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Climate Change and Inequality: Indigenous Peoples

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This post begins by illustrating the unique position of Indigenous Peoples in the climate crisis before considering, with reference to three key cases, the potential of climate litigation brought by Indigenous Peoples

The Unique Position Of Indigenous Peoples

Indigenous Peoples are uniquely harmed by the effects of climate change. Their special relationship with the land that they inhabit means that, for them, the threat of climate change is existential (Fellows Dourado, 2016, p.230). For many who live in regions which are particularly sensitive to climate fluctuations, this threat is compounded (*ibid*, p.234). It is double-edged, then, that in recognition of this unique relationship, Indigenous Peoples have been afforded unique rights which, if observed, offer them unique opportunities to play an instrumental role in the climate crisis.

Unique harm and the Krenak People: a Case in Point

The devastating effect of environmental disasters on Indigenous Peoples, be they natural or man-made, is exemplified by the case of the Krenak Indigenous People, who are some of over 200,000 claimants in Mariana v BHP Group Plc (ongoing).[1] The collapse of the Fundão Dam in Mariana, Brazil, unleashed a tsunami of approximately 50 million cubic metres of toxic iron ore tailings' waste into the Doce River which flows through the Krenak Indigenous Reserve on the eastern border of Minas Gerais. Widely regarded as the worst environmental disaster in Brazil's history (Felippe et al., 2016, p.4), for Brazil's Krenak Indigenous People, it was a "*real end-of-the-world scenario*" (Krenak, 2020, p.14).

[1] Grace Ferrier acts for the Claimants through her secondment with Pogust Goodhead.

The Krenak Indigenous Reserve is demarcated land which is owned by the Federal Government but over which the Krenak People have the exclusive usufruct *i.e.* the exclusive right to use and/or derive benefit. Prior to the collapse of the dam, the Krenak People lived off the land and the Doce River (Fontes & Rocha de Paula, 2021, p.245-248). Now, they drink from bottled water and purchase much of their food and medicine from the local market (*ibid*). But for the Krenak People, as with all Indigenous Peoples, land is much more than a resource. Carneiro da Cunha et al. (2022, p.161) explain:

> "*[For Indigenous Peoples] [a]ll beings that live on such lands – humans, but also animals, plants, rivers, topographic elements, spirits, and so on – have their own rights of existence and usufruct. Humans must take care of land, as much as they may enjoy and make use of it…*

> *In our legal system, the concept of "land" is separable from everything that may live on it. A wasted land is still land and still marketable real estate, as if everything were fungible.*"

The Krenak People's identity is inextricably connected to the Doce River – which they call "*Uatu*" and which they consider the father and mother of their Nation and a member of their People (Peixoto & Andrade, 2016, p.288). They used to bathe, swim, drink, hunt, play, row, plant and perform various rituals in and along the Uatu (Fontes & Rocha de Paula, 2021, p.245; Vasconcelos Pascoal, 2018, p.70). Now, they believe the Uatu to have died and as a result, they mourn the loss of a part of themselves (Fontes & Rocha de Paula, 2021, p.245).

Unique opportunities: domestic and/or international indigenous rights

In recognition of their unique relationship with nature, Indigenous Peoples have a number of unique domestic and international law rights. In particular, the International Labour Organization's Indigenous and Tribal Peoples Convention 1989 (No. 169) (the "**ILO Convention**"), which is legally binding in 24 ratifying states (though notably, not Australia or Canada, which feature in our analysis below), contains the following relevant provisions:

- Article 12 confers individual or collective standing on Indigenous Peoples for the effective protection of their treaty rights.

- Article 13(1) requires governments to recognise and respect the special spiritual and cultural relationship that Indigenous Peoples have with their lands and territories.

- Article 14 obliges ratifying states to "*take steps as necessary to identify*" the lands which Indigenous Peoples traditionally occupy and "*guarantee effective protection*" of Indigenous Peoples' "*rights of ownership and possession*."

- Article 23(1) requires that governments ensure that "*handicrafts, rural and community based industries*" and "*activities... such as hunting, fishing, trapping and gathering*" are strengthened and promoted.

The safeguarding of these and/or similar domestic rights has produced the following important consequences.

The legal identification and protection of indigenous lands has enabled them to become harbours of biodiversity. The legal recognition of indigenous lands in Mexico, Colombia, Peru and Brazil has served as a crucial brake on deforestation (A Forest Declaration Assessment Briefing Paper, 2022, p.10) which is essential for maintaining climatic balance within the region (Silvério et al., 2015, p.3). Research shows that although Indigenous Peoples occupy only 22% of the earth's territory, their lands contain 80% of the planet's biodiversity (Sobrevila, 2008, p.5).

In states which have ratified the ILO Convention, Indigenous Peoples will automatically have standing to safeguard their treaty rights by virtue of Article 12. Given that the spiritual, cultural and subsistence rights of Indigenous Peoples are inextricably linked to the environment (and so, also, the climate) – as the case of the Krenak People shows – Indigenous Peoples are more likely to establish standing in climate litigation (because climate change affects their treaty rights) where non-indigenous peoples cannot. In non-ratifying states, although the question of standing will turn on the domestic legal system involved, Indigenous Peoples will generally be more likely to show that they are disproportionately affected by climate change in order to establish standing, which in many jurisdictions incorporates a test of "*direct harm*". Contrast this with the position of non-indigenous peoples in T-330/18 Armando Ferrao Carvalho and Others v European Parliament and Council of the EU [2019] ECR II-324 where the European Union General Court denied ten families standing to challenge the EU's climate target (see [22], [30]) on the basis that they had not shown harm "*peculiar to them*" ([45]-[47]). The case was upheld on appeal (C-565/19).

States may also have broader domestic obligations in respect of the treatment of Indigenous Peoples. For example:

- In R. v Sparrow [1990] 1 SCR 1075 the Supreme Court of Canada interpreted section 35(1) of the Constitution Act 1982 (which provides that "*the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and*

affirmed") as imposing a fiduciary duty on the Canadian Federal Government to act in the best interest of Aboriginal Groups [1077h].

- In Brazil, in addition to ratifying the ILO Convention, as a matter of domestic law, the Brazilian Federal Government is obliged to demarcate and protect the lands which Indigenous Peoples traditionally occupy (Brazilian Constitution, Article 232) and grant Indigenous Peoples exclusive usufruct of the same (Brazilian Statute of Indigenous Communities 6.001/1973, Article 39(II)).

Unique challenges

In theory, domestic and treaty-based instruments enable Indigenous Peoples to play an important part in combating the climate crisis. However, challenges remain, both in the enforcement of these rights, and the efficacy of indigenous rights-based litigation. Four examples are worth noting:

- The rights conferred by the ILO Convention are only valuable if they are properly enforced. In a recent study of Mexico, Brazil, Peru and Colombia, all of which have incorporated the ILO Convention into domestic law, indigenous lands are regularly threatened by illegal cattle ranchers, loggers or miners, notwithstanding each governments' duty to "*guarantee effective protection*" of demarcated lands pursuant to Article 14(2) (A Forest Declaration Assessment Briefing Paper, 2022, p.12).

- Funding litigation may be particularly difficult for Indigenous Peoples to access. This is illustrated by Beaver Lake Cree Nation v (1) Canada (2) Province of Alberta (Case Number 39323) ("**Beaver Lake Cree**"). The Beaver Lake Cree brought this case in 2008 and by 2021, they had already spent $3 million on this litigation. In 2019, Alberta's Court of Queen's Bench delivered a rare advance costs order, splitting the Beaver Lake Cree's estimated $900,000 annual legal fees three ways between the Beaver Lake Cree, Canada and Alberta. This order was set aside by the Court of Appeal of Alberta in June 2020 on the basis that the Beaver Lake Cree had not met the requisite impecuniosity test. This ruling was overturned by the Supreme Court of Canada on 18 March 2022.

- In many cases, the damage to indigenous land resulting from environmental disasters is irreparable. As a result, the main source of redress will be financial compensation, as is the case in Mariana v BHP. This presents a number of difficulties: do the Indigenous People have private law rights in respect of the heads of damage that they have suffered, such as a loss of cultural heritage? If they do, how are those losses quantified? Should damages be loss-based or gain-based? Will the quantum of damage appropriately account for the special significance of nature in indigenous identity? The harsh reality, as the case of the Krenak People demonstrates, is that no amount of money will be able to properly compensate for their loss of the Uatu.

- Indigenous Peoples may need to produce novel characterisations of their claims in order to overcome obstacles inherent in the ordinary litigation process as Beaver Lake Cree demonstrates (see below).

INSIGHTS FROM THREE KEY CASES

We now turn to consider, with reference to three key cases, the unique opportunities and/or challenges which arise in climate litigation brought by Indigenous Peoples.

The Inuit Petition

In 2005, the Inuit Circumpolar Conference ("I**CC**") submitted a petition to the Inter-American Commission on Human Rights ("**IACHR**") on behalf of the Inuit of the United States and Canada ("**Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States 2005**" or "**the Inuit Petition**") requesting relief for human rights violations associated with climate change caused by actions and omissions of the United States.

The ICC's central argument was premised on the unique relationship which Indigenous People have with land and nature (see pp.13-19). In reliance on IACHR jurisprudence, the ICC argued that the Inuit's rights under the American Declaration of the Rights and Duties of Man should be interpreted with regard to "*the unique context of indigenous culture and history*" (p.70) as being "*inseparable from their environment*" (p.72):

> "*preservation of the arctic environment is one of the distinct protections required for the Inuit to fully enjoy their human rights on an equal basis with all peoples.*"

The signatories of the Inuit Petition spanned from the coast of Newfoundland and Labrador, Canada's easternmost province, to Savoonga, an American community on an island west of Alaska. Despite the geographical distance between the petitioners and their different nationalities, their shared Inuit identity empowered them to collaborate.

The IACHR dismissed the Petition without prejudice on the basis that the information provided was not sufficient to make a determination (Crowley, 2006). Despite this, the Petition is rightly regarded as a pioneering example of creative litigation:

> *"[The Petition] reframes a problem typically treated as an environmental one through a human rights lens…In doing so, the petition lies at the intersection of two streams of cases occurring at multiple levels of governance: (1) environmental rights litigation and petitions and (2) climate litigation and petitions"* (Osofsky, 2007, p.676).

The Torres Strait Islanders

The Inuit Petition paved the way for climate litigation centred on human rights, as is illustrated by Daniel Billy and others v Australia (Torres Strait Islanders Petition) CCPR/C/135/D/3624/2019. In the Torres Strait Islanders Petition, the Indigenous residents of the Torres Strait Islands – an archipelago just north of the northern tip of mainland Australia – alleged before the United Nations Human Rights Committee ("**UNHRC**") that Australia had violated (*inter alia*) Articles 6, 17 and 27 of the International Covenant on Civil and Political Rights ("**ICCPR**") by failing to curb its greenhouse gas emissions and provide funding to protect infrastructure on the islands.

The Committee's treatment of Articles 6 (the right to life), 17 (the right to home) and 27 (the right to enjoy one's own culture) is of particular relevance for what it reveals about the unique opportunities and/or challenges presented by Indigenous-led climate litigation:

- On the one hand, the decision confirms that the ICCPR is to be interpreted so as to give effect to the unique cultural identity of Indigenous Peoples. The UNHRC recognised that for Indigenous Peoples, Article 17 includes the right to utilise their territory for their subsistence and livelihood ([8.10]) and that the protection of a culture which is closely associated with territory and the use of its resources under Article 27 is directed towards ensuring the survival and continued development of their cultural identity ([8.13]).

- On the other hand, while the UNHRC accepted that Article 6(1) includes a right to life with dignity ([8.4]), it dismissed the Petitioners' argument (see Petition, [153-154]) that a right to life with dignity includes the right to maintain one's indigenous cultural identity, the latter falling within the scope of Article 27 ([8.6]).

Beaver Lake Cree

In Beaver Lake Cree, the Beaver Lake Cree (a First Nation located in Alberta, Canada) claimed that their rights pursuant to Treaty No.6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions dated 9 September 1876 to preserve their "*traditional Indian way of life*" and hunt, fish and trap, had been violated by the environmental damage caused by the grant of 19,291 permits for oil and gas activity which covered about 90% of the band's traditional lands.[2]

In addition to the funding challenge outlined above, the Beaver Lake Cree faced two further challenges:

- The defendants argued that it was an abuse of process for the claimants not to challenge each of the 19,291 permits individually. In view of the impossibility of such an undertaking, the claimants had to think "outside of the box" as to how to frame their case. Their solution was to argue that it was not the individual grant of a particular permit that was harmful *per se*, but the cumulative impact of the grant of all 19,291 permits which, by desecrating the land in question, violated their rights. This argument withstood the defendants' abuse of process challenge.

[2] Michael Mansfield KC and Jane Russell assisted the law firm acting for the Beaver Lake Cree, Woodward & Co, with the Defendants' strike out applications in 2011.

- The scale of the litigation is vast: the case was brought in 2008; in 2011, Canada and Alberta unsuccessfully sought to strike it out; and in January 2023, it is scheduled to go to trial.

The case also illustrates that unique opportunities may arise for Indigenous Peoples as a matter of domestic law:

- The case builds upon Canadian jurisprudence that domestic law is to be applied with regard to Aboriginal culture. In Tsilhqot'in Nation v British Columbia (Case No 34986) [2014] SCC 44 ("**Tsilhqot'in**"), the Canadian Supreme Court held that in applying the threefold test for Aboriginal Title of sufficient, continuous and exclusive occupation prior to assertion of European sovereignty ([25]), it must consider both common law *and* Aboriginal perspectives ([32]-[35], [49]-[50]). In balancing these perspectives, the Supreme Court held that "*occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources*" ([50]).

- A feature of both Tsilhqot'in and Beaver Lake Cree is the Canadian Supreme Court's purposive interpretation of section 35 of the Constitution Act 1982 alluded to above. Building on Sparrow, in Tsilhqot'in, the Canadian Supreme Court held that the Crown's fiduciary duty enshrined in section 35 incorporates a proportionality test: the incursion must be necessary to achieve the government's goal, the government must go no further than is necessary to achieve it and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest ([87]).

Conclusion

Climate change poses a particular danger to Indigenous Peoples because of their unique connection to the lands they inhabit. The "death" of the Uatu is a poignant example of an Indigenous community devastated culturally, spiritually and economically by an environmental disaster. Simultaneously, the unique rights held by Indigenous Peoples under domestic and international law provide opportunities for Indigenous Peoples to forge new paths for climate advocacy. The Inuit Petition and the Torres Strait Islanders and Beaver Lake Cree cases show that Indigenous Peoples are among the groups at the forefront of rights-based climate litigation and their cases have the potential to positively impact the resolution of the climate crisis.

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