caring in Environmental Ethics: Indigenous and Feminist Philosophies", in Allen Thompson and Stephen Gardiner (eds.), *The Oxford Handbook of Environmental Ethics,* (OUP 2017).
[124] [1964] S.C.R. 642.
[125] Miranda Johnson, "The Case Of The Million-Dollar Duck: A Hunter, His Treaty, And The Bending Of The Settler Contract" 124 The American Historical Review 56 (2019).
[126] Johnson n (125), p.76.

The Supreme Court upheld the Court of Appeal's decision and held Sikyea guilty on the grounds that the legislation had the power to override promises made in the treaty. Throughout the trial and the appeals, Sikyea insisted that his hunting rights resulted from Indigenous sovereignty, an argument which evidently threatened the objective of Treaties to curtail First Nations' demand for political sovereignty.[127] While *Sikyea* is not discussed extensively in this research, this litigation reveals the friction between Indigenous laws of governance and their relationship with the land and settler laws operating in courts.

Acknowledgment of the multiplicity of roles land can play is essential for implementing IEJ in adjudication. First Nations possess cultural and material relationships with landscapes. The environmental justice movements spearheaded by the Indigenous peoples also involve the protection of sacred sites and burial grounds that stand in the way of industrial expansion, developmental projects, and other similar enterprises. Schlosberg and Carruthers recognise the centrality of land to Indigenous survival in North America. They argue that the vulnerability of the land to contamination and dumping waste interferes severely with the ability of the communities to sustainably interact with the land and carry on cultural practices, ceremonies, and beliefs linked to the place.[128] Their examination of the decision in *Navajo Nation v US Forest Service*[129]("*Navajo Nation*") is a telling instance of how environmental cases with the potential to articulate IEJ forego that opportunity by sidelining the Indigenous voices. In *Navajo Nation*, the community objected to the operations of a Ski resort, and especially to its plans to reclaim sewage water and use it in the making of artificial snow for the resort. Schlosberg and Carruthers analyse the judgment's reluctance to not only recognise certain practices as religious or spiritual under the Religious Freedom Restoration Act of 1993 but also its failure to treat them as vital for the continuity of the community.

The materiality of land is not an altogether unfamiliar concept in legal geographies or new materialist thought. From Coole and Frost, who have shifted away from historical materialism's emphasis on the passivity of resources and labour to new ontologies, to Jane Bennett who has argued for vibrant matter, social scientists have approached living matters

[127] George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (New York 1974).
[128] David Schlosberg and David Carruthers, "Indigenous Struggles, Environmental Justice, and Community Capabilities", Global Environmental Politics, 10:4, (November 2010).
[129] Docket No.08-846 < https://www.justice.gov/osg/brief/navajo-nation-v-united-states-forest-serv-opposition>

through new lenses.[130] Kathryn Yusoff, for instance, details how geological time period and subterranean resources owe their existence to colonial epistemologies and material structures.[131] However, Indigenous knowledge forms concerning land have preceded these theoretical positions in New Materialism or Posthumanism. Glen Coulthard argues that the liberal tool of 'recognition' falls short of achieving justice as it fails to comprehend the recognition granted to land within Indigenous belief systems.[132] Within Indigenous epistemologies, land does not fall within a property-ownership paradigm. Land cannot be owned but has an active role as a 'being', a living entity that defines community identities and existence. A clear understanding that land is unfettered by proprietary relationships and is an expression of sovereignty and self-determination is vital for the intellectual map.

Nishnaabeg scholar Leanne Simpson terms the Indigenous relation to 'place' as 'land-based pedagogy'.[133] Simpson works her way through Canada's Nishnaabeg community knowledge forms and values associated with the land to illustrate how the landscape remains central to love, compassion, and understanding within the community.[134] Land replaces settler education and morality, thereby becoming the governing force for First Nation relations with the living beings (how hunting must be carried on) and natural resources (which trees can be chopped down and when maple syrup can be extracted), among others.[135] Simpson argues that land is both the context and the process. This formulation removes the coercion and authority embedded in the property relations within western canons.[136] In Indigenous philosophies, land is material to teaching Indigenous modes of existence. It is also a conduit that facilitates the passage of community knowledge across generations. The integrity of the land is, therefore, vital for their continuing identity formation and maintenance.[137] Sandy Grade illustrates the 'educative' and decolonising potential of the land in Native American social and political thought by terming it the 'Red Pedagogy'.[138]

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[130] Coole, D. H., Frost, S. (Eds.), *New Materialisms: Ontology, Agency, And Politics*, (Duke University Press 2010); Jane Bennett, *Vibrant Matter: A Political Ecology Of Things*, (Duke University Press 2010).
[131] Kathryn Yusoff, *A Billion Black Anthropocenes or None,* (University of Minnesota Press 2018).
[132] Coulthard, n (108).
[133] Leanne Simpson, "Land as pedagogy: Nishnaabeg Intelligence and Rebellious Transformation", 3(3), *Decolonization, Indigeneity, Education and Society,* (2014).
[134] Leanne Simpson, *As We Have Always Done: Indigenous Freedom Through Radical Resistance,* (Minnesota: University of Minnesota Press 2017).
[135] Simpson, n (134).
[136] Simpson, n (134).
[137] Christine Jill Winter "Does time colonise intergenerational environmental justice theory?", *Environmental Politics*, 29:2, 278-29 (2020).
[138] Sandy Grade, Red Pedagogy: Native American Social and Political Thought, (Rowman and Littlefield 2004).

Indigenous peoples are often considered as environmental stewards and guardians of nature.[139] 'Caring for the Country' in Australia testifies to the reciprocal relationship between First Nations and the 'land', where land becomes a placeholder for all of the environment. Historian Simon Sleight quips that "Australia is some sort of a giant mine".[140] The ideology of extraction treats Australian land as a cornucopia of resources to be plundered at all times. It also explains the reluctance of States to engage in any form of environmental reforms or ambitious climate policies. It appears, settler logic is committed to treating land as fundamental resource and Capital.[141] However, Indigenous communities do not share this vocabulary of resource and extraction but instead, use that of relationality.[142] "If you look after the country, the country will look after you" is a principle of indigeneity.[143] The power to manage land and its resources is an organic extension of the demands for self-governance. Land is a 'sentient participant' in the Australian Indigenous environmentalisms.[144] These environmentalisms draw from the values of listening to Indigenous voices—for instance, through Aboriginal Elders in processes such as heritage consultation.[145] Irene Watson pithily summarises the Indigenous belongingness to land and how colonial laws undermine it:

> In accord with Aboriginal law we continue to have the authority and the responsibility to care for and ensure that our territories are kept alive and well for future generations. Under international law the state should be compelled to consult and obtain our free, prior and informed consent regarding any proposals to develop our lands. It is again important to note that from a sovereign, self-determining, First

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[139] FAO and FILAC, "Forest Governance by Indigenous and Tribal People. An Opportunity for Climate Action in Latin America and the Caribbean" (2021). Available at: https://doi.org/10.4060/cb2953en (Last accessed: 25 December 2021).

[140] Simon Sleight, '1,000 Years of History: Australia' (Channel 5, 24 November 2021). Available at: https://www.channel5.com/show/1-000-years-of-history-australia?fbclid=IwAR0rMZqr0OnSCARl1kIiFC7dap9pmoGECd2f74LOBi0yNFcifSrSKTRbb2M (Last accessed: 25 November 2021).

[141] Karl Marx, "Chapter 25: The General Law of Capitalist Accumulation", in *Capital: A Critique of Political Economy*, Vol.1, (Penguin Books 1976).

[142] Lauren Tynan, "What Is Relationality? Indigenous Knowledges, Practices and Responsibilities With Kin" *Cultural Geographies*, 28(4):597-610 (2021).

[143] Griffiths and Kinnane, "Kimberley Aboriginal Caring for Country Plan - Healthy country, healthy people, in Report for the Kimberley Language Resource Centre, Halls Creek, WA (2010).

[144] Jessica Weir, et al, "The Benefits of Caring for the Country" Report for the Department of Sustainability, Environment, Water, Population and Communities, Canberra (2011). Available at: https://aiatsis.gov.au/sites/default/files/products/report_research_outputs/benefitscfc_0.pdf Last accessed 12 April 2020.

[145] Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (ATSIHP Act) and the Protection of Movable Cultural Heritage Act 1986 (Cth); Guidelines for the protection, management and use of Aboriginal and Torres Strait Islander cultural heritage places, 1994.

> Nations' ontological perspective we would not have the authority to consent to the damage which could result from unconventional gas and fracking developments as this could be consenting to an unlawful ecocidal act.
>
> The failure of the Australian state to address the sovereign position of First Nations Peoples in relation to the proposals to produce gas from our territories – or any of the other development projects planned and initiated across the continent – is an act of racial discrimination. It is among an avalanche of genocidal and ecocidal acts that colonists have perpetrated for more than two hundred years.[146]

This stark difference in land relations is therefore a critical component in IEJ. Harm to land can never be remedied through restoration alone. Environmental wrongs are an incremental product of historical processes. Simon Young, in his critical work *The Trouble with Tradition,* elucidates how Native title jurisprudence has evolved in Australian courts to incorporate the demand for an expansive understanding of Aboriginal rights. Inferring from a diverse corpus of case laws, Young argues that the Australian courts are now mindful of the absence of an *Aboriginal Title* versus *Aboriginal Rights* distinction.[147] The latter demands a broader and more generous reading than the former. IEJ must encompass this expansive understanding.

Indigenous Knowledge

Finally, IEJ must encompass recognition of Indigenous knowledge forms. To illustrate this, the example of non-linearity is used here. The *non-linearity* used in this thesis may be of time, space, or perception. Some historians and anthropologists have discussed how Indigenous perception varies in observing some phenomena or presenting them as evidence before court.[148] Environmental harms may be perceived in a non-linear fashion. Such experiences may be expressed in how one understands intergenerational loss or across multiple landscapes. For instance, much of the harm to Anangu Pitjantjatjara Yankunytjatjara lands in South Australia, which were due to extensive nuclear testing and dumping of nuclear wastes, has never been

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[146] Irene Watson, "Aboriginal relationships to the natural world: colonial 'protection' of human rights and the environment", *Journal of Human Rights and the Environment*, Vol. 9 No. 2, pp.119-140, 121, (September 2018).

[147] Simon Young, *Trouble with the Tradition*: *Native Title and Cultural Change*, p. 35-44 (Federation Press, 2008). See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", *Fourth World Journal*, Vol 20 Number (2), 115-130, (2021).

[148] Ann Curthoys, et al. *Rights and Redemption : History, Law and Indigenous People*, (University of New South Wales Press Ltd 2008); Arthur J Ray, *Telling It to the Judge: Taking Native History to Court*, (McGill-Queen's University Press 2011).

litigated in the courts.[149] The Anangu people were denied access to their land for decades and were silenced with meagre compensation. Similarly, Ranger Uranium mine continues its operations with sparse compensation for damage that will last for decades after the operation has been shut down.[150]

Indigenous conceptions of time vary from the western conception of linear time, which leads from one event to the other in a causal relationship.[151] The Indigenous articulation of time is non-linear, i.e., the elements of Indigenous relations are always at motion and circular.[152] Therefore, their spiritual and cultural relationships associated with the land and the environment return to the point where they started, through ancestral spirits and beliefs.[153] Landscapes, mountains, and rivers become a part of the Indigenous epistemologies that define intergenerational relationships.[154] It is necessary to understand how different conceptions of time compound environmental harm similar to how different conceptions of land influence Indigenous belief systems.

Time remains as unexamined in legal theory as it does in political theory.[155] Time is also an element, like land, that is not experienced individually but collectively. While the communities cannot present time as one of their potential claims, it is an essential element in comprehending the extent of damage and loss especially while thinking about intergenerational loss. Non-linear concepts of time inform the spiritual and cultural continuity of communities, thereby causing the past injustices to proliferate in the future. Multiple temporalities of IEJ shift the understanding of environmental harms outside of the issue-resolution paradigm. They necessitate a review of existing laws, rights, and justice discourses to accommodate a greater range of Indigenous voices. While it may be hard to understand and adopt the Indigenous

[149] "British Nuclear Tests at Maralinga", National Archives of Australia. Available at: https://www.naa.gov.au/explore-collection/first-australians/other-resources-about-first-australians/british-nuclear-tests-maralinga (Last accessed: 23 August 2021).
[150] Rebecca Lawrence, "Rehabilitating Ranger Uranium Mine: Scientific Uncertainty, Deep Futures And The Production Of Ignorance", *Environmental Politics*, (2021).
[151] Ann McGrath, "'All things will outlast us': how the Indigenous concept of deep time helps us understand environmental destruction", *The Conversation,* (18 August 2020).
[152] Linda Te Aho, "Ruruku Whakatupua Te Mana o te Awa Tupua." Māori Law Review (2014). Available from: http://maorilawreview.co.nz/2014/05/ruruku-whakatupuate-mana-o-te-awa-tupua-upholding-the-mana-of-the-whanganui-river/ as cited in Christine Jill Winter, "Does time colonise intergenerational environmental justice theory?" *Environmental Politics*, 29:2, 278-296 (2020).
[153] Tyron Love and Elspeth Tilley, "Temporal discourse and the news media representation of indigenous-non-indigenous relation", *Media International Australia,* 149, 174–188 (2013).
[154] Winter, n (137).
[155] Winter, n (137).

temporalities in defining environmental injustices, they play a vital role in the remedial aspects of justice, for instance, in the moves towards reconciliation or restorative justice that can acknowledge the magnitude of the harm (p.13; p.102). As a result, IEJ implies that the legal system must recognise non-linearity within its conception of knowledge. Writ large, this example shows how acceptance knowledge of different forms becomes a central part of achieving IEJ.

Taken together these three components – recognition of plural sovereignty, acceptance of Indigenous land relations, and acceptance of Indigenous knowledge forms – are essential hallmarks of IEJ as defined in this thesis. If we return to the definition above, IEJ is *a constructive recognition of the idea of plural sovereignty through tendering primacy to Indigenous sovereignty and self-determination, Indigenous knowledge forms, and Indigenous peoples' connection to land in adjudication.*

However, the definition does not stop there. It encompasses also action. Thus: *Further, it also requires understanding of adjudication as a process that allows for legal knowledge production and a self-reflexive allyship, which accounts for the past and present violence of colonialism against Indigenous peoples*. In other words, IEJ is explicitly connected to adjudication in this definition and requires that adjudication allow for legal knowledge production, be self-reflective, and encompass Indigenous voices. This final section of this chapter explains how these elements would be reflected in what are termed here integrity, and the micro-practises of justice. These are reflections of what IEJ looks like within the process of adjudication itself.

F. Conclusion

This thesis is alert to the contemporary environmental challenges, where knowledge production is under scrutiny for its role in sustaining and perpetuating structural injustices, particularly environmental injustices. The environment is under great pressure due to the current economic modes of production that privilege development and extraction over welfare, distribution, equality, and justice. The social movements for decolonisation and land-back demand a review of existing knowledge forms and institutions. Courts are not immune to these demands. Laws and the courts risk facilitating the relentless state-led development, willingly or inadvertently, at times.

For this reason, legal institutions have been the object of critical scrutiny by Indigenous scholars.[156] Indigenous traditions, therefore, function as an alternative to the violent traditions of settler colonialism, both past and present. Borrows argues for Indigenous constitutionalism as synchronising, governing and facilitating relationships with the world, both the living and the non-living.[157] Indigenous knowledge forms and voices are not merely instrumental in finding a way out of planetary crises. They assist in critiquing and rebuilding legal institutions, knowledge forms, and ideas of justice. Within settler colonial states, this is a complex task.

This chapter discusses the mythological conception of law as a rigid and independent entity and why such conceptions must be contested. Instead, the chapter advances law as a narrative and epistemic ally, where judgments build on the existing jurisprudence and establish pathways for future jurisprudence. To give form to IEJ within courtrooms, courts must consciously endorse the idea that judgments are acts of knowledge production and that adopting the moral principle of IEJ is an act of epistemic justice (p.34). We will use the concepts and frameworks discussed in this chapter to analyse the subsequent cases. For instance, we study how settler colonialism and western knowledge systems influence the judicial perception of Indigenous claims regarding environmental harm and loss of Indigenous land. The awareness of the influence of colonial, imperial knowledge forms also alerts the reader to the possibilities of gatekeeping—what information/evidence qualifies as valuable and admissible or who has the opportunity to speak before the court. Through this, we explore how modern courts can build newer narratives that can achieve *more,* where the 'more' seeks to look beyond what is already legal or legitimate and raises to the challenge posed by settler colonialism. Here, the *more* also understand the language of justice expansively and not merely within the liberal understanding of constitutional, Treaty or Native title rights. The narrative-building exercise through adjudication should take up opportunities to view things from marginalised perspectives and reconsider how existing concepts must shape future jurisprudence. In the following chapters, the arguments for making room for Indigenous self-determination, recognition of Indigenous knowledge forms, and understanding Indigenous land relationships contribute to Indigenous rights jurisprudence and domestic legal integrity by being more inclusive.

[156] John Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press 2016).
[157] Borrows, n (156) at p.112.

Further, often, there are some obvious limits on what can be achieved within adjudication. Partly, these limits also arise from the entrenched nature of colonialism, which even legal systems cannot escape. In these cases, it may be easier to foreground Indigenous voices during the adjudicative processes. However, what remedy can redress the full extent of injustices suffered by the Indigenous communities? Should courts be the appropriate forums for resolving past and present harms and preventing future harm? To this end, we use epistemic allyship and responsibility to understand Indigenous land relations and plural sovereignty and to adopt IEJ within or through renewed ideas of adjudicative integrity. Indigenous self-determination and sovereignty have always been tied to Indigenous land and the environment. Hence, we advance the argument that courts must not only recognise and foreground Indigenous voices but continue to be allies by reinterpreting or innovating tools that overcome limits on the available remedies and outcomes.

The conceptual framework offered in this chapter briefly touches on the idea of plural sovereignty. Nevertheless, the principle of *plural sovereignty* underpins IEJ in its entirety. Should courts wish to move away from legal systems that are unquestioningly rooted in colonialism and capitalism, they must look to the idea of plural sovereignty for guidance. This chapter holds some of the essences of plural sovereignty expressed through IEJ. It also suggests how all or some of its elements may be adopted within existing adjudicative processes. The following chapters will delineate individual instances of courts having enlivened the idea of IEJ or instances of their failure and what consequences these judgments hold for radical environmental jurisprudence mirrored in IEJ.

Chapter 2: Adjudication and Indigenous Voices

A. Introduction

This chapter discusses cases from the three jurisdictions where courts attempt to recognise and apply/incorporate the moral principle of IEJ into adjudication. The cases studied here demonstrate the processes of making room for *Indigenous voices* within adjudicative spaces either through mere recognition or constructive use of Indigenous experiences of settler colonialism and Indigenous knowledge forms.

In order to demonstrate this conclusion, the chapter focuses on two questions. First, how are Indigenous voices represented in the litigation process? Second, what is the nature of judicial engagement with Indigenous evidence and what are the consequences of this for IEJ? As was demonstrated in the previous chapter, the ability of a court to hear from and consider evidence from Indigenous communities is a central tenet of IEJ. This chapter will therefore analyse the substantive and procedural rules relevant to the case at hand, and how these interact with the components of IEJ discussed in chapter one.

However, it should be noted that there is a sizeable difference in the number and nature of cases discussed from these jurisdictions. Furthermore, the judgments demonstrate a range of judicial approaches to Indigenous testimonies and evidence. The complexity of IEJ means that courts will achieve (or not) contributions to IEJ in a range of ways. Finally, in some cases, the minority or dissenting judgment has thrown greater light on Indigenous cultural and environmental relationships and are therefore more pertinent to the question at hand. These are nevertheless included because of the role that dissenting judgments play in sowing seeds for development of future jurisprudence.

B. Australia

Buzzacott v Morgan (‘*Buzzacott’*) is one of the earliest cases against mining industries to be argued in Australia. *Buzzacott* was contested before a single judge bench in the South Australian Supreme Court.[158] The Plaintiff, Aboriginal Elder Kevin Buzzacott, made multiple

[158] [1999] SASC 149.

applications seeking declaratory relief and injunctions in respect of the defendant's mining company. The application included a claim that the unremitting operations of the mining company had caused irreparable harm to the people of Arabunna land. The plaintiff sought to represent the Arabunna people and argued that the operations of the mining company constituted an act of genocide. The plaintiff's affidavit was extensive and stated that the destruction of Arabunna land and the cultural and spiritual lifeways of Arabunna people amounted to a systemic erasure. Declaratory relief was also sought against the state that had enabled mining companies to operate on Aboriginal land. In addition, the plaintiff filed an application seeking orders to refer the matter to the Supreme Court's full bench and to have the case heard at Lake Eyre. The latter request reflected the urgency of the issue; the significance and intimacy of having evidence given on Aboriginal land; and the symbolic resistance of Aboriginal people against physically entering settler courts.

Predictably, the Court could not grant any of the requested remedies. Either the applications were dismissed, or no orders were made. The Court held that the plaintiff did not have representative capacity to bring the action, and that the designation of 'Arabunna lands' and the claim of genocide were vague and unsatisfactory. The presiding judge, Justice Nyland, engaged with each of the claims at length, appearing sympathetic with the plaintiff at times. Nyland J, while not dismissive, did not however comment on the questions of whether the matter should be before a full bench or whether it must be heard in Lake Eyre. Despite the 'legal' vagueness of the claims, *Buzzacott* remains one of the first cases to have explored new ways of Indigenous resistance to extractive industries in courts and to show the potential which exists in reaching IEJ from engaging with the kinds of arguments brought by the claimant in that case.

B1. Indigenous Voices in (Anti-Coal) Environmental Litigation

Gloucester Resources v Minister for Planning[159] is a case cut from a different cloth. Gloucester Resources Limited (GRL) had made an application for the operation of Rocky Hill open-cut coal mine. The Minister for planning refused consent for the project, and the matter came before the New South Wales Land and Environment Court (NSWLEC) as a merits review. Justice Preston's decision to refuse the application, and the reasoning for such refusal, made *Gloucester Resources* one of the most prominent environmental cases in recent times. Since it

[159] [2019] NSWLEC 7.

was a merits review, the Court explored the social, economic, and environmental impacts of the Rocky Hill project in detail. Preston J extensively examined the cost-benefit analysis of the open cut mine before upholding the denial of consent. The decision considered four broad categories of impact that weighed against the mining project.

1. Visual impact
2. Social impact—extending to a sense of place, community, and place relations
3. Impact on climate change
4. Economic impacts

Furthermore, although the case represents a fairly typical environmental law claim in terms of subject matter, Preston J allowed an extraordinary opportunity to gather evidence from Aboriginal elders to understand the social impacts of the mine thus expanding the traditional procedural 'toolbox'. The ministerial submission before the court had recognised that the environmental and social impact assessment provided by GRL was highly inadequate. The latter had completely ignored Aboriginal perspectives on the Gloucester valley, which was also a place of great cultural and spiritual significance.

Hedda Askland ('the Askland report') submitted the expert report on social impact on behalf of Respondent 2, the Groundswell Gloucester Organisation, who were the primary litigants concerned with the immediate environmental impacts of the mine. The Askland report gives a detailed account of the Aboriginal relationship with the place and how the exclusion of Aboriginal voices from the decision-making process had injured their sense of community and belonging.[160] The report also identifies what such exclusion means for Aboriginal people and the sense of justice. To quote one of the Elders interviewed in the report— "The lack of recognition of Aboriginal heritage, ontology and epistemology incites a decolonial (*sic*) process which, in Sarah's words, 'mimics the historical relationship between government and our People—relegate, move and dismiss' ".[161] Askland also emphasises that the land holds a spiritual value to the people as it is both a sacred entity and a cultural heritage. The report shows that the impending loss of the land creates an incommensurable sense of loss to the Indigenous community living on the land. In the process, the report also calls into question the

[160] Hedda Askland "Expert Witness Report on Social Impacts". Witness Statement prepared on 14 June 2018.
[161] Para 86 n (159). Cited again in the judgment in para 344.

minister's uncontested acceptance of GRL's submission that the place was of low research potential and no educational or aesthetic value.

The judgment used the Askland report extensively to understand why the social impact differed for Indigenous communities, thereby amplifying their sense of loss. Preston J also invited independent testimonies from Aboriginal elders to demonstrate what the Indigenous conception of land, and more specifically the connection to Gloucester valley, meant to them and their communities.[162] Preston J identified the GRL's expert evidence as to capture the impact of the mine on Indigenous relationships with the land.[163] The judgment accepted the Goorengai Elders' testimony to conclude that the value of the land increased when one accounted for how land is integral to Indigenous ways of life.[164] The Court emphasised that Aboriginal cultural heritage is not embedded in a specific piece of land but in the landscape as a whole.[165] Throughout the judgment, Preston J considered testimonies of the Indigenous people while determining the impact of the mine on key categories, such as visual amenity, social impact, cultural heritage, connection to land, and sense of place.[166] The judgment also considered the history of settler colonialism in Australia as significant for understanding how dispossession in the case of open-cut mine might impact future knowledge.[167] In the voice of an Elder Kim Eveleigh:

> We are the Aboriginal people of this land, so don't you dare ignore us, pay attention and listen as this is our spiritual connection to our land, we the Gooreengai people belong to the Significant Buckan Valley in Gloucester - it is our past, present, and future. If you allow it to be destroyed, you cannot fix it. Stop it before it begins. Everything from our Ancestors has been removed. All we have left is our Dreaming of our land…[168]

'Solastalgia' or a sense of despair arising from loss of place and ecology finds a prominent place in the judgment.[169] Preston J has relied heavily on this concept even in his earlier judgments, such as *Bulga Mibrodale Progress Association v Minister for Planning and*

[162] *Gloucester Resources* n (159), para 340-352.
[163] *Gloucester Resources* n (159), para 342.
[164] *Gloucester Resources* n (159), para 120-121.
[165] *Gloucester Resources* n (159), para 346.
[166] *Gloucester Resources* n (159), para 345.
[167] *Gloucester Resources* n (159), para 348-351.
[168] *Gloucester Resources* n (159), para 121.
[169] A term coined by Australian anthropologist Glenn Albrecht and which is referred to in Askland witness report. *Askland* n (160), para 106.

Warkworth Mining, to highlight the fact that the social impact of mining may be undermined in mechanical impact assessment processes.[170] In *Gloucester Resources*, Preston J discussed the idea of 'solastalgia' to lay stress on how Indigenous people have a distinct cultural connection to land and environment. Previously, the NSWLEC has made room for Indigenous testimonies and issues even when they were not the primary matter considered. The court in *Milne v Minister for Planning & Anr*, which dealt with the social impact of the expansion of the marina, called for testimonies from Aboriginal Elders to remedy the omissions in impact assessment on cultural heritage.[171] In the final decision, refusing the permit, Jagot J found that the impact on Aboriginal heritage and traditional activities outweighed the promised economic benefits.

In *Gloucester Resources*, the Court made the best use of the power to review to foreground Indigenous voice. The decision repeatedly emphasised that Indigenous cultural heritage and spiritual connection to the land are the key elements that may be harmed by the operations of the coal mine.

While the elements of 'participation' and 'recognition' may be achieved through consultation in impact assessments, the Court here remedied both material and epistemic injustices. *Gloucester Resources'* reworking of the processes in which voice matters is an important innovation. It suggests the possibility of individual judges or courts elevating Indigenous voices to where they matter. The judgment's intervention in expanding what constitutes relevant knowledge for determining the outcome of the case is as significant an innovation as compensation for 'spiritual loss' in the case of *Northern Territory v Griffiths & Ors* (*Timber Creek*).[172] In *Timber Creek* (p.107), the Court was faced with the question of traditional owners' compensation claims for the damage to their Native Title rights. Alongside economic compensation, the Federal Court encountered the complex challenge of calculating intangible values. The latter was addressed by creating a category of 'spiritual losses' that would cover the disconnect experienced by the loss of land. The chapter sets out with two questions—how Indigenous voices are represented in the litigation and what is the nature of judicial engagement with such voices, and consequently, what implications do they have for IEJ. *Gloucester Resources* finely illustrates how an adjudicative process may avail of

[170] [2013] NSWLEC 48, para 404.
[171] [2007] NSWLEC 66.
[172] [2017] FCAFC 106. Timber Creek decision is discussed in detail in the next chapter.

opportunities to foreground and engage with Indigenous voices. Further, the case also demonstrates how Preston J uses the opportunity to engage with IEJ for a larger good – that of building a narrative around climate justice and IEJ as mutually complimentary principles that take active space in adjudication of environmental matters.

B2. Darkinjung and Dempsey: Treatment of Indigenous Evidence as Expert Evidence

The treatment of Indigenous evidence in court has been a subject of interest to scholars of Native title litigation and legal history. Ann Curthoys et al., recognise the difficulties faced by Indigenous people in negotiating 'alien and hostile' non-indigenous spaces such as political and legal institutions.[173] Several anthropologists and historians, such as Ann Curthoys, Arthur Ray, Marcia Langton, Tim Rowse, have devoted their scholarly attention to reflecting on expert evidence as a product of interdisciplinary excursions into mainstream (doctrinal) adjudicative practices and the courts. In more recent works, such as the post-Mabo scholarship of Diane Smith et al.[174] and works on Canadian legal history from Arthur Ray, discussion relating to the representation of Indigenous voice in Native title litigation has gained prominence.[175] Whilst the importance of how Indigenous people relate to land in non-proprietary forms may have been recognised, there is little guidance to illuminate the treatment of Indigenous evidence in environmental litigation within this category of scholarship. In most cases, much to the anger and resentment of Indigenous peoples, their cultural and spiritual beliefs are subject to contestation regarding their veracity and legitimacy.[176] While Blackburn J in *Milirrpum v Nabalco Pty Ltd* focussed mostly on Indigenous evidence, his treatment did not treat Indigenous evidence with the fairness that is bestowed on other forms of evidence, for instance those rendered by non-Indigenous experts. In *Milirrpum*, Indigenous voices were treated mostly as narratives contradicting the expert evidence of anthropologists and not as those that exist as credible knowledge forms.[177] The jurisprudence has evolved in leaps and bounds since then, and the idea of Indigenous connection to the land is treated with greater solemnity. However, generalist courts vary greatly from specialist environmental courts, such as the

[173] Ann Curthoys et al, *Rights and Redemption: History, Law and Indigenous People*, (University Of New South Wales Press 2008).
[174] Diane Smith and Finlayson J, "Native Title Era: Emerging Issues for Research, Policy, and Practice" *Research Monograph No.10*, (ANU 1995).
[175] Arthur Ray, *Telling It To The Judge: Taking Native History To Court* (McGill Queen's Press 2011).
[176] Curthoys et al n (173), p.172.
[177] (1971) 17 FLR 141; See also: Curthoys et al n (173), p.4.

NSWLEC, in how they consider Indigenous evidence. There are two interconnected elements to be appraised with respect to the treatment of Indigenous evidence:

1. Are Indigenous representatives considered expert witnesses?
2. Is Indigenous testimony 'tested' against the expert testimonies of historians and anthropologists?

In most cases, the first question elicits an easy answer—a categorical 'no'. However, *Darkinjung* and *Dempsey* discussed here are an exception to the general treatment.

In *Darkinjung Local Aboriginal Land Council v Minister for Planning (Darkinjung),*[178] the appellants challenged the approval obtained for the extension of the Calga sand quarry under section 75 L(3) of the Environmental Planning and Assessment Act 1979. The Court heard the evidence under two heads—Aboriginal cultural heritage and non-Aboriginal cultural heritage. The proposed excavation site fell within the Darkinjung's traditional lands. More specifically, the extension was threatening a rock engraving site, referred to as 'Women's site'. The appellants also identified other sites of spiritual and cultural importance that were going to be affected by the sand quarry. Damage to these sites could not have been "avoided, mitigated, compensated, or acceptably managed".[179] Hence, the appellants argued that consent to the quarry must be denied. The appellants also argued that the extension of the quarry would harm not only specific sites but also the landscape as a whole. The land held cultural and spiritual importance to the community, and as such its destruction would destroy the Aboriginal heritage, alongside other environmental impact.[180]

The appellants advanced arguments regarding the significance of Aboriginal heritage and equated potential cultural damage with environmental damage. One of the arguments concluded that in the face of uncertainty as to the value and significance of the site, the precautionary principle requires that the expansion be denied. Besides, Aboriginal heritage is not a renewable resource, whereas sandstone is available all around New South Wales.[181] Here, the use of a concrete, well-defined legal principle (precautionary principle) to address a new

[178] [2015] NSWLEC 1465.
[179] *Darkinjung* n (178), para 36 (7).
[180] *Darkinjung* n (178), para 36 (10).
[181] *Darkinjung* n (178), para 36 (15).

circumstance (harm to Aboriginal heritage) illustrates the broader arguments of this thesis i.e. accommodating the moral principle of IEJ through interpretation of existing mechanisms or through innovation of interpretative tools and remedies (p.151). The strategy adopted in *Darkinjung* falls into the former category. Whilst the precautionary principle is an established principle of environmental law, its scope and extent have been spun out to address the gravity of Indigenous claims. By suggesting a novel approach, the appellants propel the judicial attention towards eliding the distinctions between the environment and Aboriginal heritage—the framework pertinent to the environment will also be suitable for Indigenous claims.

While the second respondent, Rocla Pty Ltd (Rocla), contested the idea of the precautionary principle introduced in this particular instance, the Minister for planning acquiesced. The Court agreed with the appellants, holding that the situation under consideration demanded the application of the precautionary principle as it is a matter of public policy. Further, the degree of scientific uncertainty involved automatically evoked its application.

As a part of the proceedings, an independent, court-appointed commission visited the Women's site along with the Darkinjung female Elders. On behalf of the appellants, Senior Law Man, Paul Gordon testified about the significance of the Aboriginal sites and the landscape. The judgment agreed with all of the appellants' arguments and provided compelling grounds for holding the approval invalid. The judges recognised the following factors were critical to the decision:

- The Aboriginal Elder, Paul Gordon, was an 'expert' as far as his testimony was concerned.[182] The same recognition was extended to testimonies of other members of the community, Hodgett and Howie, whose long ties to the land and knowledge of the Aboriginal culture were well established. The judgment excludes three of these testimonies from what it classifies as lay testimonies at the outset.[183] The account of four Elders, on the whole, is treated as 'expert evidence' alongside those of archaeologists. Further, the decision compares the expert report submitted on behalf of Rocla and finds that the report only summarises what the Aboriginal witnesses on behalf of Darkinjung have already stated regarding the heritage and connection to the land.[184]

[182] Darkinjung n (178), para 149.
[183] Darkinjung n (178), para 14.
[184] Darkinjung n (178), para 159.

- The Court recognised that any consultation cannot be complete without fully assessing the extent of cultural heritage represented by the landscape. There was adequate uncertainty that the land may hold more artefacts of cultural significance. Consequently, this uncertainty required that the land be subject to further archaeological inquiry before a valid consultation can be concluded. The judgment also states that heritage and cultural value is embedded in the entire landscape and not merely in a particular stretch of land.
- The judgment confirms the applicability of the precautionary principle argument. The reasoning elides the distinction between environment and cultural heritage and extends the grounds of 'scientific uncertainty' to cover the importance of undiscovered Aboriginal heritage.[185] Although the reference to the precautionary principle in the case is predominantly invoked in relation to imminent environmental damage, the Court extends the idea of implied risk to Aboriginal heritage.

On the whole, Darkinjung improves substantially on the previous treatment of Aboriginal evidence before courts, such as that in *Kartinyeri v Commonwealth* ('*Kartinyeri'*).[186] In *Kartinyeri*, a group of Ngarrindjeri female Elders had opposed the proposed construction of a bridge over Hindmarsh Island as the place was a sacred women's site. While the claim in *Kartinyeri* failed, the High Court recognised the complexity and distinctiveness of Indigenous evidence. According to Justice von Doussa:

> The understanding of reasons why particular activities will in the eyes and minds of Aboriginal people constitute injury or desecration is probably rendered more complex and difficult where the white community seeks to impose on the environment physical structures and activities that had no counterpart in pre-contact times. Accepting for the moment the belief as publicly disclosed, it is unlikely in the extreme that Ngarrindjeri thinking in pre-contact times contemplated an artificial link created by human intervention between the island and the mainland, any more than it would have contemplated reservoirs or major mining activities. As these post-contact events arise, necessarily a measure of innovation must occur as the bounds of Aboriginal belief and tradition are projected or refined to accommodate the changing world.[187]

[185] Darkinjung n (178), para 456-458.
[186] Kartinyeri v Commonwealth (1998) 195 CLR 337.
[187] Cited in Curthoys et al n (173), p.76.

The reasoning in *Darkinjung* implies that the Indigenous voice takes precedence over economic profitability, or the investment made in the quarry.[188]

Dempsey v State of Queensland[189] *('Dempsey')* in the Federal Court was similar to *Darkinjung* in terms of how an Indigenous claimant arguing her case was treated. *Dempsey* was, however, a Native title claim and cannot be classified as environmental litigation *per se*. Nevertheless, the reasoning is of note for this thesis because of the distinct treatment meted out to Indigenous woman's evidence regarding her claim to the land. One of the respondents, Lorna Bogdanek, argued that her community fell within the Waluwarra and Wangkayujuru Native title claim group. Bogdanek contended that her apical ancestor (common ancestor) was not included in the primary petition.[190] Therefore, for a successful Native title determination the Court had to decide on the claim that the inclusion of Bogdanek's ancestral group was indispensable to the Native title process. The respondent argued her own case without the assistance of expert evidence from either anthropologists or historians. Apart from Bogdanek's testimony, the Court heard testimonies only from other Indigenous witnesses on behalf of Bogdanek and did not seek to corroborate their evidence with anthropological insights.[191] The decision emphasises the consistency and connection between accounts of Aboriginal Elders, accepting that Indigenous knowledge forms and ways of knowing will necessarily differ from Western epistemologies. Presiding judge Mortimer J duly credited Bogdanek as an expert and a knowledgeable person of Aboriginal heritage, even where her evidence was not material to the trial. The judge painstakingly listed the details of her evidence to illustrate that even though they differ in presentation from the Anglo-Australian culture of written records, courts must be wary of 'text positivism'.[192] Mortimer J is deeply appreciative of the individuality in Indigenous evidence, although one may encounter forensic difficulties of accessing and presenting scholarly material just as well as an anthropologist does. Mortimer J helpfully observed:

> She had no need of maps. There was no sense whatsoever that she was relying on secondary sources to describe her country, and the laws and customs which

[188] Darkinjung n (178), para 339.
[189] [2014] FCA 528.
[190] An apical ancestor is the one from whom a lineage or a clan may trace its descent. Naming of the apical ancestors is essential for determination of most of the land claims under the Native Title Act.
[191] Dempsey n (189), para 102-114.
[192] Dempsey n (189), para 298-299.

> connected her to it. It was as if she could see her country, its geographical and topographical features, in her mind's eye as she was giving evidence.[193]

However, after a prolonged deliberation over the evidence from both the claim groups, Mortimer J dismissed Bogdanek's claim on narrow grounds. Mortimer J stated that while Bogdanek's testimony and supporting testimonies are authentic and indicative of the lived experiences of Indigenous persons, they are not demonstrative of the membership of the primary Native Title group. There may have been an overlap between the two groups. Nevertheless, membership in the case of Native Title determination would demand robust knowledge of and connection with the group's laws and customs. To quote from the decision:

> In my opinion, this way of speaking about people who, at least on one version of the contentions made by Mrs. Bogdanek, may be part of the society of which she asserts to be a member, does not reflect any real connection or identification with those people or their society. It is, rather, the language of an outsider.[194]

Dempsey, like *Darkinjung*, makes great effort to remedy the unfairness of subordinating Indigenous evidence to western epistemologies. *Darkinjung* takes a step towards the appropriate categorisation of evidence and uses such evidence to address the cultural and environmental issues raised by the appellants. Therefore, these instances of recognition of Indigenous evidence, both in terms of status (how well the evidence is received) and substance (how meaningfully the evidence is treated), are examples of how a court could contribute to radical environmental jurisprudence.

B3. Weighing Indigenous Evidence against Profits

However, this pattern of recognition of Indigenous evidence is not comprehensive across the legal landscape. *Adnyamathanha Traditional Land Association v Minister for Energy and Mining* (Adnyamathanha)[195], a decision of the Supreme Court of South Australia, contrasts with the decisions discussed above. Here, the Court treats Indigenous evidence as a mere evidence for the counterclaim rather than something indicative of deeper environmental and cultural relations.[196] Here, Doyle J considered an application by the plaintiffs, the

[193] Dempsey n (189), para 765.
[194] Dempsey n (189), para 279.
[195] [2018] SASC 142.
[196] Adnyamathana, n (195).

Adnyamathanha Traditional Land Association (ATLA), seeking an injunction to restrain the defendants from carrying out further work on Leigh Creek Energy Project. The defendants obtained a petroleum exploration licence under the Petroleum and Geothermal Energy Act 2000 (PGE ACT, SA). The proposed exploration covered areas in the north of South Australia, including Leigh Creek Coalfields, which fell within the area over which ATLA claimed the Native Title. ATLA argued that the area was of great cultural significance to the Adnyamathanha people. By the time of the litigation, Leigh Creek had established a demonstration plant in the area, having already submitted its Environmental Impact Assessment (EIA). ATLA advanced two important arguments in support of their claim for injunctive relief. First, they argued that Leigh Creek's proposed drilling in the demonstration plant qualified as 'regulated activity' and should not be allowed to proceed as the region did not have a Statement of Environmental Objectives (SEO). Second, they argued that the EIA did not consider Aboriginal cultural values and heritage and was hence invalid. In its submission, ATLA urged the Court to consider environmental and cultural aspects simultaneously as they intended to represent the public interest alongside Indigenous issues.[197] Besides, they also argued that should the project be allowed to go ahead, Adnyamathanha people would suffer irreparable harm to cultural values.

Although the Court considered ATLA's argument regarding the absence of the required SEO and noted that the Leigh Creek had proceeded under a different SEO unrelated to the current project, it did not find this to be a violation that affected the consent for the project. The judgment contains interesting observations on the second issue—concerning the inadequacy of the EIA under S.97 of the PGE Act—which required Aboriginal values to be considered. ATLA argued that the EIA was inadequate as it ought to have considered the cultural and spiritual significance of the land. The area on which the demonstration site was built held the creation story of Adnyamathanha people and extended from Leigh Creek coalfields to Flinders Range. In its submissions, Leigh Creek made light of the 'taking into account of cultural values' and argued that it was only a box to be ticked and that the omission should not be considered a serious deficiency.[198] Further, it contended that years of mining and previous damage to the land had diminished its cultural value. Doyle J was partially appreciative of ATLA's argument. Nevertheless, the judge endorsed a balance sheet approach in determining whether the

[197] Adnyamathanha n (195), para 29.
[198] Adnyamathanha n (195), para 71.

injunction must be granted. The judgment approvingly quoted ATLA's evidence that despite the damage to the land, it retained its vital spiritual significance. Consequently, continuing the work on the demonstration plant would result in irreversible and irreparable damage to the community. However, the decision did not explore in detail the evidence provided by ATLA or ATLA's arguments about plausible environmental harm. Instead, the decision relied on a cost-benefit assessment concerning the injunction itself. A plain reading of the decision does not fully illuminate how the Court engaged with the Indigenous evidence. Nonetheless, Doyle J made an unusual remark on why environmental concerns were not relevant at this point:

> I also accept that there will be at least some risk of environmental harm if the works continue. That said, the evidence before me in that respect is limited and somewhat speculative. There is some evidence of the general concerns in the scientific community and the community in general about the potential (and in some cases reality) of environmental harm as a result of similar undertakings elsewhere, and the adverse attitude taken to such undertakings by the governments of some other states.[199]

Surprisingly, before listing the alleged financial harms suffered by Leigh Creek should the injunction be granted, the judgment concluded:

> However, it is important to appreciate that the apparent inevitability of harm to the culture of the Adnyamathanha people, and the possibility of harm to the environment more generally, are not a sufficient basis for an injunction to restrain the works going ahead.[200]

In the last limb of the judgment, Doyle J considered the prejudice to Leigh Creek if the injunction is granted and deliberated at length about the reasons for such prejudice. Amongst the factors were:

- Adverse effects on the share price of the company,
- Impairing market capitalisation and market confidence, and
- Costs of mobilising and demobilising contractors.[201]

ATLA's refusal to ensure financial guarantee, which is a necessary precondition for grant of an injunction, was also held against the applicants and the application for the injunction was

[199] Adnyamathanha n (195), para 108.
[200] Adnyamathanha n (195), para 109.
[201] Adnyamathanha n (195), para 114-121.

rejected.[202] The cost-benefit analysis used in Adnyamathanha to determine the nature of loss and its manifestation in the case of Aboriginal cultural values categorically contrasts with the approach in *Gloucester Resources*. With a relentless privileging of the economic costs to Leigh Creek, against the cultural and spiritual values of the Adnyamathanha people, the judgment hints at a missed opportunity for adopting the principle of IEJ in order to remedy the barefaced disregard of Aboriginal heritage by settler laws (p.115). While the decision here is sound and legitimate as long as it follows the legislation and the broader judicial approaches to injunctions, we return to the question of the colonial and the capitalist nature of the laws that enable extractivism and dispossession organically (p.12). *Adnyamathanha* illustrates the precise significance of and need for constructive recognition and engagement with Indigenous voices instead of token participation in settler courts.

Australian cases discussed in this section provide concrete examples for how settler colonialism devalues Indigenous lives and cultural connection with the environment and how these practices are reinforced through the laws. On the contrary, they also indicate how individual courts may take up the opportunity recognise Indigenous voices through their 'evidence' and use them actively in reformulating or altering the limits of adjudicative processes. Small and incremental gestures, in other words, micro-practices, such as these are effective in making room for IEJ within legal processes—as legal principles.

C. Brazil

In Brazil, much of the responsibility for enforcing an intricate network of environmental laws falls on the High court, i.e., Superior Tribunal de Justiça (STJ) and the Supreme Court, i.e., Supremo Tribunal Federal (STF). The Brazilian Constitution enshrines comprehensive provisions for environmental protection and Indigenous rights. However, the celebrated constitutionalisation of environmental law has not influenced domestic Indigenous rights litigation, at least not in significantly positive ways.[203] The Constitutional Courts have been inconsistent in their interpretation of Indigenous land claims and cultural rights. At the outset,

[202] Interestingly, Doyle J states that absence of such undertaking should not be a necessary pre-condition for the grant of injunction (para 126) given the nature of the case and the claims made. However, he makes it a significant consideration in any case (para 127) while deciding.
[203] Nicholas S. Bryner, *Brazil's Green Court: Environmental Law in the Superior Tribunal de Justiça (High Court of Brazil)*, 29 Pace Envtl. L. Rev. 470 (2012).

it must be clarified that a large number of environmental conflicts that are documented in state territories have not been the subject of litigation. The STJ and STF primarily hear constitutional and appellate matters. This section will discuss the cases, which possess the appearance of pro-Indigenous judgments and those that are actually helpful to the accommodation of IEJ. The cases here testify to the harm done by disregarding Indigenous voices and IEJ within adjudication and how best a meaningful Indigenous rights jurisprudence may be achieved through micro-practices.

C1. Internal Colonialism of Raposa Serra Do Sol

Raposa Serra Do Sol ('Raposa')[204] is an oft-cited case in Brazilian Indigenous rights jurisprudence. Perspectives on what the case does and how it influences Indigenous rights differ vastly. It also made an appearance in the Inter-American Commission for Human Rights (IACHR) in a petition against the violation of the articles of The American Convention on Human Rights (American Convention). Hence, the discussion in this thesis regarding *Raposa* benefits from two approaches and two different courts. Although the petition before IACHR was made in 2004, the Commission gave its decision in 2010. Meanwhile, STF had also reached a decision on the matter in 2009 and hence the STF decision is addressed here first.

The petition before the STF was preceded by a violent domestic conflict between Indigenous Raposa and other communities that were in favour of demarcation, and pastoralists who were against it. The term *demarcation* refers to the process of determining and listing of the Indigenous land in order to guarantee the land rights of Indigenous peoples. In this case, the Raposa had a historical claim to the territory. They were in occupation of the contested lands even before the colonisation.[205] In 2004, Fundação Nacional do Índio (FUNAI) proposed the demarcation to the relevant minister. However, the ordinance was not signed until 2005. Meanwhile, there were many petitions and applications by the farmers who sought to remain within the Indigenous territories. The ministerial ordinance accepting the demarcation was passed in 2004 and was challenged in the STJ. STJ's decision affirming the ordinance was

[204] Petition 3388 / RR - Petition RORAIMA. This case has also been discussed in one of my earlier publications—See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", *Fourth World Journal*, Vol 20 Number (2), 115-130, (2021).
[205] 'O caso da Raposa' *Povos Indígenas No Brasil,* Available at: https://pib.socioambiental.org/pt/Povo:Macuxi (Last accessed: 10 June 2020).

followed by Presidential assent, and eventually, the case found itself in STF. The STF upheld the decision that the demarcation was valid and directed non-Indigenous people in the region to be removed. The decision is understandably treated as a good outcome for Indigenous communities.

The Indigenous evidence presented before the Court hardly finds a mention in the STF's decision. The judgment is overshadowed by an anachronistic and tellingly egregious understanding of indigeneity and Indigenous connection to the land.[206] The social realities around the *Raposa* litigation displayed high degree of internal colonisation and assimilation. Here, internal colonisation means the subsequent erasure of Indigenous ways of life and extermination of Indigenous peoples by the state long after external colonisation is deemed to be over. Assimilationist policies, such as the erasure of Indigenous cultures and imposition of mainstream education systems and spirituality on Indigenous peoples, characterise internal colonialism. These sentiments of internal colonialism and assimilationist tendencies were also endorsed by the Court.[207] While deciding the constitutionality of the Presidential Decree on demarcation, the STF was tasked with interpreting the rights of Indigenous people under Article 231. Instead, the STF narrowly construed the rights implied under Art.231 to mean only the right to remain on the demarcated territories instead of including Raposa sovereignty and self-determination over the land. Through the decision, the Court laid down nineteen qualifications on the rights of the Indigenous communities. Some of the key conditions included:

1. Federal or State laws may be used to allow the enjoyment of natural resources, soil, and water bodies by non-Indigenous people if it is essential to meet public interest. The Indigenous communities will only have the usufructuary right over the resources and cannot veto such decisions.
2. The usufructuary rights of the communities do not extend to making use of the mineral wealth or entering into mining agreements. Those privileges continue to rest with the government.

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[206] Cristhian Silva, "The Homologation of Raposa/Serra Do Sol Indigenous Land And Its Effects: A Performative Analysis Of The 19 Safeguards Of The Federal Supreme Court", Rev. bras. Ci. Soc. 33 (98), (2018).

[207] 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, "Toward a New Theory of Internal Colonialism," *Socialism and Democracy Online* 25, No. 1 (2011).

3. Indigenous interests do not outweigh the national defence 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 on Indigenous territories, in addition to carrying out the construction necessary for the provision of public services.[208]

The judgment is also riddled with other contradictions in how it discusses the remit and the need for constitutional rights of Indigenous peoples while also applying it narrowly in this case. In Para 11.2, the Court acknowledged that the constitutional safeguards in Article 231 are a step towards affirmative action.[209] It ensures that the land and environment are available for not only productive activities but also for social and cultural reproduction. Soon after, the Court asserts the importance of 'assimilation' of Indigenous communities into a sense of 'Brazilian-ness' and isolating them from "unhealthy influences of foreign non-governmental organisations".[210] Furthermore, in the case, the STF explored the question of who can reasonably be defined as 'people' under the Constitution in order to merit absolute control over the territory. The decision concluded that Indigenous people do not qualify under the categories of either 'people' or social organisation holding sovereign powers.[211] Effectively, the Raposa people were neither sovereign as any other citizen of Brazil nor could they be treated as a cohesive social group in which the Court may have considered recognising the sovereignty.

The decision categorically violates all the principles of the UNDRIP (p.44). Whilst the Brazilian Constitution recognises Indigenous rights, it does not comprehend Indigenous connections to the land or address the ongoing violence of internal colonisation. By treating the Indigenous rights over territory on a par with possessory or usufructuary rights, the Constitutional Court aggravates existing inequities. First, the Court leans on a spurious distinction between land as political territory and Indigenous territory. The judgment holds that the latter is only limited to ethnic and socio-cultural factors and cannot override the political

[208] Petition 3388 n (204), p.5. See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", Fourth World Journal, Center for World Indigenous Studies, Vol 20 Number (2), 115-130, (2021).
[209] Petition 3388 n (204), p.4.
[210] Petition 3388 n (204), p.5. Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", Fourth World Journal, Center for World Indigenous Studies, Vol 20 Number (2), 115-130, (2021).
[211] Petition 3388 n (204), p.7.

powers of the state even though it has been traditionally occupied.[212] However, as shown earlier, Indigenous rights over land are more than land rights. They are expressions of plural sovereignty and such sovereignty co-exists with that of the state without antagonising the latter. Second, by limiting how the rights are exercised, the judgment reneges on the promise of Indigenous self-determination and curbs the idea of 'exclusive Indigenous enjoyment' promised in Art.231 of the Brazilian Constitution. While such limited interpretation and invisible hurdles to Indigenous rights may be Brazil's reality, the endorsement of the superior Court only legitimises the practice of overlooking Indigenous people as yet another procedural inconvenience.

The decision is reminiscent of a judgment from the Federal Court of Beurarema in 2006, where the Court considered the territorial integrity of the Tupinambá community. In the case known as *Serra Do Padeiro,* the action for repossession of the land was initiated by a farmer displaced by 'Indigenous occupation'.[213] Similar to *Raposa*, *Serra Do Padeiro* was preceded by a series of petitions for injunctions against farmers and non-Indigenous people illegally occupying Indigenous land. Despite repeated demands, the government had not commenced the process of demarcation. Following an initial failed litigation in the regional courts, the Tupinambá community forcefully occupied 20 farmsteads.[214]

The Federal Court decision did not address the historical concerns regarding land occupation; anthropological evidence as to the continuity of the community; or the complete lack of demarcation that has triggered the current standoff. It merely alluded to unsubstantiated reasoning that historical occupation of Indigenous territory can be proved only by demonstrating that the communities have been practicing stipulated customs and traditions.[215] The judgment emphasised that occupation since time immemorial does not make the land Indigenous territories under Article 231 and shifted the burden on the communities to prove their indigeneity.[216] There is no trace of any historical or anthropological evidence the Court may have used in the process. Ironically, the Court relied on a historical account of 18th-

[212] Petition 3388 n (204), p.3. See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", Fourth World Journal, Center for World Indigenous Studies, Vol 20 Number (2), 115-130, (2021).
[213] 2006.33.01.000722-7, Federal Court of Beurarema.
[214] Serra do Padeiro n (213), p. 7.
[215] Serra do Padeiro n (213), p.10. See also: Peter Zoettl, "The (Il)legal Indian: The Tupinambá and the Juridification of Indigenous Rights and Lives in North-Eastern Brazil", *Social & Legal Studies*, 25(1), 3–21 (2016).
[216] Serra do Padeiro n (213), p. 11

century explorer Prince Maximilian to establish that the Indigenous communities had lost their indigeneity by assimilation into the settler culture.[217] Maximilian's account documents that "members of the community have long abandoned their hunting-gathering practices and switched to living and dietary practices that are similar to white people".[218] According to Maximilian, the fact that the people dressed in cotton garments, spoke the settler language, and had lost the 'barbarity' (*sic*) indicated that the Tupinambá community had become less Indigenous by the 18th and 19th centuries. The Court reiterated this poorly reasoned literature and claims that indigeneity has only degenerated since then, making it another reason why Indigenous people could not adequately establish their relationship to the land.[219] By terming Indigenous resistance as 'violent and illegal',[220] the judgment refuses to acknowledge the inherent violence of law, colonialism and the years of executive indifference that has deprived them of their rightful territory.

The STF in *Raposa* reiterated a similar logic but under the guise of affirmative language. Even in carrying out the demarcation, the judgment required the involvement of a disproportionately larger number of Federal entities, members of municipalities, and defence authorities, rather than members of Indigenous communities or anthropologists who can vouch for the Indigenous connection to the land or the extent of the original occupation accurately.[221] 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.[222]

The Inter-American Court of Human Rights (IACHR) and the STF have rarely seen eye to eye. The jurisprudence emerging from these institutions, ranging from the most generic issues of human rights to specific question of Indigenous rights, have often conflicted with each other.[223] In *Raposa*, the petition before IACHR claimed that the delay in demarcating, delimiting, and

[217] Serra do Padeiro n (213), p. 11
[218] Serra do Padeiro n (213), p. 11-12.
[219] Serra do Padeiro n (213), p. 13.
[220] Serra do Padeiro n (213), p. 16-17.
[221] Petition 3388 n (204), p.7.
[222] 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).
[223] Emilio Meyer and Fabrício Polido, "Brazil in the Dock: The Inter-American Court of Human Rights Rulings Concerning the Dictatorship of 1964-1985". Available at: https://verfassungsblog.de/brazil-in-the-dock-the-inter-american-court-of-human-rights-rulings-concerning-the-dictatorship-of-1964-1985/ (Last accessed 11 June 2020)

titling of Indigenous territory between 1977 and 2009 had resulted in frequent violence against Indigenous communities accompanied by rapid environmental degradation.[224] It was argued that the influx of non-Indigenous people into the territory meant there was a constant violation of freedom of movement, freedom of religion, and freedom to carry on cultural practices by Indigenous people.[225] The petitioners claimed that administrative delays and inadequate domestic laws hindered due process.

The state opposed the petition on the grounds that the process of demarcation had already been completed and that the petition was redundant. It also claimed that the Indigenous communities displaced in the alleged project areas were only moved after receiving adequate compensation. In any case, the petitioners were alleged not to have exhausted domestic remedies before approaching the IACHR. The petitioners argued that a range of activities, from developmental projects to polluting agro-industries, had contributed to the gradual destruction of the life, health, and environmental integrity of Indigenous people and their territories. None of the developmental projects were implemented with prior consultation. The understanding of Indigenous rights as mere possessory rights over the land meant that the state always had the power to override Indigenous voice (p.136). The petitioners re-emphasised that Indigenous culture and beliefs are closely tied to the environment, natural resources and territory and hence, any form of dispossession was bound to harm them.[226] IACHR paid a great deal of attention to evidence of both tangible violence and systemic erasure of cultural integrity.[227] Finally, the petition concluded with the categorical condemnation of the STF decision, which violated the internationally recognised rights of Indigenous people by denying them the right to communal property and the right to prior consultation.[228]

The IACHR has so far only decided on the admissibility of the petition. However, in doing so, it gave prominence to Indigenous evidence more than the STF did in its decisions. The idea of violence was interpreted broadly.[229] Further, the IACHR noted that independent of the state's submission, there was merit in the allegation that the state had prevented people from accessing

[224] Raposa Serra Do Sol Indigenous Peoples, Report No. 125/10, Inter American Commission for Human Rights (2010).
[225] Report No. 125/10 n (224), para 2.
[226] Report No. 125/10 n (224), para 10.
[227] Report No. 125/10 n (224), para 12-16.
[228] Report No. 125/10 n (224), para 17.
[229] Report No. 125/10 n (224), para 34.

sacred sites, natural resources and the environment vital to their existence.[230] IACHR first heard the matter on merits in 2015 and has since placed it on the back burner. While the reasons for not resuming the hearing may be deeply political, the treatment received by the petition is more considerate than the one by the STF. However, rarely, if ever, can one see traces of the IACHR jurisprudence in the judgments of STF and STJ. The experience of *Raposa* illustrates how the variation in treatment of Indigenous evidence (and Indigenous peoples, more broadly) depend as much on the judicial approaches and openness (p.134) as they do on domestic/international laws.

C2. Onca Puma and Belo Monte: Favourable Treatment of Indigenous Voices in Injunction Applications

Some of the judgments from the Federal Courts on the granting of injunctions are distinct from the patterns of injunctions found in Australia or Canada. The *Onca Puma*[231] nickel mining case, is one of the successful instances of an injunction being granted to aggrieved Indigenous communities. In *Onca Puma*, Xikrin people opposed a nickel mine in the State of Para region. Although the economic assessment of the project had promised compensation for the Indigenous people, the environmental assessment indicated that the discharge from the mine into the river harmed the source of the Xirin peoples' livelihood and their spiritual connection with the river. The Federal Court granted an injunction to stop the activities of the mine, which was upheld by the STJ.[232] The Court considered the Economic Management Plan that was presented as a mitigating plan to compensate the affected Indigenous communities.[233] In light of the serious environmental impacts, some of them irreversible, the Court considered that the downside of the mining outweighed the promised benefits.[234] The decision also evoked Kelsen to propose that norms and regulations cannot be mechanically applied.[235]

In the *Belo Monte*[236] dam case, the Court considered an application by the Paquiçamba people for a grant of an injunction against the construction of the dam. Eletronorte, a hydroelectric

[230] Report No. 125/10 n (67), para 45-47.
[231] Rcl 29162 / PA - PARA CLAIM.
[232] This was then reversed in the STF in September 2019. The judgment cursorily lifts the injunction and allows the mining operation to continue.
[233] Onca Puma n (231), p.2
[234] Onca Puma n (231), p.4.
[235] Onca Puma n (231), p.4. Translation my own. The original text reads: "Não é despropositado lembrar a estrutura escalonada das normas jurídicas, na teoria de Kelsen, segundo a qual não há ato de mera (mecânica) execução de norma individual (ato administrativo ou judicial de efeitos concretos)."
[236] Pet 2604 / PA - TO PETITION (Presidency decision).

power conglomerate and the defendant, had submitted an EIA. However, the plaintiffs contended that the scale of the assessment was grossly inadequate, and the proposed mega-project was going to have a lasting, destructive impact on the Indigenous territories. *Belo Monte* was one of the first cases filed against Eletronorte after years of prolonged social mobilisation against the dam.[237] The defendants argued that the project contributed massively to hydroelectric power production in the nation, which accounts for 77% of Brazil's energy. Similar to *Onca Puma*, the defendants prepared an Emergency Economic Management Plan providing compensation of up to 30,000 reis per village. The Court engaged with the plausible economic loss scenario set out by the defendant, in terms of loss incurred, vacant jobs, et al. in case the project did not go ahead as planned.[238] In contrast, the prosecutor argued that the dam remained not only unviable but would also destroy the traditional livelihood of the Paquiçamba people, who are already suffering the consequences of frequent droughts in the region. Since time immemorial, the Indigenous people had occupied their traditional territory and had also used the river for fishing as a part of their cultural and economic activity.

The prosecutor also argued that the costs of displacement could not be adequately compensated for by the economic package offered. More specifically, the Indigenous claimants contended that the mining was not a singular event but one of several cumulative economic activities that are bound to destroy the traditional ways of living. It was argued that the economic developments that followed would invariably destroy cultural practices and food sources while also opening up the community to potentially fatal external contact, such as disease. The Court agreed with the defendants and based its reasoning on three grounds. First, the EIA undertaken by the defendant was adequate as it had been demonstrated that they had the resources and expertise to carry out the assessment.[239] Second, the Court also agreed that there was no need for a different scale of EIA to account for Indigenous concerns raised as the present one covered the imminent environmental consequences of the project.[240] Third, the decision also proposed that there had been no decisive 'public injury' demonstrated by the petitioners which would have showed why the injunction had to be granted.[241] Since there was no demonstrable harm to public health, security, or the economy, the Court concluded that the injunction application

[237] Max Nathanson, "Belo Monte dam Xingu River Management Plan violates human rights: finding", *Mongabay*, (10 December 2018). Available at: https://news.mongabay.com/2018/12/belo-monte-dam-xingu-river-management-plan-violates-human-rights-finding/ (Last accessed: 21 December 2021).
[238] Belo Monte n (236), p.4.
[239] Belo Monte n (236), p.5.
[240] Belo Monte n (236), p.5.
[241] Belo Monte n (236), p.5.

must be rejected on the balance of convenience.[242] Unfortunately, after two disastrous dam collapses involving Samarco and Brumadinho, in 2019, *Belo Monte* turned out to be what the Indigenous petitioners had claimed it would be. The fishing communities registered that the catch was down by 50%-80% since the building of the dam.[243] The region's political and economic character had changed beyond recognition, and the dam was brought under increased monitoring as the problem of the drought had been aggravated.[244] The situation means there are greater costs to be incurred by a strained hydrology and the environmental damage is irreversible.

In the interval, the Mariana (Samarco) dam collapse shifted the conversation towards protecting and respecting Indigenous voices. Although the case was settled outside the courts, the initial settlement accord was rejected by the Federal Court for grossly underestimating the environmental costs and effect on Indigenous communities living in the region.[245] The methodology for rejecting the initial calculation for settlement and the Court's assessment of likely damage will be discussed in Chapter 3 (p.123). However, the Federal Court noted the lack of public participation and consultation before reaching the settlement as a strong reason for nullifying the accord.[246] For the most part, the Court relied on the disproportionate scale of Samarco and Vale's turnover, when compared with the settlement amount, and their impact on restoration and remediation work. For instance:

> The monitoring of the negotiations made it clear that the unjustifiable speed dictated the pace of the work and prevented the best technique from being adopted in order to trace the logical chronology of environmental damage. For instance: whether an accurate diagnosis and complete harmful effects of the event were carried out; second, whether an in situ repair should be carried out at all. If it cannot be undertaken and it was also not viable economically to return the land to its previous state, an ecologically equivalent compensation had to be determined. All these are over and beyond other items owed by polluters, such as those arising from

[242] Belo Monte n (236), p.7-8.
[243] Jonathan Watts, "Poorly Planned Amazon Dam Project 'poses serious threat to life'". Available at: https://www.theguardian.com/environment/2019/nov/08/death-of-a-river-the-ruinous-design-flaw-in-a-vast-amazon-rainforest-dam (Last accessed: April 2020).
[244] Jonathan Watts, "Belo Monte, Brazil: The Tribes Living in the Shadow of a Megadam". Available at: https://www.theguardian.com/environment/2014/dec/16/belo-monte-brazil-tribes-living-in-shadow-megadam (Last accessed: April 2020).
[245] Suspended Accord, Reclamação nº 31.935 - mg (2016/0167729-7) (STJ).
[246] Suspended Accord n (245), p.11.

> off-balance sheet collective environmental damage in proportion to the profits earned.[247]

The judicial emphasis that an accurate assessment of damage must be determined through proper consultation with the traditional owners and Indigenous communities, signifies an important approach to including Indigenous voices in seemingly straightforward legal determination of loss and environmental damage. While excluding the voices or superfluous consultation may still be 'legally correct', IEJ is a matter of opportunity to remedy outwardly right but innately unjust (legal) systems.

The cases from Brazil provide a range of examples regarding judicial treatment of Indigenous voices. While the superior courts have greater opportunities to consider the contexts and histories of Indigenous claims, such opportunities have been ignored due to the entrenched nature of colonial knowledge systems within the law. However, the injunction cases demonstrate a better approach to how courts account for Indigenous voices, especially where the environmental harm is recent and more palpable. A meaningful incorporation of IEJ into adjudication may be achieved through avoiding distinctions between immediate and visible environmental harm and long term effects of colonialism manifest in deprivation of Indigenous territory and self-determination.

D. Canada

In Canada, the aspects of participation and recognition are interlaced with the idea of duty to consult.[248] The extent to which the idea of consultation adequately represents 'recognition', if not participation, needs to be interrogated. Chapter 1 has discussed some ways where liberal recognition becomes a smokescreen for the deep-rooted nature of colonialism and ignores the more radical demands of Indigenous self-determination and sovereignty (p.39). Whilst British Columbia has given effect to The Declaration on the Rights of Indigenous Peoples Act through Bill C-15, in order to align with the aspirations of UNDRIP, the legislation remains ineffective and even less aspirational than the Convention.[249] Therefore, thinking of *listening to* and

[247] Suspended Accord n (245), p.16
[248] Haida Nation v British Columbia (Minister of Forests) [2004] 3 S.C.R. 511.
[249] Hayden King (ed), "The UN Declaration on the Rights of Indigenous Peoples in Canada: Lessons from B.C.", *Yellowhead Institute*, (December 2020). Available at: https://yellowheadinstitute.org/wp-content/uploads/2020/12/yellowhead-institute-bc-undrip-report-12.20-compressed.pdf (Last accessed: 28 November 2021).

representing Indigenous voices outside of the 'duty to consult' matrix is a difficult task. The process of 'listening' must make efforts to tie up the loose ends left by the Supreme Court in *Haida Nation v British Columbia*,[250] for instance, regarding how much of the duty to consult concerns Indigenous relations to land and environment and to what extent the duty accommodates Indigenous interests in order to achieve reconciliation.

D1. Chippewas and Clyde River: Duty to Consult as a Placeholder for IEJ

Amongst others, the two cases, *Clyde River*[251] and *Chippewas*,[252] continue to inform Canadian jurisprudence on the duty to consult. In *Clyde River*, the First Nation claimants challenged the decision of the National Energy Board (NEB) to permit offshore seismic testing for oil and natural gas resources. The grant of the permission allegedly violated the Inuit treaty rights as adequate consultations were not carried out.[253] The Supreme Court decided in favour of the First Nations as it found that the duty to consult was not fulfilled and that the NEB's consultation process fell short of comprehensively addressing Aboriginal claims or even providing adequate opportunity to raise relevant matters that affected Aboriginal rights. The EIA in *Clyde River* had addressed only some aspects of seismic activities and had not addressed broader issues regarding the environmental impact and plausible harm.

In *Chippewas*, the First Nations challenged the NEB's approval for modification of a pipeline that would reverse its flow, increase its capacity, and enable the carrying of crude oil.[254] The Supreme Court found the consultation process adequate, even though it was patently superfluous and did not make the necessary connection between Aboriginal rights and environmental harm arising from the proposed modification. The EIA used in *Chippewas* was found to be exhaustive and had raised all relevant matters regarding the pipeline modification.

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[250] Haida Nation v British Columbia (Minister of Forests) [2004] 3 S.C.R. 511. In *Haida Nation*, British Columbia had issued Tree Farming Licence over the Haida Nation Aboriginal territory. However, at the time, the First Nation claim had not been legally established. The Haida Nation also had Aboriginal right to harvest red cedar over the territory. In the subsequent years, the Minister altered the licence and eventually, handed over the management to Weyerhauser Corporation. The Minister's action was challenged by the First Nations. While the Chamber's Judge found that the Crown only had a moral obligation to consult the Haida Nation, the Court of Appeal reversed the decision. The decision was also upheld by the Supreme Court, which stated that there was clear legal obligation towards the "duty to consult with Aboriginal peoples and accommodate their interests".
[251] 2017 SCC 40.
[252] 2017 SCC 41.
[253] Clyde River n (251), para 5-8.
[254] Chippewas n (252), para 3-5.

Both cases addressed whether the NEB had the power to carry out and fulfil the requirement of duty to consult, and whether the Crown could delegate the latter to an administrative body. The actual evidence of Indigenous heritage being affected was sparse in the *Chippewas* decision. Further, the judgment only deliberated over when Indigenous participation was vital to decision-making rather than in relation to the substantive objection of First Nations to the projects.

While the basic facts of these two cases were similar, the outcome differed due to the evidence before the NEB. The questions to be answered by the court were: at what point was the duty to consult evoked and was it satisfied? In *Clyde River*, the consultation fell short in several aspects. First, the actual consultation related to the extent of the seismic operations and not to the environmental impacts of the project.[255] The First Nations were not provided with the EIA that would have illustrated the actual extent of curtailment of Inuit rights. Second, although it was assumed that the NEB had the power to undertake the consultation and any remediation action that might be necessary, it was not made clear to the First Nations that the Crown relied on the NEB in the discharge of these functions. The Court considered these to be severe deficiencies in this particular instance.[256] However, greater emphasis was placed on the fact that specific revelations concerning environmental damage ought to have been shared with the First Nations.

First, the project would have affected the harvesting rights of the Clyde River hamlet. During the consultation, the community asked broad questions about environmental impacts beyond environmental interests protected by Treaty rights. These included impacts on marine life and the migration routes of bowhead whales and narwhals, which were vital to carrying out cultural practices and important to traditional beliefs. None of the responses provided were satisfactory. The majority opinion quoted approvingly from an earlier Nunavut Court of Justice decision, where the Court had recognised that the significance of migration and harvesting of animals was more than just as economic activities.[257] These practices reflected a profound communal tradition of sharing country and food with other communities.[258]

[255] Clyde River n (251), para 13-15.
[256] Clyde River n (251), para 10.
[257] Clyde River n (251), para 45.
[258] *Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263, at para. 25) Quoted in para 43.

Throughout the judgment, the Court referred to different deficiencies, substantive or procedural, and continued to emphasise that they were contributing to an impaired consultation.[259] Whilst this was fulfilling the requirements of 'participation' in the environmental justice lexicon, the Court was also pushing the boundaries of what meaningful participation must look like. For instance, the Court was sympathetic to the fact that the NEB did not make some of the documents accessible to some participants and that only a fraction of the scientific reports were translated into the Indigenous language, Inuktitut.[260]

The Supreme Court observed that there was a history of reconciliation fostered by the Court between Indigenous people and the Crown.[261] The judgment pointed to the idea of 'reconciliation' as the principle which formed the foundation of the duty to consult. The Court elaborated that:

> The content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right.[262]

The Court also shifted the responsibility onto the Crown to ensure the adequacy of the consultation.[263] The majority opinion appended this responsibility to the idea of 'honour of the Crown', which rests on meaningful, good-faith consultation.[264] The *Clyde River* decision's interesting departure from *Chippewas* was that the Court in *Clyde River* appeared to be self-reflective of both the law and legal institutions in as much as they can contribute towards achieving reconciliation through Indigenous litigation. The sentiment is summed up in:

> That said, judicial review is no substitute for adequate consultation. True reconciliation is rarely if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation before project approval is always preferable to after-the-fact judicial remonstration following an adversarial process.[265]

[259] Clyde River n (251), para 48.
[260] Clyde River n (251), para 49.
[261] Clyde River n (251), para 1.
[262] Clyde River n (251), para 20.
[263] Clyde River n (251), para 22.
[264] Clyde River n (251), para 23.
[265] Clyde River n (251), para 24.

Some interpretations of the duty to consult project the idea of the consultation, which focusses on Aboriginal claims and interests, harms or impairs the (non-Aboriginal) public interest. Some such instances are witnessed in litigation involving injunction claims brought by Indigenous communities against extractive operations.[266] However, in *Clyde River*, the Court addresses this pithily by explaining that the duty to consult is a constitutional imperative, and that special public interests override others.[267] Hence, a project authorisation that breaches Constitutional rights cannot serve the public interest. If one is inclined to read between the lines, the Court continues to situate the arguments within the framework of constitutionality without foraying into what implications they may have for the integrity of Treaty rights or IEJ (p.138).

By contrast, in *Chippewas*, members of the First Nation were provided with funding to participate in the hearing.[268] There were opportunities for presenting evidence and delivering arguments that the pipeline would increase the risk of ruptures and spills, which in turn would harm Indigenous land. This time, whether the risks were palpable and whether Indigenous rights had any bearing on the decision-making processes, rested solely with the NEB as there was no additional evidence that would change the outcome of the consultation. The judgment contrasted the NEB's findings with those in *Clyde River* and stated that the decision of the NEB was not contingent upon an EIA. Therefore, the NEB was deemed to have fulfilled the consultation requirement. The real contrast in *Chippewas* was provided by the way the Court treated the limits of the duty to consult. The Chippewas, along with 19 other Indigenous groups, contended that their Treaty rights extended over the land, the right to harvest, the right to access sacred sites, the right to the banks of the river running through their traditional territory, and the airspace above it through their traditional territory.

The NEB found the project was in the 'public interest' and concluded that the proponent could undertake the expansion in a safe and environmentally sound manner.[269] Besides, the NEB found that the project "enables Enbridge to react to market forces and provide benefits to Canadians…".[270] The Court also imposed conditions for the "integrity and safety of the pipeline along with environmental protection and interests of the Aboriginal communities".[271]

[266] See: *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835.
[267] Clyde River n (251), para 40.
[268] Chippewas n (252), para 18.
[269] Chippewas n (252), para 20.
[270] Chippewas n (252), para 20.
[271] Chippewas n (252), para 20, 56.

The NEB claimed to have undertaken a balancing act between the benefits and burdens associated with the project and the interests and concerns of Aboriginal groups. Without discussing the merits, the Court accepted the NEB's assessment that any risk to Aboriginal rights and interests would be minimal and adequately mitigated.[272] Unlike in *Clyde River*, the Court did not spend any time on the nature of the evidence presented by Indigenous communities. By inference, the procedural fulfilment of the duty to consult satisfies the Crown's responsibility to preserve and uphold Indigenous rights under s.35 of the Constitution.

The *Chippewas* decision also established that the duty to consult and accommodate Aboriginal interests can be fulfilled by the NEB unilaterally imposing conditions on the developer.[273] Arguably, the only element distinguishing the two cases was in whether an additional EIA was essential to represent Indigenous voices or merely as another procedural hurdle to be crossed. The judgment drew from precedents that revealed the institutional limits of the duty to consult and the willingness of courts to alter those limits:

> …it may be impossible to understand the seriousness of the impact of a project on S. 35 rights without considering the larger context. Cumulative effects of an ongoing project, and historical context, may, therefore, inform the scope of the duty to consult (West Moberly First Nations v. British Columbia 18 BCLR (5th) 234, at para. 117). This is not "to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from" the project.[274]

In its conclusion, *Chippewas* departs from *Clyde River* by downgrading Indigenous interests as something to be balanced with other interests at the 'accommodation stage'.[275] The decision reiterates *Haida Nation*[276] and parrots the fact that duty to consult does not embody the right of veto or that proper accommodation of Aboriginal interests must balance societal interest with Aboriginal and Treaty rights.[277]

[272] Chippewas n (252), para 24.
[273] Chippewas n (252), para 52.
[274] Chippewas n (252), para 42.
[275] Chippewas n (252), para 59.
[276] 2004 SCC 73.
[277] Chippewas n (252), para 59.

Finally, the duty to consult is entirely enshrined in the 'honour of the Crown'. Although the principle of duty to consult allows for imagining recognition as justice, the power to imagine expansively continues to rest with the courts. The two cases reflect the limits of 'participation' as the Court is restrained in its application of the duty to consult. There appears greater willingness and legal imagination elicited in defining the boundaries of *duty to consult* where it is not applied than in understanding the import of the principle once it is formally fulfilled. This distinction is clarified in the constitutional and definitional limits discussed in Chapter 4 (p.136).

D2. Symbolic Significance of Listening to Indigenous Voices

The balancing exercise of Aboriginal interests with 'public interest', which frequently appears in cases involving claims for injunctions, is a deceptively innocuous exercise.[278] Hardly any of the judgments account for the disparate power structures while discussing the balancing act. There are even fewer judgments that acknowledge the unequal grounds on which Aboriginal and Treaty rights are contested. A telling instance of it can be found in the decision in *R v Kirby Offshore Marine Operating LLC*[279] of the British Columbia Provincial Court. The case was primarily against the company owning a vessel, which ran aground when its operator fell asleep. The accident caused a massive oil spill into the ocean. The accused pleaded guilty and was convicted under the Fisheries Act 1985, Pilotage Act 1985, and Migratory Birds Convention Act 1994. The actual trial focused mainly on the culpability of the company for the impugned act causing the environmental damage. However, the oil spill occurred in the traditional territory of the Heiltsuk Nation. The traditional territory was utilised for resource extraction by the First Nations, while approximately 1500 non-Indigenous people also lived in the region. The Court considered the lack of intention, degree of blameworthiness, demonstration of remorse, and the extent of harm, while awarding damages.[280] Since the accused had pleaded guilty and volunteered to clean up the spill, the Court accounted for this as a mitigating factor.[281] However, the Court was also left with the question of deterrence. Thus, the Court imposed a $2.7 million fine for the offence under Fisheries Act; an additional $200,000 fine for the violation of the Migratory Birds Convention Act; and a fine of $5000 for

[278] Marc Kruse and Carrie Robinson, "Injunctions by First Nations: Results of a National Study", Policy Brief (43), November 14, 2019.
[279] 2019 BCPC 185.
[280] R v. Kirby Offshore n (279), para 14-16.
[281] R v. Kirby Offshore n (279), para 18-20.

the offence under Pilotage Act. The Court directed the fines to be paid to the Environmental Damage Fund, which in turn would administer the amount to the benefit of the First Nations.[282] Further, the scientific evidence before the Court suggested that the environment would continue to be sensitive and vulnerable.[283]

The more complex elements of the case are found in the claims made by the First Nations for the right to bar vessels from entering traditional waters. The Court held the sentencing hearing in the Talking Circle of Heiltsuk First Nation. The Hereditary Chiefs, Elders, elected Chief, and other members of the community sat with the counsel and the Court and gave their evidence on the cultural significance of the land and waters.[284] The Hereditary Chiefs testified about a range of losses, including the damage to natural resources, destruction of ancestral lands and culture, intergenerational trauma, and economic losses. Recognition of First Nation ceremonies and cultural heritage demonstrated the importance of giving primacy to Indigenous voices. By emphasising their 14,000 years of stewardship of the land, the First Nation chiefs were categorically stating the irreversible nature of the damage and its incommensurability in terms of economic compensation.[285] The defendants alleged that there was no prima facie infringement of Aboriginal rights and that any infringement was only a matter of being compensated monetarily.[286] The judgment remains silent regarding these arguments.

The judgment listed the Aboriginal rights and interests that were recognised, including the right to carry on spiritual and cultural practices and maintain the sanctity of the land.[287] Nonetheless, the recognition came with qualifiers, which required claims of Aboriginal rights to be 'proved on the basis of cognate evidence' and on the balance of probabilities.[288] Subsequently, the Court applied the *Van der Peet test*, i.e., whether the rights claim had demonstrated sufficient connection to and continuity with the past, concluding that the Elders had not proven the ongoing connection to the land or that the range of losses suffered affected the community's

[282] R v. Kirby Offshore n (279), para 38.
[283] R v. Kirby Offshore n (279), para 23.
[284] Indigenous Law Centre Case Watch, "R v Kirby Offshore Marine Operating LLC". Available at: https://words.usask.ca/nativelaw/2019/08/22/r-v-kirby-offshore-marine-operating-llc-2019-bcpc-185/ (Last accessed 15 June 2020).
[285] R v. Kirby Offshore n (279), para 34.
[286] R v. Kirby Offshore n (279), para 20.
[287] R v. Kirby Offshore n (279), para 34.
[288] R v. Kirby Offshore n (279), para 21.

existence.[289] Therefore, the appeal was dismissed as no claims other than those for compensation could be proven. At first sight, the decision appears to present mixed results. While some procedural concessions were made, the Court fell back on a narrow interpretation of Aboriginal rights and damage to those rights while arriving at a decision. Nevertheless, even with all its limitations, symbolic inclusion of Indigenous voices and practices made an epistemic contribution—they widened the horizon of what is relevant and admissible within the juridical spaces. These fragments of judicial innovation and exceptions are vital for understanding how courts treat Indigenous evidence with gravity and how such practices could translate into achieving IEJ through courts and law more generally.

D3. Recognising Indigenous Spirituality through Indigenous Voices

In *Ktunaxa First Nations v British Columbia*,[290] the Supreme Court had to deal with a challenge on the grounds of Freedom of Religion under the Charter Rights. 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, central to the beliefs and cosmologies of the First Nation.[291] A year-round ski resort was proposed for the region. The developers sought government approval, and the Ktunaxa First Nations objected because the resort would impact the land and environment 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. Once the approval was granted after multiple rounds of consultation, the First Nations reasserted the claim that the project's development 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

[289] R v Van der Peet, [1996] 2 S.C.R. 507; Both in Cham Shan Temple v. Director, Ministry of the Environment, 2015 CarswellOnt 2773 and Penelakut First Nations Elders v. British Columbia (Regional Waste Manager), 2004 CarswellBC 2658 In Penelakut, the First Nations were challenging the decision to establish five wind tubing projects. The attendant developmental activities were posing threat to health and environment in the region. The First Nations were also participants in the appeal as they feared the impact of the project, the risks and uncertainties involved would threaten the traditional territory and resources. The court rejected the appeals but termed the Indigenous evidence as 'sincere and heartfelt' bur not sufficient to indicate how the project posed a severe and irreversible threat to the environment.

[290] 2017 SCC 54. This case has also been discussed in one of my earlier publications—See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", *Fourth World Journal*, Vol 20 Number (2), 115-130, (2021).

[291] Ktunaxa n (290), para 5. See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", Fourth World Journal, Center for World Indigenous Studies, Vol 20 Number (2), 115-130, (2021).

application for judicial review, challenging the approval on the grounds that it violated their Constitutional right to religion.

The Court dismissed the appeal with a part concurring opinion by Moldaver J (Côté J concurring). The majority opinion held that the claim did not constitute a violation of S.2 of the Charter, i.e., freedom of religion, as the appellants could not prove that the Minister's decision to approve the project in any way interfered with the First Nation's ability to hold and practice their cultural and spiritual beliefs.[292] The decision was founded more on the grounds that Ktunaxa First Nations were using judicial review of an administrative action to "pronounce on the validity of their claim to a sacred site and associated spiritual practices".[293] MacLachlin CJ et al. opined that the Minister's assessment, through consultation and accommodation, had sufficiently recognised the Ktunaxa's spiritual claims to Qat' muk.[294] The Court held that the State's duty was only to protect everyone's right to hold diverse beliefs.[295] MacLachlin CJ and others resist the possibility of looking at this question in any other way than as a simple exercise to determine whether there has been an adequate consultation. The Court found that the Minister had made every attempt to hear the First Nation's arguments, which qualified as effective consultation under the law.[296]

Ktunaxa First Nation's submissions consisted of a Qat' muk Declaration, which involved a unilateral declaration based on pre-existing sovereignty.[297] The Qat' muk Declaration identified areas in which no developments could be undertaken. It was marked as a 'refuge area', where the building of permanent foundations or permanent human habitation was forbidden.[298]

The judgment weighed the materials before the Court but laid more emphasis on the fact that the Minister tried to place mitigation and accommodation measures in place in response to Ktunaxa's reservations.[299] Throughout the majority opinion, very little attention was paid to the significance of the site to Indigenous beliefs or the claim that the necessity to veto the project was an expression of Ktunaxa's self-determination. Only in one instance, did the Court

[292] Ktunaxa n (290), para 6.
[293] Ktunaxa n (290), para 71.
[294] Ktunaxa n (290), para 9, 72.
[295] Ktunaxa n (290), para 71-72.
[296] Ktunaxa n (290), para 44-49.
[297] Ktunaxa n (290), para 38.
[298] Ktunaxa n (290), para 38–39.
[299] Ktunaxa n (290), para 77-79.

identify the Ktunaxa claim as expressing concerns that could not be offset by land reserves, economic payments and environmental protections.[300] In explaining the reasons for dismissal, the Court paid considerable attention to the scope of freedom of expression.[301] It drew instances from the European and American Convention of Human Rights as to how those instruments have interpreted and defined freedom of religion but remained agnostic to how spirituality in Indigenous contexts is different. The misrecognition of the issue continued when the Court concluded that the state cannot be an arbiter of religious matters or dogmas. The judgment affirmed that the state's involvement ended when the Minister discharged his duties of consultation and accommodation under s.35 of the Constitution.

Moldaver J's partially concurring opinion engaged with the submissions of Ktunaxa at length. While Moldaver J and Côté J agreed that the duty to consult was fulfilled, they differed on whether the Minister's decision to approve the ski resort infringed on the freedom of religion of the Ktunaxa First Nation. Moldaver J's opinion is interesting not only for the critical point on which he disagreed with the majority opinion but also on how he considered this vital breach may be held against other interests. He found the Minister's consultation had fulfilled the latter aspect. To quote from the opinion:

> 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). That is exactly what happened in this case. 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.[302]

[300] Ktunaxa n (290), para 45.
[301] Ktunaxa n (290), para 61-67.
[302] Ktunaxa n (290), para 118. See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", Fourth World Journal, Center for World Indigenous Studies, Vol 20 Number (2), 115-130, (2021).

Moldaver J, unlike the majority decision, dedicated some thought to how Indigenous spirituality is different from western spirituality and how it is connected to the land.[303] With the loss of land, he asserted, the Aboriginal connection to the land and the ability to pass on spiritual knowledge to future generations are lost.[304] He proceeded 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.[305]

Thus, Moldaver J's reading of s.2 in Indigenous contexts makes a useful case against a restrictive reading of freedom of religion and the inability to extend such protection to Indigenous beliefs. However, soon, the opinion considered the more procedural aspects of the decision and found that the Minister's decision was reasonable and within the remit of the consultation process.[306] The opinion stated that the Minister was cognisant of the rights of First Nation claimants, which in itself an adequate ground for upholding the decision to approve the ski resort.[307] It seems that the possibility of vetoing any development project on the land would imply that the First Nations have a proprietary right over the land.[308] If the Minister conceded, then a religious group would essentially exercise the right to exclude others from public land. Hence, Moldaver J found that the Court must agree with the Minister's claims as to the balance of interests.[309]

The conclusion in *Ktunaxa* appears to be hurried and insubstantial, given that Moldaver J's opinion does not make use of the distinction created earlier between Indigenous spiritual beliefs and other religious beliefs. Nevertheless, it also exposes the dangers of protecting Indigenous beliefs within the liberal construct of a constitutional right to freedom of religion. *Ktunaxa* remains one of the few cases that has taken up the opportunity to deviate from a gratuitously rigid understanding of the duty to consult. It thoughtfully considers the antecedents of

[303] Ktunaxa n (290), para 131-133.
[304] Ktunaxa n (290), para 125.
[305] Ktunaxa n (290), para 127. See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", Fourth World Journal, Center for World Indigenous Studies, Vol 20 Number (2), 115-130, (2021).
[306] Ktunaxa n (290), para 139-144.
[307] Ktunaxa n (290), para 145-149.
[308] Ktunaxa n (290), para 150.
[309] Ktunaxa n (290), para 154.

Indigenous claims through Indigenous belief systems. It also remains one of the few cases that can encourage jurisprudence to move forward and acknowledge the relevance of Indigenous voices to law.

E. Conclusion

This chapter presents instances of diversity and non-linearity in judicial engagement with Indigenous voices. The cases from the three jurisdictions furnish numerous opportunities through environmental litigation to examine the questions of land and Indigenous cultures. The extent to which courts are willing to use a new vocabulary and juridical imagination to understand these encounters depends on legal culture and institutional history. Canadian courts struggle to break free from the liberal regimes of recognition or pre-set understanding of what reconciliation means. There are occasional glimmers of hope when individual judges demur against the existing approaches and attempt to accommodate Indigenous voices. Nevertheless, the recent cases from Australia and Brazil illustrate how courts respond to novel challenges and proactively engage with Indigenous claims. The next chapter studies how these proactive engagements in the early stages of adjudication translate into better outcomes in court from the perspective of IEJ.

Chapter 3: Outcomes in Indigenous Environmental Litigation

A. Introduction

It is not only in the process of litigation that avenues for achieving IEJ are visible. An examination of the outcomes of such litigation is also revealing. These outcomes may include the granting of injunctions; the cancellation of permits for extractive projects; the awarding of compensation; or directing defendants to undertake remediation efforts. In some cases, courts may even direct parties to restorative justice processes. Examining the nature of such outcomes provides further insights regarding the degree of 'recognition' within the adjudicatory processes (p.46). This chapter analyses the outcomes of Indigenous environmental litigation and implications they may have for IEJ. The jurisdictions differ, of course, in terms of remedies available and the extent to which judicial discretion can be exercised in this regard (p.161). While being mindful of such domestic variations in adjudication, this chapter examines how these remedies might address Indigenous perspectives on harm and loss.

In considering the role of remedies in delivering (or otherwise) IEJ, this chapter answers three questions. First, it asks whether and how courts take account of the socio-political context from which the litigated issue has emerged in their remedial approach? Second, it asks how the nature of such remedies then affects the realisation of IEJ. Finally, it considers whether remedial flexibility or innovation in this respect, to allow realisation of IEJ, creates new challenges for the legitimacy of the judicial process. In answering these questions, the power of innovative remedial approaches to open up avenues to achieving IEJ will become clear.

B. Australia: Generous Interpretations

In this regard, the most significant innovation (and indeed variation) is to be found in the jurisprudence of Australian courts. This is for two reasons. First, the Australian court hierarchy includes both generalist and specialist environmental courts. The discretion and remedial possibilities vary among these court structures. Second, many of the claims pursued before Australian courts involve a medley of issues ranging from environmental protection and Native title to heritage preservation. This constellation has proved particularly fertile in terms of remedial innovation.

B1. Valuation and Recognition of Spiritual Connection: Aboriginal Areas Protection Authority v OM (Manganese) Ltd

One challenge in developing a remedial approach which enhances IEJ is in the valuation of interests which are not easily expressed in economic terms. This challenge was confronted by the Court in *Aboriginal Areas Protection Authority v OM (Manganese) Ltd* (Bootu Creek).[310]

In 2013, OM (Manganese) Ltd, operating the Bootu Creek manganese mine, was fined $120,000 and $30,000 for offences under the Northern Territory Aboriginal Sacred Sites Act 1989 (Sacred Sites Act). The case was brought before the Court of Summary jurisdiction. The defendant had contested 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 between March and September 2011.

The resolution of the case raises a number of important considerations. First, the fact that the site in question was a sacred site was uncontested but was nevertheless the subject of discussion by the Court demonstrates their engagement with the complexity of valuation in such cases. The Court relied on 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.[311] The sacred site was supposed to have held two women, the bandicoot and the rat, who are female Dreamtime ancestors. Even though the Dreamtime or the status of the sacred site was not contested, the Court nevertheless considered the significance of the story.[312] The judgment recognised that any inconsistencies in the story were likely to be a result of older informants having passed away.[313] It dismissed the possibility that such inconsistencies would reduce the contemporary relevance of the site.[314] The judgment also held that the cultural significance of land had been eroding since the 1950s due to ongoing extractive activities.[315]

[310] 2013 NTMC 019. This case has also been discussed in one of my earlier publications—See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", Fourth World Journal, Vol 20 Number (2), 115-130, (2021).
[311] Bootu Creek n (310), Para 4.
[312] Bootu Creek n (310), Para 6.
[313] Bootu Creek n (310), Para 7.
[314] Bootu Creek n (310), Para 5-7.
[315] Bootu Creek n (310), Para 6.

Second, the importance of genuine engagement with Indigenous communities was emphasised in the judgment. In the first part of the judgment, Magistrate Sue Oliver addressed the question of whether the defendants had exceeded the terms of the authority certificate. The initial mining plan allowed the defendants to mine at an angle of 36 degrees. Instead, they chose to mine the site at a steeper angle of 55 degrees, to maximise the amount of ore extracted.[316] The sacred site adjoining the Masai pit, where the mining was to take place, was already at risk. There was no authorisation, explicit or implicit, granted by the local custodians of the land for altering the angle of mining. Instead of obtaining an authorisation, the defendants invited two traditional owners along with a local employee of the Northern Land Council (NLC) for a meeting to discuss the altered plans. The Court observed that the implicit intention of this meeting was to obtain permission for mining at a steeper angle even though the defendants were fully aware that the people consulted neither had expertise in mining to assess the risks nor the authority to grant the necessary consent.[317] It is stated that the two traditional owners 'agreed' to the steeper angle of mining, provided the defendants informed the NLC of any subsequent damage.

In this regard, Magistrate Oliver observed:

> 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….[318]

The magistrate emphasised that the consent process was flawed and that proper engagement with stakeholders is a key element in the protection of sacred sites. The judgment discussed the consent process to illustrate that not even the liaison committee set up under the mining agreement had the power to approve the altered plan if there was a probability of significant risk to the sacred site.[319] Such a risk would then have required a new application for approval. Through these observations in a seemingly straightforward case, Magistrate Oliver reflected on both the legal and moral questions raised by the case and on the relationship between such consultation processes and the dimension of justice in relation to environmental protection.

[316] Bootu Creek n (310), Para 18.
[317] Bootu Creek n (310), Para 20.
[318] Bootu Creek n (310), Para 22.
[319] Bootu Creek n (310), Para 23.

Third, the Court also discussed the concept of 'desecration' under section 35 of the Sacred Sites Act. Since the defendant contested the charge of desecration, Magistrate Oliver had to address the definition of desecration. The legislative provision itself merely states 'A person shall not desecrate a sacred site'. While s.33 and s.34 of the Sacred Sites Act dealt with 'entry into and prohibition of work on sacred sites', s.37 provided for contravention of terms set out in the authority certificate. Therefore, it seemed that the violations by the defendant would be covered under these two provisions and as such it was arguably unnecessary to enter into the discussion regarding desecration.

Nevertheless, in interpreting this term, Magistrate Oliver decided to rely on the apparent intention of the legislation, which is to preserve and protect the sacred and spiritual value of the site. The summary judgment did not suggest that the judge has consulted any preparatory materials that have gone into the making of the legislation. The judge refused however to accept the defendant's claim that an act of desecration requires an element of contempt by the desecrator, and is a matter of attitude and disposition.[320]

Rather, the Court emphasised the importance of the sacred elements of the site to its protection. In this particular case, the significant feature of the sacred site in question was a horizontal rock arm extending from the rocky outcrops on the site. The rock arm was prominent and recognisable and represented the two female ancestors. Traditional owner Gina Smith's testimony on why harming the site erodes the sacredness of the place is reiterated in the decision to illustrate the gravity of the desecration:

> 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 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.[321]

[320] Bootu Creek n (310), Para 33-34.
[321] Bootu Creek n (310), Para 38.

Jeffrey Stead, a non-indigenous expert witness, also testified that the actions of the defendant were best described as 'desecration' since it removed the "sacredness from the sacred sites".[322] Magistrate Oliver concluded that the removal of the horizontal arm of the sacred site amounted to desecration beyond reasonable doubt.[323] The judgment not only imported meanings where none were provided but also suggested that the Sacred Sites Act and the term 'desecration' must be interpreted broadly. To this end, the judge relied on the argument of foreseeability of damage to the sacred site.[324] The decision highlighted the fact that the defendant's conduct throughout, including the attempts to obtain approval from the two traditional owners, suggested that they knew the site was sacred and that the horizontal arm was not a mere geological feature. It could therefore be assumed that anyone whose conduct has subjected the site to a substantial risk has contributed to eroding the site's sacredness. Moreover, the judge found it to be a reasonable burden on any ordinary corporation to understand the intention of the Sacred Sites Act and the obligations under it.[325] Interestingly, the judge called the defendant's actions a product of 'wilful blindness' and 'illogical' as it failed to 'appreciate that preservation of the sacredness and spiritual significance of the Sites was central to the system of protection'.[326]

Taken together, these three elements – the discussion of sacredness even when uncontested; the focus on the genuine nature of consultation and engagement; and the broad interpretation of desecration – set the scene for a significant judgment. However, in *Bootu Creek*, the Court was constrained by the level of authority and the level of penalty that may be imposed. S.35 allows for body corporates to be penalised with a penalty of 2000 unit.[327] Procedurally, Magistrate Oliver was confined by a rulebook that neither recognised the loss of sacred land nor compensated for the spiritual loss. Importantly therefore, whilst the judgment understood desecration expansively by relying on the intention of the legislature and interpreted broadly the obligations emerging under the statute a court of summary jurisdiction will be hard-pressed to award proportionate compensation. Thus, the destruction of sacred sites in cases such as these, resulting in intergenerational and incommensurable loss, reaches a remedial watershed

[322] Bootu Creek n (310), Para 40.
[323] Bootu Creek n (310), Para 42.
[324] Bootu Creek n (310), Para 70.
[325] Bootu Creek n (310), Para 71.
[326] Bootu Creek n (310), Para 72.
[327] In Northern Territory some of the penalties are expressed in penalty units with a predetermined value issued under Penalty Units Act 2009. See also: Sakshi, "Denying Indigenous Environmental Justice: Experiences from Australia, Brazil, and Canada", Fourth World Journal, Center for World Indigenous Studies, Vol 20 Number (2), 115-130, (2021).

in the rules relating to court hierarchies. In this sense, Povinelli's pessimistic conclusion that the decision's failure to understand (and translate in remedial outcomes) the sentience of the sacred site and its relationship with the Aboriginal people, may suggest the lack of "legal metabolism" for Indigenous evidence.[328] However, in the absence of alternative protections offered for sacred sites, such as legal personhood for Aboriginal artefacts and heritage, the Court could not have done more. This particular Court was ill-equipped to answer the political questions of whether Indigenous heritage is valued adequately and if not, whether it could be remedied in litigation, given the constraints on its action.

Still, this case has been considered from a range of interdisciplinary perspectives. Anthropologists Elizabeth Povinelli and Benedict Scambary have discussed the *Bootu Creek* litigation and thrown light on the legal and anthropological ramifications it has had for protection of sacred sites.[329] The Northern Territory has robust state heritage protection laws, such as the Aboriginal Sacred Sites Act 1989 and Heritage Conservation Act 1991. These laws were partially responsible for the effective prosecution of the mining corporation in *Bootu Creek*. For instance, unlike Western Australia's archaic Aboriginal Heritage Act 1972 that enabled Rio Tinto to destroy the 60,000-year-old Juukan Gorge caves during the expansion of an iron ore mine, the laws of the Northern Territory are relatively recent and more robust.[330] Furthermore, historically, there has been a steady opposition to uranium mining in the region. Although there has not been anti-Uranium litigation, the history of Indigenous resistance to mining, and more specifically uranium mining, in the Northern Territory has enabled anthropologists to take a closer look at the social and economic conditions of the region.[331] Toohey and Gray document the cultural and spiritual impacts of expanding mining industries on the Aboriginal people in the region, which led the Aboriginal people to believe that the land

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[328] Povinelli E, *Geontologies: A Requiem to Late Liberalism*, p.56 (Durham: Duke University Press, 2016)

[329] Povinelli E, n (328), p.27 (Durham: Duke University Press, 2016); Scambary B, *My Country, Mine Country: Indigenous People, Mining and Development Contestation in Remote Australia*, CAEPR Research Monograph, No.33, (Canberra: Australian National University, 2013).

[330] "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 October 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.

[331] Altman J, "Fighting Over Mining Monies: The Ranger Uranium Mine and the Gagudju Association", in Smith and Finlayson *Fighting over Country: Anthropological Perspectives*, (1997); Rumsey A and Weiner(eds), *Mining and Indigenous Worldviews in Australia and Papua New Guinea*, (Sean Kingston Publishing 2004).

was becoming 'sick'.[332] The disconnect between Western cartographic methods introduced by the settlers—subsequently used by mining companies—and the Aboriginal conceptions of sacred sites, has also been reiterated in anthropological works to suggest that the definition of sacred sites cannot be confined to specific sites but should include a larger landscape.[333] The limitations that remedial constraints impose on the achievement of IEJ is therefore made apparent by this decision.

B2. Novelty in Assessment of Compensation: Northern Territory v Griffith & Ors

Whilst Northern Territory v Griffith & Ors (Timber Creek)[334] was a Native title litigation (p.167), the materials available through the claims and the nature of the judgment have implications beyond land rights litigation. The departure here is also justified by the need to obtain plurality of principles and innovations in interpretative strategies that do not compromise legal integrity, such as those found in the adjudication of climate litigation, to accommodate IEJ (p.193).

Background:

The judgment in *Timber Creek* engages with the cultural disconnect from the land and loss of Indigenous sovereignty in environmental contexts. The *Timber Creek* litigation had three phases of adjudication. At the trial stage, a single judge bench of the Federal Court consisting of Justice Mansfield presided over the matter.[335] Mansfield J's decision was later appealed and considered by the Full Federal Court (FCAFC), which upheld the trial court decision. Subsequently, the decision of the FCAFC was appealed in the High Court. The High Court partially upheld the decision of the FCAFC. This chapter only deals with the compensation claim and how the trial court and the FCAFC dealt with the relevant questions.

The Ngaliwurru and Nungali People (henceforth 'the claim group') had obtained a favourable Native title determination of the Timber Creek land in 2007.[336] Between 1980 and 1996, the

[332] Toohey JL, *Finnis River Land Claim: Report by the Aboriginal Land Commissioner to the Minister of Aboriginal Affairs,* (Canberra 1981); Gray PRA, *Gimbat Area and Alligator Rivers Area Land Claim: Report and Recommendations of the Aboriginal Land Commissioner to the Minister of Aboriginal Affairs,* (Canberra 1996).
[333] Brendt RM and Brendt CH, *Man, Land, and Myth in Northern Australia: The Gunwinngu People,* (Sydney 1970).
[334] (2019) HCA 7.
[335] Griffiths v Northern Territory (No.3) [2016] FCA 900.
[336] Griffiths v Northern Territory (2006) 165 FCR 391.

Northern Territory made 53 grants of tenures and public works contracts in Timber Creek. Most of them involved the compulsory acquisition of land thereby impairing or extinguishing Native title rights and interests held by the claim group. Therefore, a claim for compensation was made under s.51 of the Native Title Act 1993 ('NTA') along with Schedule 2 of the Land Acquisition Act 1978 ('LAA'). The claim group contended that the compensation must include:

(1) The value of the land determined according to the criteria in Rule 2(a) (market value). It would presume that the interest acquired was on a freehold estate since the date of acquisition

(2) Compound interest on the economic compensation claimed for the relevant period.

(3) Loss or diminution of connection or traditional attachment to the land, and intangible loss suffered from the loss of rights to live on and gain spiritual and material sustenance from the land.

Timber Creek: Justice Mansfield, Federal Court

The trial judge, Justice Mansfield, determined that all the categories of claims put forth by the claimants were valid. The language of compensation in this judgment relied on the idea of 'just compensation'. Although 'just compensation' finds a mention in s.51 of the NTA, it was interpreted expansively by the judge.[337] Hence, this particular judgment provides ample scope for understanding remedial innovation where a court could potentially use the existing language of legislation and use the very limits of such language to create a new category of compensation.

The limit on the determination of compensation is stated in s.51A of the NTA.[338] S.66 of the LAA provides that the rules mentioned in Schedule 2 of the LAA must be taken into account by the relevant tribunal in determining the compensation. Amongst other considerations that determine the value to the landholder, the schedule states 'intangible disadvantages' (Rule 9). Whereas 'intangible disadvantages' are not defined, the rule allows the tribunal to determine a reasonable amount to compensate the landholder for the loss suffered. The two heads of compensation, economic and spiritual, and the grounds for granting them are discussed in the following sections.

[337] Timber Creek n (334), para 158-174.

[338] s.51A "the total compensation payable under the Division for an act that extinguishes all native title … must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters."

Economic Compensation

There were two aspects of economic compensation discussed in the *Timber Creek* trial decision. First contention concerned the date of assessment. The second contention was regarding the nature of the assessment. The Northern Territory government argued that compensation should be evaluated from the date of determination of Native title, i.e., 2006 instead of the date of compulsory acquisition of the land, which was between 1980 and 1996. It also argued that the value of the Native title land should be less than the market value of freehold as it was inalienable and could only be subject to exclusive possession.[339] The claim group contended that the Native title recognition was a mere recognition of the title, whereas they had exercised control over and customary relationship with the land long before such recognition.[340] The claim group urged that the value of assessment should be the market value as inalienability of Native title land did imply absence of power to relinquish their rights over the land. They could always do so by surrendering the title.[341] Besides, they argued that evaluating native title land differently from freehold land violated the Racial Discrimination Act 1975 (Cth).

The judge used the frameworks of fairness and justness to answer the two contentions. Justice Mansfield relied on a series of precedents, including *Native Title Act case* and *Jango v Northern Territory* ('Jango'), which had implications for the applicability and operations of NTA.[342] The judicial opinions in both the *Native Title Act Case* and *Jango* held that the 'past act' by the state was critical for the application of the NTA. They had also established that the compensable act is determined from the time when rights, usufructuary or otherwise, are denied to the Indigenous title-holders and not merely from the point when such rights were recognised.[343] In support of this conclusion, Justice Mansfield cited *United States v Shoshone Tribe of Indians* ('Shoshone') which had considered a similar question of compensability.[344] The date at which compensation should be assessed for the loss of half of the Shoshone Tribe's reserved land formed the critical question in *Shoshone*. Through a Treaty in 1868, the Shoshone Tribe had relinquished a reservation of over 44m acres. Instead, they

[339] Timber Creek n (334), para 47-48.
[340] Timber Creek n (334), para 7-31.
[341] Timber Creek n (334), para 175 clause (e).
[342] Native Title Act Case, (1995) 183 CLR 373; Northern Territory v Griffiths & Ors, (2007) 159 FCR 53.
[343] Timber Creek n (334), para 122-131.
[344] 299 U.S. 476.

had demanded a reservation of just over 3m acres in exchange in Wyoming. This reservation was to be set apart for the absolute and undisturbed use and occupation of the Shoshone Indians.[345] In 1891, the Commissioner of Indian Affairs issued a public notification that another band of Indigenous people had equal rights to the reservation land (although they had been illegally occupying it since 1878) and deemed that such transfer did not depend upon the further consent of the Shoshones.[346] Subsequently, parts of the reservation area were ceded to the United States for payments made to both tribes equally, although against the protestations of the Shoshone. Eventually, a special law was enacted in March 1927, enabling the Shoshone Tribe to pursue a cause of action against the United States for violation of the Treaty. The issue before the Court in *Shoshone* was whether the damages should be calculated from the date of illegal occupation (1878), the commissioner's declaration (1891) or the jurisdictional enactment (1927). Justice Cardozo of the Supreme Court concluded that the date of assessment ought to be the date of illegal occupation. The date of enactment of the jurisdiction only provided a forum to contest Indigenous claims.[347] The date of determination by the commissioner would not alter the fact that a reservation, which was supposed to be for the permanent and exclusive enjoyment of the tribal nation, had been unlawfully occupied for a long time.

Mansfield J in *Timber Creek* adopted these ideas of exclusivity and permanence to assess just compensation for the loss of Native title land. Therefore, the decision held that the date of extinction of the right by the validating Act was the relevant date for the assessment of the compensation.[348] Mansfield J clarified the point of 'justness' further in the judgment where the decision considered the tangible worth of the Native title land. The decision attributes greater importance to the negotiation value or the value at which Native title-holders would be willing to surrender the title to the land, which reflects the importance of the land to the Aboriginal community.[349] Although for the sake of assessment, market value is considered vital, Mansfield J took into account other ways in which Native title land can be assessed and valued.[350] The judgment reiterated that the compensation should be determined based on what the Native title group lost after the acquisition and not merely on what the purchaser was willing to pay for the

[345] Shoshone n (344), para 2.
[346] Shoshone n (344), para 4.
[347] Shoshone n (344), para 14-16.
[348] Timber Creek n (334), para 172.
[349] Timber Creek n (334), para 200, 210-221.
[350] Timber Creek n (334), para 224-245.

freehold title.[351] The judgment also revisited the claimants' arguments that the Aboriginal communities have lived on the land for a long and uninterrupted period. Mansfield J acknowledged that this period, however tempestuous and conflict-ridden, did not diminish the value of Indigenous connection to the Country.[352] While the settlers may have disrupted the connection with the land, and have subsequently drawn the Aboriginal communities into a new and exploitative economic order, the judgment emphasised only the connection with the Country was a relevant factor for assessment in this case.[353] The decision holds that "it would be erroneous to treat the nature of their original interests in land as other than the equivalent of freehold and the economic value of those interests as other than the equivalent of freehold interests".[354] The only distinction made between the Native title and the freehold title re-appeared in the process of determining the actual monetary value of the community land. Mansfield J held that the rights may be equivalent to freehold land, but that the Native title will always be a bundle of community rights. These rights are distinct from the rights of what a single landholder may have in terms of his individual property. Hence, the judgment concluded that the two rights and their respective values ought to differ.

Spiritual Loss – Solatium

The second part of the decision deals with the intangible loss or non-economic loss. Whilst the first part provided generous interpretation to the idea of economic compensation to the Native title land, such interpretation was already well-supported by existing statutes and precedents. The decision is at its innovative best in the second part as it created a category of 'spiritual loss' to capture non-economic losses. Mansfield J clarified that the said compensation cannot be termed as a 'special value' as it did not recognise any of the property rights that are within a communal bundle.[355] Such recognition may amount to double compensation, which was not the intention of the court.[356] Instead, the judge proposed that this compensation would be called a 'solatium'. The applicants had submitted two elements of the non-economic or intangible loss without specifying an amount for compensation. These were: (1) the diminution or disruption in the traditional attachment to Country; and (2) the loss of rights to live on and gain

[351] Timber Creek n (334), para 220-221.
[352] Timber Creek n (334), para 364.
[353] Timber Creek n (334), para 370-373.
[354] Timber Creek n (334), para 214.
[355] Timber Creek n (334), para 297-298.
[356] Timber Creek n (334), para 297.

spiritual and material sustenance from the land.[357] In the discussion on categorisation of non-economic losses, Mansfield J referred to the history of colonisation that separated the Aboriginal people from their land.[358] Mansfield J observed that the Aboriginal dispossession and non-economic loss has been 'incremental and cumulative'.[359] While settler colonialism displaced the communities from their primal relationship with the land, they were subsequently integrated as labourers in the cattle station.[360] However, they witnessed a continuing erosion of songlines and Dreaming sites, which now constituted the category of intangible loss.[361] The judgment relied equally on the testimony of the Elders as well as that of anthropologists to determine the spiritual loss endured by the community.[362]

While the Court could recognise the spiritual loss in principle, the difficulty was in arriving at a precise sum for compensation. The judge identified that the compensation amount must reflect the loss of communal Native title and collective ownership rights.[363] These rights are not restricted to a patch of land or an isolated geographical area but apply widely to the landscape associated with the Dreaming.[364] The judgment also recognised the inter-generational consequences of the damage.[365] It stated that the losses will be felt in the future and by the future generations that depend on continuity of land and Dreaming sites for their cultural and spiritual education. In Mansfield J's words:

> That evidence, understandably, was more focused on the area of the town water tanks, as that is a more significant area, and in other areas in the vicinity of Timber Creek which were also of significant importance. That does not enable the Court simply to ignore the sense of responsibility for looking after the country which, in relation to the compensable acts were regarded as a failure to properly to look after the country and to preserve it for future generations. Those matters of cultural sensitivity should be compensable.[366]

[357] Timber Creek n (334), para 295.
[358] Timber Creek n (334), para 323-324.
[359] Timber Creek n (334), para 324.
[360] Timber Creek n (334), para 24.
[361] Timber Creek n (334), para 379-381.
[362] Timber Creek n (334), para 367.
[363] Timber Creek n (334), para 371.
[364] Timber Creek n (334), para 371.
[365] Timber Creek n (334), para 381.
[366] Timber Creek n (334), para 381.

Finally, Justice Mansfield stated that three factors determined the solatium. First, the destruction of the Dreaming site while undertaking construction of the water tank, caused immense grief and loss to the Aboriginal community. Second, since it was not a particular site but an entire landscape that was harmed it would have been difficult to carry on spiritual activities on the land. Third, cultural connection and sense of belongingness to the land was harmed by the development-led dispossession. Furthermore, its effects could not be limited to a stretch of land and would have to be understood as affecting the whole landscape.[367]

In a critical observation concerning the compensation awarded, Justice Mansfield alluded to the responsibility of courts to identify the implications of Native title rights. The following observation sums up the judicial recognition of the connection between land and indigeneity:

> I accept that the compensation awarded for solatium should be assessed having regard to the communal native and collective ownership of the native title rights and interests. It must reflect the loss or diminution of traditional attachment to land arising from the extinguishment or impairment in question (rather than from earlier or subsequent events or effects), and it must be assessed having regard to the non-exclusive nature of the Native title rights and interests in question. So much is not contentious. The process required is a complex, but essentially an intuitive, one. As the Territory pointed out, the compensation must be assessed having regard to the spiritual and usufructuary significance and area of the land affected, but relative to other lands that remained available to the Claim Group for the exercise of the Native title rights and interests.[368]

The final compensation at the trial court was determined as: economic compensation which was 80% of the freehold value; a simple interest on the economic compensation since the date of acquisition; the spiritual compensation/solatium of a $1.3 million.[369]

<u>Timber Creek: High Court</u>

[367] Timber Creek n (334), para 374-384.
[368] Timber Creek n (334), para 301-302.
[369] Timber Creek n (334), Para 466.

On appeal, the Full Federal Court reduced the economic compensation to 65% of the freehold value and upheld the rest of the trial court decision.[370] The High Court, on the other hand, reduced the economic compensation to 50% of the freehold, while concluding that the simple interest would be calculated on the new compensation. However, even the High Court upheld the solatium of a $1.3 million.[371] The majority of the judges agreed that the trial court and Full Federal Court's assessment of economic compensation were 'manifestly excessive'.[372] The High Court's engagement with the idea of 'justness' in assessing compensation is narrow even if legally correct, effectively turning down an opportunity to endorse the openness with which Mansfield J approached the matter.

The majority opinion concluded that the claim group only had usufructuary and ceremonial rights over the land and any other rights they may have had were not exclusive to the community.[373] The Court continued that the rights of the claim group did not completely exclude other beneficiaries and grants, such as pastoral leases as they could be made without completely extinguishing the Native title.[374] Comparing the trial court decision with the High Court's decision, it seems there is an apparent lack of generosity in the interpretation of what a Native title is, what are the implications of such narrow interpretation for the Indigenous right (and the land), and the historic weakening of Native title rights since *Wik Peoples v Queensland*.[375] The differences in interpretation of the Federal Court and the High Court appear to be grounded more in how they endorse and distance Indigenous connection to land and its relevance to every aspect of adjudication respectively.

However, the High Court agreed with the trial court entirely on the assessment of cultural and spiritual loss.[376] The bench unanimously acknowledged the emotional loss suffered due to the

[370] Northern Territory of Australia v Griffiths, [2017] FCAFC 106.
[371] Northern Territory v Griffiths & Ors, [2019] HCA 7.
[372] Northern Territory v Griffiths n (371), para 106.
[373] Northern Territory v Griffiths n (371), para 74-76.
[374] Northern Territory v Griffiths n (371), para 80-81.
[375] Wik Peoples v The State of Queensland [1996] HCA 40 was another of historic decisions by the Australian High Court where some of the protections offered by Mabo (No.2) in recognising and preserving native title were taken back. In Wik, the High Court held that native title can be extinguished by the government only with an explicit legislation to that effect. Any other form of deprivation of full enjoyment of the native title land, such as granting of pastoral leases, did not destroy the native title. Wik has been often criticised for prioritising pastoral leases over native title. Tehan, M. "Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act". (2003) 27(2) Melbourne University Law Review 523.
[376] Northern Territory v Griffiths n (64), para 225-228.

loss of country and harm to a deep spiritual connection with the land.[377] It contended that the effects of the compensable act included:

> dispossession, serious and ongoing hurt to feelings of the claimants, the impeding of access to hunting grounds, damage to significant sites, and impeding the abilities of the claim group to practise traditions and customs and amounting to damage to the claimants' ability to fulfil their duties to the country.[378]

The judgment recognised the legitimacy of the trial judge's assessment of 'intangible losses' on the basis that he undertook a visit to the Country and obtained detailed oral histories, none of which the High Court itself could do.[379] In upholding the spiritual loss wholeheartedly, the Court appears to imply that the intangible is separable from the 'tangible', or the economic, aspect of the Native title. Whereas the reality of Indigenous people in Australia and elsewhere indicate otherwise, leaving them without resources and impoverished (p.151). In the next section, we study the *Talbott* litigation, where narrow interpretation where a better outcome could have been devised has adverse consequences for Indigenous litigants.

B3. Disregarding Indigenous Heritage in Favour of Economic Profits

In the 2020 decision in the case of Veronica Joyce Talbott v Minister for the Environment (Cth) (Talbott)[380], the Federal court relied on plain administrative grounds for reasoning while answering the critical questions of the intersection between the environment, Indigenous heritage, and economic development. In *Talbott*, the applicant, Dolly Talbott, a Gomeroi woman and member of the Gomeroi Traditional Custodians group (GTC), sought judicial review of two decisions made by the Minister for the Environment. The Minister had refused to make a declaration under s.10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) ('the Heritage Act') although the Gomeroi community had made an application for the declaration of Aboriginal heritage area in 2015. The heritage areas, over which declarations were sought, were within or close to the site of the proposed Shenhua Coal Mine that were newly approved by the Minister. Among other things, the Minister had

[377] Northern Territory v Griffiths n (371), para 230-232.
[378] Northern Territory v Griffiths n (371), para 180-194.
[379] Northern Territory v Griffiths n (371), para 215-216.
[380] [2020] FCA 1042. This case has also been discussed in my previous publication— Sakshi "The Many Entanglements of Capitalism, Colonialism, and Indigenous Environmental Justice", *Soundings*, (78), 64-80, 2021.

considered the social and economic benefits of the Shenhua Mine to the local community while refusing the declaration.

Contention:

Section 10 of the Heritage Act conferred power on the Minister to make a declaration for the preservation or protection of a specified area from injury or desecration. The process was contingent on the fact that the Minister received an application by or on behalf of Aboriginal groups seeking such a declaration. The Minister was also required to be satisfied that the area is significant to Aboriginal heritage and that it is under threat of injury or desecration. The applicant contended that the determination by the Minister could not take into account social and economic impacts on the broader local community instead of just the Aboriginal community as there were explicit limitations on what factors could be considered under s.10(1)(d). In her response to the applicants, the Minister had stated that "it was open [to her] to take into account a wide range of policy and public interest considerations, including social and economic considerations" even if it meant the likely destruction of the Aboriginal heritage.[381]

Race Powers:

An important argument by the applicants concerned the question of race powers. The claimants contended that the Minister had exceeded the ministerial power of assessment by considering extraneous factors, such as social and economic benefits for the broader community. Instead, it was argued that the declaration of heritage area under sections 10 and 12 of the Heritage Act can take into account only those factors that were uniquely Aboriginal in characteristic. Further, the claimants contended that the s.10 (4) allowed 'proprietary and pecuniary interests' of the non-Aboriginal people affected to be considered. It was claimed that such interests were confined to plausible compensation claims concerning present damage or loss and certainly did not extend to future pecuniary interests. To advance this contention, the applicants argued that the Constitutional provisions must inform the limitations on Minister's consideration of s.51 (xxxi), which is termed as the race power in Australian Constitution. The race powers under the Australian Constitution require two elements: first, a 'special law' made concerning 'people of any race'; second, such a power has been deemed necessary.[382] The applicants argued that

[381] Talbott n (380), para 15.
[382] Talbott n (380), para 18.

through this Constitutional power, the Minister's discretion should be redefined to consider only those factors that are relevant to the preservation of Aboriginal heritage, given that the Heritage Act is a special law existing under the auspice of the race powers. While the race powers and heritage laws have a long and chequered history. The Federal Court has interpreted the Heritage Act differently on various occasions including the decisions in *Tickner v Chapman* or *Tickner v Bropho*.[383]

The Reasoning:

In *Talbott*, the applicants attempted to frame their claim strictly in terms of existing precedents and jurisprudence instead of making a broader appeal based on moral principles. However, the Federal Court took a narrow view of the matter, ignoring some of the progressive possibilities in interpreting heritage law, and decided against the applicants. In his reasoning for dismissing the application, Justice Abraham stated that the elaboration of the race powers was a settled issue if one closely studied the precedents such as *Kartinyeri v The Commonwealth*, which had held that race powers may even be used to make laws to the detriment of Aboriginal rights and interests.[384] In *Tickner v Bropho*, the Federal Court had concluded that the ministerial decision not to recognise the Heritage Area was unreasonable as it was the Minister's duty to know that the state government in Western Australia had withdrawn protection to the Aboriginal area leaving it vulnerable to 'injury or desecration'.[385] Instead, Justice Abraham decided to focus selectively on Chief Justice French's dissenting opinion in *Tickner v Bropho* which stated that the Heritage Act:

> …was enacted for the benefit of the whole community to preserve what remains of a beautiful and intricate culture and mythology. Its protection is a matter of public interest. There will, however, be occasions on which that objective will conflict with other public interests. The public interest in the provision of safe, convenient and economic utilities may, in some cases only be advanced at the expense of areas of significance to Aboriginals.[386]

The *Talbott* judgment further suggested it was a failure on the part of the applicants to rely on parliamentary second readings and Hansard to determine the purpose of the Act but not to rely

[383] *Tickner v Chapman* (1995) 57 FCR 451; *Tickner v Bropho* [1993] FCA 208.
[384] [1998] HCA 22.
[385] Tickner v Bropho n (384), para 35-36.
[386] Tickner v Bropho n (384), para 223.

on the precedents that had already determined the scope of the legislation.[387] Justice Abraham observed that there was no basis for assuming those matters that were properly considered by the Minister under s.10 of the Act were also necessary for the 'operation of the Act' or that they were 'Parliament's desired end'.[388] The judgment categorically refused to understand that three decades stand between the *Tickner* and *Talbott* litigation. Even though the Heritage Act had not seen any amendments or reforms, the *Talbott* application aimed at strengthening the jurisprudence around heritage and environmental laws. As gathered from the extra-curial statements of the applicant Dolly Talbott and their solicitors, the novel economic and social pressures of the coal mine were presenting new challenges to the Aboriginal communities.[389]

B4. Restorative Justice: Lessons Learnt from Garret v Williams and Chief Executive, Office of Environment and Heritage v Clarence Valley Council

Application of restorative justice in environmental crimes is a familiar concept in environmental law scholarship.[390] Particularly, scholars from New Zealand suggest that adopting restorative justice processes and conferencing has resulted in better outcomes for resolving environmental offences.[391] Restorative justice processes have also been encouraged at the institutional level by judges, suggesting that the utility of restorative justice conferencing far surpasses other outcomes. In Australia, the concept has enjoyed some attention. Judge Rachel Pepper et al. consider it to be an innovative strategy that ought to be used in environmental jurisprudence.[392]

However, there have only been two instances of restorative justice mechanisms being used, and both of them have been in the NSW Land and Environment Court. Both these cases were decided by Justice Preston. A popular definition of restorative justice is drawn from criminal

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[387] Talbott n (380), Para 45.
[388] Talbott n (380), Para 55.
[389] "Aboriginal heritage: Gomeroi elders attack 'useless' law after Shenhua mine setback". Available at: https://www.theguardian.com/australia-news/2020/jul/26/aboriginal-heritage-gomeroi-elders-attack-useless-law-after-shenhua-mine-setback (Last accessed: 24 October 2020).
[390] Mark Hamilton, *Environmental Crime and Restorative Justice: Justice as Meaningful Involvement,* (SpringerLink 2021); Stefano Porfido, "The use of restorative justice for environmental crimes in the European Union's legal framework", *Queen Mary Law Journal*, Vol.1, (106-133).
[391] John Verry, Felicity Heffernan and Richard Fisher, 'Restorative Justice Approaches in the Context of Environmental Prosecution' 9. Available at: https://restorativejustice.org.uk/sites/default/files/resources/files/RJ%20and%20Environmental%20Prosecution.pdf (Last accessed: 28 June 2018); Cook.K, & Powell.C, "Unfinished business: Aboriginal reconciliation and restorative justice in Australia", *Contemporary Justice Review*, 6:3, 279-291 (2003).
[392] Judge Rachel Pepper et al., "Restorative Justice for Environmental Crime: An Antipodean Experience", International Union for Conservation of Nature Academy of Environmental Law Colloquium 2016 (Oslo, Norway: 2016).

law: "a process whereby all parties with a stake in a particular offence come together to resolve how to deal with the aftermath of the offence and its implications for the future".[393] Although in both the cases in NSWLEC, restorative justice was used in an Aboriginal heritage context, little has been said about how restorative justice processes facilitate IEJ. In chapter one, we have examined why IEJ requires more deliberation than the existing participation-distribution-recognition framework (p.44). The judicial facilitation of conferencing with the offender in the course of the trial provides a primacy to Indigenous voices, thereby propelling the understanding of tripartite framing of environmental justice (p.44). Here, while restorative justice may not be in itself an innovative remedy. Instead, it is used in new circumstances and contexts that result in radically transformative outcome for IEJ.

Facts of the Cases:

Garret v Williams (*Williams*)[394] and Chief Executive, Office of Environment and Heritage v Clarence Valley Council (*Clarence Valley Council*)[395] were decided eleven years apart. In both these cases, Justice Preston suggested that the parties go into a restorative justice conference before the prosecutor proceeded with the sentencing hearing.[396] In both cases, the facilitator for the restorative justice process was a person independent of the court. In *Williams*, the defendant was the director of the Pinnacle mines responsible for the mining operations in the region. He was prosecuted for the offence of damaging Aboriginal heritage in three instances under section 90(1) of the National Parks and Wildlife Act 1974 (NSW). The destruction of Aboriginal heritage occurred in the process of expanding mining operations and constructing railway sidings to transport the ore. Even before the operations commenced, the archaeologist who conducted the archaeological survey had submitted a report that the private railway siding was running along and over Aboriginal cultural sites. However, this report was disregarded. The first two offences by the mining company resulted in damage to a significant number of Aboriginal artefacts, including evidence of quartz stone quarrying, working tools, and grinding tools that belonged to Aboriginal people. The third time, the digging of a mine site resulted in the destruction of Bronze Winged Pigeon Dreaming. The Court also considered other environmental harms, such as damage to plant species and the water table of the region, resulting from the actions of the defendant alongside damage to Aboriginal heritage. The

[393] T Marshall, 'The evolution of restorative justice in Britain' (1996) 4(4) *European Journal of Criminal Policy and Research* 21, 37.
[394] Garret v Williams, [2007] NSWLEC 96.
[395] Chief Executive, Office of Environment and Heritage v Clarence Valley Council, [2018] NSLEC 205.
[396] Williams n (394), para 39-40.

defendant pleaded guilty to all the offences. Quoting from Bazemore and Umbreit[397], Judge Preston stated:

> The conference offers victims an opportunity to meet the offender in a safe, structured setting and engage in a mediated discussion of the crime. With the assistance of a trained facilitator, the victims are able to tell the offender about the crime's physical, emotional or financial impact; receive answers to questions about the crime and the offender; and be directly involved in developing a plan for the offender to make reparation or restitution for harm caused to the victims.[398]

Outcome in *Williams*:

Under s.90 of the Act, the maximum penalty for each of the offences is $5,500 or imprisonment for six months or both. Judge Preston noted that the offence had expressly gone against the objective of the legislation, which is to preserve the integrity of cultural heritage.[399] In discussing the material harm caused to the artefacts, the judgment also dwelt on the emotional distress of such a loss by reiterating the testimony of one of the Elders and traditional owners from the Broken Hill Aboriginal Land Council.[400]

Several remedies were offered in the final decision. The defendant had to pay the expenses of the independent facilitator ($11,000) and the costs of the traditional owner for being present at the conference.[401] The parties agreed to develop a voluntary conservation plan and a future collaboration strategy to prevent similar incidents. The defendant also agreed to equip members of the Aboriginal community to work at the Pinnacle mines.[402] Although this arrangement resulted in the reduction of the monetary penalty on the defendant, Judge Preston clarified that the restorative justice intervention in itself would not substitute the role of the Court in determining an appropriate sentence.[403] Preston J also emphasised that the circumstances and character of the defendant (adequate expression of remorse and contrition in the restorative

[397] G Bazemore and M Umbreit, A Comparison of Four Restorative Conferencing Models", *Juvenile Justice Bulletin*, (Feb 2001).
[398] Williams n (394), para 41.
[399] Williams n (394), para 67-77.
[400] Williams n (394), para 49.
[401] Williams n (394), para 53 and 113.
[402] Williams n (394), para 62.
[403] Williams n (394), para 64.

justice process) in this case called for a milder approach, especially when the Aboriginal Land Council also embraced such an approach.

Outcome in *Clarence Valley Council*:

The role of restorative justice was elaborated in *Clarence Valley* where the Council was prosecuted under s.86 of the National Park and Wildlife Act 1974 for knowingly desecrating a known Aboriginal object. In 2013 the Council had cut down the top of a 'scar tree' or a culturally significant tree to Gumbaynggirr people. This lopping off led to the gradual decline in the health of the tree. Eventually, the tree had to be completely removed in 2016. The Council self-reported the incident to the Office of Environment and Heritage, conceding that it had harmed an Aboriginal object. Justice Preston understood the resolution could not be confined to the penalty for that particular tree even if the injury was specific to one tree.[404] The judgment emphasised the shock and sadness caused to the members of the Aboriginal community and the deeply devastating effect it had had on the 'connection to country'.[405] Since a penalty or compensation could not correctly address the nature of the harm suffered, the restorative justice agreement settled for a more comprehensive set of outcomes. First, the Council agreed to undertake cultural awareness and skills developed for Clarence Valley Council ('CVC') staff. Second, the Council also agreed to support CVC Senior Managers and Planners to engage more effectively with Aboriginal people. It was suggested that there should be concrete measures in place for positive recognition of Aboriginal people to the wider CVC community and measures to improve consultation via the Clarence Valley Aboriginal Advisory Committee. The Council also agreed to undertake employment and youth initiatives in the CVC area and a Tree Restoration and Interpretation Project with respect to the Scar tree[406]

It was also agreed that any financial sanction imposed on the Council by the court must be paid to the Grafton Ngerrie Local Aboriginal Land Council to be used towards increasing awareness of local Aboriginal history and culture.[407] Further, the Council would also develop tools and strategies for knowledge dissemination concerning Aboriginal culture, ways of living and knowledge form, such as the naming of places and the integrating of interpretative tools with a cultural display.[408]

[404] Clarence Valley n (395), para 115-124.
[405] Clarence Valley n (395), para 8.
[406] Clarence Valley n (395), para 21.
[407] Clarence Valley n (395), para 58.
[408] Clarence Valley n (395), para 121.

In his decision, while answering a specific legal question, Justice Preston ensured that the remedy is both immediate and far-reaching. The institutional sentiment about justice is best summed up in this quote:

> The Court's duty is to take the community's view of crimes against the environment and Aboriginal cultural heritage into account in the sentencing process. If the Court fails to responsibly discharge the duty that has been entrusted to it by the community, confidence in the system of justice will be eroded.[409]

Admittedly, the scale of operation of the Pinnacle mines and Clarence Valley was also a factor in determining whether restorative justice intervention was a suitable way forward in this instance. In both cases, the Court took into account the 'subjective factors' in an offence. These included the offending history, remorse expressed and the likelihood of future offences.[410] A similar approach to restorative justice will barely be appropriate to the destruction caused by large mining conglomerates like Rio Tinto in Juukan Gorge, for instance. Broadly, the judgment appeared to be a step towards constructive strengthening of Aboriginal heritage laws and policies rather a simple issue-resolution paradigm.

C. Brazil: Promises of Settlement Accords

Brazil has a robust mechanism for civil liability for environmental damage. Some concepts in Brazilian environmental law regime, such as those of moral damages, have been occasionally deployed in Indigenous environmental litigation. The general regime of civil liability for environmental damage arises from article 225 of the Federal Constitution. The strict liability for environmental damage is further detailed in the National Environmental Policy Act 1981 (article 14).[411] The concept of punitive damages does not find a mention any of the statutes. However, the superior courts, especially the Superior Court of Justice (STJ), have previously awarded punitive damages to remedy environmental harms, especially when the scope of the damage is unknown, and the damage largely irreversible.[412]

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[409] Clarence Valley n (395), para 93.
[410] Clarence Valley n (395), para 97.
[411] Article 225 reads as follows: "Behaviours and activities considered harmful to the environment shall subject offenders, individuals or legal entities, to criminal and administrative sanctions, besides the obligation to repair the damages caused". See also: Délton Winter de Carvalho, *Dano Ambiental Futuro: A Responsabilização Civil pelo Risco Ambiental* (Rio de Janeiro: Forense Universitária, 2008).
[412] Raphael Magno Vianna Gonçalves, "Offshore Oil Spill and Punitive Damages in Brazil", *In* Patrick Chaumette (ed). *Richesses et misères des océans: Conservation, Ressources et Frontières*, (GOMILEX, 2018).

Nonetheless, the category of moral damages sits between what is statutorily pronounced and what is viable in a given circumstance. The concept of moral damages for environmental harms finds cursory references in the Federal Constitution.[413] It is further elaborated in article 1 of *Law N°. 7.347/85*, as amended in 1994 by *Law N°. 8884*. The precedents suggest, moral damages aim to cover the intangible and incalculable aspects of the harm.[414] They address the harm suffered by the community from the loss of environment or enjoyment of aspects of the environment. The 'community' conceived here is not confined to Indigenous communities, but a community determined by citizenship whose shared enjoyment of environmental resources are affected. Nevertheless, it has been applied while determining damages to the Indigenous communities where they are the relevant community.[415] The lack of guidance in what constitutes moral damage makes it difficult to study its application across State and Federal Courts. However, there have been two exceptionally insightful outcomes involving compensation claims, one of which was a promising decision by the Federal Court.

C1. Mariana Dam—Settlement Accord

The case of *Mariana dam* collapse was discussed briefly in Chapter 2 (p.85). By rejecting the initial settlement accord, the Federal Court availed itself of an opportunity to dismiss settlements that did not represent Indigenous voices. Further, the Court also closely scrutinised the methods through which other compensation sums were determined.[416] The interlocutory decision rejecting the settlement accord questioned the assessments on two grounds. First, the Court found the settlement accord lacking on the grounds of accuracy in both assessing the extent of damage and arriving at an appropriate sum as a remedy.[417] The judgment stated that the speed with which the assessment was carried out effectively disregarded the 'polluter pays' principle.[418] The haste with which the extent of the damage was evaluated resulted in the

[413] Article 5 Clause V.
[414] See for instance: TRF-3 – Apelação Cível/SP n. 96.03.014267-0, Relator Juiz Federal Rubens Calixto, 01/08/2007.
[415] *Case No. 2001.001.14586* in appeal, with Judge-Rapporteur Maria Raimunda T. Azevedo, who overturned the trial court's sentence to require the appellant to pay for environmental moral damages equivalent to 200 (two hundred) times the minimum wage in favour of a fund provided for in Article 13 of *Law 7,347/85*. In addition, the judgement required the planting of 2800 trees and the undoing of works that caused the damage. The rapporteur pointed out that the impossibility of returning the environment to its previous state justified the application of moral damages for the relevant community, which was the Indigenous community in the affected reservation.
[416] Suspended Accord, Reclamação nº 31.935 - mg (2016/0167729-7) (STJ).
[417] Suspended Accord n (416), para II A.
[418] Suspended Accord n (416), para II A.

ecological aspects of the harm being ignored. In addition, the hasty processes meant that the reversibility and irreversibility of the damage would not be assessed properly. Since any compensation awarded must address the full extent of damage, the Court decided that the assessment ought to be rejected. The judgment also took particular exception to the designation of 240 million reais as the compensatory amount and 500 million reais for a generic plan for collection and treatment of sewage. This allocation was considered to be unsubstantiated and inadequate as the effect of the damage was likely to be a lasting one, especially for the riparian communities.[419]

Moreover, the Court stated that the apportionment of liability according to the shareholding was unacceptable, especially in the case of Vale.[420] The judgment stated that the state corporation could have foreseen the risks by virtue of being part of the regulatory apparatus and not as a mere shareholder.[421] Hence, there should have been greater culpability in the corporation's role as a regulator. Second, the Court also observed that the current damages did not indicate a proportionate burden on the corporation, as it should in cases of liability for environmental damage.[422] The element of proportionality required that the punitive element of compensation should have been calculated against the profits made by Samarco.[423] In addition to adequate funds towards remedying and restoration, the Court suggested that the compensation also be extended to putting in place a damage prevention mechanism.[424] The Court also suggested that the proposed damage prevention mechanism should include an extensive social and environmental monitoring to support an ecologically balanced environment, since such expensive mechanism can easily be afforded by the mining conglomerate.[425]

Even though the *Mariana Dam* decision does not treat Indigenous claims separately, the repeated conflation of ecological harm and non-representation of Indigenous voice provides an important lesson in potential judicial attitudes towards IEJ. Such conflation has high contemporary relevance, as we find greater evidence of how Indigenous cultural responsibility and environmental guardianship overlap. The judgment demands that the methods by which

[419] Suspended Accord n (416), para II B.
[420] Suspended Accord n (416), para II B.
[421] Suspended Accord n (416), para B.II.7.
[422] Suspended Accord n (416), para B.II.8.
[423] Suspended Accord n (416), para II A.
[424] Suspended Accord n (416), para II A and Part II B.
[425] Suspended Accord n (416), para II A.

both the severity of environmental damage and mode of compensation are determined needs revisiting. While judicial determination of compensation may be one of the well known remedies, it still does not comprehensively involve Indigenous voices in critiquing why the assessment or amount is not adequate. In the next case, we see a clear instance of foregrounding Indigenous voice within a legal space but without adjudication.

C2. Ashaninka Settlement Accord

The recent settlement accord involving the Ashaninka people of Acre provide a good example for the convergence of IEJ and reconciliation. Given very few Indigenous environmental cases have reached a conclusion, let alone a successful conclusion, out of court settlements are gaining prominence. The Ashaninka community of the State of Acre along the Brazilian Amazon had sued the defendants, a logging corporation represented by its directors, for carrying out illegal logging between 1981 and 1987.[426] The Ashaninka people were recognised to be the rightful owners of their territory in 1992. However, the logging invasion in the 1980s left a lasting adverse impact on tree diversity and the cultural identity of the Ashaninka people. Thousands of mahogany, cedar, and other native trees were chopped down between 1981 and 1987 to supply wood for the European furniture industry.[427] The logging took place without the consent of the Indigenous people and without any form of compensation for their loss. Unlike other unsuccessful struggles against logging in Brazil, the Ashaninka people sued the logging corporation, which was owned by the family members of the then Governor of Acre.[428]

The prosecution was jointly pursued by the Federal Ministry (MPF—Ministério Publico Federal) and Fundação Nacional do Índio (National Indian Foundation, 'FUNAI') on behalf of the Ashaninka people. While the case had partial success in the courts. The plaintiffs obtained an interlocutory injunction in the Federal Court and even in the STJ. However, in April, the prosecutor signed a large settlement amount on behalf of the Ashaninka people. The settlement was concluded only after the offenders had offered an unconditional apology for the destruction

[426] Termo de Conciliação No.01/2020/CCAF/CGU/AGU-JRP-RCM. Available at: http://www.mpf.mp.br/pgr/documentos/documentoassinado.pdf
[427] Naira Hofmeister, "R$ 14 milhões e pedido de desculpas: acordo inédito indeniza os Ashaninka pelo desmatamento em suas terras". Available at: https://brasil.mongabay.com/2020/04/14-milhoes-de-reais-e-um-pedido-de-desculpas-acordo-inedito-indeniza-os-ashaninka-pelo-desmatamento-em-suas-terras/ (Last accessed 24 October 2020).
[428] Hofmeister n (427).

of the reservations and Indigenous territories in the past. The settlement accord approved by the relevant Court reiterated that the defendants were jointly and severally liable. The compensation awarded included: First, compensation for material damage caused by illegal timber extraction between 1981 and 1982 and further, between 1985 and 1987. Second, compensation for moral damages to the Ashaninka people, to be jointly managed by the Federal Ministry and FUNAI. Third, the settlement also created a general environmental defence fund for facilitating environmental restoration.[429] On the whole, 14 million reais were allocated for tangible factors, such as restoration and remedying, while 6 million reais were settled as a benefit fund for the Ashaninka Association of the River Ammonia.

One of the defendants refused to participate in the settlement process, and as a consequence, the criminal prosecution against him is still ongoing.[430] The critical part of the settlement was the apology, which included the defendants expressing their regret "for all the evils caused, respectfully recognising the enormous importance of the Ashaninka people as guardians of the forest, zealous in preserving the environment and in conserving and spreading their customs and culture".[431] The terms of reconciliation established that the resources should be ring-fenced for the defence of the community and the Amazonian forest. The representative committee of the Indigenous people would send periodic reports of the activities carried out under the approved projects, starting from the date of settlement of accord.

The Ashaninka community considered the prosecutor's office as an ally, making this case an excellent illustration for what co-ordinated Indigenous environmental litigation can achieve.[432] In the post-settlement statement published by the MPF, the Attorney General of the Republic, who was also the prosecutor in the Ashaninka case, observed that this was a historic moment in exploring extra-judicial solutions to Indigenous environmental problems.[433] The prosecutor also added that the Constitution protects the 'sacred rights' of Indigenous people, and that they have the right to choose their lives and material destinies, while also making political choices.[434] One of the leaders of the Ashaninka community emphasised on how the litigation was a commentary on the relationship between Indigenous communities and environmental

[429] Termo de Conciliação n (426), Para 1.4-1.4.1
[430] Recurso Extraordinário 654833.
[431] Termo de Conciliação n (426), Para 3.1
[432] MPF, "Acordo histórico garante reparação a povo indígena Ashaninka por desmatamento irregular em suas terras". Available at: (Last accessed: 24 October 20).
[433] MPF n (432).
[434] MPF n (432).

resources. He suggested that the present victory was a victory for Indigenous communities across the world who suffer the loss of land and damage to their ways of life.[435]

Even though the Brazilian instance may appear to be an exceptional case, it is a significant departure from the pattern of disappointing judicial decisions and hostile political developments. In similar fashion to court-mediated developments in other jurisdictions, Brazil has forged an innovative path in extra-judicial settlements where Indigenous voices are amplified while the community also gains from reparative and restorative justice. Chapter 4 throws light on some of the inherent limits within Brazilian judiciary and why creative interpretation in adjudication becomes a difficult task, leaving much of the progress in IEJ to social than legal realm (p.140).

D. Limits on Judicial Innovation in Canada: Mount Polley and Beyond

The existing Indigenous Treaty rights may paint a picture of robust environmental outcomes and Indigenous rights regime in the Canadian context. The express or implied limits on what kind of litigation makes way to adjudicatory forums also, to some extent, shapes and determines the range of outcomes that are available in an adjudication. Most of the domestic compensation claims with respect to the management of land and other First Nation matters are covered under the Specific Claims program. By definition:

> "Specific claims" are claims made by a First Nation against the federal government which relate to the administration of land or other First Nation assets and to the fulfilment of Indian treaties. The primary objective of the Specific Claims Policy is to discharge outstanding legal obligations of the federal government through negotiated settlement agreements.[436]

To this end, a Specific Claims Settlement Fund and Specific Claims Tribunal are constituted under the Specific Claims Tribunal Act 2008. Elements that are not covered under Specific Claims legislation are termed as 'special claims', and the government is compelled to respond to them because of 'legal, moral, political and policy reasons'.[437] Funds for these special claims must be sought from a source fund that is distinct from the Specific Claims Fund. The Specific

[435] MPF n (432).
[436] Government of Canada—Indigenous and Northern Affairs (GoCINA), "Grants to First Nations to Settle Specific Claims". https://www.aadnc-aandc.gc.ca/eng/1386084928262/1386084995142 (16 October 2020).
[437] GoCINA n (436), Para 1.

Claims and Special Claims have been designed in the spirit of reconciliation and recognise the past injustices with an intention to address them.[438] While this arrangement takes care of a substantial number of land-related claims that may arise under Treaty rights, it is unlikely anything in the nature or scale of *Northern Territory v Griffiths*[439] (p.107) will ever be contested in Canadian courts.

At the outset, there have been very few compensations claims in Canadian courts. The protruded Mount Polley dispute, which is yet to be adjudicated, promised engagement with a compensation claim for environmental damage. In 2014, the Mount Polley dam holding back a tailings pond at the Mount Polley mine above Quesnel Lake collapsed. Around 24 million cubic metres of mine tailings containing toxins like arsenic, mercury, selenium, lead and copper were released into the Hazeltine Creek and then into the Quesnel Lake.[440] Quesnel Lake was both a source of drinking water and a habitat for a significant part of the sockeye salmon population of the province. Many First Nations communities along the river bank were affected. Their traditional fishing rights and water use rights were severely curtailed and possibly irreversibly harmed.[441]

The Province failed to initiate a prosecution against the Mount Polley Mining Corporation under the Mines Act 1996 and Environmental Management Act 2003. However, former chief of the Xat'sull First Nation initiated a private prosecution for the environmental damage and damage caused to traditional Xat'sull rights due to the dam collapse, claiming compensation and remediation.[442] Instead of pursuing the case, the BC prosecution service took over the private prosecution and decided to abandon it because the matter did not meet the charge assessment standards.[443] The charge assessment guidelines denote whether prosecution is in

[438] GoCINA n (436), Para 3.
[439] [2019] HCA 7.
[440] A brief report was submitted on the matter and remains dormant until date: Mount Polley Mine Tailings Pond Failure (Re), 2015 BCIPC 30. This case has also been discussed in my previous publication— Sakshi "The Many Entanglements of Capitalism, Colonialism, and Indigenous Environmental Justice", *Soundings,* (78), 64-80, 2021.
[441] "A Breach of Human Rights—The Impact of the Mount Polley Mine Disaster, British Columbia", *Mining Watch,* (24 May 2017).
[442] West Coast Environmental Law, "Mount Polley disaster escapes BC law because of government policy on private prosecutions". Available at: https://www.wcel.org/blog/mount-polley-disaster-escapes-bc-law-because-government-policy-private-prosecutions (Last accessed: 24 October 2020)
[443] "BC Prosecution Service Directs Stay of Proceedings of Mt. Polley Mines Private Prosecution" British Columbia Prosecution Service, Media Statement (2018). https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/media-statements/2018/18-02-sop-mt-polley-mines.pdf (Last accessed 24 Oct. 20).

the public interest. The prosecution service did not provide any reason why Xat'sull First Nation's case failed the test of public interest. While the First Nations have made a commitment to larger environmental protection and reconciliation with non-Indigenous people as a meaningful continuation of environmental protection, the state repeatedly fails to undertake a similar commitment.

D1. Innovative Injunction: Snuneymuxw First Nation et al. v. R

Snuneymuxw First Nation et al. v. R (*Snuneymuxw*)[444] is a case of injunction application by the First Nations and provides useful anchor for instances where the courts lack the ability to break free from the domestic legal culture in determining remedies. However, we may sense the willingness in court to respond to the matter. More often, these scenarios result in interesting judicial reflections, if not useful innovation.

The observations of the Court and the outcome in *Snuneymuxw* appear contradictory but entirely predictable, given the chequered history of injunctions in the context of the Canadian First Nations. *Snuneymuxw* was an application for an interlocutory injunction against the defendants in order to prohibit them from storing log booms in the Nanaimo River Estuary. The estuary had been used extensively for the storage and transportation of log booms since the beginning of 1950. Since 1961, there had been a lease arrangement for the continued use of the estuary for storage. After the expiration of the lease, log boom storage had continued under month-to-month arrangements while the various parties attempted to negotiate a new 20-year lease. The estuary was considered a particularly good place for storage as it sheltered the logs from storms and greatly reduced log damage through the daily drying of logs at low tide.

The Snuneymuxw First Nations had economic and cultural connection with the river. The estuary had been a prime fishing area from the pre-settlement period. The First Nation historically fished and gathered salmon, herring, flounder, cockles, crabs and clams in this stretch of the estuary. The area around the estuary was a site for several petroglyphs in which fish figure prominently and where the traditional knowledge of fishing had been handed down from Elders to the younger generation.[445] The test for whether an injunction could be granted was a standard test, assessing whether the plaintiffs had an arguable case, and whether the

[444] 2004 BCSC 205.
[445] Snuneymuxw n (444), para 14.

balance of convenience would be in favour of an injunction. As it is done in most injunction cases in Canada, the Court weighed the tangible economic interests of the defendant with dissimilar, intangible interests of the plaintiffs.[446] Nevertheless, in the process, the judgment mentioned several claims of the First Nations and even engaged with them helpfully by acknowledging the gravity of their claims.

The First Nation claimants argued that log boom storage in the estuary had done serious harm to the water body, which was once covered with white sand and had sizeable populations of fish. Due to the industrial activity, the estuary was now muddy, and some species of fish had begun to see a serious decline in numbers. However, the Court observed that fishing had been previously damaged due to bacterial growth and as a consequence, the plaintiff's claim that they will not be able to carry on 'fishing as done previously' was held to be an obscure claim.[447] The Court looked at the past and the present of Indigenous fisheries and placed a burden on the First Nation plaintiffs to quantify the decline due to the activity of log boom storage with scientific precision.[448] The judgment in *Snuneymuxw* swerves between contradictory positions, recognising Indigenous claims while also denying them a beneficial outcome. For instance, in saying:

> I am satisfied that the plaintiffs in this case can show irreparable harm. From the plaintiff's standpoint, the ability to fish is more than an economic right…I am also satisfied that the situation with the estuary is of sufficient long-standing that there remain only a few elders that can remember it in a more pristine condition. Sadly, the lives of those elders are inevitably drawing to an end and they have limited time to train the younger generation in traditional ways.

the judge allows for a recognition of Indigenous intergenerational responsibility, unlike several other injunction cases.[449] However, in the following paragraphs, the decision weighed the economic loss for the industry in granting an injunction against damage that had already been aggravated by the previous decline in fish stock.[450] The Court also observed that the economic

[446] Marc Kruse and Carrie Robinson, "Injunctions by First Nations: Results of a National Study", Policy Brief (43), November 14, 2019.
[447] Snuneymuxw n (444), para 12-15.
[448] Snuneymuxw n (444), para 16-30.
[449] Snuneymuxw n (444), para 32.
[450] Snuneymuxw n (444), para 11.

loss in terms of the halting of the industry, economic harm to community and loss to individual workers took precedence over evidence of irreparable harm to First Nations.[451]

In conclusion, the Court arrived at 'limited injunctive relief' as a remedy.[452] The judge suggested that another long lease for the continued use of the estuary for log boom storage might leave defendants with an impression that they were free to disregard First Nation interests. So, the decision laid down a mechanism for periodic review and a non-derogation clause that protected First Nation rights and did not foreclose future possibilities of injunctions.[453] The remedy also demanded that the parties acknowledge the existence of current litigation before entering into future leases. Further, it required that the new terms for the head lease, which might affect the Snuneymuxw First Nations' interests, must be provided to the First Nation claimants before the future lease can be put in place. This relief ensured that the First Nations had the opportunity to take issue with any term that they considered non-complaint with this particular injunction and hindered their ability to pursue an effective negotiation. By devising a 'limited injunctive relief' within an interlocutory injunction application and allowing for a limited dialogue process, the Court attempted to arrive at the best possible solution. However, it does not resolve the extent of harm acknowledged by the very judgment. The Court's inability to grasp the magnitude of harm and loss suffered by Indigenous peoples is palpable in this decision. While the judgment maintains the integrity of the adjudication processes by remaining largely faithful to the previous cases of injunction decided by other Canadian courts, it overlooks an opportunity to adopt IEJ and consolidate newer forms of judicial integrity (p.187).

A useful and beneficial remedy in Indigenous environmental litigation is often not spectacular. Nonetheless, a good remedy manages to dislodge centuries of presumptions and injustices even if slightly. Such remedies also address the structural opacity of courtrooms and those of their procedures that resist Indigenous voices. Admittedly, this is a question of structural transformation as much as it is of judicial innovation. Much of this burden is shouldered by strategic litigation, which is manifest in the right set of litigants pursuing the right struggle in the proper court (p.43). The outcome in *Smerek v Areva Resources Canada* may be instructive of how lapses in strategic litigation may send out wrong messages. In this case, the Court

[451] Snuneymuxw n (444), para 34-35.
[452] Snuneymuxw n (444), para 40-44.
[453] Snuneymuxw n (444), para 40.

chastised the litigants for using courts for 'political discussions'.[454] The case involved a challenge against a new uranium mine that was going to be established and which would have severely compromised environmental and Indigenous rights. However, the application challenging the permission for the mine did not have an Indigenous representative, who would voice the concerns of the relevant First Nation.[455] *Smerek* is a good example of omissions in litigation when they ignore the importance of Indigenous voice while seeking to represent the losses suffered by Indigenous peoples. The omission allowed the Court to brush aside the matter as being a mere political gesture, whereas, in actuality, radical jurisprudential shift is already a deeply political act by the courts.

E. Conclusion

The outcomes analysed in this chapter are unique and speak to the distinctiveness of the juridical spaces. However, they also provide a compelling testimony to a slow transformation that is afoot in judicial attitudes towards justice-oriented jurisprudence and self-reflective settler courts that resist some of the historical limits on their powers. Even where the courts do not lay the blame directly on the settler colonial institutions or laws, there is an acknowledgment that the present issues are products of the past dispossession. The questions raised at the beginning of this chapter help us understand the position of each court in their response to Indigenous claims. There can be a reasonably conservative decision by a court, such as the *Bootu Creek*, because of the formal legal constraints on the power of a court. But at the same time, the judicial opinions can also be progressive in how they understand the Indigenous-land connection. Where courts cannot be overtly political in rejecting the state sovereignty, such as in the *Timber creek* decision, they can forge a resolution that upholds the plural sovereignties, such as spiritual beliefs of First Nations. The Brazilian courts counter the pressures of limited constitutional possibilities and a hostile political environment by resorting to creative solutions, such as settlement accords, outside of the courts but within the legal spaces. IEJ requires both the power of radical outcomes as well as sympathetic acknowledgement of settler legal spaces. Some of these remedies described here have been necessarily monetary. However, the idea of IEJ acknowledged in the decision or forged in alternative resolutions, such as restorative justice, has also been rewarding. The vast

[454] 2014 SKQB 282.
[455] Smerek n (454), para 21.

differences between the legal cultures of the three jurisdictions and what lessons we may draw from it will be discussed in the next chapter.

Chapter 4: Comparative Lessons from the Three Jurisdictions: Adjudicative Limits to IEJ in Theory and Practice

A. Introduction

> The modern development of Australian law governing Aboriginal title to land is part of that post-colonial jurisprudence that has been developed in other countries to protect the relationship between the descendants of the indigenous inhabitants and their traditional lands…The post-colonial relationship of the indigenous population with their traditional land is not only, or even chiefly, a problem for the courts. But the courts, sensitive to the demands of justice for minorities and the disadvantaged in society, are likely to remain a forum in which indigenous peoples will seek to right what are now perceived to be historic wrongs.
>
> - Justice Brennan[456]

The comparative study of environmental and Indigenous rights jurisprudence undertaken in this thesis is a beneficial but challenging task. The element of comparison between these jurisdictions is not limited to how the courts approach, or ignore, IEJ. Rather it is also important to consider how different judicial interpretations of Indigenous rights take into account contemporary social, political, and climate justice movements that challenge power structures. Justice Brennan's statement above suggests that the courts will continue to be the most important institutional spaces for obtaining justice for Indigenous peoples. This chapter considers the lessons we can learn from the comparative analysis undertaken in the previous chapters.

It shows that from the analysis of these cases three broad categories of jurisprudence developed by courts emerge. First, in some cases courts understand justice as something that can be derived from straightforward application of existing laws, treaties, and constitutional frameworks. However, such conception of justice is likely to be narrow and less responsive to

[456] The Hon. Sir Gerard Brennan, AC KBE, Chief Justice of Australia "Aboriginal Land Claims—An Australian Perspective" 1995 Seventh International Appellate Judges Conference Ottawa - 25-29 SEPTEMBER 1995, (27 September 1995). Available at: https://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_canada.htm (Last accessed: 14 February 2021).

contemporary challenges. Such framing rarely accommodates newer demands of Indigenous environmental litigation, for instance, integrating Indigenous voices within adjudication processes through more than tokenistic recognition. Second, judges may also interpret existing laws and constitutional rights with greater openness to and in recognition of the importance of understanding and hearing Indigenous claims. Consequently, courts tend to be more welcoming of an expansive understanding of Indigenous claims, which they believe is already supported by existing legislations and constitutional provisions even if it requires certain degree of interpretative innovation. Finally, in some, albeit to date limited cases, we can see the creation of a new and invigorated jurisprudence, which both responds to and recognises the ongoing Indigenous struggle for justice and sovereignty.

A repeated emphasis on diversity in legal cultures across the three jurisdictions may raise concerns about the strength of the comparison in how courts have encountered and shaped IEJ. However, such concerns may be addressed by indicating that the pervasiveness of settler colonialism and the excessive reliance on western, colonial knowledge forms are common to the three jurisdictions. This common ground becomes the very reason why one must attempt comparative exercises to understand how best a common vocabulary and a common end may be achieved in particularly inhospitable legal processes.

To explain the findings of the comparative study further, this chapter develops an analytical framework. This analytical framework is an original contribution of the thesis and is constructed from two parts. The first explores the bounded nature of courts' power. The theoretical limits that determine the nature of the courts' functions, power and scope, i.e. whether they are fundamentally liberal and open or reluctant and limiting spaces, are explained. The second part examines the practicalities of such limits, especially the limits in terms of the nature of litigation that is likely to come before the courts and the nature of available outcomes. The two parts illustrate an osmotic relationship between theoretical and practical limits (or openness, where relevant), which may explain the diversity of outcomes in the three jurisdictions.

B. The Three Limits - Theory

In this first part of the chapter, the theoretical limits which shape the power, function and scope of judicial activity is explained. We focus on three such limits: constitutional, institutional, and

definitional. These limits taken together form a more or less porous membrane around the ability of the courts to innovate either within the framework of existing laws, or more profoundly to challenge those very structures through an openness to achieve IEJ.

B1. Definitional Limits

This section deals with the distinctions between the state power/sovereignty and multiplicity of other sovereignties. A helpful manner of discussing the distinction may be from understanding the nature of these limits if we were to understand settler constitutions and laws as a higher norm i.e. the *grundnorm,* which is "considered its juridical-logical constitution".[457] A higher norm in settler colonialism not only establishes the legitimacy of the system but also determines the limits of what can or cannot be done within the legal system. In other words, it has the power of defining what may be done or what may be allowed within a legal system. In light of this gatekeeping, there will be little room for any kind of creative navigation regarding Indigenous claims. Kelsenian understanding of the objective higher norm or *grundnorm* is premised on the inferiority of non-sovereign individuals or those who would—in contemporary legal scholarship—would have equal claims on sovereignty. In order to understand the nature of specific laws or the motivation of courts to determine matters in one way or another, we ought to look at the foundational norm of a legal system. This is analogous to understanding the foundational legal narrative and creating avenues how such narratives can be developed to accommodate multiplicity of voices (p.52). Even if one were to argue that *grundnorms* evolve or have evolved in settler legal systems, partial or tokenistic recognition of Indigenous rights within such "juridico-logical" constitutions may only fulfil the higher norms aspired by the settler legal systems or states and not the justice demanded by Indigenous peoples.

Partial recognition extended to Indigenous rights in settler constitutions has allowed the courts to bypass the matter of Indigenous sovereignty (p.52). Often, Indigenous sovereignty is treated as a settled question and any recognition of it is presumed to disturb the absolute supremacy of state sovereignty. All the three jurisdictions here have endorsed the uncontested supremacy of state sovereignty through their case laws.[458] Even the UNDRIP recognises Indigenous self-

[457] Hans Kelsen, *A General Theory of Public Law,* 1925 as cited in Alexandre Trivisonno, "On the continutity of the doctrine of the basic norm in Kelsen's Pure Theory of Law", *International Journal of Legal and Political Thought,* Vol.12(3), 324, 321-346, (2021).
[458] Love & Thoms v Commonwealth of Australia, [2020] HCA 3.

determination only insofar as it does not antagonise state sovereignties.[459] Such an assumption of 'bounded spaces' in jurisprudence has made it difficult to argue for multiple sovereignties as a legally tenable principle. Contrary to the popular conception of 'settled colonies', Indigenous scholarship in both Australia and Canada has long argued that these lands were never ceded.[460] Even in the absence of a defined settler colony, Brazilian Indigenous communities have asserted their relationship with the land and the environment as a clear indicator of their co-existing sovereignty within the modern state. The monolithic understanding of sovereignty as solely existing in relation to the state hinders an understanding of plural sovereignties that exist within modern states. First Nations have argued that Indigenous sovereignty finds its expression in non-dominant, non-hierarchical relationships, such as kinship with the land and water and recognition of Indigenous knowledge forms.[461]

The potential of plural sovereignty (p.52) by overcoming definitional limits is evidenced in the case of Australia through the contemporary movement for enshrined constitutional voice to the Australian Parliament. The demand for substantial constitutional recognition in the form of Uluru Statement from the Heart illustrates the many possibilities of accommodating plural sovereignties within liberal constitutions.[462] The statement is an invitation to the Australian people to recognise past violence and move forward towards 'healing' by correcting these wrongs. The movement demands that the state power be dissipated by making room for Indigenous peoples' voices. It asserts that the acknowledgement and existence of Indigenous sovereignty is the way forward for truth, justice, and reconciliation. The 'plurality of sovereignties' here may be over, amongst others, the right to self-determination, the right to survive and retain indigeneity, and the right to sustain Indigenous knowledge forms.

Only where the courts are receptive to conceptions of plural sovereignties will there be proactive judicial action towards what ought to be achieved within the adjudicatory processes. As demonstrated in the previous chapters, most of this burden may be shouldered by individual judges. Nevertheless, the next section shows that the individual radical decisions are more likely to be followed, and hence more likely to have an impact, when it comes from specialist

[459] Article 46, United Nations Declaration on the Rights of Indigenous Peoples.
[460] Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty*
[461] Harald Bauder & Rebecca Mueller, "Westphalian Vs. Indigenous Sovereignty: Challenging Colonial Territorial Governance", *Geopolitics*, 28(1), 156-173, (2023).
[462] "Voice.Treaty.Truth. Uluru Statement from the Heart". Available at: https://ulurustatement.org (Last accessed: 20 January 2021).

environmental courts. These decisions are first recognised for their pedagogical importance and then as a template to be followed in similar cases, although such patterns may be hard to come by in superior courts.

B2. Constitutional Limits

There are several express legal limits that may often act as confining factors as well as constructive factors in environmental litigation. These express legal limits may be statutes, constitutions, domestic and international rights instruments or other forms of obligations under international law. In this section, the *constitutional limits* framework offered encompasses limits created by both the non-statutory and the statutory articulation of Indigenous rights. It has been termed *constitutional* as it operates more as a foundational norm in domestic legal systems than as a simple descriptive factor. Unlike the definitional limit, here, we look at the examples of codified laws and constitutional provisions: that define Indigenous rights narrowly; drive an artificial distinction between environmental preservation and Indigenous cultural and spiritual distinction; remain without a clear expression on Indigenous self-determination etc.

Some examples of constitutional recognition of Indigenous rights operating as limiting force may be found while adjudicating Indigenous environmental claims in Canada and Brazil.[463] For instance, in Canada where rights implied in and arising from s.35 of the Constitution Act and Treaty rights dominate the field of Indigenous litigation, most jurisprudential questions are presumed to have been resolved within Treaty regimes or s.35 of the Constitution instead of being treated as an evolving field. Similarly, the constitutional recognition of Indigenous rights in Brazil performs the role of meeting the broader moral obligations towards Indigenous rights and IEJ, thereby reducing the scope for innovation from courts.[464] Brazil's Constitutional language of 'protecting the environment' and 'ecological safeguard', amongst others, has been interpreted narrowly to uphold the artificial distinction between the people and the environment that characterises western environmentalism.[465] While the Brazilian Constitution recognises Indigenous peoples, the limits of such recognition is contingent on the nature of interpretation by the courts. As the outcome in *Raposa Serra Do Sol* tells us (p.79), a top-down approach to

[463] John Borrows, *Freedom And Indigenous Constitutionalism* (University of Toronto Press 2016).
[464] Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States,* (Duke Press 2014).
[465] José Rubens Morato Leite & Marina Demaria Venâncio, "Environmental Protection in Brazil's High Court: safeguarding the environment through a rule of law for nature" *Sequência (Florianópolis)*, (77), 29-50 (2017).

rights framework that does not account for Indigenous voices can just as easily be weaponised against Indigenous people as it can be empowering for them.

In this chapter, the tendency to confine interpretative possibilities within constitutional frameworks is referred to as an 'interpretative limit'. For the purposes of this chapter, both express and implied constitutional limits are understood in the broadest sense. There may not be any scope for innovation where there are express constitutional limits, such as negotiated Treaty rights or Native title rights. However, the implied constitutional limits, such as expanding the scope and meaning of s.35 of the Canadian Constitution, may accommodate interpretation more generously. To this end, any form of judicial innovation becomes a result of an individual judge pursuing a different line of interpretation in a specific case rather than creating a new interpretative possibility in law that will leave the jurisprudential field open. Interpretation to enrich jurisprudence or to overcome adjudicatory hurdles then becomes a part of legal narratives (p.35; p.167). We have previously encountered the idea of legal narratives as means by which one might overcome the stronghold of colonial legal principles, values and modes of adjudication. Attempts to prevail over the implied constitutional limits or, in some cases, the complete absence of any form of constitutional guidance are concrete instances of how legal narratives may be built. Further, legal narratives may result from the opportunity provided by particular litigation or a conscious judicial choice through understanding the duty and responsibility to articulate justice. Some instances of duty to articulate justice and plurality of principles emerging from strategic litigation will discussed in Chapter 5 (p.167).

However, these constraints have been largely absent in Australia, primarily because the Australian Constitution has little to do with any form of rights, let alone Indigenous rights. Even human rights do not find any mention in the text of the Constitution. The Australian Constitution is considered more of an administrative document concerned with 'structures of the government and distribution of power'[466] rather than providing a rights-based framework or defining constitutional morality. As definitional limits are at present being addressed in Australia, there is greater opportunity for making constitutional limit more pronounced within domestic legal system. Since the Constitution is neither a post-colonial constitution nor one to

[466] Elisa Arcioni and Adrienne Stone "The small brown bird: Values and aspirations in the Australian Constitution", *International Journal of Constitutional Law,* (2016), Vol. 14 No. 1, 60–79

emerge out of post-conflict need for reconstructing the nation-state,[467] it remains without a grand hierarchy of 'objective values'[468] but only with a 'basic law'.[469] Nonetheless, legal scholars have found value in the basic document even though it does not reflect the 'deepest commitments'[470] or any of the fundamental or aspirational morals and values found in other constitutions. Arcioni and Stone argue that even an elementary text such as the Australian Constitution can be useful as it does not foreclose the possibility of developing a wholesome and robust constitutional culture.[471] A comparative lesson from the three jurisdictions would clearly illustrate the differences in treatment of Indigenous voices by virtue of a presence of Treaties and constitutional provisions (Canada and Brazil) and the absence of any such placeholder (Australia). Whilst Canada and Brazil may not adversely treat Indigenous claims, the interpretative possibilities or the courts' ability to build legal narrative appear more limited than those in Australia. However, the ability of the court to pursue innovative or radical approaches to IEJ are limited not only by the legal constraints on the power of the state as expressed in the constitution, but also by the nature of the domestic institutional arrangements. In effect, *the nature of the adjudicatory body matters as much as the constitutional limits on their power*.

B3. Institutional Limits

In Canada, while there are legal institutions to ensure a good understanding of Treaties, Treaty relationships and reconciliation, such as the Specific Claims Tribunal, Office of the Treaty Commissioner and Treaty Relations Commission Manitoba, these are not adjudicatory bodies. The lack of domestic institutional mechanisms hinders the efforts to understand Indigenous rights as a confluence of environmental justice and sovereignty struggles. The absence of an adequate institution means that the older adjudicatory mechanisms and institutions end up gatekeeping, thereby allowing little room for strategic litigation or specialised judicial focus towards Indigenous and environmental issues.

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[467] Arcioni et al n (466) at 61.
[468] Arcioni et al n (466) at 63.
[469] The Hon. Patrick Keane, In Celebration of the Constitution, http://www.naa.gov.au/collection/publications/papers-and-podcasts/australian-constitution/keane.aspx (Last accessed: 5 June 2021); Jeffrey Goldsworthy, Constitutional Cultures, Democracy, and Unwritten Principles, U. Ill. L. Rev. 683 [2012].
[470] Jeremy Webber, Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform, 21 Sydney L. Rev. 260, 261–262 (1999).
[471] Arcioni et al n (466) at 67.

In contrast, Brazil has created specialist courts in particular states, such as the State of Amazonas Environmental Court in Manaus[472] and special environmental benches in the Superior Court of Justice (STJ) and Supreme Federal Court (STF). The opportunity for specialist focus within adjudication allows courts to understand the domestic environmental laws that are still steeped in colonial environmentalism. For instance, despite the forced human-nature-culture separation in environmental legislation, colonial ideas of land management, conservation and heritage protection etc. specialist environmental courts may ask for the issues of environmental harm to be reframed and understood differently through participation of Indigenous peoples. Unlike regular courts, specialist courts would be less constrained adjudication of dispute.[473] Instead, their primary responsibility is regarding 'rule formation'[474] and this process may require greater emphasis on principles. Determination of such broader nature ensures that the courts can contextualise issues before them as well as the laws that are relevant and applicable. In other words, even if the constitutional provisions and statutes are opaque, courts will be able to accommodate a holistic understanding of human-nature relationships that align with many of the Indigenous belief systems. Although the existence of specialist courts/benches leaves Brazil better equipped than Canada, it is doubtful whether these institutions are adequate to accommodate IEJ.

Unlike Brazil or Canada, Australia has no dearth of adjudicatory bodies. Australian environmental laws are primarily governed by the states rather than the Commonwealth. One of the effective specialist court, the New South Wales Land and Environment Court (NSWLEC), was established in 1979 by the Land and Environment Court Act 1979. The Court was a result of continuing demand for environmental law reform and aimed to take a novel approach towards planning and development.[475] One of the original mandates of the Court was to ensure the cheap, speedy, and effective resolution of environmental matters.[476] There is little evidence to indicate either the objective of modernising the Court or the objective of

[472] "Greening Justice Creating and Improving Environmental Courts And Tribunals" George (Rock) Pring & Catherine (Kitty) Pring". Available at: https://www.eufje.org/images/DocDivers/Rapport%20Pring.pdf The Access Initiative (Last accessed 20 January 2021).
[473] Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and Search for Legitimacy*, p.26 (Hart 2020).
[474] G Pring and C Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*, p.110, (World Resources Institute, 2009).
[475] Brian J. Preston, Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study, 29 Pace Envtl. L. Rev. 396 (2012).
[476] Paul.L.Stein, "Specialist Environmental Courts: The Land and Environment Court of New South Wales, Australia ", Environmental Law Review, 4, (2002).

introducing a new administrative style were aimed at achieving environmental justice or IEJ. The recent progress in environmental jurisprudence from NSWLEC discussed later in the chapter emerges as an antidote to institutional limits that may be experienced in the regular courts. This suggests that institutional innovation may allow for more creative or innovative approaches to achieving IEJ even where the original purpose of that innovation was something quite different. We might suggest that the carving out of a focus on *the environment* in particular makes possible a creative approach to IEJ.

C. Three Limits—Practice

These three limits – definitional, constitutional, and institutional – all apply to the three jurisdictions considered, but to different degrees. First part of this section deals with the limits —in the course of trial and the second part examines the limits manifest in the outcomes of adjudication. While several factors, such as the absence of specific legislation enabling certain judicial remedies, limit the range of outcomes available in a litigation, such constraints are not relevant to the adjudicatory process. The sheer volume of laws, rules, actors, and issues at hand facilitate judicial re-imagination of participation-distribution-recognition radically, and as expansively as required in Indigenous environmental litigation. Effectively, IEJ involves breaching theoretical limits and creating newer spaces for contestation and resolution of Indigenous sovereignty through adjudicative practices. Here, contestation does not merely mean strategic ways of presenting cases to achieve the best possible outcome but also means creating an adjudicatory space responsive to numerous injustices, historical or contemporary. Admittedly, one may question if this is the responsibility of the judiciary at all. Notwithstanding such objections, the cases we have examined, and a wealth of critical legal theory have already made it plain that the adjudicatory processes are a combination of existing legal mechanisms and aspirational interpretative mechanisms.

Principles and Possibilities

The diversity of environmental principles in domestic and international law has attracted significant scholarly analysis. Eloise Scotford's commentary on the evolution of environmental law captures the sheer range of judicial interpretations that have endowed 'principles' in environmental law with flesh and soul. While some of these judicial acts of endowment are specific to the legal culture in which environmental cases are contested, others arise from

attempts to find norms outside of the law to test and develop environmental principles.[477] Scotford's reference to 'concealed references' is illuminating:

> Legally, environmental principles fall within a 'category of concealed multiple reference',[478] so that something more is required to determine their precise legal meaning and application. That 'something more' is increasingly discernible in different legal systems as environmental principles develop more identifiable legal roles.[479]

IEJ shares similarities with the above articulation of 'concealed references' in that, it requires *something more* from the courts in their interpretation and the application of the principle in the broader adjudicative processes. Whilst as a principle, IEJ may have an independent standing and meanings, its application to specific circumstances requires courts to overcome the limits or utilise the openness discussed in the previous sections. The additional information/contexts for the courts may include being aware of the colonial history of Indigenous peoples and its impact on the current environment, the awareness of the settler legal canon's roots in colonialism and its exclusion of other voices and knowledge forms etc.

Much effort in adjudicatory processes goes into determining the legal character of environmental principles.[480] This delicate process of determining the legal character of principles is informed by a range of factors, including the nature of the audience to which such principles are presented, their implications, and the way the existing structures and limitations of law allow the principles to develop. More importantly, in the application of IEJ, courts must engage with Indigenous sovereignty and also be willing to understand why Indigenous people must challenge the existing order of power and knowledge forms within settler institutions. Here, the courts are also addressing what is known as 'epistemic injustices' (p.34), where certain knowledge forms are disregarded, undermined and erased to the detriment of social and political justice.[481] Consequently, much of the *legal character of the principles* will emerge from the socio-political contexts of those principles and claims. These interpretative efforts indicate the difficulty in the application of IEJ as it is and why, in some instances, it is

[477] Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing, 2017).
[478] Julius Stone, *Legal System and Lawyers' Reasonings* (Stanford University Press 1964) 246.
[479] Scotford n (477) at p.6.
[480] Scotford n (477) at p.27.
[481] Ian James Kidd, José Medina and Gaile M. Pohlhaus, *The Routledge handbook of epistemic injustice* (Routledge handbooks in philosophy, Routledge, Taylor & Francis Group 2017).

worthwhile interpreting the elements of IEJ into existing laws instead of a straightforward application.

C1. Limits At The Threshold—Lessons from Climate Litigation

In the discussion on institutional limits, we have dealt with arguments why carving out an environmental focus might be a beneficial exercise for outcomes in Indigenous claims (p.140). Here, there are clear evidence as to the overlaps between issues and principles in Indigenous environmental litigation and climate litigation in a way that benefits IEJ.

In the special courts of Australia, the two kinds of litigation have been enmeshed. Most of the instances where IEJ is applied as a principle are those where claims have been made against extractive industries on the grounds of adverse climate impacts. Notably, none of the climate change cases was pursued by the Indigenous communities themselves although their claims received the attention they deserved within the litigation. For instance, *Gloucester Resources Ltd v Minister for Planning*[482] is notable for the depth and seriousness with which the Court engaged with the question of the tangible and intangible effects open cut coal mines. Justice Preston is a prominent voice in *Gloucester Resources* and *Bulga Mibrodale Progress Association v Minister for Planning and Warkworth Mining*[483], which preceded *Gloucester Resources*, in guiding the course of adjudication. Justice Preston's willingness to open up the spaces of adjudication to address marginalised concerns and expand the participation of relevant voices militates against interpretative limits. In a seemingly dyed-in-the-wool legal system and with archaic laws, the NSW Land and Environment Court's progressive jurisprudence stands out despite a single judge seemingly leading the transformative efforts. In subsequent cases of similar nature, the other benches of the NSWLEC have also demonstrated keenness to engage with difficult environmental policy questions. Even though the latter instances are confined to climate change cases, the question of 'what is a legal fact' (Bylong Coal Mine and its direct impact on climate change)[484]; the question of whether permission for

[482] [2019] NSWLEC 7.
[483] [2013] NSWLEC 48. The case dealt with the similar issue of a permit for the opening of a new coal mine and raised similar concerns as *Gloucester* regarding social, visual and environmental impact. However, *Bulga Mibrodale* did not deal with the Indigneous claims. Neither did it raise any explicit issues regarding Indigenous peoples.
[484] KEPCO Bylong Australia Pty Ltd v Independent Planning Commission (No 2) [2020] NSWLEC 179.

new coal mines stand the test of compatibility under the Human Rights Act;[485] and the question of how far courts should stretch the limits of expert evidence (impact of greenhouse gas emissions in bush fire litigation – 'Bushfire Survivors Case')[486] have now entered the adjudicatory spaces.

Canadian Indigenous rights jurisprudence demonstrate a pronounced effect of constitutional limits (p.138). 'Indigenous rights' here tend to remain as they were defined by a series of cases from *Calder v British Columbia* to *Tsilhqot'in Nation v. British Columbia.*[487] *Delgamuukw v British Columbia*[488] was the first judgment to have considered the Aboriginal oral traditions and histories as admissible and vital evidence in determining Aboriginal title and rights. The institutional willingness to accommodate or platform different kinds of environmental challenges, especially those led by Indigenous peoples, is also sparse. There are no platforms in Canada that are equivalent to the NSWLEC[489] or the special benches of STJ or STF in Brazil. This vacuum is highlighted by one of the recent climate change cases brought by First Nations that was dismissed despite the magnitude of the issue at hand.

In *Dini Ze' Lho'imggin et al. v. Her Majesty the Queen*('Dini'),[490] the two houses of the Wet'suwet'en First Nations filed a legal challenge in the Federal Court alleging that the Canadian government's approach to climate change violated the constitutional and human rights of Wet'suwet'en peoples. The *Dini* climate litigation threw light on the extent to which the Federal Court was inclined to understand the interrelation between climate change and Indigenous rights. The petitioners alleged that Canada's failure to honour its international commitments to reduce greenhouse gases under several international agreements, including the 1998 Kyoto Protocol and the 2015 Paris Agreement, made it impossible to meet the target of keeping the global warming at 1.5 degrees. Consequently, it was argued, the plaintiffs suffered adverse effects on health and the environment in their traditional territories.

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[485] Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors, [2020] QLC 33. The case has been brought before the Queensland Land Court.
[486] Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority [2021] NSWLEC 92.
[487] Calder v British Columbia (AG) [1973] SCR 313; Tsilhqot'in Nation v. British Columbia, 2014 SCC 44.
[488] [1997] 3 SCR 1010.
[489] The Environment and Land Tribunal, Ontario combines the five tribunal that deal with Land planning, environment and heritage and mining. But the function largely remains quasi-judicial.
[490] 2020 FC 1059.

Further, it was also contended that the disproportionate effects of climate change aggravated the existing structural racism suffered by Indigenous people in Canada. The plaintiffs claimed that Canada was in breach of its duties under section 91 of the Constitution (regarding the duty to make laws for the peace, order and good government of Canada); section 7 of the Charter of Rights and Freedoms (right to life, liberty and security of person); and section 15(1) of the Charter of Rights and Freedoms (equality before the law).

The Federal Court dismissed the challenge on the grounds that the case was not justiciable and that the petitioners did not have a reasonable cause of action. The Court's reasoning in dismissing the petition did not effectively engage with any of the claims made in the petition. Surprisingly, there was little reference to First Nations or their contentions. The Court also repeatedly tried to distance itself from the issue of climate change, stating that "[t]he issues of climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government".[491] The Court also found that there was no breach of specific laws that gave rise to plaintiffs' grievances and no specific remedy that would warrant judicial supervision.

Climate change litigation across the world has experienced difficulties in establishing causation, amongst other issues, and is still shaping itself into robust forms of litigation.[492] While the plaintiffs in *Dini* pursued arguments similar to those found in most climate change litigation elsewhere, including those in *Gloucester Resources*, the Canadian Federal Court failed to attend to the novelty of the claims made.[493] The petitioners' arguments in *Dini* elaborately stated the impact of climate change on the hunting, fishing, and cultural rights of the First Nations. They also emphasised how kinship-based relationships with the environment distinguish the communities from how they experience the ramifications of climate change.[494] Nevertheless, the Federal Court in its dismissal appeared impervious to both the nature of the claims and the litigants. Even though the specificity of claims is important for climate litigation, the courts before which such novel claims have been made must recognise that there have been no laws that may address similar situations. Likewise, there could be no effective remedies that

[491] Dini n (490), para 77.
[492] Louis Kotzé, "Neubauer Et Al. versus Germany: Planetary Climate Litigation for the Anthropocene?" 22 German Law Journal 1423, (2021).
[493] Dini n (490), para 33-50.
[494] Para 79-80, Docket No: T-211-20 Petition available at: https://climate-laws.org/geographies/canada/litigation_cases/lho-imggin-et-al-v-her-majesty-the-queen

the claimants might claim in such cases. Interpretative limits combined with absence of relevant laws hinder the application of IEJ. The recognition of First Nations' concerns would also be a question of moral necessity, which would engage with the limitations of settler colonial laws and jurisprudence within settler colonial juridical spaces. In *Dini*, Justice McVeigh approvingly quotes the idea of 'justiciability' of claims from Justice Rowe's dissenting opinion:

> By way of example, the courts may not have the legitimacy to assist in resolving a dispute about the greatest hockey player of all time, about a bridge player who is left out of his regular weekly game night, or about a cousin who thinks she should have been invited to a wedding.[495]

While distancing itself from the realm of policy where courts cannot venture, the judgment ignores the possibility that Indigenous claims have never been 'justiciable' within contemporary settler legal spaces. As is often observed by Indigenous scholars, structural inequities and the lack of legal vocabulary to express Indigenous claims (p.33) adversely affect First Nation engagement with the settler courts.[496] The judge equating concerns about losing indigeneity and ways of life with the casual social exclusion that is legally inactionable highlights a small instance from a wide range of hostilities experienced by Indigenous people in courts. Another striking instance of the exclusion of Indigenous voices is manifest in how the submission of the Canadian government contesting the Indigenous claims is privileged throughout the judgment.[497] However prominent the existing Treaties may be, they leave the courts with an impression that every Indigenous concern should be addressed through legislative or executive action. Some problems are exclusively left to the courts and must be resolved through adjudication as these fall into the realm of 'rule formulation' (p.142). These problems indicate forms of epistemic erasure and non-accommodation of Indigenous voice and are categorically matters of legal reform by making way for moral principle of IEJ (p.49). As is consistently argued in this thesis, epistemic erasure (p.34) may only be brought to light when the courts are consciously engaging with the colonial and capitalist structures of settler legality. In these cases, jurisprudence must look within for a solution.

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[495] Highwood Congregation of Jehovah's Witnesses, 2016 ABCA 255 at paras 82-84.
[496] Cruikshank, Julie "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw v. BC*." *BC Studies*, Special Issue No. 95:25-42 (1992).
[497] Dini n (490), para 54 - 60.

At about the same time as the *Dini* litigation, *Ecology Action, et al v. Minister of Environment and Climate Change* ('Ecology Action')[498] pursued by a non-Indigenous climate group had a more promising outcome. In *Ecology Action*, the claim alleged a failure to properly assess the risks of exploratory drilling for oil and gas off Newfoundland and Labrador's coast. These regions are also significantly populated by First Nations. The petitioners contended that an increase in offshore oil and gas exploration threatens Canada's commitment to reach net-zero emissions by 2050. The Federal Court in Ottawa denied the Canadian government's motion to dismiss and the case is awaiting a full decision. The overlaps between *Dini* and *Ecology Action* are significant. However, the contrasting decisions suggest that the courts favour specificity of issues and familiarity with language and framing, thereby illustrating definitional and constitutional limits in action.

In *Dini,* despite the promising overhaul of Indigenous rights, the Court's openness to issues that cannot be articulated in settler legal vocabulary appears absent. The injunction applications against logging and extractive industries and developmental projects in Canada, discussed in Chapter 2, have illustrated the failure of the courts in perceiving the urgency of Indigenous concerns (p.88). Although one encounters such failures in Australian environmental jurisprudence, the recent decisions are markedly distinct from those of Canada. Some of the extra curial opinions also reveal the judicial attitude towards the new category of cases,[499] something that is absent in Canadian contexts where courts function largely within the definitional, constitutional and institutional limits.[500] The Canadian Constitution, which has been hailed as the 'living tree',[501] has not enjoyed much growth in expanding the settler nation's legal integrity (p.187) or deepening the roots of Indigenous rights.

Brazil has only recently witnessed its first major case of climate change litigation in the Supreme Court. Broadly, most of Brazil's climate cases were initiated between 2019 and 2020. The climate case popularly known as Case ADPF 708 ('Climate Fund case'), was concerning

[498] 2020 FC 663.
[499] Michael Pelly, "Top judge urges lawyers to take stand on climate change", *Financial Review.* Available at: https://www.afr.com/policy/energy-and-climate/top-judge-urges-lawyers-to-take-stand-on-climate-change-20210115-p56uhc (Last accessed 28 January 2021).
[500] Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "The Civilisation of Difference", https://www.scc-csc.ca/judges-juges/spe-dis/bm-2003-03-07-eng.aspx (Last accessed: 28 January 2021).
[501] Edwards v. Attorney-General for Canada, [1930] A.C. 124 (P.C.) at 136; See also: The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada (Montreal & Kingston: McGill-Queen's University Press, 2002).

Brazil's Climate Fund, which was the National Climate Policy Plan's financial instrument. Earlier in 2020, a collective of political parties in Brazil challenged the Federal government for failing to implement climate mitigation and adaptation policies. The petition alleged that the inaction towards climate mitigation and adaptation policies violated Brazil's constitutional and international obligations.

In September 2020, the Brazilian Supreme Court (STF) held the country's first public hearing on climate change.[502] For the first time, a climate litigation case had reached Brazil's highest court, marking a historic moment for its legal system. A broad range of members from civil society, government, and the business sector participated in the hearing. This diversity in participation enabled a wide range of perspectives on the current legal, environmental, social, scientific, and economic state of climate policy in Brazil to be a part of the adjudicatory process. The Court inquired about a range of challenges to the actions and omissions from the Brazilian government concerning climate change, especially those related to the Climate Fund's financial resources. The plaintiffs sought relief on more technical grounds and economised on the arguments for environmental justice. The original claim was to compel the government to reactivate the climate fund so as to fulfil its international obligations. The government argued that there was no constitutional obligation for creating or using such funds. Further, it also argued that the court's interference would violate the separation of powers and infringe on the realm of policy-making, which was uncalled for within the remit of the Supreme Court.[503]

The STF undertook an unprecedented public hearing exercise spanning over two days.[504] The Court heard testimonies from various actors, including climate scientists, environmentalists, Indigenous peoples, representatives from the agribusiness and financial sectors, non-governmental organisations, economists, climate researchers, legislators, federal representatives and state governments. The STF did not presume there were any limits on either its powers or matters that could be entertained in climate litigation. The presiding Judge,

[502] Astrid Bernal, "ADPF708 / Climate Fund. What to expect from Brazil's first public hearing on climate policy?". Available at: https://gnhre.org/2020/09/22/adpf708-climate-fund-what-to-expect-from-brazils-first-public-hearing-on-climate-policy/ (Last accessed: 25 January 2021).
[503] Joana Setzer, "First Climate Case Reaches Brazil's Supreme Court", (September 2020). Available at: https://www.lse.ac.uk/granthaminstitute/news/first-climate-case-reaches-brazils-supreme-court/ (Last accessed: 25. January 2021).
[504] Recordings of the public hearing are available here: https://www.youtube.com/c/STF_oficial/videos (Last accessed: 25. January 2021)

Minister Barroso, called the public hearing a 'plural conversation' and stated that climate issues were not confined to legal or policy domain.[505] Rather, they were to be treated as an interdisciplinary concern affecting a range of stakeholders, some more disproportionately than others. While the final decision is pending, other challenges of a similar nature have followed the climate litigation close at heels. In November, Partido Socialista Brasileiro (PBS) and a group of political parties brought a challenge against the Federal Government of Brazil on the grounds that the non-implementation of the national deforestation policy had contributed to climate change and hence violated fundamental constitutional rights of the citizens.[506] This petition primarily focused on the adverse impacts of unregulated deforestation on the rights of Indigenous people, especially on their survival and cultural integrity. The petition also gave an extensive account of how deforestation, expansion of logging industries, and destruction caused by extractive activities such as gold mining, had destroyed Indigenous cultural knowledge and ways of life. Further, the petition also emphasised intergenerational inequity and the injustice that follows deforestation, with a particular focus on the loss of indigeneity.[507] The challenge has been allowed and like the climate fund case, awaits full judgment.

The recent spate of climate change cases and the receptivity of courts in Brazil to broader claims, which have no precedent in legislation or jurisprudence, allude to the responsiveness of the juridical spaces. Effectively, the courts are breaching the constitutional and definitional limits by their novel approaches in climate litigation. Brazilian courts have dealt with Indigenous constitutional recognition since 1989, and the robust environmental laws of Brazil pre-date even the Constitution. However, as stated earlier, Indigenous rights and environmental rights continue to maintain artificial distinction in legislations (p.138). In the past few years, an alarming rise in the deforestation rates within the Amazon Basin[508] and the incessant strain on environmental law enforcement due to land speculators, cattle ranchers, and *garimpeiros* (artisanal gold miners) appears to have communicated a sense of urgency to remedy such (constitutional) limits within adjudication. The complete absence of consolidated radical jurisprudence and the faulty, ineffective environmental decision making processes

[505] Bernal n (502).
[506] PSB et al v Brazil (Deforestation case 2020). Available at: http://climatecasechart.com/non-us-case/brazilian-socialist-party-and-others-v-brazil/ (Last accessed: 25. January 2021)
[507] Full petition: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201111_12697_application-1.pdf
[508] Jonathan Watts, "Amazon Deforestation at a Highest Level in a decade" *Guardian*. Available at: https://www.theguardian.com/environment/2019/nov/18/amazon-deforestation-at-highest-level-in-a-decade (Last accessed: Last accessed: 25. January 2021).

starkly contrasts with the recent approach of the STF, which demands 'plural conversation'. In response, the efforts of Indigenous social and environmental movements have also intensified, and their collective voice has dominated popular consciousness.[509] The presence of Indigenous claimants in nearly all of the climate fund, Amazon fund and deforestation cases has propelled the Indigenous voice into structures that have been neither strictly inclusive nor exclusive until now. We may see some instances where these transformations create opportunities to overcome the three limits.

C2. Limits of the Adjudication Processes

As the previous chapters have shown, the development of legal narratives about what a court can or cannot do (or should do) impacts adjudicatory processes. There is a more expansive understanding of what a specialist court can do as opposed to a regular court (p.140). As a good example, Australian specialist courts willingly embody Indigenous voices while patterns of it in higher courts, such as the Federal Court, are relatively oblique. Nonetheless, the transformations are ongoing, and some of the recent cases suggest that the courts have been largely responsive to the social and political movements generated outside of the courts. The Federal Court decisions to grant an injunction against the Djab Wurrung heritage trees are instructive in this respect.

Background

In October 2020, the Victorian State government chopped down the culturally significant 'Directions tree' as a part of the controversial Western Highway upgrade project. The magnificent yellow box tree situated in Western Victoria held immense cultural and spiritual significance to the Djab Wurrung people and was estimated to be 350 years old.[510] The Djab Wurrung Heritage Embassy was established in 2018 to fight for protecting the heritage area. More specifically, the protection was aimed at the culturally significant 'birthing trees' that

[509] "Bolsonaro has been the worst for us" *Guardian* https://www.theguardian.com/world/2020/jan/02/amazonian-chief-raoni-metuktire-bolsonaro-has-been-the-worst-for-us (Last accessed: 23 January 2021); "Jair Bolsonaro could face charges in The Hague over Amazon rainforest", *Guardian* https://www.theguardian.com/world/2021/jan/23/jair-bolsonaro-could-face-charges-in-the-hague-over-amazon-rainforest?CMP=twt_a-world_b-gdnworld (Last accessed: 23 January 2021).

[510] Calla Wahlquist, "Djab Wurrung trees: destruction on hold as Victorian supreme court agrees to hear case" *Guardian.* Available at: https://www.theguardian.com/australia-news/2020/oct/28/djab-wurrung-trees-destruction-on-hold-as-victorian-supreme-court-agrees-to-hear-case (Last accessed: 26 January 2021). See also: This case was discussed in my earlier publication— Sakshi "The Many Entanglements of Capitalism, Colonialism, and Indigenous Environmental Justice", *Soundings*, (78), 64-80, 2021.

came under threat from the ambitious Western Highway construction project. The successful project would have resulted in the removal of about 3,000 trees. The state government had defended the project arguing that the initiative would reduce travel time and improve safety along the stretch of road.[511] There was no unanimous Indigenous voice approving of or dissenting from the project. The registered Aboriginal party, which had the authority to speak for the traditional owners, had initially approved the project. Subsequently, the Eastern Maar Aboriginal Corporation and the Djab Wurrung Heritage Embassy negotiated to save 16 more trees of cultural importance.[512]

The Djab Wurrung Heritage Embassy applied for the Commonwealth protection for the trees affected by the Highway project under the Aboriginal and Torres Strait Islanders Heritage Protection Act (ATSIHP). Eventually, the Commonwealth government rejected the application. However, the Federal Court in *Clark v Minister for the Environment* (Clark)[513] set aside the Minister's decision not to make a declaration under s.10 and 12 of ATSIHP protecting the birthing trees based on a legal error in the ministerial assessment. The Court had demanded the Minister reconsider her decision in light of the wider interpretation of the ATSIHP Act, which included considering evidence affecting not merely individual trees but the cumulative impact on the heritage area.[514] It is ironic that the Court, which usually does not look beyond procedural limits, was willing to read the ATSIHP Act expansively. The Federal Court also recognised that the law aims to protect more than fragments of heritage, especially when the land is central to the idea of indigeneity.[515]

However, the Minister refused protection for the second time and approved the project. The tortuous history of the negotiation finally culminated in the destruction of the Directions tree despite vocal opposition from the community. Soon after, an emergency injunction application was made to protect a few other trees under threat, and another review application was made to the Federal Court. Meanwhile, Australia had witnessed catastrophic Aboriginal heritage destruction in May, when the mining giant Rio Tinto destroyed the Juukan Gorge caves to

[511] "Supreme Court grants Djab Wurrung sacred tree injunction on Western Highway project". Available at: https://www.abc.net.au/news/2020-12-03/supreme-court-orders-djab-wurrung-injunction-until-trial/12899028 (Last accessed: 26 January 2021).
[512] Sherryn Groch, "What do these sacred trees tell us about Aboriginal heritage in Australia?" *The Sydney Morning Herald*. Available at: https://www.smh.com.au/national/what-do-these-sacred-trees-tell-us-about-aboriginal-heritage-in-australia-20201030-p56a0g.html (Last accessed: 26. January 2021).
[513] [2019] FCA 2027
[514] Clark, n (513).
[515] Clark, n (513), para 147-148.

expand its extractive operations. The Western Australian Heritage Act came under scrutiny, and soon the draft amendment process was set in motion.[516] Criticism against Rio Tinto's actions was followed by legal scholars and jurists criticising the heritage law's archaic nature and maintaining that the action was not merely an unfortunate event but symptomatic of the deep settler colonial violence and erasure etched in law.[517] In the review application in *Onus v Minister for the Environment* ('*Onus*'),[518] the Federal Court considered the application by the two traditional owners of Djab Wurrung Country, seeking judicial review of the decision in which the Minister had declined to make declarations under either s.10 or s.12 of the ATSIHP Act. The Federal Court decision appeared to take into account the time and context in which the particular litigation was carried out.

Outcomes in *Clark* and *Onus*

Earlier, in *Clark,* the Heritage Embassy had challenged the previous ministerial decisions refusing to grant declarations under s.10 and 12 of ATSIHP. Justice Robertson set aside the Minister's decision, concluding that the Minister had adopted an oversimplified view of the statutory definitions and concepts of 'Aboriginal tradition' and 'injury or desecration'. The Court found the Minister's decision was not properly informed by the existing Aboriginal traditions, observances, customs, and beliefs. The sole reliance on the state agency's plans to develop the project was found to be disproportionate and unjust. The agency's commitment to not destroy the trees did not answer the broader question of whether the works and highway alignment posed a threat of injury or desecration to the sacred landscape or five of the six trees that were sought to be protected.

Justice Griffiths in *Onus* treated the matter with the same carefulness as Robertson J. The judicial attentiveness in the matter is striking, especially because of the number of times the Court dealt with the issue of Djab Wurrung. Griffiths J referred to various sources, including the second reading of the AITSHIP Act where the parliamentary debates suggested that the Act's objective was to enrich the heritage of all Australians and not merely to 'museumise'

[516] "Review of the Aboriginal Heritage Act 1972". Available at: https://www.dplh.wa.gov.au/aha-review (Last accessed: 26 January 2021).
[517] Dan tout, "Juukan Gorge Destruction: Extractivism And the Australian Settler-Colonial Imagination", *Arena Quarterly No.4,* (December 2020); Jon Altman, "The Native Title Act Supports Mineral Extraction And Heritage Destruction". Available at: https://arena.org.au/the-native-title-act-supports-mineral-extraction-and-heritage-destruction/(Last accessed: 24 January 2021).
[518] [2020] FCA 1807.

Indigenous heritage. In one of his observations, Griffiths J quoted Hon J H Wootten AC QC in Junction Waterhole Report approvingly[519]:

> The issue should not be whether, judged by the norms and values of our secular culture or our religions, the sites are important, but whether they are important to Aboriginals in terms of the norms and values of their traditional culture and beliefs. In other words, the issue is not whether we can understand and share the Aboriginal beliefs but whether, knowing they are genuinely held, we can therefore respect them.[520]

By making the ability or inability to appreciate Indigenous beliefs irrelevant to the merit of Indigenous spiritual and cultural beliefs, Griffiths J signalled a radically different approach to heritage cases. The judgment reiterated some of the Indigenous testimonies concerning the significance of the trees and the Black Cockatoo Dreaming. It also reasserted that the significance of the trees was not limited to their physical use but included the belief that the trees held their ancestral spirit.[521]

The novelty of *Onus* is in the fact that Griffiths J continued to depart from *Tickner v Bropho,* which even the Dolly Talbott litigation failed to resist (p.115). Griffiths J emphasised that Aboriginal heritage is not something that can be sacrificed for the benefit of economic considerations. The judgment provided an analogy to explain how the contentions of the Djab Wurrung are now relevant to all of Australia:

> As the Court pointed out during the hearing, it may not be an easy task for non-Indigenous people to appreciate the complexity and subtleties of "Aboriginal tradition" as defined in the Act. A broad analogy which highlights the significance of the metaphysical character of cultural heritage is the importance attached by many Australians to the battlegrounds at Gallipoli. It is well to recall the public outcry in Australia in 2005 when Turkish authorities announced that they would widen parts of the coastal road at Anzac Cove and build two carparks there. It is also important not to lose sight of the fact that the purpose of the Act is not merely

[519] Junction Waterhole Report to the Minister (1992) p.68-69
[520] Onus, n (518) para 105.
[521] Onus, n (518) para 115.

> to preserve and protect significant Aboriginal areas and objects so as to enrich Aboriginal heritage – the purpose goes much further and seeks to enrich the heritage of all Australians.[522]

In light of the increasing incidents of desecration and environmental harms, the decision appears to be responding to the call to amplify Indigenous voice in all forums thereby breaching constitutional limits. Griffiths J expanded the meaning of 'injury' to Aboriginal heritage by literally looking at the meaning of 'injury' and relying on the wider context of erasure and injustice suffered by the First Nations.[523] This particular decision suggests the means to overcome what Roger Cotterrell terms as the failure of self-referential understandings of law. The self-referential systems fail to "account for all legal developments, especially in contemporary conditions of rapid legal change, policy-driven law and transnational pressures on legal regulation".[524] Further, we may also recall what Scotford terms as concealed references to break away from Cotterrell's self-referential systems. Griffiths J integrated both these concepts and responded to the failure of the laws (archaic heritage laws), judicial interpretations disconnected with settler realities (Aboriginal heritage is vital and cannot be traded off for economic benefit of a larger Australia), and the apparent neutrality of courts that have been as destructive as wilful environmental and cultural harm.[525]

Since Canadian courts have been less proactive in engaging with Indigenous environmental struggles, fewer courts achieve what Australian courts have accomplished. These may even be partially attributed to institutional limits. Even though there are no 'striking' events like the Juukan Gorge destruction, the injustices within the settler colonial legal spaces have been cumulative. The latter can be scarcely distinguished from the former (p.55), particularly in the backdrop of the many Treaty violations committed with impunity and the slow judicial formulation of Indigenous rights. In 2020, Wet'suwet'en First Nations protested against the Coastal Gaslink Pipeline project proposed through Indigenous territories. Unfortunately, despite *Delgamuukw*[526], the recognition of a large number of Aboriginal title continues to

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[522] Onus, n (518) para 125.
[523] Onus, n (518) para 113.
[524] Roger Cotterrell, '*Is there a Logic of Legal Transplants?*' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2001) 80–81.
[525] Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and redemption : history, law and indigenous people* (University of New South Wales Press Ltd 2008)
[526] Delgamuukw v British Columbia, [1997] 3 SCR 1010.

happen through contestation and adjudication in settler terms. The wider reading in *Tsilhqot'in Nation v British Columbia*[527] about what constitutes Indigenous territory and how the First Nations can use it effectively, for both cultural and economic purposes, has not translated into reality.[528] Hence, Wet'suwet'en First Nations did not have an explicit agreement with the Crown recognising their title nor was it contested and established in any court. The pipeline proposal had encountered opposition from the Wet'suwet'en Nation even before it had acquired authorisation from the British Columbia Environmental Assessment Office. The protests at the pipeline site resulted in Coastal Gaslink seeking an injunction against the First Nation protestors. The British Columbia Supreme Court readily granted the injunction against the protesting First Nations, preventing them from entering the site and held that 'self-help remedies' should not be used for preventing extractive projects.[529] The Supreme Court did not concern itself with Aboriginal title, apart from repeating the phrase of 'self-help remedies' that appears in most injunction claims pursued by First Nations. The protest sites were heavily policed and subjected to violence, which made into the mainstream media as the 'Wet'suwet'en stand-off'.[530]

The year also witnessed Sipekne'katik and Mi'kmaq First Nations fishers being assaulted, and their traditional fishing practices and spots vandalised by non-Indigenous commercial fishers in Nova Scotia.[531] The slow development and recognition of Indigenous fishing rights are a telling instance of how courts have failed to adequately respond to the interconnectedness of land, environment and political economy in supporting indigeneity. While *R v Sparrow*[532] recognised Indigenous rights to fish if they could be proved as vital for cultural subsistence, *R v Van Der Peet*[533] was the first setback to fishing rights, denying the status of Indigenous rights if the fishing was carried out in order to sell the catch. *R v Marshall (No.1)*[534] recognised the right to fish as a right inherent within the Treaty rights, which allowed First Nations to make a

[527] Tsilhqot'in Nation v. British Columbia, 2014 SCC 44.
[528] Whatever little that has been earned has also been under threat from the industries, which have consistently tried to underplay the importance of Delgamuukw. See also: https://thenarwhal.ca/industry-government-pushed-to-abolish-aboriginal-title-at-issue-in-wetsuweten-stand-off-docs-reveal/
[529] Coastal GasLink Pipeline Ltd v Huson, 2019 BCSC 2264.
[530] "Wet'suwet'en RCMP standoff sparks national protests". Available at: https://www.cbc.ca/radio/frontburner/wet-suwet-en-rcmp-standoff-sparks-national-protests-1.5459164 (Last accessed: 28 January 2021).
[531] Lucia Fanning, "Mi'kmaq lobster fishery conflict reveals confusion over who makes the rules". Available at: https://thenarwhal.ca/canada-mikmaw-lobster-fishery-rights-rules/ (Last accessed: 30 January 2021).
[532] [1990] 1 SCR 1075.
[533] [1996] 2 SCR 507.
[534] [1999] 3 SCR 456.

livelihood out of fishing but not to sell fish for profit as other non-Indigenous people could do. It was not until *Ahousaht Indian Band, and Nation v. Canada (Attorney General)*[535] in 2018 that the Indigenous people won the right to fish on a commercial scale. This was possible only after demonstrating that these rights existed before colonisation and the arrival of the Europeans.

Reconciliation and the three limits

The rights affirmed through Treaties and litigation may now have been established in Canada. Nonetheless, these have come at huge cost and delay for the First Nations and leaves one wondering if they have breached any of the limits at all. Incidentally, Indigenous communities in both Australia and Canada appear to be working towards reconciliation with the settler states at the same time. The early constitutional recognition in Canada, which, had it been used well, would have mitigated most of the expensive Indigenous litigation. 'Reconciliation' in Canada is made out to be an already achieved concept. In *Delgamuukw,* the Chiefs of the Gitksan and Wet'suwet'en Nations presents the most powerful articulation of what a piece of evidence is in Indigenous cosmology:

> My power is carried in my House's histories, songs, dances and crests. It is recreated at the Feast when the histories are told, the songs and dances are performed, and the crests are displayed. With the wealth that comes from respectful use of the territory, the House feeds the name of the Chief in the Feast Hall. In this way, the law, the Chief, the territory, and the Feast become one.[536]

While McEachern CJ in 1991 did not find the testimony to be a 'legal fact' that could be verified, the subsequent acceptance of oral traditions has signified an important shift in legal history.[537] There is a marked gap between accepting Indigenous voices and appreciating them and granting them the value they deserve. As Cotterrell observes, if law embodies social knowledge, such embodiment reproduces the dominant epistemologies and structural inequalities that are intrinsic to them.[538] It is hard to find the Canadian equivalent

[535] 2018 BCSC 633.
[536] As quoted in *Aboriginal Rights and Title in Canada After Delgamuukw: Part One, Oral Traditions and Anthropological Evidence in the Courtroom,* Native Studies Review. 14(1):1-26 and *Part Two: Anthropological Perspectives on Rights, Tests, Infringement & Justification*, Native Studies Review. 14(2):1-42.
[537] Delgamuukw n (526).
[538] Roger Cotterrell, *The politics of jurisprudence : a critical introduction to legal philosophy* (Butterworths 1989).

of *Darkinjung*[539] or *Dempsey*[540] from the Federal Court of Australia discussed in Chapter 2 (p.70), where conscious decisions were made to 'listen to' Indigenous voice as expertise, as demanded by the gravity of the situation. Indigenous oral traditions also understand the role of listening and storytelling as vital to the process of justice as they provide an opportunity to communicate the importance of what is sacred and significant. Canadian courts have not yet accepted the role of a listener. Oral traditions can survive the pressure of being proved, verified, mediated and substantiated by western knowledge forms. As anthropologist Julie Cruickshank observes:

> The listener is part of the storytelling event too, and a good listener is expected to bring different life experiences to the story each time he or she hears it and to learn different things from it at each hearing. Rather than trying to spell out everything one needs to know, it compels the listener to think about ordinary experience in new ways. Storytelling is possibly the oldest and most valued of the arts and encompasses a kind of truth that goes beyond the restricted frameworks of positivism, empiricism, and "common sense".[541]

While there may have been a long lull after Australia's *Mabo*[542] decision in 1993, the changes in jurisprudence and judicial approach to Indigenous environmental question are remarkable, especially when we understand that newer approaches to Indigenous claims are being created within mainstream adjudication. In contrast, Canada remains strikingly impervious to any progress in Indigenous rights and self-determination discourse outside of the juridical spaces. The recognition of Indigenous rights continues to be established through an adversarial process, where First Nations are exhorted to prove the legitimacy of their claims before the courts repeatedly. There is little value in conceding that the Aboriginal rights have always existed and then compelling the First Nations to embark on an expensive, reductionist litigation process to prove their title or their connection to the land and environment. The fact that the nature of Indigenous litigation has not changed at all, but has grown to be more difficult since *Delgamuukw*, creates an additional hurdle for the recognition of IEJ.

<u>Overcoming the limits in law beyond adjudication</u>

[539] [2015] NSWLEC 1465.
[540] [2014] FCA 528.
[541] Cruikshank, n (496) at p. 32.
[542] Mabo v Queensland (No.2), [1992] HCA 23.

The way cases are conducted in Brazil is a subject that remains largely excluded from popular juridical discourses. The nature of exclusion also shows the exclusion of the epistemologies of the South from social, political and juridical imaginations. Boaventura Sousa Santos suggests that the Eurocentric traditions tend to provide 'weak answers' for the 'strong questions' facing our times.[543] Such a tendency often replicates itself in the legal literature, especially when the focus is on predominantly human rights-oriented cases. Again, Santos criticises formulating all understandings of the political struggle using the 'grammar of human rights', to the exclusion of non-Western world views and notions of resistance generated and articulated outside of human rights discourse.[544]

Familiarity with the Brazilian legal system is achieved partly through studying its engagement (or non-engagement) with the IACHR and understanding the country's continuous political turmoil that erodes hard-earned Indigenous rights. In majority of the cases, one witnesses all the three limits at play at the same time. However, there are two distinct lessons that stand out. First, what appear to be successful Indigenous rights cases have a completely contradictory effect on the ideas of IEJ (p.79). Such contradictions remain far from being theorised even when they appear useful to the understanding of domestic experiences in Brazil. Second, the focus on the outcomes of STJ, STF, and occasionally the cases that go through the IACHR means that the influence of social movements on legal processes remains excluded from the analysis. A closer examination of Brazilian judicial culture suggests that in the recent past, at least since 2016, there has been an epistemological turn in the law outside of adjudicative processes. The definitional and constitutional limits are being overcome with the specific objective of achieving IEJ. This turn has been more than a sheer academic exercise. These aim to involve and engage judges at all levels so that Indigenous litigation does not suffer from discriminatory outcomes.

The Brazilian National Judicial School for Formation and Development (ENFAM)[545] has designed new Indigenous training programs for judges of all ranks, including magistrates, across the States. The training begins with the acknowledgement that in spite of the recognition of 'the ancestral rights to land, culture, and sustainability under article 231 of the Constitution',

[543] Boaventura de Sousa Santos, *Epistemologies Of The South: Justice Against Epistemicide* (Paradigm Publishers 2014).
[544] Santos n (543) at p.42.
[545] Escola Nacional de Formação e Aperfeiçoamento de Magistrados.

Indigenous rights have come under severe strain because of widespread extractive activities.[546] These affect not only specific rights to land but also cultural existence and Indigenous knowledge. Interestingly, what is dubbed as a modest and ordinary training programme involves a sharp and straightforward transition into justice-oriented jurisprudence. A literal translation of the manual has the following segment:

> However, even though the judicial schools have been designed in order to carry out a transdisciplinary and multidisciplinary training, there is still a huge gap in the curriculum with respect to understanding the social realities and the needs of Indigenous peoples that are distinct from what is desirable to the modern society. Hence the need to ensure that all operators of the justice system are trained to act on the matter…so that the application of the law is compatible with the rules of this complex issue. These guidelines proposed by ENFAM are aimed to bring the judiciary closer to society.[547]

The first of these training sessions was held in 2016 in the State of Amazonas, followed by one in 2017 in the State of Roraima. In 2019, the State of Acre was chosen for the training session and the judges were taken on a physical visit to the Region of Vale do Juruá along the Amônia River. This part of the region is known to be one of the most biodiverse regions on the planet. It is also culturally and linguistically plural, with nearly 15 Indigenous communities living in the region.[548] The introduction to the session also elaborated on the history of social movements in the region led by Indigenous communities to demarcate their reserves and protect the forests and natural resources.[549] Historically, the 'Alliance of Peoples of the Forest' has brought together Indigenous communities and rubber planters in a collaboration to fight against increasing deforestation. The training materials emphasise the importance of Indigenous knowledge in environmental protection, forest management, and sustainability goals, even when Indigenous people are carrying on their traditional economic and livelihood activities. The crucial part of the training manual is the part where it requires the judges to understand the specific training as preparation for the "exchange and diffusion of knowledge in order to promote intercultural dialogue between Indigenous people and magistrates and other actors of

[546] ENFAMA "3 Curso Nacional – O Poder Judiciário e o Dereito Indigena", Aldeia Apiwtxa – Acre (2019).
[547] ENFAMA, n (546) at p.3.
[548] ENFAMA, n (546) at p.3.
[549] ENFAMA, n (546) at p.4.

the justice system".[550] This creation of two equal worlds between the law and the Indigenous belief systems has been without precedent, especially in a predominantly non-Indigenous scholarship. The manual continues to cover not only the relational but also the epistemological aspects, observing:

> Given the importance of the topic and the distinct character of Indigenous laws and claims, which requires knowledge from other disciplines, in addition to a purely legal approach, it is considered important to participate in the lives of other actors in the justice system. This process aims to encourage the magistrates to have dialogues with other knowledge forms, recognising them and their subjects, their legitimacy, with a positive impact on the realisation of Indigenous collective rights recognised by the 1988 Constitution. Training the judges to listen to the knowledge and ways of lives of the Indigenous people carefully will enable sensible construction of their judgments. It would also offer judges training in theoretical-empirical references that help to ground their decisions.[551]

While there is a temptation to dismiss this as a hollow, symbolic exercise, the recent victory of the Ashaninka tribe[552] against the logging industry through a reconciliatory settlement and the issuing of an apology indicates the immediate effects of epistemic shifts within judicial practices (p.125). The legal actors involved in Indigenous litigation may be diverse, but the opening up courts to interdisciplinary, even intercultural, influences has a profound signalling effect on the adjudicatory processes (p.177).

C3. Limits and Outcomes

Comparative law, especially the Indigenous environmental litigation studied here, lends itself to fragmented analysis through what Eloise Scotford calls 'interpretive communities'.[553] While Scotford's terminology deals with courts that shape the legal roles of environmental principles within particular domestic legal cultures, transnational legal cultures also emerge as communities within settler colonial structures. These communities may be termed interpretative and epistemic insofar as the courts and judges interact with changing conceptions

[550] ENFAMA, n (546) at p.4.
[551] ENFAMA, n (546) at p.5.
[552] Termo de Conciliação No.01/2020/CCAF/CGU/AGU-JRP-RCM.
[553] Scotford n (477) at p.11.

of social justice (p.42). As a consequence, broader notions of justice are shaped within and through courts. In Brazil, Indigenous peoples have fought for their rights mostly outside of the courts, through vigorous political and social movements spearheaded by the communities themselves, even though the Constitution provides fairly robust protection. In turn, the courts (legal actors, more broadly) are now responding with some forms of the principle of IEJ by voluntarily breaching the definitional and constitutional limits (and to some extent, institutional limits). Australia, which had to wait a long time before even the fundamental land rights and Native titles were realised, has opened up institutions and beginning to challenge constitutional limits. However, the overwhelming presence of the state power (definitional limit) has to some degree shaped the social movements in Australia, which have so far focussed more on Native title than on environmental issues. A more holistic conversation, which includes even the wider non-Indigenous public, has only emerged post 2017 with the introduction of the Uluru Statement from the Heart.[554]

Environmental principles are often determined through interpretative mechanisms and subjected to several knowledge production processes. Invariably, environmental principles and principles of IEJ will be framed by both facts (what the applicable law is) and values (the morality of the law, the morality of the institution, and the morality that is in flux and constantly influenced by the social transformations). Scotford's elucidation that "environmental principles are significant focal points for determining the nuanced evolution of environmental law within discrete legal systems, in terms of their own legal frameworks, doctrines and cultures, which can reflect changing environmental policy priorities to the extent that such priorities inform legal reasoning" applies even to the less articulated IEJ.[555]

While constitutional, institutional and definitional limits in the adjudicatory process may be overcome with relative ease, it is not so straightforward in judicial outcomes. In all three jurisdictions, the law as a structure is still embedded within the immutable positivist and colonial legal structures. Hence, challenging litigation's probable outcomes is not as simple as forging different approaches to adjudicatory processes. Courts tend to be limited by their power and jurisdiction while thinking of a suitable outcome that responds to Indigenous claims.

[554] Francis Markham & Will Sanders, "Support for a constitutionally enshrined First Nations Voice to Parliament: Evidence from opinion research since 2017", Working Paper no. 138/2020, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra (2020).
[555] Scotford, n (477) at p.4.

Chapter 3 has illustrated this limitation and the innovative ways in which courts have overcome these limitations to a certain extent (p.118).

A comparative lesson in litigation outcomes is less obvious for the very reason that radical change in judicial approach is often tempered by the existing laws that do not change at the same pace. In most cases, the progressiveness of the outcome depends on cumulative effects of judicial and legislative efforts responding to social and legal momentum. However, in cases that have been decided by the superior courts, favourable IEJ outcomes may be achieved as there are greater opportunities for creative breaching of definitional and constitutional limits. Due to the pre-existing constitutional vacuum, Australia (p.118; 107) has produced outcomes that are 'spectacular' both in terms of the number of decisions and the quality of jurisprudence. Brazil comes close in using strict environmental laws to empower a wide constituency of stakeholders, incidentally benefiting Indigenous communities. These are primarily manifest in injunctions granted against potentially harmful extractive industries or developmental activities (p.85). Despite the long period of inactivity between the creation of Constitution of 1988 and the growing environmental degradation and Indigenous dispossession of the recent years, the courts are more responsive to the pressures of the new environmental challenges. What bearing this will have on the outcomes of pending cases remains to be seen. Canada's slow response to adopting IEJ in the adjudicatory practice has also resulted in less 'spectacular' outcomes as well as engagement. The Constitution and the Treaties with the First Nations reiterate the limitations of the politics of recognition within liberal constitutions, as is often criticised by the Indigenous scholars. Nevertheless, the dissenting opinion in *Ktunaxa*[556] and a laboured compromise reached in *Snuneymuxw*[557] highlight particular instances where individual judges shoulder the efforts to articulate justice.

It is apt to remember at this point what Davi Kopenawa, a Yanomami shaman and representative for Yanomami Indians of Brazil, said about the process of narrative and listening:

> The forest is alive. The white people persist in destroying it. We are dying one after another, and so will they. In the end, all of the shamans will perish, and the sky will collapse. Before it is too late, the prophet adds, I want to talk to you about a time

[556] 2017 SCC 54.
[557] 2004 BCSC 205.

> long ago when the animal ancestors transformed. Thanks to my shaman elders, I learned how to call them. I see them, I share life with them, and I listen to them. You must hear me— time is short.[558]

The experiences from all three jurisdictions suggest that this 'listening' is a vital aspect of justice-oriented jurisprudence. Recognising and respecting Indigenous voices for what they are is the key element of IEJ. Such listening does not necessarily demand the courts to fully understand the complexities of Indigenous voices or narratives. The act of judicial *listening* is an opportunity for creating *legal narratives*. The innovative ways through which legal narratives may be created not only allows adoption of IEJ but also overcoming the three limits, which may otherwise create hurdles for importing IEJ into adjudication.

Marcelo Neves' 'transconstitutionalism' best sums up how and why courts must engage with and contribute to the legal articulations of IEJ. Neves argues that increasing "systemic complexity and social heterogeneity" in juridical spaces complicate the fundamental understanding of human rights and constitutionalisms within nation-states.[559] Moreover, specialisation of functions in bureaucratic, legislative, and judicial spheres ensures that there is no single centre for state power. The problems of social justice or governance will have to seek redress from more than one source, even if it means resorting to beliefs and knowledge systems outside of the law. Neves' idea of 'transversal rationalities' may be useful to the analysis here.[560] It is a term used to define insights from different knowledge systems and epistemologies as the bridge between legal systems and social systems. This bridge also binds and enables the operations of both law and other world systems. IEJ has similar foundations. Indigenous philosophies and knowledge forms have understood IEJ as a resilient value—the *something more* or values and principles outside of colonial laws that sustains life, indigeneity, and kinship. This uniqueness compels IEJ to have an affinity to gravitate towards law, and to also be a coherent principle that will transform the law and achieve useful results in Indigenous environmental litigation. Understanding Indigenous claims in itself leads to better outcomes in the long run, if not for immediate gratification through spectacular remedies. In Indigenous struggle for justice in courtrooms, the transversal rationality has the power not only to straddle different legal jurisdictions but also legal and cultural universes. It also functions as the key

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[558] Kopenawa, Davi, and Bruce Albert, *The Falling Sky: Words of a Yanomami Shaman*, (Harvard University Press 2013).
[559] Marcelo Neves, *Transconstitutionalism*, p.1-11, (Hart Publishing 2009).
[560] Neves, n (559) at p.25.

that can effectively breach definition, constitutional and institutional limits over a period of time.

D. Conclusion

This chapter has brought together the foundational differences and similarities in legal cultures across Australia, Brazil, and Canada, and has illustrated how these differences and similarities influence the adjudication of Indigenous environmental litigation. The chapter has also articulated how these differences may be categorised into limits expressed in adjudication processes. The comparative exercise has taken into account the structural and epistemic limits (or their absence thereof) to contextualise the outcomes within Indigenous environmental litigation and other emerging forms of litigation. This chapter has grouped judicial approaches and outcomes into three categories:

- First, judgments that have attempted to understand what justice is, or more specifically, the nature of IEJ, within existing laws and constitutional limits.
- Second, judgements that push the constitutional limits without disrupting the existing structures, working around how expansively constitutional morality can be stretched to accommodate present claims.
- Third, judgments that innovate while recognising the limitations of settler colonial legality.

The analysis here has understood the adjudicatory process as a whole, including contemporary developments on the socio-legal front, since judgments do not exist in isolation.

While the existing Native title laws or the Treaties in Australia and Canada have channelled Indigenous litigation in certain ways, Indigenous connection with the environment pre-dates settler laws. It is only now, in light of movements for Indigenous voice, that the nature of litigation is beginning to demonstrate a noticeable shift. The new social movements emphasise the need for constitutional recognition and signify how political and legal empowerment may provide an answer for the environmental crises of our times. The judiciary has been privy to this transformation. However, how much the courts are willing to respond is predicated on the internal perception of how ‘settled’ the Indigenous rights questions are within existing laws. Australia, which has barely had any help except from the post-*Mabo* land rights jurisprudence has started its efforts to address IEJ afresh and with more ‘spectacular’ results. Canadian jurisprudence presumes that the liberal recognition of Indigenous rights may have taken it on

the road to reconciliation as well. These forms of limits have resulted in outcomes with less potential to integrate IEJ into adjudication processes. Brazil sits between Australia and Canada, a middle ground achieved by the fact that continued structural racism and discrimination against Indigenous people, despite a seemingly robust constitutional recognition, has brought them to the brink of environmental destruction. Consequently, the overhaul of Brazilian environmental jurisprudence has just begun with promises of inclusivity on the horizon.

Irrespective of how different the legal cultures in these three jurisdictions are, the common thread that articulates IEJ is in listening and valuing Indigenous voice and philosophies throughout adjudication. The implications of such inclusivity to law and justice is manifest in how effectively the three limits on domestic legal cultures may be effectively overcome without compromising the legal integrity. However, the next chapter examines in detail what does IEJ and plurality of principles mean in the aftermath of definitional, constitutional and institutional openness and what implications do they have for future jurisprudence.

Chapter 5: Epistemic Communities, Plural Sovereignties, and Indigenous Environmental Justice

A. Introduction

The previous chapters have explored the case law of the courts in the three jurisdictions and drawn comparative conclusions into their respective engagement with and treatment of Indigenous environmental justice (IEJ). This chapter considers what these comparative conclusions tell us, more generally, about the role of courts and judicial processes in respect of IEJ and how this affects the integrity of the law. As this thesis has shown, multiple factors influence and determine how and the extent to which courts engage with or achieve IEJ. This chapter explains the consequences for the legal system as a whole in achieving, or otherwise, this engagement.

The first step is to think widely about IEJ as part of the legal system as a whole. While judicial processes are often conventional, the lessons of the previous chapters show that there are innovative possibilities which will allow our legal systems to more fully achieve justice for Indigenous communities. Four new decisions from the three jurisdictions are particularly important in exploring these possibilities and will be examined in this chapter. These judgments are indicative of proactive judicial engagement with existing settler laws that are not equipped to deal with the challenges posed by: Indigenous sovereignty (*Love and Thoms v Commonwealth of Australia*[561]); climate change (*Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment*[562]); customary rights (*R v Desautel*[563]), and novel pressures on Indigenous land (*Public Civil Action for demarcation of Piripkura Indigenous Land*[564]). Whilst these cases engage a mixture of environmental and non-environmental questions, they demonstrate the wider lessons which can be drawn from the comparative conclusions of this thesis, especially when combined with the conceptual framework in chapter one which argued that law can be conceived of as a narrative enterprise (p.35).

[561] [2020] HCA 3.
[562] [2021] FCA 560.
[563] 2021 SCC 177.
[564] PUBLIC CIVIL ACTION (65). Process: 0005409-02.2013.4.01.3600.

The chapter demonstrates this by considering four aspects. First, it uses the practical example of *Mabo* and *Love & Thomas* to demonstrate the concept of 'law as narrative' in practice. Second, it then shows that conceptualising and articulating justice remains one of the vital tasks of the courts. Judgments improve on the jurisprudence of their predecessors and contribute to the radical reformation of the settler legal systems. Third, it shows that expressions of IEJ are significant for the integrity of law and not only for IEJ itself. Such integrity can be enhanced by an open-minded attitude to Indigenous evidence, knowledge, and connections with the environment. Finally, it demonstrates that plurality in legal principles has the potential to assist in addressing the structural inequalities upon which settler legal systems are constructed and therefore in opening up avenues to achieving IEJ (and therefore, enhancing the integrity of the system). This chapter demonstrates this through reliance on the concept of law as narrative, through adjudication, courts (can) improve existing jurisprudence and contribute to the retelling of legal narratives that are often "unfinished and awaiting the next retelling".[565]

Section 1: Law as Narrative – Post-Mabo Radical Rights-Jurisprudence and Its Reflections in Love and Thoms

In chapter one, the concept of law as narrative was explained. However, the example of the Australian case law and dialogue post-Mabo demonstrates this in practice. The 1992 *Mabo v Queensland (No.2)*[566] ('*Mabo'*) judgment was a watershed moment in Australian legal history. Although the hallmark of the case was abolition of the doctrine of Terra Nullius, the judgment was sympathetic to the Indigenous relationships with the land and to the need for the law to be more accommodative of cultural differences. Through its legendary status, *Mabo* ranks among the first *legal narrative* of Indigenous rights in Australia. The substantial political overhaul of land rights that followed the *Mabo* decision may be attributed to the progressive jurisprudence of the Australian High Court.[567] Nevertheless, the judgment was itself a product of social momentum building up from the 1963 Yolngu people's Yirrkala bark petition up to the Wave Hill walk-off. The aforementioned social movements lasted for nine years and culminated

[565] Edward Chamberlin, "The Common Ground Around the Tower of Babel" in Hester Lessard et al (eds.) *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community,* p.125-17, (UBC Press 2011).
[566] (1992) 175 CLR 1.
[567] Jennifer Nielsen, "Breaking the Silence: The Importance of Constitutional Change" in Simon Young et al (eds.) *Constitutional Recognition of First Peoples in Australia,* p.2-29 (The Federation Press 2016).

in *The Aboriginal Land Rights (Northern Territory) Act 1976.*[568] *Eventually,* the enactment of the Native Title Act 1993 (Cth) empowered Indigenous communities to stake claim over their traditional land. Unfortunately, contrary to all expectations, the Australian legal narrative abruptly stopped and regressed to erratic judicial pronouncements regarding the remit of land rights or the interconnectedness of Indigenous cultural and environmental rights.[569] As demonstrated in Chapter 4 (p.138), this long interregnum in the legal retelling of Indigenous rights jurisprudence can be mostly attributed to constitutional limits. The absence of the constitutional recognition of Indigenous people has allowed little scope for articulating sovereignty claims or for realising the full potential of the decision in *Mabo*.

Despite the slow progress in Indigenous rights jurisprudence, the legacy of the plaintiff Eddie Mabo and the legal actors who participated in it has thrived. Remembering Eddie Mabo as the illuminating force in the struggle for Indigenous rights, and the solicitors and barristers who fought for the case at a great personal and professional cost over ten years, is a part of the institutional memory. For instance, Ron Castan and Bryan Keon-Cohen, who represented the Murray island plaintiffs throughout the litigation and solicitor Greg McIntyre, who was retained as a solicitor, shared their understanding of the scope and contents of Indigenous rights with the plaintiffs. The personal investment of the lawyers in the progress of the case and their later reflections have become part of the understanding of what *Mabo* jurisprudence means for the contemporary land rights struggle.[570] Barrister Keon-Cohen had observed that:

> through the mid-80's the Mason court was a reformist court, it was interested in stating overarching principles, and, if necessary, abandoning precedent to reflect both justice for the parties and the Australian community. We thought that we had a High Court that was interested in resolving this issue and that some of the judges were likely to be on our side. But, any more than that, you can never predict.[571]

In strategically taking the case to a seemingly progressive High Court led by Chief Justice Anthony Mason, the lawyers were not making strategic choices that are any different from those made in everyday litigation. Nevertheless, the despondency experienced by the team

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[568] Ambelin Kwaymullina, "Recognition, referendums and Relationships: Indigenous Worldviews, Constitutional Change, and the 'Spirit' of 1967" in Simon Young et al (eds.) *Constitutional Recognition of First Peoples in Australia,* p.29-47 (The Federation Press 2016).
[569] Kwaymullina n (568).
[570] Louis Martin, "Mabo - The Case The Made History: A Behind-The-Scenes Reflection", *Victorian Bar New,* No.152, (Spring 2012).
[571] Martin, n (570) at p.6.

during the trial wondering what the outcome was going to be, and the hopefulness they experienced when the court began to generously interpret Native title as an expression of community rights, is memorialised as parts of the legal narrative. Here, the narrative of jurisprudence is as much a personal story and a story of individual ideologies. Keon-Cohen's reflection on the senior barrister Ron Castan is revelatory.

> He enjoyed discussing and debating with the High Court judges. He would listen to a question and then always came up with an answer; whether it convinced the judges or not is another matter, but he delighted in advocacy on his feet. He always had a fine sense of what was a proper argument to put. He took the view that, however apparently devoid of authority or difficult an argument might be, if it had a proper basis in principle, and it advanced his client's interests, it should be put.[572]

Furthermore, the decision and its aftermath created several expectations about what an engaged juridical space might look like or how justice can be achieved through adjudication. More than settling the land question conclusively, *Mabo* was seen as a starting point for the reconciliation project. In the 2005 Mabo Oration, Noel Pearson sharply calls out the treatment of the decision even after twenty-three years.

> As to whether this country will seize the opportunity of *Mabo* will depend upon whether we are faithful to its substantive principles as well as its spirit. I have on previous occasions expressed the fear that the opportunity of *Mabo* was going to be squandered by the Australian people, and that too many of our political and judicial leaders just simply *know not what they do,* when they treat Eddie Mabo's achievement as simply a legal doctrine relating to real estate—rather than as the principles which effect a reconciliation of the original occupation and ownership of this continent and its islands by its Indigenous peoples and the assumption of sovereignty by the British Crown to which the Australian nation is successor.[573]

Later on, he contended that:

> The Australian courts fail to understand, at a fundamental level, that the law of native title is the law of reconciliation. This is not to say that all land and cultural

[572] Martin, n (570) at p.6.
[573] Noel Pearson, "2005 Mabo Oration: Peoples, Nations and Peace". Available at: https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0005/19598/2005-Mabo-Oration.pdf (Last accessed: 09 July 2021).

> justice could and would be delivered through the strict working out of native title—legislative and political measures were and still are necessary to account for dispossession—but *Mabo* established the overarching moral framework for such reconciliation.[574]

Such articulation of what appears to be a simple precedent speaks to the complexity of decisions and how they impact the judicial retelling of the political history of a nation. Questions around Indigenous self-determination, constitutional recognition, free and prior informed consent and Indigenous sovereignty complicates the foundational jurisprudence of *Mabo*. Before returning to environmental cases, it is useful to consider the case of *Love and Thoms v Commonwealth of Australia* (‘*Love and Thoms’*),[575] which was decided twenty-eight years after *Mabo*. *Love and Thoms* explicitly discussed citizenship and belongingness within a settler colonial nation. Different conceptions of sovereignty arising from both the majority and dissenting opinions in the judgment throw light on the contemporary anguish and obfuscations around Indigenous sovereignty in Australia.

In *Love and Thoms*, the plaintiffs were born outside of Australia (Mr Love in Papua New Guinea and Mr Thoms in New Zealand, respectively). The plaintiffs had lived in Australia for a substantial period and held valid visas subject to revocation if the person holding the visa was convicted of an offence for which a sentence of imprisonment is twelve months or more. The plaintiffs were convicted of certain offences and were now to be deported upon formal revocation of the visas. Mr Love and Mr Thoms never sought Australian citizenship even though they had one Australian parent by birth. Mr Love was a Kamilaroi man and was acknowledged as such by an Indigenous Elder of the Kamilaroi community. Mr Thoms identified as Gungarri and was accepted by members of the Gungarri people.[576] He also held the Native title for their land. The question before the High Court was whether the revocation of visa rendered the plaintiffs subject to the application of ‘aliens power’ under s 51(xix) of the *Constitution, i.e.* in their capacity as Aboriginal Australians. The exercise of aliens power under S.51 (xix) meant that the Aboriginal Australians would be treated on par with non-citizens or aliens. More than a legal question, this case examined the fundamental place of

[574] Pearson, n (573).
[575] [2020] HCA 3.
[576] Love and Thoms n (575), para 3.

Aboriginal and Torres Strait Islanders within settler society and the relationship between settler constitution and Indigenous sovereignty.[577]

The case is critical to understanding how judiciary's self-reflexive thinking can also co-exist alongside a 'panic' and contradictions about plural sovereignties. Chief Justice Kiefel, Justice Gageler, and Justice Keane wrote the dissenting opinions, drawing their ideas of citizenship and membership of the Commonwealth from colonial construction of citizenship and belongingness. The dissenting opinions reflect the tense friction between the idea of Indigenous sovereignty and its hostile reception in a courtroom. The majority opinions from Justice Bell, Justice Nettle, Justice Gordon, and Justice Edelman are relatively more progressive and open-minded even though they fall back on the settlement as a founding premise for the creation of Crown sovereignty. Each of the opinions considers *Mabo* as a foundational and emancipatory text of the settler state. *Mabo* constitutes the most important reference point in *Love and Thoms*, especially its recognition of indigeneity and connection to the land.

Kiefel CJ swiftly dealt with the settlement of Australia as uncontested and dismissed *Mabo* as not having the adequate philosophical basis to answer the 'constitutional questions' central to this case.[578] Such unsubstantiated claim is later contrasted by Gordon J's more considered claim as to citizenship being a constitutional question and not a statutory one and hence requiring fresh contemplation by the court.[579] Justice Gageler opined that the "Australian courts before and after *Mabo*, as well as in the reasoning in Mabo itself, have consistently rejected the existence of Aboriginal or Torres Strait Islander sovereignty".[580] Further, Gageler J added that "Aboriginal and Torres Strait Islander societies have never been treated constitutionally as 'distinct political societies' or as 'domestic dependent nations' the members of which have owed 'immediate allegiance to their several tribes' ".[581] The latter is contrasted with the recognition of Indian tribes in the Constitution of the United States. This part of the decision finds itself incapable of imagining Aboriginal and Torres Strait Islander identities outside of their incorporation into the dominion of the Crown through settlement. The last dissenting opinion is by Keane J, who stated that the "Aboriginal Australians do not enjoy a

[577] Eddie Synot, 'The Rightful Place of First Nations: *Love* & *Thoms*' on AUSPUBLAW (6 March 2020) https://auspublaw.org/2020/03/the-rightful-place-of-first-nations-love-thoms
[578] Love and Thoms n (575), para 45.
[579] Love and Thoms n (575), para 305.
[580] Love and Thoms n (575), para 102.
[581] Love and Thoms n (575), para 102.

constitutionally privileged political relationship with the Australian body politic".[582] Later, in his reflections on the remit of *Mabo,* Keane J further asserted that "political sovereignty is not an incident of native title".[583] The absence of enshrined Indigenous constitutional voice and the presence of structural racism provide some foundation for the claim that Aboriginal Australians do not have a privileged political relationship with the Australian body politic.

However, the whole array of dissenting opinions, where each one reflects on Indigenous sovereignty when it is not the question before the court, is disappointingly hostile. Gageler J mused on the plaintiffs' argument—that membership of a particular Indigenous community is a sufficient reason for not being subjected to alien powers—terming it as 'morally and emotionally engaging' but not 'legally sustainable'. In effect, Gageler J summed up a tradition of settler jurisprudence that is unwilling to reflect on its participation in sustaining the settler colonial injustices.

Majority opinion

While the majority decision is significantly different and positive in its treatment of Aboriginal and Torres Strait Islander sovereignty, there are no radical gestures from what would otherwise be considered a conservative court. However, the judges refer to the historical trail of cases that have emphasised unique Indigenous connections to land.[584] The majority opinions remain plain and simple, and at places, problematically deferential to the settler colonial project.[585] Despite these limitations, the opinions respect the Indigenous relations to land, re-examine the precedents that have previously dealt with Indigenous sovereignty in some form and reiterate indigeneity as essential for a nation-building enterprise. Bell J admitted that the position of the Aboriginal Australians is *sui generis*.[586] Recognising the uniqueness of Aboriginal Australians calls for a novelty of approach instead of organised resistance to the notion of Indigenous sovereignty. Like Gordon J's reasoning later in the decision, Bell J relied on *Mabo's* two-part rule for establishing someone as Aboriginal Australian and termed that Indigenous membership was a question of fact and not a constitutional question.[587] Hence, the person is Indigenous if recognised by biological descent and through mutual recognition by the community,

[582] Love and Thoms n (575), para 178.
[583] Love and Thoms n (575), para 199.
[584] Love and Thoms n (575), para 277.
[585] See: Nettle J's opinion. Love and Thoms n (575), para 266-270.
[586] Love and Thoms n (575) para 74.
[587] Love and Thoms n (575) para 295.

represented by its elders or those with similar authority. Amongst the majority opinions, Gordon J had a richer and more thoughtful engagement with the issue of Indigenous connection to land that overrides the liberal notion of citizenship. The following paragraph reflects the judge's attentive engagement with the idea of land and indigeneity, which, if employed effectively, could also be a means of recognising IEJ within juridical spaces.

> European settlement did not abolish traditional laws and customs, which establish and regulate the connection between Indigenous peoples and land and waters. Assertion of sovereignty did not sever that connection. Nor did the Federation, or any event after Federation, render Aboriginal Australian aliens. As later events confirmed, at Federation many Indigenous peoples retained their connection with land and water; they retained rights in respect of the land and water and they remained subject to obligations under traditional laws and customs with respect to the land and waters.[588]

Gordon J's opinion does not rely on *Mabo* or other precedents to make adverse claims about the status of Indigenous rights in Australia. The opinion insists that the failure to recognise the Aboriginal connection to the land and its waters results in failure to recognise the First People and restricts rights and jurisprudence developed concerning Indigenous peoples in juridical spaces.[589] A great deal of emphasis is laid on the connection to the land in a vocabulary familiar to settler language but which does not emulate its violence. The text also relies on *Northern Territory v Griffiths*[590] to revisit the meanings of cultural connectedness to the land. For instance, the following paragraph defers to the Indigenous knowledge and traditional laws and customs inherent in any form of land relations.

> That connection is spiritual or metaphysical "[t]here is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular and everything that exists on and in it, are organic parts of one indissoluble whole". And the connection that persisted, and continues to persist, is a connection determined according to Indigenous laws acknowledged, and the traditional customs observed, by the Indigenous peoples.[591]

[588] Love and Thoms n (575), para 267.
[589] Love and Thoms n (575), para 298.
[590] [2019] HCA 7.
[591] Love and Thoms n (575), para 290.

The opinion is neither fully free of its deep-rooted commitment to settler jurisprudence nor is it rigidly unmoved by the novelty of the claims and diversity of factors at consideration. It approvingly quotes Julius Stone's "(L)aws and customs do not exist in a vacuum. They are socially derivative and non-autonomous".[592]

Edelman J takes a similar position by emphasising that "statutory citizenship is not the exclusive test for membership of the political community".[593] Further, he draws much from *Northern Territory v Griffiths* to assert:

> Native title rights and interests require a continuing connection with particular land. However, underlying that particular connection is the general spiritual and cultural connection that Aboriginal people have had with the land of Australia for tens of thousands of years…Sometimes events, including the cessation of the existence of a particular Aboriginal society, cause the loss of native title rights to land. But the loss of those rights to, and the relationship with, particular land, or even the effluxion of particular Aboriginal societies, does not extinguish the powerful spiritual and cultural connections Aboriginal people have generally with the lands of Australia.[594]

In an interesting observation, Edelman J states:

> (T)he sense of identity that ties Aboriginal people to Australia is an underlying fundamental truth that cannot be altered or deemed not to exist by legislation in the same way that changing legislative definitions of citizenship cannot alter the fundamental truth underlying identity that is shaped by the core combined norms that metaphorically tie a child to Australia by birth and parentage.[595]

The judge appears to recognise the significance of the idea of Indigenous 'belongingness' as if it were a parallel but equally important construct to 'citizenship'. Like the rest of the majority decision, Edelman J's decision hesitates to recognise Indigenous sovereignty where it is seemingly clashes with the territorial sovereignty of the settler state.

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[592] Love and Thoms n (575), para 269.
[593] Love and Thoms n (575), para 422.
[594] Love and Thoms n (575), para 451.
[595] Love and Thoms n (575), para 451.

Nettle J's opinion remained deferential to colonial constructs of acquisition of territory and legitimacy while also suggesting that Indigenous connection to land must be treated well in juridical spaces. The opinion stated that the Australian colonies were acquired 'neither by conquest or cession' but by 'settlement' and hence the court 'cannot doubt that conclusion'.[596] Further, he adds that the "Crown sovereignty has always been observed and acknowledged since the acquisition".[597] The history of Australia is not so much a narrative of Commonwealth as much as it is of Indigenous resistance to legal and political institutions of the Crown governance. Claiming something as having been always 'acknowledged and observed' ignores the long history of violent and non-violent confrontation with the settler state. While the courts may not overturn state sovereignty, they are often provided with an opportunity to recognise that 'settlement' was not an apolitical event. *Love and Thoms* was one such instance where the court willingly let go of that opportunity, very much like its predecessors. However, the rest of Nettle J's decision takes great care to understand how indigeneity or belongingness to Indigenous groups is vital for the integrity of the rest of the nation and to the common law. He observes:

> To classify any member of such an Aboriginal society as an alien would have been to recognise that the Crown had power to tear the organic whole of the society asunder, which would have been the very antithesis of the common law's recognition of that society's laws and customs as a foundation for rights and interests enforced under Australian law. Consistently, therefore, with its recognition of Aboriginal societies as the source and sanctuary of traditional laws and customs, the common law must be taken always to have comprehended the unique obligation of protection owed by the Crown to those societies and to each member in his or her capacity as such.[598]

While Indigenous scholarship outside juridical spaces has recognised Crown sovereignty and common law as innately violent and embodying dispossession, Nettle J tried to explain this away by terming the Crown's responsibility towards Indigenous people a 'unique obligation'.[599]

In one of his observations, Nettle J stated:

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[596] Love and Thoms n (575), para 266 and 278.
[597] Love and Thoms n (575), para 281.
[598] Love and Thoms n (575), para 272.
[599] The term is used five times in the entire decision and all of it by Justice Nettle.

> Underlying the Crown's unique obligation of protection to Australian Aboriginal societies and their members as such is the undoubted historical connection between Aboriginal societies and the territory of Australia which they occupied at the time of the Crown's acquisition of sovereignty. As is now understood, central to the traditional laws and customs of Aboriginal communities was, and is, an essentially spiritual connection with "country", including a responsibility to live in the tracks of ancestral spirits and to care for land and waters to be handed on to future generations. Ignorance of those connections and their potential significance in Common law justified the early dispossession of Aboriginal peoples in the decades after 1788.[600]

Interestingly, he concluded by quoting the prominent Indigenous barrister and academic Michael Dodson:

> Everything about Aboriginal society is inextricably interwoven with, and connected to, the land. Culture is the land—the land and spirituality of Aboriginal people. Our cultural beliefs or reason for existence is the land. You take that away and you take away our reason for existence. Removed from our lands, we are literally removed from ourselves.[601]

Borrowing the words of a fiery Indigenous scholar, who is known for his unequivocal position on Indigenous sovereignty, to make a prosaic point about belongingness without confronting settler colonialism perfectly mirrors the many contradictions of *Love and Thoms*.

Section 2: The Duty to Conceptualise and Articulate Justice

It is not enough merely to establish that law is a narrative as there is risk of reproducing settler narratives all over again. The legal narrative that supports IEJ is an act of conceptualising and articulating justice for Indigenous peoples. Such a narrative might require active engagement with the elements that constitute IEJ, as previously discussed in Chapter one (p.49). The narrative which courts may produce must take into account the existing social and political conditions that determine Indigenous peoples' encounters with the settler legal systems. Legal narratives that account for IEJ may adopt existing mechanisms within the legal systems or may have to innovate entirely (p.135). In Australia and Canada, social movements for Indigenous

[600] Love and Thoms n (575), para 276.
[601] Love and Thoms n (575), para 276.

rights (which are also forms of narratives outside of courts), along with legislative attempts prompted by such reform, have been beneficial to Indigenous communities. However, these changes are variable and temporary. Justice is a matter of lasting transformation without a threat of political uncertainty that can rescind the rights accumulated through years of struggle.

For instance, the Western Australian government enacted the Aboriginal Heritage (Marandoo) Act 1992, for the smooth functioning of extractive operations led by companies such as Rio Tinto. The Marandoo Act aimed at 'disapplication of the Aboriginal Heritage Act 1972', the latter being the only state legislation that provided threadbare protection to Aboriginal heritage sites and artefacts.[602] The Act enabled Rio Tinto to operate with impunity and discard numerous Aboriginal artefacts nearly 18,000 years old in rubbish tips.[603] The legislation continues to operate today, and the demands to repeal the Act have only been made in light of the public scrutiny that followed the Juukan Gorge destruction (p.14). Other constraints on Indigenous litigation, such as long and expensive litigation processes; the pressure to prove community's Native title claims; absence of a meaningful constitutional recognition, make the feasibility of reform within courts as likely as those outside of them.

In Canada, Treaty-related litigation have drained resources from the First Nations despite the promise of Treaty rights. The costs incurred in litigation are prohibitive especially in cases where the First Nations challenge the state for violation or disregard of the Treaty rights. The instances of 'advance costs'—costs levied pre-emptively as a condition for carrying on the litigation—are imposing unnecessary strain on community resources. Litigating First Nations will be forced to decide whether they should carry on the litigation against extractive projects or use resources to sustain the basic requirements that have become vital and non-negotiable following the destruction of their traditional lands.[604]

In 2008, when Beaver Creek Nation challenged Alberta's decision to hand out oil sands project contracts in Treaty 6 territory, the trial court held that the parties ought to pay $300,000 per

[602] Aboriginal Heritage (Marandoo) Act 1992. Available at: https://www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_4_homepage.html
[603] Lorena Allam, "Rio Tinto accused of allowing irreplaceable Indigenous artefacts to be dumped in rubbish tip", *Guardian,* (25 June 2021). Available at: https://www.theguardian.com/business/2021/jun/25/rio-tinto-accused-australian-indigenous-artefacts-dumped-rubbish
[604] Stephanie Wood, "'Are you poor enough?': First Nations face compounding financial hardship when defending rights in court", *The Narwhal,* (12 June 2021). Available at: https://thenarwhal.ca/first-nations-canada-indigenous-rights-beaver-lake/

year to ensure the continuation of the trial.[605] In 2019, the Queen's Bench of Alberta ruled that expecting the First Nations to pay the advance costs was manifestly unjust.[606] Unfortunately, the ruling was overturned by the Court of Appeal.[607] The adverse decision was despite the submission by the First Nations that the funds set aside were not a surplus but resources committed to ensuring the supply of clean water to the community and to address emergencies. The judgment laid greater emphasis on whether the First Nations fulfilled the 'impecuniosity requirement' by demonstrating that the payment of the advance costs was 'genuinely unaffordable'.[608] Admittedly, outside the adjudicatory processes, the all-pervasive nature of neoliberal economies is likely to weaken the Indigenous people's fight against extractive capitalism and settler colonialism. A resource conflict does not stop at mere resistance to the extraction of natural resources. Settler colonialism eliminates alternate Indigenous economies, destroying their traditional sources of livelihood and draining the resources set aside for contingencies.[609] An appellate court endorsing the ubiquitous, destructive logic outside the adjudicative processes will make a lasting legal as well as moral impact in Treaty litigation.[610] Fixating on the conditions, such as 'impecuniosity', without being mindful of the historical contexts in which they were framed or the current contexts in which they are used makes the law complicit in settler colonial violence.

Instead, following the Canadian Supreme Court's approach in *R v Desautel ('Desautel')*[611] might provide a helpful guidance regarding what duty to conceptualise and articulate justice mean in reality. The defendant, Richard Lee Desautel, had entered Canada legally from the United States of America, where he was normally a resident and a citizen. When Desautel shot an elk in British Columbia ('BC'), he was charged with an offence of hunting without a licence contrary to s.11(1) of the Wildlife Act, RSBC 1996, c. 488, and hunting big game while not being a resident contrary to s.47(a) of the same *Act*.[612] At the point of shooting, the defendant was neither a resident of BC nor had a licence to hunt in the Province. While the defendant

[605] Anderson v Alberta (Attorney General), 2019 ABQB 746.
[606] Anderson v Alberta n (605).
[607] Anderson v Alberta (Attorney General), 2020 ABCA 238.
[608] Anderson v Alberta, n (607).
[609] Shiri Pasternak, "Assimilation and Partition: How Settler Colonialism and Racial Capitalism Co-produce the Borders of Indigenous Economies", *South Atlantic Quarterly*, 119(2), p. 301–324 (April 2020).
[610] This is not unprecedented. British Columbia Supreme Court waived the advance costs of the Blueberry River First Nations, where the court held that charging the First Nations to access the courts was against the principles of reconciliation. See: *Yahey v British Columbia* 2020 BCSC 278.
[611] 2021 SCC 177.
[612] Desautel, n (611) para 4.

accepted the *actus reus* of the offence, he raised the defence that he was exercising his Aboriginal right to hunt in the traditional territories of his Sinixit ancestors. By implication, this was a right protected under s.35 (1) of the *Constitution Act, 1982*. Some of the facts in the case were unchallenged. Desautel was established as a member of the Lakes Tribe of the Colville Confederated Tribes based in the State of Washington in the United States, a successor group of the Sinixt people of Canada.[613] The date of the first contact between the Sinixt and Europeans was determined as 1811. The Sinixt were known to have carried on their traditional seasonal hunting and fishing practices throughout their ancestral territory, which extended between present-day Washington State and British Columbia. The place where Mr Desautel shot the elk in October 2010 was within the ancestral territory of the Sinixt, although the modern international territories had created a border between the US and Canada.

The Court framed the central issue as "whether persons who are not Canadian citizens and who do not reside in Canada can exercise an Aboriginal right that is protected by s.35 (1) of the Canadian Constitution". The majority decision by the seven presiding judges, penned by Rowe J, relied on the purposive interpretation of the s.35 rights and found in favour of the defendant. A straightforward way of resolving the case was through a perfunctory reasoning of whether Desautel was entitled to exercise his Aboriginal rights in Canada even if he did not belong to the place geographically. Rowe J's opinion took a surprisingly sensitive approach to the question of belongingness, Aboriginal rights, and colonial dispossession. The Supreme Court did not dispute the trial court findings that although the Sinixt ancestors were displaced from their traditional lands violently, they moved to the United States due to a 'constellation of factors'.[614] Even after the move, the Lakes tribe did not give up their claim on the traditional territories in BC. The Oregon Boundary Treaty 1846 created an international boundary and outlawed traditional hunting in BC through the Game Protection Amendment Act 1896, thereby creating a period of dormancy between 1930 and 1972. However, the trial court found that this did not sever the First Nation's connection to the land where ancestral hunting practices had been carried on.[615] Rowe J's opinion also emphasised how the "evidence demonstrated that the land and traditions were not forgotten and that the connection to the land was still present in the minds of the members of the Lakes tribe".[616] For the majority of judges,

[613] Desautel, n (611) para 5.
[614] Desautel, n (611) para 5.
[615] Desautel, n (611) para 5.
[616] Desautel, n (611) para 8.

the connection between the people and the land was significant in demonstrating a sense of community.

There were two implied questions answered in *Desautel*. First, should an unbroken chain of continuity be established? If yes, whether the non-exercise of a certain right had resulted in its extinguishment?

Rowe J could have answered these questions in light of precedents, such as *R v Van der Peet* that state the current common law position on Aboriginal rights.[617] Without departing from the existing precedents, the opinion reflected on the implications of continuity, sovereign incompatibility, and the nature of Aboriginal rights under s.35 of the Canadian Constitution. The majority decision agreed with the Court of Appeal reasoning that *Van der Peet* does not require a demonstration of continuity of practice or geographical continuity to uphold the common law Aboriginal right. It also reiterated that: "Imposing such a requirement would fail to take into account the Aboriginal perspective, the realities of colonisation and displacement, and the goal of reconciliation".[618]

There is a clear indication that Canadian Aboriginal rights jurisprudence has the potential to be a lucid narrative, building on cases that have been previously sympathetic to Indigenous rights (p.39). The primary reasoning in the Supreme Court decision in *Desautel* sits between upholding the findings of the trial court and emphasising the need for recognising common law Aboriginal rights according to their widest import to further the ends of reconciliation. While a cursory reading of the decision appears to suggest that the Court has mounted a barrier by demanding to establish the defendant's membership of the Aboriginal community, this is not a burdensome requirement. To quote from the opinion:

[617] [1996] 2 S.C.R. 507. Whilst *Van der Peet* was a decision regarding whether Aboriginal fishing rights extended to commercial fishing, its constitutional significance is in the 'integral to distinctive culture' test laid down by the Supreme Court. The Court held that in order for an Aboriginal right to be 'integral', such a practice, custom or tradition must be of central significance to the Aboriginal society in question. To determine the court will also have to take into account the perspective of Aboriginal peoples. Further, the claims must be specific rather than general and that the Aboriginal right must be of independent significance to the Aboriginal culture in which its exists. The decision was criticised for imagining Aboriginal cultures as stagnant or 'frozen in time', without paying attention to the changing nature of cultures. See also: John Burrows, *Recovering Canada: The Resurgence of Indigenous Law,* (U of Toronto Press 2002).
[618] Desautel, n (611) para 12.

> …the two purposes of s. 35(1) are to recognise the prior occupation of Canada by organised, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them. These purposes are reflected in the structure of Aboriginal rights and title doctrine, which first looks back to the practices of groups that occupied Canadian territory prior to European contact, sovereignty or effective control, and then expresses those practices as constitutional rights held by modern-day successor groups within the Canadian legal order.[619]

In *Desautel*, the Court encountered a predicament somewhat similar to the one faced by the Federal Court in *Love and Thoms*. Here, the challenge was to articulate Indigenous rights without imposing the additional burden of establishing continuity of practice or conceding that the rights emerge from Indigenous sovereignty. However, the Court resolved the issue in a non-confrontational manner, stating that "…the Crown's historic assertion of sovereignty over Aboriginal societies gives rise to continuing obligations to their successors as part of an ongoing process of reconciliation".[620]

Consequently, neither first contact nor the subsequent declaration of sovereignty can disrupt the internal organisation of First Nations or their connection to their land. Hence, the Court concluded that even those who are not residents or citizens of Canada may be Aboriginal people of Canada. Although it is never directly stated, by recognising the integrity of cultural practices and community-making rules, the Court recognised the epistemic sovereignty of the Sinixt Nation. Rowe J's opinion returned to precedents such as *Calder v Attorney-General of British Columbia*, which have recognised the First Nations as sovereign, organised political communities with a legitimate title.[621] Further, it referred to *R v Côté*[622], one of the first cases to have recognised that "an interpretation that excludes Aboriginal peoples who were forced to

[619] Desautel, n (611) para 22.
[620] Desautel, n (611) para 22.
[621] [1973] S.C.R. 313. This case was one of the first to have explicitly stated the Aboriginal title was never extinguished by the European settlement of Canada. Here, Frank Arthur Calder and the Nisga'a Nation Tribal Council bought an action for a declaration that Aboriginal title over some land in the British Columbia province were never extinguished. Whilst the seven-judge bench of the Supreme Court recognised that the Nisga'a had Aboriginal title over the alleged land at the time of European contact, there was a 3-3 split over whether such title continued to exist till date or was successfully extinguished post European settlement. Even though the Nisga'a claim failed in this particular decision, this first judicial acknowledgment of the Aboriginal title provided the much-needed legitimacy for First Nations land claims.
[622] [1996] 3 S.C.R. 139.

move out of Canada would risk perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonisers".[623]

How the Court in this case attempts to process this knowledge and respond to the contemporary challenges of sovereignty is what makes *Desautel* both original and important. There is a hesitant acknowledgement of First Nations sovereignty without challenging the sovereignty of nation-states. Such an acknowledgement is evidenced in the way the judgment appreciates the violence of settler colonisation:

> I would add that an interpretation of "aboriginal peoples of Canada" in s. 35(1) that includes Aboriginal peoples who were here when the Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed, reflects the purpose of reconciliation. The displacement of Aboriginal peoples as a result of colonisation is well acknowledged: Aboriginal peoples were displaced physically—they were denied access to their traditional territories and, in many cases, actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools — which undermined their ability to pass on traditional values to their children…and attacked traditional activities such as significant dances and other ceremonies.[624]

The rest of the decision mediates briefly on the question of sovereign incompatibility: whether entering Canada and hunting on the land creates a discord with the national sovereignty? The Court found against the claim as the defendant had legally entered the territory. In addition, where the Crown argued that a too generous reading of who can exercise their Aboriginal rights in Canada may impair the duty to consult obligation, Treaty rights, and land claims, the Court rejected it on the grounds that "the difficulty of identifying members of the [Aboriginal] community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada".[625]

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[623] Desautel, n (611) para 33.
[624] Report of the Royal Commission on Aboriginal Peoples, vol. 1, Looking Forward, Looking Back (1996), at pp. 139-40 quoted in para 33 of *Desautel*, n (65).
[625] Desautel, n (611) para 76.

The entirety of the decision rests on the narrative of reconciliation, which is frequently a synonym for justice. While reconciliation, similar to Coulthard's critique against liberal recognition of Indigenous rights (p.52), is not unproblematic, the judicial rendering of it as a critical logic for acquitting Desautel is significant. In the process of recognising the violent settler-colonial project in law and elsewhere, the Court provides a refuge from the ongoing violence of settler colonialism that the state embodies. The reasoning in *Desautel* bears both incidental and invaluable relevance to the notion of IEJ. The Supreme Court's reasoning indicates on how much the courts are willing to (and can) build on their knowledge to achieve the ends of justice, especially when we study them in the context of pre-existing Indigenous rights jurisprudence.

Even though anti-colonial politics must be embedded in the wider social and political fabric of a nation, what transpires in the courtrooms has a lasting impact on the future of social justice movements. In settler colonial States like Canada and Australia, which primarily rely on resource extraction and aggressive capitalist development, acquiring justice from legislative actions is less likely to happen. Some of the Indigenous rights that may be recognised will result from negotiation and political compromise, which will continue to be at risk of being reversed. Despite Treaty rights, Indigenous claims on land in Canada are met with disproportionate police force and state-led hostility. The Wet'suwet'en protests against Coastal Gaslink Pipeline are a clear example of the latter.[626] Another instance could be from the ongoing Aboriginal title case between British Columbia and Kwikwetlem First Nation regarding the claim over certain lands in the City of Port Coquitlam, where the Crown argued that Aboriginal title does not exist until a court declaration says it does, exorcising the spectre of *terra nullius*.[627] Before backing down the following day, the Crown even suggested that Aboriginal title does not and should not exist if it interferes with the normal operation of property law.[628]

[626] Sarah Cox, "UN committee rebukes Canada for failing to get Indigenous Peoples' consent for industrial projects", *The Narwhal*, (15 January 2021). Available at: https://thenarwhal.ca/un-rebukes-canada-industrial-projects/

[627] 2021 BCSC 978 of the Supreme Court judgement, where an application was made as leave to serve interrogatories which was unsuccessful. The case has hence been reverted back to the Court of Appeals.

[628] See: Senior Counsel representing the First Nations, Robert Janes' statement, in "Province Denies Forcing First Nation to Prove Aboriginal Title After Promise To Change Policy". Available at: https://vancouversun.com/news/local-news/province-plans-to-force-first-nation-to-prove-aboriginal-title-despite-promise-to-change-policy

Tellingly, neither the legislature nor the executive will be an ally for the First Nations as these institutions interact with the frameworks of justice differently. On the contrary, however inconsistent judicial outcomes may be, communities will still glean the broadest expressions of Indigenous rights from positive expressions of justice to achieve better outcomes. The recent decision of the Supreme Court of British Columbia in *Yahey v British Columbia*,[629] concerning the Crown's violation of Treaty No.8, was resolved in favour of the Blueberry River First Nations (the plaintiffs). The claimants had alleged that the Crown had authorised industrial development without regard for Blueberry River First Nation's Treaty rights. The First Nation also alleged that the cumulative effects of industrial development had significant adverse effects on the meaningful exercise of the Treaty rights. The Court upheld the plaintiff's claim by reasoning that at the time of entering into the Treaty, it was promised that First Nation's mode of life would not be harmed.[630] Despite the promises made, over a period of time, the Province had gradually opened up the territory and its surrounding areas to industrial and economic development. Indigenous rights were infringed by specific impacts from specific acts under the project. Rather, it was the cumulative effects from a range of provincially authorised activities, such as the development of oil and gas, forestry, mining, hydroelectric infrastructure, agricultural clearing and other activities that were found to be in breach of Treaty No.8. The Court recognised that the Province had failed to assess the cumulative effects of reckless development on the meaningful exercise of Treaty rights and indigeneity. Again, the judgment resorted to the language of reconciliation and stated:

> The courts are the guardians of the Constitution and the duty of the judiciary is to ensure that the constitutional law prevails. The Supreme Court of Canada confirmed in *Sparrow* that S. 35 is protective and remedial. In accordance with the purposive approach to construing S. 35, remedies relating to Aboriginal and treaty rights should be sensitive to and advance the distinct purposes of Aboriginal rights, including the importance of treaty-making as an honourable form of reconciliation.[631]

The legal reasoning in the outcome departs from the textbook jurisprudence. Instead, Burke J builds on the compelling claims of the Blueberry River First Nations, finding that the loss

[629] 2021 BCSC 1287.
[630] Yahey, n (629) at paras 18-26.
[631] Yahey, n (629) at para 1869.

suffered in the interregnum of 120 years is grave enough to warrant a declaratory relief sought by the plaintiffs.

Law's Ability to Adopt IEJ

In his work on the points of convergence between common law and critical theory, legal theorist Charles Barzun contends that the two are not necessarily different species.[632] Barzun draws his arguments from Catherine MacKinnon's work with respect to sexual harassment laws and the judicial treatment of the issue. In her classic work *Sexual Harassment of Working Women: A Case of Sex Discrimination,*[633] MacKinnon distinguishes between individual instances of harassment and misogyny and sexism as structural issues.[634] Even though the courts provide legal remedies for sexual harassment, they only perceive individual instances of culpability.[635] Equating structural power imbalance with mere individual instances of abuse fails to facilitate the development of justice-oriented jurisprudence. MacKinnon proposes a more holistic model for addressing cases, which include "understanding of how our social and moral—and hence legal—norms change over time. People are brought to see things differently (and more clearly), leading them to re-evaluate the moral stakes involved".[636] Such a model would "involve scrutinising one's substantive moral judgments in light of the epistemic conditions under which such judgments are produced".[637] Barzun finds that this holistic approach to common law as having "structural affinity with the critical theory".[638] He finds that common law is inherently radical as its case by case approach opens it for revision and reform at all times. Drawing from the quick success of sexual harassment cases, leading up to the endorsement of a new category of (sexual harassment) offences by the Supreme Court, Barzun reiterates MacKinnon's claim that common law continues to be "open to reality".[639] Barzun proposes transactional learning between common law and critical theory so that both the streams of knowledge can complement each other and address the power inequalities within the spaces in which they are situated. Barzun states:

[632] Charles Barzun, "The Common Law and Critical Theory" University of Colorado Law Review, Vol.92, 1221-1236.
[633] Catherine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, (Yale University press, 1979).
[634] MacKinnon, n (633) at p.129.
[635] MacKinnon, n (633) at p.129.
[636] Barzun, n (632) at p.1230.
[637] Barzun, n (632) at p.1231.
[638] Barzun, n (632) at p.1232.
[639] Barzun, n (632) at p.1233.

> If there is any lesson that feminist and critical-race critiques of traditional Marxism have taught us, it is that domination and oppression can take different forms and are often hard to spot. That is because ideology rarely functions in ways that are obvious to those participating in its production.[640]

Canadian jurisprudence especially illustrates the obliviousness to the overlaps between settler colonialism and extractive capitalism. According to Justice Souter, "there are no resolutions immune to rethinking when the significance of old facts may have changed in the changing world".[641] While it is easy to follow Judge Souter's proposition in relatively neutral contexts, to do so by resisting colonial knowledge systems, legal infrastructures and principles steeped in imperialism and settler capitalism, western canons hostile to Indigenous belief systems is a difficult task (p.60). Decisions in *Desautel* and *Blueberry River First Nations* promise a degree of transformation in this regard. These decisions also indicate that it is possible to produce legal knowledge in the wider socio-political contexts, specifically addressing the need to articulate justice—more specifically, IEJ.

Section 3: IEJ and the Integrity of the Law

The third core argument of this chapter is that, taking account of the duty to articulate concepts of justice explained above, the integrity of the law is enhanced where IEJ is, at least, striven for by the courts. The relationship between the integrity of the law and the role of the courts is demonstrated by the judgment of the Brazilian Court in the Piripkura litigation.

In April 2021, Judge Frederico Pereira Martins of Civil and Criminal Court of the Judicial Subsection of Juína-MT[642] held that FUNAI (the Brazilian government protection agency for Indigenous interests) had 90 days to demarcate and secure the Indigenous territory.[643] The task was to fully demarcate the 243,000-hectare of Piripkura reserve, an area nearly the size of the US city of Seattle.[644] The Piripkura reserve held only two members of the community at the

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[640] Barzun, n (632) at p.1234.
[641] Justice David H. Souter, Harvard Commencement Remarks, HARV. GAZETTE, http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech (May 27, 2020). As quoted in Barzun, n (98) at p.1234.
[642] PUBLIC CIVIL ACTION (65). Process: 0005409-02.2013.4.01.3600.
[643] Public Civil Action n (642).
[644] Sam Cowie, "Brazil Judge Provides A Lifeline For Threatened Indigenous Tribe", *Aljazeera*, (12 May 2021). Available at: https://www.aljazeera.com/news/2021/5/12/brazil-judge-provides-a-lifeline-for-threatened-indigenous-tribe

time of the adjudication. As is the case in most of Brazil's Indigenous reserves now, the region had been subjected to relentless logging.[645] Scholars have suggested that the illegal loggers murdered Piripkura people to the point of extinction. By the end of the 1980s, there were only 20 people left in the community.[646] Elsewhere, on the Yanomami reserve, the violent invasions of the *garimpeiros* (gold miners) are fast eroding Indigenous control over the territory and Indigenous ways of life.[647] Besides fighting against State-led colonisation and the creeping neo-liberalisation, Indigenous communities are in a literal fight to stay alive. The decision by Judge Martins must be interpreted in light of the current social and political contexts of Brazil. Categorically, the text of the decision does not speak about *justice* but discusses the urgency of demarcation, which the Federal government had side lined.

In 1985 FUNAI had formed a working group to contact the Indigenous Kawahib group to identify and delimitate the Indigenous reserve.[648] Since then, very little has been done to ensure the physical integrity of the Indigenous people and their traditional land. Even the Federal Ministry of Justice (MPF) had observed that the "… Funai's omission has been going on for almost three decades, and this has serious implications for the enjoyment of fundamental rights by the Piripkura".[649] In their submission, the MPF argued that the:

> failure of the State to complete the identification, demarcation and registration of the Piripkura Indigenous Land violates the fundamental right to life and opens space for the threats to physical and cultural survival to become a concrete reality, thus perpetuating the extermination cycle started with the first contacts made by the economic exploration fronts in the region.[650]

Judge Martins' decision emphasised how the Piripkura people had been subjected to prolonged administrative negligence, making this judgment both urgent and necessary. While holding FUNAI responsible for being negligent for decades, the Court recognised that demarcation was a right and also an instrument of protection for Indigenous people as it helps them to remain in

[645] MPF Press Release, "Justiça atende pedido do MPF e determina que Funai adote medidas de proteção do território Piripkura (MT)". Available at: http://www.mpf.mp.br/mt/sala-de-imprensa/noticias-mt/justica-atende-pedido-do-mpf-e-determina-que-funai-adote-medidas-de-protecao-do-territorio-piripkura-mt
[646] Cowie, n (644).
[647] Sam Cowie, "Brazil: Indigenous Communities Reel From Illegal Gold Mining", *Aljazeera*, (14 June 2021). Available at: https://www.aljazeera.com/news/2021/6/14/indigenous-reel-from-brazil-illegal-gold-mining
[648] Public Civil Action n (642).
[649] MPF Press Release, n (645).
[650] Public Civil Action n (642).

isolation.[651] The 2008 Federal government ordinance had restricted entry into the Indigenous territories, except entry by the military and the federal police. Even in that case, they had to be accompanied by an authorised member of FUNAI.[652] Further, it had prohibited the exploitation of any existing natural resource within the 242,500 hectares of the reserve under the ordinance. However, the ordinance lapsed after two years, and no actions were taken for its renewal.

The decision categorically stated that the "FUNAI has been negligent for decades when dealing with the Piripkura community".[653] With the lapse of the ordinance, the illegal loggers rushed to the territory, increasing the scale of deforestation at an alarming rate. The Real-Time Deforestation Detection System issued deforestation alerts in the Piripkura Indigenous land for 877.97 hectares and forest degradation alerts for 147.62 hectares between August 2020 and March 2021.[654] From March 2021 until the date of hearing, fresh submissions indicated the destruction of a further 518.8 hectares, with an estimated 298,000 trees cut down.[655] Judge Martins' opinion appreciated the magnitude of the threat caused by logging (environmental integrity) and by constant unauthorised entry into the Indigenous territories (personal and cultural integrity).[656] The judgement calling for immediate demarcation of the territory termed the situation, especially with the onset of the pandemic, a "siege".[657] Instead of proposing a local remedy, the Court articulated the matter as a constitutional question, suggesting that the issue demanded a quick resolution and that no further delay in enforcing article 231 of the Brazilian Constitution can be allowed.

The Court also reflected on whether its directives violated the separation of powers since the Federal Government had argued that directing the state with regard to its administrative tasks was beyond the remit of judicial powers.[658] The decision dismissed this argument, prioritising the physical health and integrity of the Piripkura people and asserted that the power to issue this directive emanates from the Constitution. The phrasing of the Court's directives is significant in that it foregrounds juridical and constitutional obligation to protect Indigenous

[651] Public Civil Action n (642).
[652] Public Civil Action n (642).
[653] Public Civil Action n (642).
[654] MPF Press Release, n (645).
[655] MPF Press Release, n (645).
[656] Public Civil Action n (642).
[657] Public Civil Action n (642).
[658] Public Civil Action n (642).

territories, especially when the current legislature is rolling back existing protection of environmental and Indigenous rights.

Another Federal Court decision directing the immediate demarcation of Morro dos Cavalos in Santa Catarina followed the *Piripkura* decision.[659] Even if demarcations were an administrative matter, the Court found that twenty years' delay was not reasonable and demanded judicial intervention.[660]

The active intervention of the judiciary in developing Brazilian Indigenous rights frameworks has provided a new impetus to the people's movements. The judgments may appear as purely administrative decisions. Nevertheless, when situated in the present volatile political context, these decisions respond to the environmental crises faced immediately by communities. Before the STF (Federal Court) went into a recess in July 2021, it was hearing a crucial case determining the ambit of Indigenous rights in the repossession lawsuit filed by the government of Santa Catarina against the Xokleng people.[661] The suit was in relation to the Ibirama-Laklãnõ Indigenous Territory, where the Guarani and Kaingang peoples have also been residing and claiming traditional lands for over twenty years.[662] The case is classified as a 'general repercussion case', and the outcome of this case is expected to serve as a guideline for the Federal Government and all other courts dealing with similar matters. In addition, it will also be binding regarding all pending proceedings, administrative procedures, and legislative bills concerning demarcation procedures.[663] While juridical processes and principles are evolving, the Federal Government is now trying to push through Bill PL 490, which would effectively open up protected Indigenous territories to commercial agriculture and mining.[664] Popularly known as '*marco temporal*' (temporal mark or time limit strategy), this legal fiction is now introduced through Bill PL 490 to limit all Indigenous land claims before the

[659] APIB Official Press Release, "Justiça determina que Bolsonaro finalize, em 30 dias, demarcação da TI Morro dos Cavalos" (26 June 2021). Available at: https://apiboficial.org/2021/06/26/justica-determina-que-bolsonaro-finalize-em-30-dias-demarcacao-da-ti-morro-dos-cavalos/
[660] APIB Official Press Release, n (659).
[661] APIB, "Brazil's Federal Supreme Court Postpones Decisive Trial; Indigenous Peoples Keep Their Resistance Against the Marco Temporal Thesis" (30 June 2021). Available at: https://apiboficial.org/2021/06/30/brazils-federal-supreme-court-postpones-decisive-trial-indigenous-peoples-keep-their-resistance-against-the-marco-temporal-thesis/?lang=en
[662] APIB, n (660).
[663] APIB, n (660).
[664] APIB, "Entenda porque o caso de repercussão geral no STF pode definir o futuro das terras indígenas" (29 June 2021). Available at: https://apiboficial.org/2021/06/29/entenda-porque-o-caso-de-repercussao-geral-no-stf-pode-definir-o-futuro-das-terras-indigenas/

Constitution of 1988 came into force. Invariably, this doctrine has garnered huge support among pastoralists and mining companies.

Under *marco temporal*'s narrow interpretation of the time limitation, Indigenous peoples will only have the right to demarcate the lands that were under their possession on October 5, 1988.[665] If the Indigenous people were not occupying the land at that time, the burden will fall on the communities to prove the existence of a legal dispute or conflicting claim. The Brazilian Constitution does not impose any temporal limits, and as a consequence, the bill is seen as a legislative attempt to subvert guaranteed constitutional protection. Placing a burden of proof on communities, which do not have the same resources as the state or rich land holders and have been subjected to continuous dispossession, is a self-defeating proposition. Consequently, the future of both environmental and Indigenous rights jurisprudence of Brazil rests on this particular decision from the STF. There are more than 50 *amici curiae* and representatives from Indigenous communities and organisations involved in the hearing.[666] The Xokleng community directly affected by the primary case rightfully claims that the history of Indigenous peoples did not begin in 1988. Even the slightest endorsement of *marco temporal* will bolster the aggressive destruction of Indigenous reserves. The formal narrative of justice in Brazilian juridical spaces is recent and has a fluctuating trajectory. Moreover, these communities are almost exclusively at the mercy of the juridical space, especially now where the nation faces a turn towards *terra nullius* through legislative actions. Whether courts can provide a robust foundation of IEJ depends on how they intend to use the opportunities presented in *marco temporal* and the climate litigation cases discussed in Chapter 4 (p.144).

The *Piripkura* decision is a fine instance of how courts can adopt IEJ in decision making without compromising on formal adjudicative integrity. On the contrary, the advances made by the adjudication process by taking into account IEJ will enhance the integrity of the law and judicial processes. Ceri Warnock argues that even if integrity is an important element of adjudication, there is no single 'unassailable form of integrity'.[667] Adjudication does not merely establish facts or legal disagreements. Warnock argues that it also has a predictive role, especially when understood in the context of specialist environmental courts.[668] This futuristic

[665] APIB, n (664).
[666] APIB, n (664).
[667] Ceri Warnock, *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy*, p.94 (Hart 2020).
[668] Warnock, n (667) at p.100.

and responsive role of adjudication arrives at some form truth, if not making a claim on a single definitive truth.[669] As Warnock approvingly quotes Martha Nussbaum—"justice focuses not on a past that can never be altered but on the creation of future welfare and prosperity". An adjudication process with a vision generates both interaction and diverse types of adjudication.[670]

In Brazil, the detrimental effect of colonisation, and capitalist destruction of landscape through relentless developmental projects is a dominant truth. But the Court in *Piripkura* only recognised the duty owed to a community then and there instead of establishing a universal truth about destruction of Indigenous peoples through colonisation. However, the decision effectively considered the fate of the communities, and how they have been left unprotected by successive governments and stepped into fulfil the responsibility towards justice in this specific litigation. The incremental judicial effort to strengthen Indigenous rights effectively counters the slow dismantling of existing protection for Indigenous peoples through legislative actions.

In *Piripkura*, the Court was acting to ensure both the future welfare of the community and responding to the fact/truth determination of the present. This particular judgment indicates that neither of these aforementioned elements need to be mutually exclusive in order for a court to maintain adjudicative integrity.

In the following section, the duty to articulate justice and IEJ are further developed by understanding how a plurality of principles may be drawn from *diverse types of adjudication*. As Warnock points out, adjudication has multi-faceted impacts on the future i.e. "the real value of adjudication can lie more in shaping the future than in sorting out factual events from the past".[671] One form of litigation may influence the other; one approach in a novel form of litigation may pave way for similar untested claims in another forum. The pathways to IEJ will benefit from any naturally occurring opportunity or those that may be termed as deliberately crafted strategic litigation. Climate litigation are a good combination of the above two categories.

[669] Warnock, p.110.
[670] Warnock, n (667) p.106.
[671] Warnock, n (667), p.101.

Section 4: Plurality of Principles and avenues to IEJ

IEJ benefits both from judicial approach as well as plurality of principles. What principles may be devised or where can courts look for guidance is not confined to a particular category of cases. For instance, the novelty of environmental or human rights litigation may provide the necessary legal and moral basis for adopting new principles in an area where both environmental principles and human right values overlap—as in the case of Indigenous rights. In Chapter 4 we have encountered Eloise Scotford's idea of 'interpretative communities' to understand the comparative lessons learnt in this thesis (p.142). Chapter 4 has also illustrated a number of limits that hinder adoption of IEJ to constitute effective Indigenous rights litigation. One of the way in which such limits may be overcome is to understand environmental litigation as a community, perhaps more categorically, as an interpretative community that produces approaches, concepts and principles that may well be used elsewhere.

Benedict Anderson's notion of *imagined community*, primarily used in the context of nation, nationality, and nationalism, can be useful here.[672] Juridical spaces are forms of imagined communities. There are norms, regulations, codes of conduct, and expectations which govern knowledge production.[673] The members draw the perimeters of what constitutes legal knowledge and also decide the metrics of inclusion and exclusion within such realm. To an extent, courtrooms are also an independent sphere of knowledge production that fits the description of 'inherently limited and sovereign'.[674] Such construction allows for self-reflection in judicial decision-making and opens up possibilities of reform and innovation within adjudication. Although imagined communities are immutable, even for sovereign nations, the Anthropocene presents challenges for the integrity of these institutions. Such challenges are deeply felt in environmental and climate litigation. To face these challenges, the law and juridical spaces must constantly re-examine and re-invent themselves. Any attempts at addressing these challenges is a valuable lesson learnt and applied or replicated in other forms of litigation.

While reflecting on the responsibility of the modern jurist, Julius Stone argues:

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[672] Benedict Anderson, *Imagined Communities: Reflections On The Origin And Spread Of Nationalism* (Verso 1983)
[673] Anderson, n (672) at p.7.
[674] Anderson, n (672) at p.6.

> In his (*sic*) study of law and society he must garner knowledge where knowledge is to be found, and must therefore call on all the mobile and expanding social sciences…He is concerned to bring such accumulated bodies of knowledge to bear, so far as they are relevant, upon legal problems, and to do so, as we have said, for both past and present legal orders. Moreover, it is also among his tasks to bring the resulting findings concerning law and other social phenomena onto as general a level of statement as these will tolerate.[675]

Stone's critique of Roscoe Pound's reformatory proposal, the 'Ministries of Justice', guides the discussion on how and why courts bear significant responsibility of 'reform', even in its reductive sense of the word.[676] Pound had proposed a 'Ministry of Justice' as a branch of government which would concern itself with legal reform and "not merely with the ongoing administration of the law".[677] Such a ministry would also constantly reassess the law's adequacy for a particular time and place, highlight the failures of justice mechanisms and social policy, and prescribe appropriate remedies. Stone agrees with Pound's proposition in essence but contests it on the basis that many of these functions are allocated piecemeal between different sectors of governance, legislation, regulation etc.[678] These include judges using their rule-making powers and taking on more administrative roles within the judiciary. Gradually, these roles peter out into independent commissions, ombudsman and the like, dissipating the ability to bring substantive change.[679] Stone argues that the responsibility towards legal reform cannot be siloed to certain departments. The matter of legal reform requires non-legal expertise and the ability to deal with complexities that can hardly be resolved within a limited timeframe.[680] Stone approves Arthur Vanderbilt's assertions that the vastness and complexity of modern law have rendered it such that it can only stay "vital in content, efficient in operation and accurate in aim" by borrowing truths "from the political, social and economic sciences", and "from philosophy".[681]

Even if the knowledge necessary for reform are drawn from different disciplines, 'law' emerges as a centre for hosting such diverse sets of reform. As Stone suggests, even outside the courts,

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[675] Julius Stone, *Law and the Social Sciences,* p.6 (North Central Publishing 1966).
[676] Roscoe Pound, "Anachronisms in Law", *Journal of the American Judicature Society,* 3, 142-147 (1920).
[677] Stone, n (675) at p.21.
[678] Stone, n (675) at p.22.
[679] Stone, n (675) at p.22.
[680] Stone, n (675) at p.23.
[681] Stone, n (675) at p.109.

the 'law centre' may function as "a vital ancillary, perhaps even a power house, for various institutions, public and private, active in legal reform".[682] If we understand Indigenous environmental litigation as a form of law centre, then the essential knowledge, frameworks and principles must flow to it from all other forms of litigation.

As Stone reminds the readers, translating the ideas of reform and innovation into "terms of the tasks of ministering to the ongoing needs of law and justice should not conceal the real proportions of the efforts required, and the great costs and dedication of personnel involved".[683] Undoubtedly, it is a task that requires the combined resources of the state and the judiciary. However, that should not deter every jurisdiction from aspiring or undertaking reformatory projects. As Stone warns:

> while civilisation has survived in bygone eras without science, there never has been a civilisation which has survived without a system of law adapted to its peculiar needs…unless we make progress here, even the greatest faith and pride in the common law will not assure its viability in the challengingly ominous conditions of our age.[684]

In the following section, the recent climate change litigation in Australia best illustrates how the common law is bracing itself for the unprecedented challenges through new forms of climate litigation, thereby altering the previous conceptions about what constitutes as responsibilities of courts (p.177).

Pluralities through Climate Litigation: Sharma & Ors v Minister for the Environment

Sharma by her legal representative Sister Marie Brigid Arthur v Minister for the Environment ('Sharma')[685] provided a tangible example for Stone's arguments in action. The proceedings in *Sharma* were brought on behalf of the children ordinarily residing in Australia and represented children globally. The second respondent was the Vickery Coal Pty Ltd, a subsidiary of the Whitehaven Coal Pty Ltd, which had obtained consent under the Environmental Planning and Assessment Act 1979 (NSW) to develop a coal mine in northern New South Wales ('the Vickery project'). In 2016, the Vickery project applied for further

[682] Stone, n (675) at p.22.
[683] Stone, n (675) at p.23.
[684] Stone, n (675) at p.24.
[685] [2021] FCA 560.

approvals to expand and extend the coal mine to increase the total coal extraction from 135 to 168 million tonnes.[686] The current petition concerned the application pending before the Commonwealth Minister for Environment, who could either approve or refuse the extension of the Vickery project under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act').

Arguments Advanced

The primary claim under the petition was that the Minister owed a *duty of care* towards the petitioners and other Australian children. The petitioners also claimed an injunction to preclude the Minister from breaching that duty of care. Under the law of negligence, the duty of care exists if the alleged harm is foreseeable and there exists a relationship between the person whose actions cause the harm and the person who is or would be harmed. The petitioners claimed that the economic and social harm (along with potential mental and physical injury or property loss) that may arise from the exposure to climatic hazards induced by increasing global temperature and due to emission of carbon dioxide (CO_2) required this duty of care. The likelihood of harm emerging from CO_2 emissions from the coal mine extended to a non-exhaustive list of bushfires, storm surges, coastal flooding, cyclones and other extreme weather events.[687]

The Ruling and its Implication

For the most part, the judgment is essentially an examination of the law of tort and the concept of common law duty of care. The presiding judge, Justice Bromberg paid great deal of attention to the grounds put forward for extending the Minister's legal responsibility under the laws of negligence. In lieu of strong human rights legislation in Australia, what would otherwise have been a traditional human rights litigation is now pursued under tort law.[688] A substantial part of Bromberg J's reflects the willingness to extend the remit of the common law for the sake of *intergenerational justice*. The radical nature of the decision is apparent when Bromberg J takes common law and provides it with a refurbishment without compromising its integrity (p.187). The judgment examined the IPCC reports, studying the CO_2 emissions, the emission standards

[686] Sharma, n (685) para 4-8.
[687] Sharma, n (685) para 12-14.
[688] See: For instance, the wage theft class action and the stolen generations compensation claim are now litigated under the tort liability. Dr Joanna Kyriakakis "Torts And Human Rights: Australian Federal Court Paves The Way For Negligence Based Climate Litigation". Available at: https://castancentre.com/2021/06/24/torts-and-human-rights-australian-federal-court-paves-the-way-for-negligence-based-climate-litigation/

and their bearing on climate change, the operations of coal mines and their imminent impact on climatic conditions. In addition, the judgment emphasised on the scientific evidence and expert testimonies about the extent of the bushfires and how badly they may affect the environment, thereby affecting the quality of human lives in the future. The first quarter of Bromberg J's opinion focuses on the material effects of a 2-degree rise in temperature on the planet and what needs to be done to counter it. Following this, the opinion turns to whether there is a 'novel duty of care', as the complexities of establishing causation and reasonable foreseeability in this case do not have any analogous precedents.[689] The question is answered by comparing past cases regarding the law of negligence, the duty of care, and the test of foreseeability that have differed according to time and social conditions.

A critical intervention in paragraph 137 sums up the essence of the case and its relevance to this thesis. Bromberg J stated:

> The cases reviewed demonstrate the willingness of the common law to respond to changing social conditions including those brought about by the increasing power of human beings to cause harm to others. That is the context in which the applicants contend that because today's adults have gained previously unimaginable power to harm tomorrow's adults, the common law should now impose correlative responsibility.[690]

The case decided that the Minister owed the children a duty of care as the foreseeability of the risk due to climate change is reasonable and it is binding on the Minister to protect the 'special vulnerability of the children'[691] and their 'innocence'.[692] Later on, Bromberg J summed the gravity of the situation, which has led to the present reasoning and conclusion in the case:

> It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the children. As Australian adults know their country, Australia will be lost and the world as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience – quality of life,

[689] Sharma, n (685) para 96-114.
[690] Sharma, n (685) para 137.
[691] Sharma, n (685) para 311.
[692] Sharma, n (685) para 322.

> opportunities to partake in nature's treasures, the capacity to grow and prosper – all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next.[693]

Unfortunately, *Sharma* does not make any place for Indigenous voices.[694] Unlike Justice Preston in *Gloucester Resources*[695], the Court does not invite Indigenous representatives to speak or raise any specific questions concerning the marginalised voices. While *Sharma* makes impressive contributions to the contemporary climate jurisprudence, the knowledge is situated within a settler legal space and the Court is unable to foreground Indigenous voices, or the intergenerational loss suffered by First Nations since the settlement. The gravity of the environmental issues faced in *Sharma* are not novel. Non-Indigenous claimants only articulate them in a language that is comprehensible to exclusive institutions, such as courts (p.144). Indigenous scholars have always argued that environmental harm is a subset of dispossession and genocide.[696] The urgency of Indigenous loss has come before courts, as it did in *Buzzacott v Morgan*[697] (p.65), only to be ignored jurisprudentially.

Nonetheless, a combination of a judge-oriented jurisprudence, as seen in the case of Justice Preston or Justice Mansfield, and the willingness of higher courts to reconsider existing laws in light of newer challenges, gives hope for novel environmental jurisprudence. Mere fact that the Court in Sharma did not consider Indigenous voices should not deter us from drawing the valuable principles and opportunities established by the *Sharma* judgment. The Court in *Sharma* deduced that deriving a novel duty of care does not damage the adjudicative integrity of the process given the gravity of the threat posed to the children of Australia. As a principle, this approach of the Federal Court remains open and available for the future courts to adopt and develop (p.35). In effect, the *Sharma* decision contains both the narrative and the

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[693] Sharma, n (685) para 293.
[694] This deficit was subsequently remedied when the Youth Verdict and Bimblebox Alliance challenged the Waratah Coal Mine project in Galilee Basin in the Queensland Land Court. The objectors (Youth Verdict et al) clearly advanced arguments highlighting the effects of new coal mines on Indigenous land rights and self-determination.
[695] [2019] NSWLEC 7.
[696] Kyle Whyte, "Against Crisis Epistemology" in Brendan Hokowhitu et al (eds.) *Routledge Handbook of Critical Indigenous Studies*, p.53-64 (Routledge 2021).
[697] [1999] SASC 149.

responsibility aspects of IEJ. The next part discusses how and why these micro-practices (p.41) of reforms are important for IEJ.

Non-reformist reforms facilitating legal narratives and judicial integrity

Legal scholar Nicholas Stump offers the idea of 'non-reformist reforms' while thinking about emancipatory projects within critical legal research.[698] These reforms are most accurately expressed as embodying *transformation* than achieving a *specific objective*. Hence, the emphasis here is on understanding power relations, capitalist and colonial foundations of law, and knowledge within law. To quote Amna Akbar: "non-reformist reforms advance a radical critique and radical imagination…reform is not the end goal; transformation is".[699]

Stump argues that these non-reformist reforms are inherently creative strategies that envision long term changes through assisting grassroots movements and those that resist formulaic approaches.[700] One way of achieving these reforms would be to endorse 'radical lawyering' in how one approaches and understands the problems.[701] The future of the litigation strategies would then take shape accordingly. One instance of such radical lawyering could be the Sharma case discussed in the previous section (p.193). Whereas the idea of non-reformist reforms pays attention to processes leading up to adjudication, the same can be said of reimagining legal principles and notions of justice within adjudicative processes. Like IEJ, adjudicating in the Anthropocene is an expression of multiple processes and micro-practices and not a set objective to be achieved. Law itself is an ongoing transformative project with its end goals in a state of constant flux. The three jurisdictions studied in the thesis have reflected the contemporary pressures and tensions of environmental litigation and become living registers for how domestic jurisprudence evolves and expresses transformative elements.

John Borrows calls for legal language to be "retranslated and transposed by Indigenous peoples".[702] Borrows contends that the language of rights "convey our meanings", and this has greater significance when a court elaborates on the rights to convey the meanings of

[698] Nicholas F Stump, "Non-Reformist Reforms" In Radical Social Change: A Critical Legal Research Exploration" *Boston University Law Review Online,* Vol.101(6), 6-16 (2021).
[699] Amna A. Akbar, *Demands for a Democratic Political Economy* 134 HARV. L. REV. F. 90, 102 (2020).
[700] Stump, n (698) at p.13.
[701] Stump, n (698) at p.7, 13.
[702] John Borrows, "Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics" University of New Brunswick Law Journal as cited in Jeremy Webber and Colin M. Macleod (eds.) *Between Consenting Peoples: Political Community and the Meaning of Consent*, (UBC Press, 2011).

contemporary legal moralities.[703] The pressures of the Anthropocene is unprecedented not only with respect to the climatic conditions. Means of resolving the planetary collapse also require re-examination of our institutions and organisation of social and legal conditions (p.12). Borrows claims that "the language of rights, just like other normative languages, can be translated and re-described through a (genuine) conversation between different traditions, and a living tradition can be reinvigorated, and some of its more vulnerable elements can even gain strength from, a suitably transformed discourse of rights and citizenship".[704]

Borrows' argument summarises the cases we have previously seen, including *Love and Thoms* discussed in this chapter (p.168). Justice is not overthrowing settler colonialism through the judicial process. It is only expected that the courts, the judges and other primary actors are conscious of the fundamental injustices on which doctrinal understanding of adjudicative integrity is built. Taiaiake Alfred argues that rights are "the benefits accrued by Indigenous peoples who have agreed to abandon their autonomy in order to enter the legal and political framework of the state".[705] Indigenous rights have been a matter of negotiation and presuppose a surrender of sovereignty. The *Love and Thoms* and *Desautel* decisions illustrate how a rush to recognise rights and move towards 'reconciliation' disguise an obvious discomfort about Indigenous sovereignty.

IEJ is in the micro-practices of recognising Indigenous voices and making space for them. The state plays an exceptionally large role in incorporating Indigenous voice through participation in the democratic processes and emphasising truth and reconciliation. Often, one encounters the notion of reconciliation in settler courts as a way out of legal predicament or justification for why certain Indigenous rights were recognised and most others discarded (p.88). Nevertheless, reconciliation is an effective objective only if it is preceded by recognising the violence and conflicts between the state and the Indigenous peoples. Courts can contribute to a meaningful reconciliation process, but that is unlikely to be achieved by mere semantics. Unlike the state, it is difficult for courts to undo the valuable lessons learnt in how justice is conceptualised and operationalised as part of knowledge production. Therefore, litigation continues to be the biggest ally of Indigenous rights movements and the courts ought to

[703] Borrows, n (702).
[704] Borrows, n (702).
[705] Taiaiake Alfred, Peace, Power, Righteousness: An Indigenous Manifesto p.140 (OUP 1999).

contribute accordingly, for the sake of the marginalised others and the sake of its adjudicative integrity.

B. Conclusion

The history of all legal cultures is dotted with instances of courts responding to political and moral demands of those particular periods. Indigenous environmental litigation has provided a vital opportunity for courts to fulfil this responsibility to settler legal systems and integrity of courts. As the three jurisdictions face an unprecedented threat of planetary collapse in the Anthropocene, the situation raises questions about how we think about Indigenous communities who have always faced these threats. First Nations around the world have been dispossessed and erased and have had their sovereignty stripped from them. Yet, the courts have been hesitant and slow to respond. Any constructive remedy in these cases demands recognition of Indigenous self-determination, sovereignty, past and present of settler colonial violence, and sacrifice zones created by the capital-driven economic interests.

This chapter brings together the principles and frameworks developed in this thesis to illustrate how courts applying the principle of IEJ contribute to legal knowledge production, ideas of radical jurisprudence, and provide footholds for Indigenous sovereignty. Whilst the principles here required certain degree of innovation, they arise from the well-established duty of courts to articulate justice, however, without compromising their integrity. As examples from Australia and Brazil show us, radical environmental jurisprudence is not about overthrowing structures or discarding existing norms but being epistemic allies (p.42). Since a significant part of adjudication is processing knowledge through facts, principles, and collective values, judicial knowledge production is vital for shaping social movements. When courts provide platforms and prominence to Indigenous claims, they enable more polished litigation in the future. Similarly, courts can borrow lessons from contemporaneous forms of polished litigation to create avenues for Indigenous voices. Narratives of justice cannot be found in a single instance or an episode of history. Courts have implicitly contributed to the building of these narratives. Indigenous environmental justice is an invitation to deliberate on and contribute to the narratives of justice consciously.

Conclusion

This chapter concludes the thesis by addressing the conceptual entry and exit from the issues at the heart of this work. The chapter is divided into two parts—ingress and egress. The first part looks at the number of entry points into the conception of justice and narratives, why they are necessary, and how the chapters in this thesis have addressed them. The second part looks at the impactful way in which courts can navigate the spaces they have entered and then exit to a meaningful outcome, such as the framing of IEJ.

A. Ingress

When we think about justice, rarely can one claim to have a definite form, quantity, or definition attributed to the concept. The idea of justice may be informed by an assemblage of moral, social, political, and legal meanings. However, the concept has a strong tenor within legal spaces. Resolving the meanings and limits of the concept, at least incrementally, through adjudication becomes necessary for the integrity of the law. Thinking about justice or working towards it does not require one to quantify justice or determine who precisely bears the responsibility to deliver justice. Justice is always a process such that, it is both transformational and aspirational. Often, theorising justice is categorically more complex than achieving it in individual instances. While justice, in theory, desires an end and a definite articulation, justice in action entails an immediate response and making room for the uncertainty that foresees and contributes to future possibilities.[706] This thesis has studied the specific question of Indigenous environmental justice, intending to frame it within adjudication and as accessible to the legal theory. More importantly, the thesis aims to bring the legal theorisation of the moral principle of IEJ as close to everyday realities of the Indigenous struggle for sovereignty as possible. The thesis also ensures that the colonial knowledge production and its demands for certainty in legal theorisation do not harm the Indigenous voices and their encounters with the courts. This work establishes how IEJ can be understood by recognising Indigenous epistemologies, cultural relations with the land, and political and economic self-determination. Nevertheless, these elements of recognition are shaped by adjudication. Consequently, the arguments here

[706] This particular framing of justice is similar to what Peter Caws understands as the framing of knowledge production. For instance, in "Science is a kind of knowledge, and as such it must always be retrospective. But values are different from knowledge. They do not come to us from the world; they go from us to the world.". See: Peter Caws, *Ethics from Experience*, p. 82, (Jones and Bartlett Publishers 1996).

critique the past and present settler colonial legality and open avenues for jurisprudence to accommodate plural sovereignties in the future.

At first, this thesis is a product of comparative legal research. It can be read as pure legal text insofar as it adheres to the comparison of structural, contextual, and analytical similarities and differences in the domestic legal systems of Australia, Brazil, and Canada.[707] However, the research here is also partly resisting the constraints of western epistemic frameworks that have a gatekeeping role in legal knowledge production. While being a comparative legal work, the thesis aims to communicate the need for courts to learn from Indigenous epistemologies and from each other in how they address contemporary environmental challenges. Much of the thesis relies on the notion of *epistemic allyship,* which is used here to articulate the common ground and the ability to merge knowledge forms between legal systems, world views, and the judicial engagement with Indigenous voice. The cases examined here show that the ability to encounter and accommodate Indigenous voices is inherent in the juridical space. Adjudication, a fundamental form of knowledge production through courts, provides numerous opportunities for when and how to do so in a manner best suited to the circumstance of particular forms of litigation. The contingency around the 'when' and the 'how' is both a matter of strategy as well as the institutional and structural openness endemic to the domestic legal systems. Often, the receptivity of the courts, especially individual judges, is determined by how they perceive the environmental harm, Indigenous rights and juridical responsibility at that particular moment. In these cases, judicial engagement may appear primarily as self-reflective and transformative within settler spaces and impliedly as acts of solidarity with Indigenous voices. Such reception and determination bring us to the next key framework of the thesis, where judgments are studied as narratives.

Narrative Forms of Knowledge Production

The notion of 'narratives' has been borrowed from both Indigenous philosophies and critical jurisprudence. Indigenous scholars emphasise the interconnectedness of the living world, environment and cultural heritage, and the ability of Indigenous people to make claims on their sovereignty and self-determination through land and indigeneity. Some scholars from the law and literature movement and international law have studied the power and genealogy of language, interpretation, and translation in adjudication, concluding that adjudication and

[707] Mark Van Hoecke, "Methodology of Comparative Legal Research", *Law and Method,* Aflevering 12 (2015).

judicial reasoning form an unbroken continuity in knowledge production within as well as outside of the discipline.[708] Indigenous environmental litigation provides several opportunities for the settler courts to build on the previous rights jurisprudence while also expanding their understanding of the role and impact of harm, infringement, colonialism, and relentless economic development on Indigenous peoples. These avenues of rethinking must draw from a wide range of knowledge sources, more importantly, Indigenous knowledge forms. The thesis has been structured to analyse the different stages through which courts encounter and engage with Indigenous voices and how it affects adjudication on the whole. Effectively, the thesis is a narrative of IEJ as a principle in adjudication. The western epistemic frameworks across disciplines are fundamentally incompatible with Indigenous knowledge forms and connections with the land.

There is very little to remedy these knowledge collectives as a whole. Further, there is little room to navigate the idea of Indigenous sovereignty, plural and epistemic sovereignty, without confronting State sovereignty. However, adjudication provides ample opportunities to build new stories and jurisprudence within the juridical spaces and gradually chip away at the coloniality of knowledge production. To this end, Chapter 1 provides an intellectual map drawing from a wide range of Indigenous scholarship, detailing what the principle of IEJ means and what elements of the principle may be palpable to the language of law (p.49). While supplementing its primary arguments, the chapter also makes a case for how law and justice have the characteristics and apparatus to be narratives so that Indigenous voices may be effectively received.

The understanding of *justice as a narrative* anticipates good listening, especially proactive listening to Indigenous voices. Lawyers intervening and fighting the landmark Indigenous rights cases have always contributed to a fine collection of feel-good stories (p.168). On the contrary, shaping new and radical jurisprudence is a matter of responsibility. This responsibility falls squarely on the courts (p.177). Consequently, the thesis argues that courts are the better forum to contest and resolve the idea of IEJ. It also argues that through certain forms of reading and privileging of Indigenous voices, the judges must make way for plural jurisprudence and build on the rigour of legal integrity. In spirit, this argument has had many

[708] See: Robin West, *Narrative, Authority, and the Law*, (University of Michigan Press 1993); Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, (Clarendon Press 1990).

proponents. Historian Arthur Ray talks about his involvement in the landmark treaty and hunting rights cases, such as *Delgamuukw* and *R v Horseman*,[709] and how rendering expert evidence was an opportunity to 'educate the court' despite the many obstacles to comprehending newer knowledge forms within settler legal spaces. To quote Ray:

> As problematic as the courtroom may be as a classroom, and even though judges approach and use history differently than is my practice, the reality is that, in the end, it is the judges who in their reasons for judgments write the ethnographies that matter most to Aboriginal people. Rights are recognised or denied on the basis of judges' perceptions.[710]

Ray's argument may have been passed over as a historian's perspective in the last decade, where Indigenous environmentalism had less ascendancy than it does today. Instead, Chapter 2 of this thesis shows judgments in cases such as *Gloucester Resources*, *Darkinjung*, and *Ktunaxa First Nations*, explore new idioms of IEJ, while probing newer ways of engaging with Indigenous evidence and laying down distinctive Indigenous rights jurisprudence. In places where more substantial contributions can be made in later stages, such as novel remedies, courts have been less hesitant to prospect challenging outcomes. Cases analysed in Chapter 3, such as *Bootu Creek*, *Timber Creek*, *Clarence Valley Council*, and the Ashaninka settlement accord, indicate that IEJ can don more tangible expressions when courts delve more into what is necessary than what is (or has been!) possible. These conscious choices may be impressive within settler courts even if we cannot always find a consensus on how communities themselves receive the outcome. They also indicate the bulk of work still left to develop radical jurisprudence resisting settler legality. However, some recent judgments, such as climate litigation cases from Australia, recognise the need to revisit jurisprudence without awaiting sea changes in the legislative spaces. Most cases at the heart of environmental struggle do not make it to courts due to a range of procedural and economic constraints. The long-standing Fairy Creek blockade, which is a combined movement of First Nations and non-Indigenous environmentalists against old-growth logging in British Columbia, has not been contested in courts beyond several injunction claims.[711] Those opposing the logging by Teal Cedar Products Ltd have been physically occupying the logging site and obstructing the machinery entering

[709] [1990] 1 SCR 901.
[710] Arthur J. Ray, *Telling it to the Judge: Taking Native History to Court* (2011)
[711] For extensive and chronological coverage of Fairy Creek struggle, see: "Fairy Creek Blockades" *The Narwhal.* Available here: https://thenarwhal.ca/topics/fairy-creek-blockade/ (Last accessed: 08 November 2021).

the site. The logging company had successfully obtained an injunction against the protestors at Fairy Creek, which often resulted in excessive force and brutality by the Royal Canadian Mounted Police (RCMP) while enforcing the injunction order.

B. Egress

Earlier in this thesis, there is an allusion to how injunction cases in Canada are fundamentally hostile to Indigenous claimants (p.129). Earlier in October 2021 another petition for injunction filed by Teal Cedar corporation against the protestors in Fairy Creek came before the British Columbia Supreme Court. In *Teal Cedar Products Ltd v Rainforest Flying Squad* ('Teal Cedar'),[712] the petitioner had asked for the extension of the existing injunction by another twelve months on the ground that the logging company was likely to suffer significant economic loss from continuing blockade and obstruction. Fairy Creek in southern Vancouver was not only an ecologically sensitive area but a place of cultural significance to Pacheedaht, Ditidaht and Huu-ay-aht First Nations. While some degree of self-determination over traditional territories was handed over to the community after the signing of the Hišuk ma c̓awak Declaration in June 2021, the larger opposition to logging or the persistent RCMP violence had not stopped.[713] Fairy Creek was not a quintessential case that could have been litigated in courts, especially since there were no treaty rights violations and logging falls in the province of legislative decisions prioritising public and economic interests.

Nonetheless, the Supreme Court considered this application for extension of injunction as an opportunity to reconsider how courts must decide cases involving Indigenous people in light of the implications they may have on the public. The judgment contained some startlingly original reflections on the responsibility of courts in the face of apparent injustice and settler state violence. Without breaching any of the limits on the judicial powers in an injunction application, Douglas Thompson J carefully considered the matter of public interest alongside the conventional balancing exercise. While excessive RCMP brutality against protestors was well recorded, the Court was confronted with the question of reputational damage, should it take into account the social context around the issue. Thompson J observed that there would be "dangers of depreciation of the legitimacy and effectiveness of the Court when a dispute

[712] 2021 BCSC 1903.
[713] Sarah Cox, "Pacheedaht First Nation tells B.C. to defer old-growth logging in Fairy Creek", *The Narwhal*, (June 2021). Available at: https://thenarwhal.ca/bc-pacheedaht-old-growth-logging-deferral-fairy-creek/ (Last accessed: 08 November 2021).

between citizens on one side and the government and a logging company on the other is converted into a dispute between citizens and the Court".[714] Since the defendants urged to take public interest into account while renewing the injunction, despite its reservation, the Court proceeded to contextualise the Fairy Creek blockade and the ensuing chain of events.

In an important reflection, Thompson J suggested that the range of relevant circumstances is wide. The public interest may vest in maintaining the reputation of the Court as a neutral arbiter as much as it is in "standing against interference with private rights by unilateral and unlawful actions".[715] None of these reservations necessarily imply that the analysis in the adjudication must end with an exhaustive list of public interests. Following this, the judgment proceeded to consider the high handedness of the police, which stood out more than the violent acts of the protestors themselves. One of the allegations from the defendants included the fact that the police in attendance never wore any identification or regiment number that were likely to hold them accountable. Instead, only a 'thin blue' was present on the uniforms, reminding the protestors, especially Indigenous protestors, of settler colonial violence and the genocidal history of the RCMP.[716] This element became a pivotal point for deciding whether a fresh injunction must be issued. To quote Thompson J:

> I addressed the "thin blue line" issue informally at a judicial management conference. I suggested that the RCMP might consider asking their members to remove the patch in these circumstances where they are enforcing a court order. The response to my suggestion came in the RCMP's written argument: matters relating to RCMP attire are for the Commissioner of the RCMP, and the "thin blue line" patch is a labour relations matter in which this Court should not become involved. Of course, I have no jurisdiction or inclination to make orders about RCMP attire or otherwise become involved in its labour relations. But the RCMP has made a choice not to enforce their direction against the wearing of a symbol that it knows is divisive. It must realise that in circumstances where RCMP members are enforcing the Court's order, the wearing of this symbol reflects on the Court. I intend to do no more than to consider the effect of this regrettable

[714] Teal Cedar n (712), para 43-44.
[715] Teal Cedar n (712), para 44.
[716] National Inquiry into Missing and Murdered Indigenous Women and Girls, Reclaiming Power and Place: Final Report. Available at: https://www.mmiwg-ffada.ca/final-report/ (06 November 2021).

> RCMP decision on the Court's reputation, which is a relevant public interest consideration on this application.[717]

While a substantial part of the decision delves on the reputation of the Court to imply the separation of power and judicial integrity, soon the same framework is transformed to achieve an end that does justice to the social context of the Fairy Creek blockade. In widening the notion of 'reputation of the Court', the Court opens newer ways of comprehending a legal issue. The decision is immensely useful in how a settler court recognises the limits of adjudication but also reimagines the juridical space to respond to a palpably unjust situation. In his final decision rejecting the injunction application, after acknowledging that there is significant harm to Teal Cedar Corporation, Thompson J wrote:

> On the other hand, methods of enforcement of the Court's order have led to serious and substantial infringement of civil liberties, including impairment of the freedom of the press to a marked degree. And, enforcement has been carried out by police officers rendered anonymous to the protesters, many of those police officers wearing "thin blue line" badges. All of this has been done in the name of enforcing this Court's order, adding to the already substantial risk to the Court's reputation whenever an injunction pulls the Court into this type of dispute between citizens and the government.[718]

The outcome here is an extraordinary contrast to previous injunction decisions from Canadian courts that fervently adhered to the balance of convenience rule. Invariably, the balance of convenience has been a principle that weighs economic benefits over past and present wrongs in Indigenous litigation. The Fairy Creek blockade will continue to morph itself into one of the most intense and complex environmental struggles of our times. In its long journey, the decision of the Supreme Court will be an invaluable intervention against the overreach of settler state as it dismantles the previous understandings of what adjudication can achieve. Chapter 2 and 3 of this thesis have strived to unpack similar interventions and their value for future Indigenous environmental movements. However, like the *Teal Cedar* decision, the cases analysed serve another key purpose. They categorically state that the judgments have a more powerful role as knowledge produced rather than as mere outcomes within an issue-rule-

[717] Teal Cedar n (712), para 86.
[718] Teal Cedar n (712), para 80.

resolution paradigm. Legal knowledge production is a process that is over and beyond conventional judicial reasoning.[719] When judges reflect on what is suitable, what is possible, and what implications do relevant factors and factors that cannot be reasonably considered have for adjudication and for the litigants, it reflects the positionality of the court. The analyses in these chapters and the broader thesis advance an argument for the judicial rendering of the principle of IEJ, and more so, for them to emerge from self-reflective settler courts. Justice is embedded in the micro-practices of listening to Indigenous voices and recognition of plural sovereignties than in grand theories (p.52). As a consequence, the court, which have historically shaped Indigenous rights as desired by liberal constitutionalism, have a greater responsibility to shape them in light of newer epistemic and legal challenges.

Chapters 4 and 5 highlight the advantage of comparative legal research by discussing the lessons drawn from the three jurisdictions and what they mean to the future of legal knowledge production. While there are several socio-economic and political similarities in the three jurisdictions, one needs to look closer to discern how settler colonial legality and constitutionalisms result in differing judicial engagement with contemporary Indigenous voices. Chapter 4 theorises the definitional, constitutional, and institutional limits that result in varied treatment of Indigenous issues and documents the means through which courts have benefitted from the absence of such limits in creating radical jurisprudence. Chapter 5 contemplates judgments as knowledge production in a more open-ended manner. It also takes the opportunity to engage with two categories of crises—Indigenous sovereignty and climate change—to understand how courts respond when forced into novel and legally fractious conditions. Evidence from Australia, Brazil, and Canada suggest that the judicial treatment of difficult questions concerning the role and responsibilities of common law, Indigenous self-determination, connection to the land and cultural heritage have been largely affirmative. The outcomes of these analyses illuminate how best iterations of radical environmental jurisprudence may benefit from similar engagement.

The nature of reform spearheaded by and within the courts are distinct from those advanced by the legislature. The former has greater moral heft when it comes to Indigenous rights. In a candid observation about early 1990s Canadian courts, Arthur Ray states:

[719] See also: Kim Bouwer and Joana Setzer, “Climate Litigation as Climate Activism: What Works?”, (The British Academy, 2020).

> Courts, on the other hand, use history to bury the past rather than to continually revisit it. Judges use their findings of historical "facts" to resolve disputes arising from contested pasts so that opposing parties in the litigation can move forward.[720]

Contrary to such evasions, courts of today are actively thinking about reconciliation. Canadian Cases discussed in Chapter 2 assert that achieving reconciliation with First Nations is a fundamental juridical responsibility as much as it is political (p.89). However, if reconciliation must be concrete and meaningful, it needs to confront the past through truth-telling than just an exercise to determine facts. The nature of cases examined in this research makes such encounters possible.

Mediating Facts and Coloniality

Elsewhere, in Native title and Treaty rights litigation, courts must determine the facts that are necessary for delimiting the rights imagined by a settler state. On the contrary, Indigenous environmental litigation compels a court to understand the past and present environmental harm. Further, it must also understand the textured contexts of environmental harm and the future of indigeneity as none of these elements can be untangled from each other. The case of *Yahey v British Columbia*[721] discussed in Chapter 5 addresses this conjunction, where both the environmental harm and the violation of the Treaty rights arise from continuous and systematic erosion of Indigenous sovereignty. Consequently, there is no single cause that is giving way to a single identifiable harm. Recognising such cumulative losses and holding the state accountable amounts to an implied engagement with extractivism, Indigenous sovereignty and IEJ, while also identifying the *more than legal* questions entrenched in every Indigenous litigation.

When broadly contextualised, this thesis sits in the research space at the intersection of anti-capitalism, anti-racism, environmental justice, and settler colonial studies. The above fields can no longer remain outside legal theory if we are talk about the new conceptions of justice and plural sovereignties. Instead of considering courtrooms as distinct, self-sufficient, and only capable of visiting other disciplines, this thesis attempts to embrace the multiple frameworks interrogating capitalism and colonialism within adjudication processes. The research here is

[720] Ray n (710), p.152.
[721] 2021 BCSC 1287.

not just about what is available in decisions but also about how we can read the cases to shape jurisprudence in just and inclusive ways. Resource extraction, logging and other developmental activities unpack the role of capital in turning natural resources into commodified and exploitable entities, away from their foundational existence in nature or in relation to the Indigenous people. Capital cannot function without the sanction and legal apparatus of the state. The inevitable nexus between colonialism and capitalism is reproduced time and again in the creation of the settler colonies, where relations between the law, environment, land and Indigenous communities cannot be benign. Several schools of thought have contributed to understanding the relationship between law, coloniality, and capitalism. Marxist legal theory has one of the most incisive analyses of extraction of resources and racialised labour as the defining characteristic of capitalism and the organising logic of social, economic, and epistemic relationships under settler colonialism.[722] As illustrated at the beginning of this thesis, settler colonial studies populate the field, interrogating the ongoing settler colonial project and how that influences governing institutions, especially courts. Nonetheless, one wonders about the conditions that make this research necessary and extremely relevant—the question of what is missing in legal theory and why the existing theories and frameworks are inadequate to address IEJ?

One of the intuitive and loaded answers to the inadequacies in knowledge production is the absence of primacy given to the Indigenous voices. If indigeneity can be understood rightfully only through mediation by Indigenous voices, how can we overlook the fact that legal knowledge production cannot go on meaningfully without requisite Indigenous intervention? The insistence of micro-practices in accommodating and listening to Indigenous voices in this thesis is one of the means through which the entrenched nature of settler colonial onto-epistemologies can be dismantled. Through these micro practices, courts can break free from the language, interpretative tools, and the legal imagination rooted in coloniality. While one must hope for a radical and instant shift in the juridical spaces, such processes are bound to be protracted without collective efforts in the legislative and social spheres. A great deal of hopefulness expressed in this thesis is due to stumbling upon the avenues for rethinking adjudication and reconsidering notions of justice than being satisfied with courts for arriving at promising outcomes in the few cases that have been litigated. In its poignant introduction to

[722] Brenna Bhandar, *Colonial Lives of Property: Law, Land, and racial Regimes of Property*, (Duke University Press, 2018).

the final report on Juukan Gorge, the parliamentary committee Chair Hon Warren Entsch MP writes:

> The Committee has prioritised the voices of Aboriginal and Torres Strait Islander peoples throughout the report. The Committee acknowledges that there are many companies within the resources industry taking strong measures to protect heritage sites and commends those companies. However, the resources industry has more access to governments, the media and therefore the broader Australian community, than traditional owners and the Committee considered it important to highlight Aboriginal and Torres Strait Islander voices above all others.[723]

Indigenous voices have been enmeshed within asymmetrical power relations of settler legal spaces for far too long. The unjustness of such exclusion is felt with greater intensity now as climate change aggravates the existing inequalities, eroding Indigenous sovereignty and Indigenous relationship with the land. Courts become a vital space for consolidating and reinforcing IEJ by making room for multiple narratives and epistemologies. As we reach the end of this work, it is worthwhile remembering anthropologist Antonia Mills' collection of testimonies rendered by Witsuwit'en[724] Elder Johnny David during Delgamuukw litigation in the trial court.[725] Johnny David's evidence is a mix of direct evidence, cross examination and redirect from the claimants' lawyer. These testimonies span over eight volumes, where the Court heard evidence on, among others, Witsuwit'en and Gitxsan connection to their traditional territory, genocidal violence, the creeping colonisation of land and resources, and the urgent need for cross-cultural communication. Chief Johnny David's testimony is a masterclass in illustrating colonial violence, loss of indigeneity, Indigenous epistemologies and ways of life. At the end of his cross-examination and redirection, Johnny David closes his statement with: "If you hang on to these words that I have told you, everything will be fine."[726] These words hoped to sincerely urge the Canadian Court to open itself to Indigenous knowledge forms and rethink what justice meant in the face of genocide and dispossession. Ironically, the trial court in *Delgamuukw* was willingly oblivious to the gravity of Indigenous testimonies. However,

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[723] Joint Standing Committee on Northern Australia, A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge (October 2021, Canberra). Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge/Report (Last accessed: 06 November 2021).

[724] The spelling of Witsuwit'en here is as used in Mills' book as opposed to We'suwet'en used elsewhere in this thesis.

[725] Antonia Mills (ed.), , *'Hang Onto These Words'Johnny David's Delgamuukw Evidence* (Heritage, University of Toronto Press 2005)

[726] Mills n (725), Volume VIII p.39.

more than thirty years later, courts have newer opportunities to hang on to Indigenous voices and this research hopes that it has made a small effort towards ensuring they do so.

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